

## 1. TEST CLAIM TITLE

Test Claim of San Diego County re San Diego  
RWQCB Order No. R9-2013-0001

## 2. CLAIMANT INFORMATION

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

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For CSM Use Only

Filing Date:

**RECEIVED**

June 29, 2015

**Commission on  
State Mandates**

Revised on July 15, 2015

Test Claim #: 14-TC-03

## 4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

San Diego RWQCB Order No. R9-2013-0001 (NPDES No. CAS 0109266), effective June 27, 2013.

Copies of all statutes and executive orders cited are attached.

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

5. Written Narrative: pages 5-1 to 5-60 .

6. Declarations: pages 6-1 to 6-A1 .

7. Documentation: pages 7-1 to 7-936 .

Sections 5, 6, and 7 should be answered on separate sheets of plain 8-1/2 x 11 paper. Each sheet should include the test claim name, the claimant, the section number, and heading at the top of each page.

## **5. WRITTEN NARRATIVE**

Under the heading "5. Written Narrative," please identify the specific sections of statutes or executive orders alleged to contain a mandate.

Include a statement that actual and/or estimated costs resulting from the alleged mandate exceeds one thousand dollars (\$1,000), and include all of the following elements for each statute or executive order alleged:

- (A) A detailed description of the new activities and costs that arise from the mandate.
- (B) A detailed description of existing activities and costs that are modified by the mandate.
- (C) The actual increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate.
- (D) The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.
- (E) A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.
- (F) Identification of all of the following funding sources available for this program:
  - (i) Dedicated state funds
  - (ii) Dedicated federal funds
  - (iii) Other nonlocal agency funds
  - (iv) The local agency's general purpose funds
  - (v) Fee authority to offset costs
- (G) Identification of prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate.
- (H) Identification of a legislatively determined mandate pursuant to Government Code section 17573 that is on the same statute or executive order.

## **6. DECLARATIONS**

Under the heading "6. Declarations," support the written narrative with declarations that:

- (A) declare actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate;
- (B) identify all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs;
- (C) describe new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program);
- (D) If applicable, describe the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Section 17573, and the authority to file a test claim pursuant to paragraph (1) of Section 17574(c).
- (E) are signed under penalty of perjury, based on the declarant's personal knowledge, information or belief, by persons who are authorized and competent to do so.

## **7. DOCUMENTATION**

Under the heading "7. Documentation," support the written narrative with copies of all of the following:

- (A) the test claim statute that includes the bill number alleged to impose or impact a mandate; and/or
- (B) the executive order, identified by its effective date, alleged to impose or impact a mandate; and
- (C) relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate; and
- (D) administrative decisions and court decisions cited in the narrative. Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement; and
- (E) statutes, chapters of original legislatively determined mandate and any amendments.

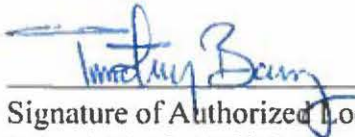
## 8. CLAIM CERTIFICATION

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

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

**Timothy M. Barry**

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



Signature of Authorized Local Agency or  
School District Official

**Chief Deputy County Counsel**

Print or Type Title

**July 14, 2015**

Date

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



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Re: *San Diego Region Water Permit – County of San Diego*  
*San Diego Regional Water Quality Control Board Order No. R9-2013-0001*

Enclosed please find the County of San Diego's ("County") revised test claim asserting that certain provisions of San Diego Regional Water Quality Control Board Order No. R9-2013-0001 issued on May 8, 2013 and effective on June 27, 2013 ("2013 Permit") are unfunded mandates ("Test Claim"). The 2013 Permit regulates discharges to and from the County's municipal separate storm sewer system ("MS4"). Pursuant to Government Code section 17553, this Test Claim includes a narrative statement, declaration of Jon Van Rhyn, and copies of the 2013 Permit, its fact sheet, and the statutes, regulations and other authorities cited in the narrative statement.

Thank you for your consideration of this Test Claim.

Sincerely,

By:   
TIMOTHY M. BARRY, Chief Deputy

Enclosures

cc David Gibson, Executive Officer  
San Diego Regional Water Quality Control Board

**TEST CLAIM**

**IN RE**

**SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD**

**ORDER NO. R9-2013-0001**

**NPDES NO. CAS 0109266**

**OF**

**COUNTY OF SAN DIEGO**

**SECTION 5**  
**NARRATIVE STATEMENT**  
**IN SUPPORT OF TEST CLAIM**  
**IN RE**  
**SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD**  
**ORDER NO. R9-2013-0001**  
**NPDES NO. CAS 0109266**  
**OF**  
**COUNTY OF SAN DIEGO**

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## I. INTRODUCTION

On May 8, 2013, the San Diego Regional Water Quality Control Board (“Regional Board”) issued Order No. R9-2013-0001 (National Pollutant Discharge Elimination System (“NPDES”) Order No. CAS0109266) (hereinafter the “2013 Permit” or “Permit”).<sup>1</sup> The 2013 Permit became effective on June 27, 2013 and regulates discharges from municipal separate storm sewer systems (“MS4s”) in San Diego County.<sup>2</sup> The 2013 Permit replaced Regional Board Order No. R9-2007-0001 (NPDES Permit No. CAS0108758), which was first adopted by the Regional Board on July 16, 1990 (Order No. 90-42), renewed on February 21, 2001 (Order No. 2001-01) (“2001 Permit”), and then renewed on January 24, 2007 (Order No. R9-2007-0001) (“2007 Permit”).

The 2013 Permit establishes a new regional permit that will regulate all Phase I MS4 discharges within the Regional Board’s jurisdiction, including those MS4s within south Orange County, San Diego County, and Riverside County. It purports to be based on the Federal Water Pollution Control Act, or “Clean Water Act,”<sup>3</sup> the Porter-Cologne Water Quality Control Act,<sup>4</sup> 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 Board”), the Water Quality Control Plan for the San Diego Basin adopted by the Regional Board, the California Toxics Rule, and the California Toxics Rule Implementation Plan.

The 2013 Permit does not distinguish between those requirements in the Permit that are based on federal law from those based on state law. It is clear, however, that the federal Clean Water Act (“CWA” or “Act”) governs only discharges of pollutants to navigable waters from a point source.<sup>5</sup> Any activities regulated beyond such discharges are regulated under state law and not federal law.

The 2013 Permit contains a number of unfunded State mandates for which the County is entitled to reimbursement under Article XIII B, section 6 of the California Constitution. This Test Claim describes the activities that constitute unfunded mandates and sets forth the basis for reimbursement of the costs of such activities. These unfunded programs and activities are described in detail below, and are generally described as follows:

- A. Higher level of service is required to strictly comply with receiving water limitations.
- B. New requirement to comply with numeric effluent limitations in TMDLs and to undertake associated monitoring and reporting requirements.
- C. New requirement to develop goals, strategies, schedules, panels, assessment and

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<sup>1</sup> The Regional Board amended the 2013 Permit on February 11, 2015 through Order No. R9-2015-0001. This Test Claim does not assert a claim pursuant to the February 11, 2015 amendment. The County reserves its rights to assert a test claim related to the February 11, 2015 amendment.

<sup>2</sup> A copy of the 2013 Permit is included under Section 7 – Documentation to this Test Claim, together with a copy of the Fact Sheet for the 2013 Permit.

<sup>3</sup> 33 U.S.C. § 1251 *et seq.*

<sup>4</sup> Water Code, § 13000 *et seq.*

<sup>5</sup> 33 U.S. C. § 1362, subd. (12).

adaptive management strategies, and watershed coordination in the development and implementation of watershed based Water Quality Improvement Plans.

- D. New requirement to manage critical sediment yield areas in accordance with hydromodification management standards and to update the BMP Design Manual in response to increased regulation.
- E. New requirements for residential inspections, including mandatory escalated enforcement actions, minimum inspection frequencies, development of a compliance program, and reporting and assessment requirements.
- F. New requirements to retrofit existing development and rehabilitate streams within areas of existing development.
- G. New requirement to update the Jurisdictional Urban Runoff Management plan to incorporate expanded Permit requirements.
- H. New requirement to appear before the Regional Board on request by the Board and to prepare and make presentations on topics identified by the Board.

The County first incurred costs as a result of the Permit after July 1, 2013, during the fiscal year that ended on June 30, 2014.<sup>6</sup>

## **II. PROGRAM BACKGROUND**

California adopted the Porter-Cologne Water Quality Control Act (“Porter-Cologne”) in 1969, three years prior to the adoption of the federal CWA and eighteen years before federal law expressly regulated MS4s. When Congress enacted the CWA, it modeled the Act in part on Porter-Cologne, but scaled back many requirements to meet the needs of a national program. As a result, the comprehensive statewide program enacted through Porter-Cologne exceeds the more limited regulatory scope of the CWA, including the CWA’s National Pollutant Discharge Elimination System program.

One primary difference between Porter-Cologne and the CWA is the role Congress intended the CWA to play in the state regulatory scheme. When adopting the CWA, Congress preserved the states’ ability to impose more stringent water quality controls, allowing the Act to be a federal baseline for water quality.<sup>7</sup> California quickly elected to incorporate the CWA’s NPDES program into its existing regulatory structure, becoming the first state in the nation authorized to issue NPDES permits. The California Legislature (“Legislature”) determined that assuming the responsibility was “in the interest of the people of the state, *in order to avoid direct regulation*

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<sup>6</sup> See Declaration of Jon Van Rhyn, ¶ 8, included under Section 6 – Declaration.

<sup>7</sup> Section 510 of the Clean Water Act, which is codified at Title 33 U.S.C. § 1370, acknowledges the states’ authority to adopt or enforce standards or limitations regarding the discharge of pollutants provided such standards are not less stringent than the “effluent limitation, or other limitation, effluent standard, prohibition pretreatment standard or standard of performance” under the Clean Water Act.

*by the federal government of persons already subject to regulation under state law* pursuant to this division . . . .”<sup>8</sup>

## A. FEDERAL LAW

The CWA, adopted in 1972, is the principal federal law regulating water quality. Since 1987, discharges from MS4s serving a population of more than 100,000 or from systems that the United States Environmental Protection Agency (“US EPA”) or the state determine contribute to a violation of a water quality standard or represent a significant contribution of pollutants to waters of the United States must obtain an NPDES permit issued under the CWA.<sup>9</sup> The CWA establishes three basic requirements for all MS4 permits. The MS4 permits:

- (i) may be issued on a system or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.<sup>10</sup>

In 1990, the US EPA issued regulations to implement Phase 1 of the NPDES program, 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, including 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.<sup>11</sup>

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<sup>8</sup> Water Code, § 13370, subd. (c) [emphasis added].

<sup>9</sup> 33 U.S.C. § 1342, subd. (p)(2) requires NPDES permits for the following discharges:

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

<sup>10</sup> 33 U.S.C. § 1342, subd. (p)(3)(B).

<sup>11</sup> 40 C.F.R. § 122.26, subd. (d)(2)(iv).

The US EPA has the initial authority to administer the NPDES permitting program within a state.<sup>12</sup> The US EPA is required to suspend the federal permitting program and to authorize a state “to administer its own permit program” when that state presents “the program it proposes to establish and administer *under state law*” and demonstrates that “the *laws of such State . . .* provide adequate authority to carry out the described program.”<sup>13</sup> NPDES permits issued under state laws must be consistent with the requirements of the suspended federal program.<sup>14</sup> States may issue permits with requirements exceeding the requirements of the federal program; states cannot, however, issue permits with requirements less stringent than the requirements of the federal program.<sup>15</sup> This structure establishes two separate permitting programs: (1) a federal program administered by the EPA, and (2) a state program, if authorized by the EPA, which operates under state law and is subject to limited EPA oversight.

## B. CALIFORNIA LAW

Immediately after adoption of the CWA in 1972, California became the first state authorized to implement a state permitting program under state law.<sup>16</sup> California sought authorization of its program “in order to avoid direct regulation by the federal government of persons already subject to regulation *under state law*[.]”<sup>17</sup> As an authorized state, California’s permitting system is a state program operating under state law. The State Board and the nine Regional Water Quality Control Boards (“WQCBs”) comprise “the principal state agencies with primary responsibility for the coordination and control of water quality.”<sup>18</sup>

California’s permitting system is a state program, not a federal program, although, as noted, it must meet the requirements of the federal program. The CWA:

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. . . .<sup>19</sup>

Porter-Cologne, therefore, provides California with broader authority to regulate water quality than it would have if it were operating exclusively under the CWA. The State’s authority under Porter-Cologne extends to non-point sources of pollution, such as urban and agricultural runoff, discharges to ground water and discharges to land overlying ground water. It not only establishes broader regulatory authority than the CWA, but also extends that broader regulatory

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<sup>12</sup> 33 U.S.C. § 1342, subs. (a), (b).

<sup>13</sup> 33 U.S.C. § 1342, subs. (b), (c)(1) [emphasis added]; 40 C.F.R. § 123.1, subd. (d)(1) [“Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program.”].

<sup>14</sup> 33 U.S.C. § 1342, subd. (b).

<sup>15</sup> 33 U.S.C. § 1370.

<sup>16</sup> *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1565-1566.

<sup>17</sup> Water Code, § 13370, subd. (c) [emphasis added].

<sup>18</sup> Water Code, § 13001; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

<sup>19</sup> *Id.* at pp. 627-628.

authority to a larger class of waters. It is under this authority that the State and Regional Boards act when issuing NPDES permits that exceed the minimum requirements set forth in federal law, namely Title 40, section 122.26 of the Code of Federal Regulations.

The courts, the State Board and the Regional Boards have repeatedly acknowledged that many aspects of NPDES permits issued in California exceed the minimum requirements of the CWA or are not otherwise required by federal law. In a decision on the merits of the 2001 Permit for San Diego County, the State Board acknowledged that the since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect “waters of the state,” rather than being limited to “waters of the United States.”<sup>20</sup> As the State Board has expressed it, “the inclusion of ‘waters of the state’ allows the protection of groundwater, which is generally not considered to be ‘waters of the United States.’”<sup>21</sup>

On June 16, 2015, the State Board adopted Order No. WQ 2015-0075 In the Matter of Review of Order No. R4-2010-0176, NPDES Permit No. CAS004001 (“Los Angeles Order”).<sup>22</sup> The Los Angeles Order recognizes the dual permitting structure and asserts that “the State Water Board has discretion under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, [and] the State Water Board may also utilize the flexibility under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.”<sup>23</sup> It further recognized that the State Board and Regional WQCBs have discretion under federal law to express WQBELS [Water Quality Based Effluent Limitations] for TMDLs [Total Maximum Daily Loads] incorporated into a permit “either as numeric effluent limitations or as BMPs [Best Management Practices].”<sup>24</sup>

The Regional Boards have also acknowledged in official documents that many of the requirements of MS4 permits exceed the requirements of federal law and are based, therefore, on the broader authority of Porter-Cologne. For example, in a December 13, 2000 staff report regarding the San Diego Regional Water Quality Control Board’s draft 2001 Permit, it was found that 40% of the draft permit requirements “exceed the federal regulations” because they are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.<sup>25</sup>

In *Burbank v. State Board*, *supra*, 35 Cal.App.4th 613, the California Supreme Court acknowledged that NPDES permits may contain requirements that exceed federal CWA, and held that to the extent such provisions are not required by federal law, the State and Regional Boards are required to consider state law restrictions on agency action.<sup>26</sup> Implicit in the Court’s decision is the requirement that orders issued by the State and Regional Boards are subject to

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<sup>20</sup> In Re Building Industry Association of San Diego County and Western States Petroleum Association, State Board Order WQ 2001-15.

<sup>21</sup> *Ibid.*

<sup>22</sup> Statement of Decision, State Water Resources Control Board Order No. WQ 2015-0075 *In Re* Order No. R4-2012-0175, SWRCB/OCC Files A-2236(a)-(kk) (“Los Angeles Order”).

<sup>23</sup> *Id.* at p. 11.

<sup>24</sup> *Id.* at p. 57.

<sup>25</sup> A copy of the Staff Report is included under Section 7 – Documentation to these Test Claims.

<sup>26</sup> *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 618.

State Constitutional restrictions, including those on funding set forth in Article XIII B section 6 of the California Constitution.

In a decision issued by California Court of Appeal in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the Appellate Court specifically considered whether permit terms in an MS4 Permit issued by the San Diego Regional Board (for San Diego County and the Cities therein) involving compliance with numeric effluent limits, were either “authorized” or “required” by the CWA. The Court held that: “it is well settled that the Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law.”<sup>27</sup> In short, the Court in *BIA v. State Board* found that the San Diego Regional Board had the “discretion” to impose certain permit terms that were not “required” by the CWA.<sup>28</sup>

### III. STATE MANDATE LAW

Article XIII B section 6 of the California Constitution requires the State to provide a subvention of funds to local agencies any time the Legislature or a state agency requires the local agency to implement a new program, or provide a higher level of service under an existing program. Article XIII B section 6 states in relevant part:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local governments for the cost of such program or increased level of service . . . .

The purpose of Section 6 “is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”<sup>29</sup> The section “was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues.”<sup>30</sup> In order to implement Section 6, the Legislature enacted a comprehensive administrative scheme to define and pay mandate claims.<sup>31</sup> Under this scheme, the Legislature established the parameters regarding what constitutes a state mandated cost, defining “Costs mandated by the state” to include:

any increased costs which a local agency ... is required to incur after July 1, 1980, as a result of any statute enacted on or after

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<sup>27</sup> *Building Industry Association of San Diego County v. State Water Resources Control Board* (2002) 124 Cal.App.4th 866,881.

<sup>28</sup> *Id.* at 886 [“That provision gives the EPA *discretion* to determine what pollutant controls are appropriate,” citing *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1167-67 (emphasis added)].

<sup>29</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

<sup>30</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 984-985.

<sup>31</sup> Gov. Code § 17500, *et seq.*; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331, 333 [statute establishes “procedure by which to implement and enforce section 6”].

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.<sup>32</sup>

Government Code section 17556 identifies seven exceptions to the rule requiring reimbursement for state mandated costs. The exceptions are as follows:

- (a) The claim is submitted by a local agency . . . that . . . requested legislative authority for that local agency . . . to implement the program specified in the statute, and that statute imposes costs upon that local agency . . . requesting the legislative authority. . . .
- (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.
- (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. . . .
- (d) The local agency . . . has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. . . .
- (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies . . . that result in no net costs to the local agencies. . . , or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. . . .
- (f) The statute or executive order imposes duties that are necessary to implement, or expressly included in, a ballot measure approved by the voters in a statewide or local election. . . .
- (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

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<sup>32</sup> Gov. Code § 17514.



When federal law requires a new program or level of service, courts have determined that specific actions *suggested* by federal authority are reimbursable mandates once they are *required* by the State.<sup>33</sup> This principle was expressly recognized in *Long Beach Unified School Dist. v. State of California*, (1990) 225 Cal.App.3d 155. In that case, the Court found that a state executive order requiring school districts to measure and address racial segregation in local public schools constituted a reimbursable mandate. After reviewing federal law and case law, the Court concluded that schools have a constitutional obligation to alleviate racial segregation insofar as reasonably feasible.<sup>34</sup> However, to the extent the state executive order required school districts to undertake defined remedial actions and measures that were merely advisory under the governing federal law, the requirements exceeded federal constitutional and case law requirements.<sup>35</sup> There was no question that the State had the authority to impose the challenged requirement under federal law; however, merely having the authority to impose the requirement does not equate to federal mandate. Where federal law suggests the means for compliance and the State “orders” or “commands” specific actions, those orders constitute State mandates.<sup>36</sup>

The Commission’s decisions on other municipal NPDES permits have likewise recognized that the authority to impose a requirement does not equate to a federal mandate. In its decision on Test Claim 07-TC-09, regarding the San Diego County municipal NPDES permit, the Commission addressed this issue in the context of the United States Supreme Court’s decision in *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700. The Commission held:

Staff 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.” 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

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<sup>33</sup> *Long Beach Unified School Dist. v. State of California*, (1990) 225 Cal.App.3d 155, 173.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

freely chosen to impose these requirements. Thus, staff finds that part D.1.g. of the permit is not a federal mandate.<sup>37</sup>

None of the challenged programs in the 2013 Permit are specifically required by the CWA or its implementing regulations, yet the Permit imposes requirements on the County that exceed the requirements of federal law, and that are unique to the local government entities such as the County.<sup>38</sup> The 2013 Permit therefore represents a state mandate for which the County is entitled to reimbursement pursuant to Article XIII B section 6 of the California Constitution.

#### **IV. STATE MANDATED ACTIVITIES AND PROGRAMS**

On May 8, 2013, the Regional Board adopted the 2013 Permit that mandates new programs and activities or higher levels of service not required by federal law or any previous permit. A test claim must be filed with the Commission “not later than 12 months following the effective date of a statute or executive order, or within 12 months of first incurring increased costs as a result of a statute or executive order, whichever is later. For purposes of claiming based on the date of first incurring costs, ‘within 12 months’ means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.”<sup>39</sup> The County first incurred costs as a result of the Permit during fiscal year 2013-2014, which began on July 1, 2013.<sup>40</sup> The County did not incur any such costs during the three days of fiscal year 2012-2013 when the Permit was effective.<sup>41</sup> The County thus timely files this Test Claim by June 30 of fiscal year 2014-2015, which is “the fiscal year following the fiscal year in which increased costs were first incurred[.]”<sup>42</sup>

The following programs and activities and higher levels of service are at issue in this Test Claim:<sup>43</sup>

#### **A. HIGHER LEVEL OF SERVICE REQUIRED TO ACHIEVE RECEIVING WATER LIMITATIONS IN PROVISION A.2 OF THE 2013 PERMIT IS AN UNFUNDED STATE MANDATE**

##### **1. Challenged Program Requirement**

Provision A.2 of the 2013 Permit, entitled “Receiving Water Limitations,” imposes a higher level of service than is required by federal law and what was required by previous permits without providing funding for the new higher service level. Specifically, Provision A.2 of the Permit requires the County to strictly comply with the limitation that discharges not cause or

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<sup>37</sup> Statement of Decision, Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 45 [internal citations omitted].

<sup>38</sup> Orders issued by any Regional Water Board pursuant to Division 7 of the California Water Code (commencing at section 13000) come within the definition of “executive order.” *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 920.

<sup>39</sup> Cal. Code Regs., tit. 2, § 1183.1, subd. (b).

<sup>40</sup> Declaration of Jon Van Rhyn, ¶ 7.

<sup>41</sup> *Ibid.*

<sup>42</sup> Cal. Code Regs., tit. 2, § 1183.1, subd. (b).

<sup>43</sup> This Test Claim specifically incorporates all challenges to prior MS4 permits contained in test claims submitted by the County.

contribute to a violation of water quality standards in any receiving waters (the “Receiving Water Limitations” provision). As noted below, the higher level of service is implicated by recent case law from the 9th Circuit, which reinterprets the significance of the Receiving Water Limitations Provision.

Provision A.2 reads as follows:

## 2. Receiving Water Limitations

- a. Discharges from MS4s must not cause or contribute to the violation of water quality standards in any receiving waters, including but not limited to all applicable provisions contained in:
  - (1) The San Diego Water Board’s Basin Plan, including beneficial uses, water quality objectives, and implementation plans;
  - (2) State Water Board plans for water quality control including the following:
    - (a) Water Quality Control Plan for Control of Temperature in the Coastal and Interstate Waters and Enclosed Bays and Estuaries (Thermal Plan), and
    - (b) The Ocean Plan, including beneficial uses, water quality objectives, and implementation plans;
  - (3) State Water Board policies for water and sediment quality control including the following:
    - (a) Water Quality Control Policy for the Enclosed Bays and Estuaries of California,
    - (b) Sediment Quality Control Plan which includes the following narrative objectives for bays and estuaries:
      - (i) Pollutants in sediments shall not be present in quantities that, alone or in combination, are toxic to benthic communities, and
      - (ii) Pollutants shall not be present in sediments at levels that will bioaccumulate in aquatic life to levels that are harmful to human health,
    - (c) The Statement of Policy with Respect to Maintaining High Quality of Waters in California;
  - (4) Priority pollutant criteria promulgated by the USEPA through the following:

(a) National Toxics Rule (NTR) (promulgated on December 22, 1992 and amended on May 4, 1995), and

(b) California Toxics Rule (CTR).

- b. Discharges from MS4s composed of storm water runoff must not alter natural ocean water quality in an ASBS [Area of Special Biological Significance].

## 2. Requirements of Federal Law

Nothing in the CWA, its regulations, or case law requires local agencies to strictly comply with receiving water limitations. The United States Congress, the US EPA, and the State Board have recognized on multiple occasions that municipal stormwater discharges are different from industrial stormwater discharges, and are best addressed through the implementation of BMPs rather than through a strict compliance requirement.<sup>44</sup>

The US EPA has repeatedly expressed a preference for regulating stormwater discharges by requiring the implementation of BMPs, rather than by imposing either technology-based or water quality-based numerical limitations.<sup>45</sup> The courts, including the 9th Circuit Court of Appeals, recognize EPA's policy preference. In fact, the 9th Circuit reiterated the EPA's BMP-based approach to receiving water limitations in *Defenders of Wildlife v. Browner*, stating:

... the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. ***The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits . . . to provide for the attainment of Water Quality Standards."*** The EPA applied that approach to the permits at issue here. Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion.<sup>46</sup>

Most recently, the State Board considered whether federal law mandates strict compliance with Receiving Water Limitations. It concluded as follows:

the State Water Board has ***discretion*** under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4

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<sup>44</sup> See e.g., 33 U.S.C. § 1342, subd. (p).

<sup>45</sup> U.S. EPA NPDES Permit Writers' Manual (2000) pp. 9-3 – 9-8; U.S. E.P.A. Interim Permitting Strategy Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43761 (Aug. 26, 1996); and U.S. E.P.A. Questions and Answers, 61 Fed. Reg. 57425 (Nov. 6, 1996); see also *Divers' Environmental Conservation Organization v. State Water Resources Control Board* (2006) 145 Cal.App.4th 246, 256-57 [citing *id.*].

<sup>46</sup> *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-1167 [emphasis added].

discharges, [and] the State Water Board may also utilize the *flexibility* under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.”<sup>47</sup>

Here, the Regional Board exercised its discretion to require such compliance because federal law does not mandate strict compliance with Receiving Water Limitations.

### 3. Requirements of Previous Permits

Previous permits included the same or similar language regarding Receiving Water Limitations; however, after the previous permits were adopted, case law has reinterpreted the significance of the Receiving Water Limitations Provision. In 2013, the Ninth Circuit applied principles of contract interpretation to render each provision in a stormwater permit separately and strictly enforceable.<sup>48</sup> As discussed in more detail, below, prior to this decision, the State Board and Regional Board did not require strict compliance with Receiving Water Limitations consistent with the flexibility provided in federal law. As a result of the reinterpretation of permit provisions to require strict compliance, the 2013 Permit imposes a higher level of service by requiring strict compliance with Receiving Water Limitations.<sup>49</sup>

Consistent with federal law,<sup>50</sup> the State Board’s policy since 1999 has been to prohibit discharges from municipal stormwater systems that cause or contribute to exceedances of Water Quality Standards, but to allow dischargers to remain in compliance with that requirement by implementing pollution control measures through the iterative process.<sup>51</sup> In 2001, the State Board had the opportunity to clarify its Receiving Water Limitations Provision in previous permits in light of the *Defenders of Wildlife v. Browner* decision. The State Board issued Order WQ 2001-15, *In the Matter of the Petitions of Building Industry Assoc. of San Diego County and Western States Petroleum Assoc.* (2001). In discussing the propriety of requiring strict compliance with Water Quality Standards, and the applicability of the Maximum Extent Practicable (“MEP”) standard, the State Board held:

While we will continue to address Water Quality Standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate. ***We will generally not require “strict compliance” with Water Quality Standards through numeric effluent limits and we will continue to follow an iterative approach, which seeks compliance over time.*** The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through

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<sup>47</sup> Los Angeles Order, *supra*, at p. 11 (emphasis added).

<sup>48</sup> *NRDC v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-1167.

<sup>51</sup> State Board Order WQ 2001-15.

BMPs that must be enforced through large and medium municipal storm sewer systems.<sup>52</sup>

Following its decision in Order No. WQ 2001-15, State Board policy is, and has been, that Receiving Water Limitations Provisions are to be achieved over time through the iterative process.

#### **4. Mandated Activities in 2013 Permit**

The 2013 Permit requires the County to undertake activities to strictly comply with the Receiving Water Limitations Provision. Strict compliance with this provision is currently infeasible. Every action the County takes to comply with the Permit is, at least in part, an attempt to comply with the Receiving Water Limitations Provision.

#### **5. Actual and Estimated Reimbursable Costs**

Compliance with the Receiving Water Limitations of Section A.2 of the 2013 Permit will require the County to significantly increase its existing resource commitments to develop, administer, and maintain a multitude of costly program elements. Meeting these requirements would require a significant expansion of all existing program activities, as well as the construction and operation of treatment control BMPs throughout the unincorporated County. Required activities include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. The costs of carrying out new and expanded programs at a level sufficient to meet these standards are not currently known, but the County reasonably expects them to exceed \$250,000,000 per year.

### **B. NEW REQUIREMENTS INCORPORATING NUMERIC EFFLUENT LIMITATIONS FOR TMDLS IN PROVISION A.3.b OF THE 2013 PERMIT IS AN UNFUNDED STATE MANDATE**

#### **1. Challenged Program Requirement**

Provision A.3.b of the 2013 Permit, entitled “Effluent Limitations,” imposes several new State-mandated programs on the County that are not required by federal law without providing funding for the new mandatory programs. Specifically, Provision A.3.b of the Permit requires the County to “comply with applicable WQBELs established for the TMDLs in Attachment E to [the] Order, pursuant to the applicable TMDL compliance schedules.” Attachment E mandates, in part, as follows:

#### **3. Total Maximum Daily Loads for Total Nitrogen and Total Phosphorus in Rainbow Creek Watershed**

The final total nitrogen and total phosphorus TMDL compliance requirements for Rainbow Creek consist of the following

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<sup>52</sup> *Id.* at pp. 7-8 [emphasis added].

(1) Final TMDL Compliance Date

The Responsible Copermittee must comply with final TMDL compliance requirements by December 31, 2021.

(2) Final Water Quality Based Effluent Water Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance date under Specific Provision 3.b.(1):

Table 3.1

Final Receiving Water Limitations Expressed as Concentrations in Rainbow Creek

Constituent	Receiving Water Limitations
Nitrate (as N)	10 mg/L
Total Nitrogen	1 mg/L
Total Phosphorus	0.1 mg/L

(b) Final Effluent Limitations

(i) Discharges from the MS4s containing concentrations that do not exceed the following effluent limitations by the compliance date under Specific Provision 3.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 3.b.(2)(a):

Table 3.2

Final Effluent Limitations Expressed as Concentrations in MS4 Discharges to Rainbow Creek

Constituent	Receiving Water Limitations
Nitrate (as N)	10 mg/L
Total Nitrogen	1 mg/L
Total Phosphorus	0.1 mg/L

(ii) Annual pollutant loads from given land uses discharging to and from the MS4s that do not exceed the following annual loads by the compliance date under Specific Provision 3.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 3.b.(2)(a):

Table 3.3

Final Effluent Limitations Expressed as Annual Loads in MS4 Discharges to Rainbow Creek

Land Use	Total N	Total P
Commercial Nurseries	116 kg/yr	3 kg/yr
Park	3 kg/yr	0.1 kg/yr
Residential areas	149 kg/yr	12 kg/yr
Urban areas	27 kg/yr	6 kg/yr

(c) Best Management Practices

(i) The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision 3.b.(2)(a) and/or the effluent limitations under Specific Provision 3.b.(2)(b) for Rainbow Creek.

(ii) The Responsible Copermittee should coordinate any BMPs implemented to address this TMDL with Caltrans and other sources as possible.

(3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance date, may be demonstrated via one of the following methods:

(a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR



(b) There are no exceedances of the final receiving water limitations under Specific Provision 3.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

(c) There are no exceedances of the final effluent limitations under Specific Provision 3.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR

(d) The annual pollutant loads from given land uses discharging to and from the MS4s do not exceed the final effluent limitations under Specific Provision 3.b.(2)(b)(ii); OR

(e) The Responsible Copermittee develops and implements the Water Quality Improvement Plan as follows:

(i) Incorporate the BMPs required under Specific Provision 3.b.(2)(c) as part of the Water Quality Improvement Plan,

(ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Specific Provision 3.b.(2)(c) achieves compliance with Specific Provisions 3.b.(3)(a), 3.b.(3)(b), 3.b.(3)(c) and/or 3.b.(3)(d),

(iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,

(iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 3.b.(2)(c), AND

(v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 3.d, to demonstrate compliance with Specific Provisions 3.b.(3)(a), 3.b.(3)(b), 3.b.(3)(c) and/or 3.b.(3)(d).

### **c. INTERIM TMDL COMPLIANCE REQUIREMENTS**

The interim total nitrogen and total phosphorus TMDL compliance requirements for Rainbow Creek consist of the following:

#### **(1) Interim Compliance Dates and WQBELs**

The Responsible Copermittee must comply with the interim WQBELs, expressed as annual loads, by December 31 of the interim compliance year given in Table 3.4.

Table 3.4

*Interim Water Quality Based Effluent Limitations Expressed as Annual Loads in MS4 Discharges from Specific Land Uses to Rainbow Creek*

Land Use	Total N Interim Effluent Limitations (kg/yr)			Total P Interim Effluent Limitations (kg/yr)		
	Interim Compliance Date			Interim Compliance Date		
	2009	2013	2017	2009	2013	2017
Commercial nurseries	390	299	196	20	16	10
Park	5	3	3	0.15	0.10	0.10
Residential areas	507	390	260	99	74	47
Urban areas	40	27	27	9	6	6

(2) Interim TMDL Compliance Determination

Compliance with interim WQBELs, on or after the interim TMDL compliance dates, may be demonstrated via one of the following methods:

- (a) There is no direct or indirect discharge from the Responsible Copermittee’s MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision 3.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee’s MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision 3.b.(2)(b)(i) at the Responsible Copermittee’s MS4 outfalls; OR
- (d) The annual pollutant loads from given land uses discharging to and from the MS4s do not exceed the final effluent limitations under Specific Provision 3.b.(2)(b)(ii); OR
- (e) The annual pollutant loads from given land uses discharging to and from the MS4s do not exceed the interim effluent limitations under Specific Provision 3.c.(1); OR
- (f) The Responsible Copermittee has submitted and is fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance dates.

**6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)**

The Responsible Copermittees for MS4 discharges to the water bodies listed in Table 6.0 **must be in compliance** with the final TMDL compliance requirements according to the following compliance dates:<sup>53</sup>

Constituent	Dry Weather WLA Compliance Date	Wet Weather WLA Compliance Date
Total Coliform	April 4, 2021	April 4, 2031
Fecal Coliform		
<i>Enterococcus</i>		

Discharges from the MS4s **must not cause or contribute to the exceedance of the following receiving water limitations by the compliance dates** under Specific Provision 6.b.(1): [Tables 6.2a, 6.2b].<sup>54</sup>

The Water Quality Improvement Plans for the applicable Watershed Management Areas in Table 6.0 **must incorporate** the Comprehensive Load Reduction Plans (CLRPs) required to be developed pursuant to Resolution No. R9-2010-0001.<sup>55</sup>

The Responsible Copermittee **must implement BMPs** to achieve the receiving water limitations under Specific Provision 6.b.(2)(a) and/or the effluent limitations under Specific Provision 6.b.(2)(b) for the segments or areas of the water bodies listed in Table 6.0.<sup>56</sup>

In short, the 2013 Permit imposes a series of new mandates in connection with the bacteria TMDL for twenty beaches and creeks in the San Diego region and the TMDL for total nitrogen and total phosphorus in Rainbow Creek Watershed, specifically requiring the County to meet both interim and final numeric limits (referenced as “Waste Load Allocations” or “WLAs” within the Permit) and to comply with monitoring and reporting requirements. None of these requirements (hereafter, the “TMDL-Related Mandates”) are required by federal law. Thus, all are State mandates that are required to be funded by the State under the California Constitution. The 2013 Permit provides that the County may rely upon BMPs in attempting to comply with these numeric effluent limits, but implementation of such BMPs does not constitute compliance

<sup>53</sup> 2013 Permit, Attachment E, § 6.b.(1).  
<sup>54</sup> 2013 Permit, Attachment E, § 6.b.(2)(a).  
<sup>55</sup> 2013 Permit, Attachment E, § 6.b.(2)(c)(i).  
<sup>56</sup> 2013 Permit, Attachment E, § 6.b.(2)(c)(ii).

with the numeric limits. Thus, the 2013 Permit requires compliance with interim and final numeric limits, irrespective of what BMPs may or may not be implemented and regardless of how effective the BMPs may be.

The Permit provisions requiring strict compliance with the Waste Load Allocations in the TMDLs are not compelled by federal law. Nor does federal law require the related monitoring and reporting requirements contained in the 2013 Permit. Accordingly, all such mandates require the subvention of funds before they can properly be required of the local agencies under the 2013 Permit.

## 2. Requirements of Federal Law

The CWA establishes distinct roles for the federal and state governments. Under the Act, the EPA is required to establish and enforce technology-based limitations on individual discharges into the Country's navigable waters, and each state is to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. According to the California Supreme Court, "[t]hese state water quality standards provide 'a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'"<sup>57</sup>

Under the CWA, a TMDL is to be established once a water body has been determined not to be meeting a water quality standard, *i.e.*, once the water body has been listed as being "impaired" for the particular pollutant or pollutants in issue.<sup>58</sup> A TMDL is to be established "at a level necessary to implement the applicable water quality standards."<sup>59</sup> Under the federal regulations, a "TMDL" is defined as follows:

Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.<sup>60</sup>

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<sup>57</sup> *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 704.

<sup>58</sup> 33 U.S.C. § 1313, subds. (d)(1)(C) and (D).

<sup>59</sup> 33 U.S.C. § 1313, subd. (d)(1)(C); also see *Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1404 ["A TMDL must be 'established' at a level necessary to implement the applicable water quality standards. . . . Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the waste load allocations in the TMDL."].

<sup>60</sup> 40 C.F.R. § 130.2, subd. (i).

The regulations then define a “Waste Load Allocation” or “WLA” as: “A 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.”<sup>61</sup>

Finally, federal regulations do not require that a WLA be incorporated into a stormwater permit as a strict numeric limit. Federal regulations only require that NPDES permit terms be “*consistent with the assumptions and requirements of any available wasteload allocations* for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.”<sup>62</sup> How a WLA is to be incorporated into an NPDES Permit depends upon whether a permit is for an industrial or municipal discharger. For industrial waste dischargers, Congress chose to require strict compliance with water quality standards pursuant to 33 U.S.C. § 1311 (b)(1)(C), *i.e.* the wasteload allocations need to be strictly enforced through the use of numeric limits in the industrial waste discharger’s NPDES Permit. However, for municipal storm-sewer dischargers, Congress chose to replace “*the requirements of § 1311 with the requirement that municipal storm-sewer dischargers ‘reduce the discharge of pollutants to the maximum extent practicable,’*” and “expressly” “*did not require municipal storm-sewer dischargers to comply strictly with 33 U.S.C. § 1311(b)(a)(C).*”<sup>63</sup> Similarly, the Ninth Circuit Court of Appeal found that when it comes to municipal stormwater dischargers, “*Congress did not mandate a minimum standards approach.*”<sup>64</sup>

Moreover, the law is clear that unless the CWA or the federal regulations expressly require a particular permit term, the Regional Board has wide discretion in imposing permit requirements.<sup>65</sup> In *Rancho Cucamonga*, the Court of Appeal held that for municipal NPDES permits, “The Act authorizes States to issue permits with conditions necessary to carry out its provisions. [Citation] *The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants.*”<sup>66</sup> A Regional Board exercises its discretion when it incorporates WLAs from a TMDL into a permit as numeric effluent limits.<sup>67</sup> In *Divers’ Environmental*, the plaintiff brought suit claiming that an NPDES Permit issued to the United States Navy, by the San Diego Regional Board, was contrary to law because it did not incorporate WLAs from a TMDL into the Navy’s permit as numeric effluent limits. After discussing the relevant requirements of the CWA, as well as governing case authority, the Court of Appeal found that, in

<sup>61</sup> 40 C.F.R. § 130.2, subd. (h).

<sup>62</sup> 40 C.F.R. § 122.44, subd. (d)(1)(vii)(B) (emphasis added).

<sup>63</sup> *Defenders of Wildlife v. Browner* (9th Cir. 1999) (“*Defenders*”) 191 F.3d 1159, 1165 (emphasis added). In *Defenders*, the Ninth Circuit Court of Appeal recognized the different approach taken by Congress for stormwater, finding that “*industrial discharges must comply strictly with state water-quality standards,*” while “*Congress chose not to include a similar provision for municipal storm-sewer discharges.*” The Court found that “33 U.S.C. § 1342(p)(3)(B) is not merely silent regarding whether municipal discharges must comply with 33 U.S.C. § 1311,” but instead Section 1342(b)(3)(B)(iii) “replaces the requirements of § 1311 with the requirement that municipal storm-sewer dischargers ‘reduce the discharge of pollutants to the maximum extent practicable.’” The *Defenders* Court thus concluded that “*the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).*”

<sup>64</sup> *Natural Resources Defense Council v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, 1308.

<sup>65</sup> See, e.g., *Rancho Cucamonga v. Regional Water Quality Control Board, Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389 (“*Rancho Cucamonga*”).

<sup>66</sup> *Id.* at p. 1389 (emphasis added).

<sup>67</sup> *Divers’ Environmental Conservation Organization v. State Water Resources Control Board* (2006) 145 Cal.App.4th 246 (“*Divers’ Environmental*”).

regulating stormwater permits, EPA “*has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations.*”<sup>68</sup> The Court went on to find that “it is now clear that in implementing numeric water quality standards, such as those set forth in CTR [the California Toxics Rule], permitting agencies *are not required to do so* solely by means of a corresponding *numeric* WQBEL’s”<sup>69</sup> Thus, *Divers’ Environmental* confirms that the TMDL-derived numeric effluent limits included in the 2013 Permit here are not mandated by federal law, but are included at the discretion of the Regional Board.

The State Board confirmed that federal law does not mandate that numeric effluent limits be incorporated into the 2013 Permit. In its recent Los Angeles Order, the State Board recognized that:

The permitting authority [has] discretion as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs[.]<sup>70</sup>

In sum, while “TMDLs serve as a link in an implementation chain” linking the implementation of water quality standards to the NPDES Permits,<sup>71</sup> strict compliance with WLAs in the TMDL is *not* required when incorporating a TMDL into a stormwater NPDES Permit. Nonetheless, as this Commission has previously recognized, “the federal Clean Water Act authorizes states to impose more stringent measures than required by federal law.”<sup>72</sup> Thus NPDES “permits may include state-imposed, in addition[] to federally required measures. Those state measures . . . may constitute a state mandate if they ‘exceed the mandate in . . . federal law.’”<sup>73</sup>

Here, the Regional Board has clearly exercised its discretion “to impose more stringent measures than required by federal law.” Specifically, the provisions within the 2013 Permit that require all interim and final numeric targets to be “achieved” and “met,” as well as the monitoring and reporting obligations associated with such numeric targets, plainly go beyond what is required by federal law, and are thus State mandates. Further, the local agencies responsible for complying with such programs do not have any authority to impose fees to recover the cost of complying with these State mandates.

### 3. Requirements of Previous Permits

Previous permits did not contain the TMDL-related mandates at issue in this Test Claim. As such, all of the requirements involving the TMDLs within the 2013 Permit are new requirements that go beyond what is required under federal law. All such requirements constitute unfunded State mandates.

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<sup>68</sup> *Id.* at p. 256.

<sup>69</sup> *Id.* at p. 262 (emphasis added).

<sup>70</sup> Los Angeles Order, *supra*, at p. 57.

<sup>71</sup> *Arcadia v. EPA* (N.D. Cal. 2003) 265 F.Supp.2d 1142, 1144-45.

<sup>72</sup> Test Claim 07-TC-09, Discharge of Stormwater Runoff – Order No. R9-2007-0001, p. 41.

<sup>73</sup> *Id.* [finding individual permit terms must be analyzed “to determine whether the state requirements exceed the federal requirements imposed on local agencies”].

#### **4. Mandated Activities in 2013 Permit**

Provision A.3.b and Attachment E in the 2013 Permit impose mandates on the County to meet the numeric effluent limits specified in Section 6 of Attachment E, along with related monitoring and reporting obligations. Each of the TMDL-related mandates are new programs not contained anywhere in previous permits. Further, each mandate obligates the County to strictly meet interim and final numeric effluent limits, and exposes the County to enforcement action or third-party citizen suits if the limits are not met.<sup>74</sup> Yet, as discussed in detail above, and as confirmed in case after case and in numerous State Board orders and policy documents, not to mention the plain language of the Act itself, the CWA does not require the imposition of numeric effluent limits within municipal NPDES Permits.

#### **5. Actual and Estimated Reimbursable Costs**

To comply with the 2013 Permit's TMDL requirements, the County must expend resources each year to develop, administer, and maintain a costly program. This includes costs needed to conduct studies and investigations, plan and implement new program activities (research, meetings, stakeholder coordination, etc.), and to monitor, assess, report on, and modify these programs as necessary to achieve and maintain compliance with the TMDLs. Any of these cost types may include staffing, materials and supplies, and contract work. To date, the County has expended \$1,179,055 in FY 2013/14 and \$1,377,473 in FY 2014/15 to conduct special studies and investigations needed to plan and implement the TMDLs. The County expects to expend an additional \$1,297,839 for studies and investigations during FY 2015/16 through FY 2017/18, plus additional costs related to program planning, implementation, reporting, and assessment. The costs of carrying out these additional requirements are not currently known, but the County reasonably expects them to exceed \$35,000,000 per year. Note that these costs are a subset of those identified for complying with Receiving Water Limitations in Section A above.

### **C. NEW REQUIREMENT TO DEVELOP, IMPLEMENT, UPDATE, AND PROVIDE ANNUAL REPORTS ON WATER QUALITY IMPROVEMENT PLANS IN PROVISIONS B AND F OF THE 2013 PERMIT ARE UNFUNDED STATE MANDATES**

#### **1. Challenged Program Requirement**

Provisions B and F of the 2013 Permit require the County "to develop a Water Quality Improvement Plan for each of the Watershed Management Areas in Table B-1."<sup>75</sup> The County is required to develop, implement, update and provide annual reports on 7 different Water Quality Improvement Plans (each a "WQIP"): one for each of 7 different Watershed Management Areas. Each WQIP is required to do the following:

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<sup>74</sup> See 33 U.S.C. § 1365; see also *NRDC v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194 [holding the Los Angeles County Flood Control District liable in a third-party citizen suit based upon monitoring results that showed exceedances of numeric water quality standards].

<sup>75</sup> 2013 Permit, Provision B.1.

**(a) Pursuant to Provisions B.2-B.6:**

- identify the water quality priorities within each Watershed Management Area that will be addressed by the Water Quality Improvement Plan.<sup>76</sup>
- Consider [nine factors] at a minimum, to identify water quality priorities based on impacts of MS4 discharges on receiving water beneficial uses.<sup>77</sup>
- consider [six factors] at a minimum, to identify the potential impacts to receiving waters that may be caused or contributed to by discharges from the Copermittees' MS4s.<sup>78</sup>
- use the information gathered for Provisions B.2.a and B.2.b to develop a list of priority water quality conditions as pollutants, stressors and/or receiving water conditions that are the highest threat to receiving water quality or that most adversely affect the quality of receiving waters. The list must include [five elements] for each priority water quality condition.<sup>79</sup>
- identify the highest priority water quality conditions to be addressed by the Water Quality Improvement Plan, and provide a rationale for selecting a subset of the water quality conditions identified pursuant to Provision B.2.c.(1) as the highest priorities.<sup>80</sup>
- identify and prioritize known and suspected sources of storm water and non-storm water pollutants and/or other stressors associated with MS4 discharges that cause or contribute to the highest priority water quality conditions identified under Provision B.2.c. The identification of known and suspected sources of pollutants and/or stressors that cause or contribute to the highest priority water quality conditions as identified for Provision B.2.c must consider [five factors].<sup>81</sup>
- evaluate the findings identified under Provisions B.2.a-d, and identify potential strategies that can result in improvements to water quality in MS4 discharges and/or receiving waters within the Watershed Management Area. Potential water quality improvement strategies that may be implemented within the Watershed Management Area

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<sup>76</sup> 2013 Permit Provision B.2.a.

<sup>77</sup> 2013 Permit Provision B.2.a.

<sup>78</sup> 2013 Permit Provision B.2.b.

<sup>79</sup> 2013 Permit Provision B.2.c.(1).

<sup>80</sup> 2013 Permit Provision B.2.c.(2).

<sup>81</sup> 2013 Permit Provision B.2.d.(1)-(5).



must include [three factors].<sup>82</sup>

- identify and develop specific water quality improvement goals and strategies to address the highest priority water quality conditions identified within a Watershed Management Area. The water quality improvement goals and strategies must address the highest priority water quality conditions by effectively prohibiting non-storm water discharges to the MS4, reducing pollutants in storm water discharges from the MS4 to the MEP, and protecting the water quality standards of receiving waters.<sup>83</sup>
- develop and incorporate numeric goals into the Water Quality Improvement Plan. Numeric goals must be used to support Water Quality Improvement Plan implementation and measure reasonable progress towards addressing the highest priority water quality conditions identified under Provision B.2.c. The Copermittees must establish and incorporate [final and interim] numeric goals in the Water Quality Improvement Plan.<sup>84</sup>
- develop and incorporate schedules for achieving the numeric goals into the Water Quality Improvement Plan. The schedules must demonstrate reasonable progress toward achieving the final numeric goals required for Provision B.3.a.(1). The Copermittees must incorporate the schedules for achieving the numeric goals into the Water Quality Improvement Plan based on final and interim dates for achieving final and interim numeric goals based on eight considerations specified in Provision B.3.a.(2).(a).(i)-(iv) and Provision B.3.a.(2).(b).(i)-(iv).<sup>85</sup>
- identify the strategies that will be implemented in each Watershed Management Area as follows:
  - (1) Jurisdictional Strategies ...<sup>86</sup>
  - (2) Watershed Management Area Strategies ...<sup>87</sup>
  - (3) Schedules for Implementing Strategies.<sup>88</sup>
- develop and incorporate an integrated monitoring and assessment

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<sup>82</sup> 2013 Permit Provision B.2.e.

<sup>83</sup> 2013 Permit Provision B.3.

<sup>84</sup> 2013 Permit Provision B.3.a.(1).

<sup>85</sup> 2013 Permit Provision B.3.a.(2).

<sup>86</sup> 2013 Permit Provision B.3.b.(1).

<sup>87</sup> 2013 Permit Provision B.3.b.(2).

<sup>88</sup> 2013 Permit Provision B.3.b.

program into the Water Quality Improvement Plan.<sup>89</sup>

- implement the iterative approach pursuant to Provision A.4 to adapt the Water Quality Improvement Plan, monitoring and assessment program, and jurisdictional runoff management programs to become more effective toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a, and must include the following
  - re-evaluation of priority water quality conditions . . .
  - adaptation of goals, strategies and schedules . . .
  - adaptation of monitoring and assessment.<sup>90</sup>

***(b) Provision F.1 requires the following:***

**1. Water Quality Improvement Plans**

The Copermittees for each Watershed Management Area must develop and submit the Water Quality Improvement Plan in accordance with the following requirements:

**a. WATER QUALITY IMPROVEMENT PLAN DEVELOPMENT**

Each Water Quality Improvement Plan must be developed in accordance with the following process:

**(1) Public Participation Process**

The Copermittees must implement a public participation process to solicit data, information, and recommendations to be utilized in the development of the Water Quality Improvement Plan. The public participation process must include the following:

(a) The Copermittees must develop a publicly available and noticed schedule of the opportunities for the public to participate and provide comments during the development of the Water Quality Improvement Plan. The schedule may be adjusted as necessary by the Copermittees, provided the public is provided timely notification of the changes to the schedule.

(b) The Copermittees must form a Water Quality Improvement Consultation Panel to provide recommendations during the

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<sup>89</sup> 2013 Permit Provision B.4.

<sup>90</sup> 2013 Permit Provision B.5.

development of the Water Quality Improvement Plan. The Water Quality Improvement Consultation Panel must consist of at least the following members:

- (i) A representative of the San Diego Water Board;
- (ii) A representative of the environmental community familiar with the water quality conditions of concern of the receiving waters in the Watershed Management Area, preferably from an environmental interest group associated with a water body within the Watershed Management Area; and
- (iii) A representative of the development community familiar with the opportunities and constraints for implementing structural BMPs, retrofitting projects, and stream, channel or habitat rehabilitation projects in the Watershed Management Area, preferably with relevant engineering, hydrology, and/or geomorphology experience in the Watershed Management Area.

(c) The Copermittees must coordinate the schedules for the public participation process among the Watershed Management Areas to provide the public time and opportunity to participate during the development of the Water Quality Improvement Plans.

## (2) Priority Water Quality Conditions

(a) The Copermittees must solicit data, information and recommendations from the public to be utilized in the development and identification of the priority water quality conditions and potential water quality improvement strategies for the Watershed Management Area.

(b) The Copermittees must review the priority water quality conditions the Copermittees plan on including in the Water Quality Improvement Plan with the Water Quality Improvement Consultation Panel to receive recommendations or concurrence.

(c) The Copermittees must consider revisions to the priority water quality conditions based on recommendations from the Water Quality Improvement Consultation Panel.

(d) The Copermittees must include all the potential water quality improvement strategies identified by the public and the Water Quality Improvement Consultation Panel with the

submittal of the priority water quality conditions to the San Diego Water Board.

(e) The Copermittees must submit the Water Quality Improvement Plan requirements of Provision B.2 to the San Diego Water Board as early as 6 months and no later than 12 months after the commencement of coverage under this Order. Upon receipt, the San Diego Water Board will issue a public notice and release the proposed priority water quality conditions and potential water quality improvement strategies for public review and comment for a minimum of 30 days.

(f) The Copermittees must consider revisions to the priority water quality conditions and potential water quality improvement strategies developed pursuant to Provision B.2 based on public comments received by the close of the comment period.

(3) Water Quality Improvement Goals, Strategies and Schedules

(a) The Copermittees must solicit recommendations from the public on potential numeric goals for the highest priority water quality conditions identified for the Watershed Management Area, and recommendations on the strategies that should be implemented to achieve the potential numeric goals.

(b) The Copermittees must consult with the Water Quality Improvement Consultation Panel and consider revisions to the following items based on the Panel's recommendations:

(i) The numeric goals and schedules the Copermittees propose to include in the Water Quality Improvement Plan;

(ii) The water quality improvement strategies and schedules the Copermittees propose to implement in the Watershed Management Area and include in the Water Quality Improvement Plan; and

(iii) If the Copermittees choose to implement Provision B.3.b.(4), the results of the Watershed Management Area Analysis the Copermittees proposed to incorporate into the Water Quality Improvement Plan.

(c) The Copermittees must submit the Water Quality Improvement Plan requirements of Provision B.3 to the San Diego Water Board as early as 9 months and no later than 18 months after the commencement of coverage under this Order.

Upon receipt, the San Diego Water Board will issue a public notice and release the proposed water quality improvement goals, strategies and schedules for public review and comment for a minimum of 30 days.

(d) The Copermittees must consider revisions to the water quality improvement goals, strategies and schedules developed pursuant to Provision B.3 based on public comments received by the close of the comment period.

**b. WATER QUALITY IMPROVEMENT PLAN SUBMITTAL AND IMPLEMENTATION**

(1) Within 24 months after the commencement of coverage under this Order, the Copermittees for each Watershed Management Area must submit a complete Water Quality Improvement Plan in accordance with the requirements of Provision B of this Order to the San Diego Water Board. The San Diego Water Board will issue a public notice and release the Water Quality Improvement Plan for public review and comment for a minimum of 30 days.

(2) The Copermittees must consider revisions to the Water Quality Improvement Plan based on written comments received by the close of the public comment period.

(3) The Copermittees must promptly submit any revisions to the Water Quality Improvement Plan to the San Diego Water Board no later than 60 days after the close of the public comment period.

(4) If issues concerning the Water Quality Improvement Plan are resolved informally through discussions among the Copermittees, the San Diego Water Board and interested parties, the San Diego Water Board Executive Officer may provide written notification of acceptance to the Copermittees that the Water Quality Improvement Plan meets the requirements of Provision B. However, if the Executive Officer determines that significant issues with the Water Quality Improvement Plan remain, the matter will be scheduled for San Diego Water Board consideration at a public meeting.

(5) The Copermittees must commence with implementation of the Water Quality Improvement Plan, in accordance with the water quality improvement strategies and schedules therein, upon written notification of acceptance with the Water Quality

Improvement Plan by the San Diego Water Board Executive Officer.

(6) During implementation of the Water Quality Improvement Plan the Copermittees must correct any deficiencies in the Plan identified by the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report following a request by the Board to do so.

(7) The Water Quality Improvement Plan must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of receiving notification of acceptance with the Water Quality Improvement Plan by the San Diego Water Board Executive Officer.

***(c) Provision F.2.c requires the following:***

**c. WATER QUALITY IMPROVEMENT PLAN UPDATES**

(1) The Water Quality Improvement Plans must be updated in accordance with the following process:

(a) The Copermittees must develop and implement a public participation process to obtain data, information and recommendations for updating the Water Quality Improvement Plan. The public participation process must provide for a publicly available and noticed schedule of opportunities for the public to participate and provide comments during the development of updates to the Water Quality Improvement Plan;

(b) The Copermittees must consult with the Water Quality Improvement Consultation Panel on proposed updates of the Water Quality Improvement Plan, and consider the Water Quality Improvement Consultation Panel's recommendations in finalizing the proposed updates;

(c) The Copermittees for each Watershed Management Area must submit 1) proposed updates to the Water Quality Improvement Plan and supporting rationale, and 2) recommendations received from the public and the Water Quality Improvement Consultation Panel and the rationale for the requested updates, either in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. The updates submitted will be deemed accepted for inclusion in the Water Quality Improvement Plan ninety (90) days after

submission unless otherwise directed in writing by the San Diego Water Board Executive Officer;

(d) The Copermittees must revise the requested updates as directed by the San Diego Water Board Executive Officer; and

(e) Updated Water Quality Improvement Plans must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of acceptance of the requested updates by the San Diego Water Board.

(2) No later than six months following Office of Administrative Law and USEPA approval of any TMDL Basin Plan amendment with wasteload allocations (WLAs) assigned to the Copermittees during the term of this Order, the Copermittees must initiate an update to the applicable Water Quality Improvement Plans in accordance with Provision F.1 or Provision F.2.c.(1) to incorporate the requirements of the TMDL WLAs.

**(d) Provision F.3.b.(3) requires the following:**

**(3) Water Quality Improvement Plan Annual Reports**

The Copermittees for each Watershed Management Area must submit a Water Quality Improvement Plan Annual Report for each reporting period no later than January 31 of the following year. The annual reporting period consists of two different periods: 1) July 1 to June 30 of the following year for the jurisdictional runoff management programs, 2) October 1 to September 30 of the following year for the monitoring and assessment programs. The Water Quality Improvement Plan Annual Reports must be made available on the Regional Clearinghouse required pursuant to Provision F.4. Each Annual Report must include the following:

(a) The receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1 and D.2, summarized and presented in tabular and graphical form;

(b) The progress of the special studies required pursuant to Provision D.3, and the findings, interpretations and conclusions of a special study, or each phase of a special study, upon its completion;

(c) The findings, interpretations and conclusions from the assessments required pursuant to Provision D.4;

(d) The progress of implementing the Water Quality Improvement Plan, including, but not limited to, the following:

(i) The progress toward achieving the interim and final numeric goals for the highest water quality priorities for the Watershed Management Area;

(ii) The water quality improvement strategies that were implemented and/or no longer implemented by each of the Copermittees during the reporting period and previous reporting periods;

(iii) The water quality improvement strategies planned for implementation during the next reporting period;

(iv) Proposed modifications to the water quality improvement strategies, the public comments received and the supporting rationale for the proposed modifications;

(v) Previous modifications or updates incorporated into the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document and implemented by the Copermittees in the Watershed Management Area; and

(vi) Proposed modifications or updates to the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document;

(e) A completed Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D to this Order or a revised form accepted by the San Diego Water Board) for each Copermittee in the Watershed Management Area, certified by a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative; and

(f) Each Copermittee must provide any data or documentation utilized in developing the Water Quality Improvement Plan Annual Report upon request by the San Diego Water Board. Any Copermittee monitoring data utilized in developing the Water Quality Improvement Plan Annual Report must be uploaded to the California Environmental Data Exchange Network (CEDEN).<sup>29</sup> Any Copermittee monitoring and assessment data utilized in developing the Water Quality Improvement Plan Annual Report must be available for access on the Regional Clearinghouse required pursuant to Provision F.4.



## 2. Requirements of Federal Law

Nothing in the CWA, its regulations, or case law requires local agencies to develop, implement, update, and provide annual reports on a WQIP for each of the Watershed Management Areas.

## 3. Requirements of Previous Permits

Previous permits did not contain a requirement to develop, implement, update, and provide annual reports on a WQIP for each of the Watershed Management Areas. The most analogous provisions were Provisions E.2.f and g of the 2007 Permit, which required the County to collaborate in the development and implementation of a Watershed Urban Runoff Management Program for each watershed. Each Watershed Urban Runoff Management Program was required to include watershed activities selected by the permittees to address high priority water quality problems and a schedule for implementing the activities. The Commission previously found that the requirements of Provisions E.2.f and g in the 2007 Permit were unfunded State mandates on the grounds that the “federal regulations authorize but do not require the specificity regarding whether collaboration occurs on a jurisdictional, watershed, or other basis.”<sup>91</sup>

## 4. Mandated Activities in 2013 Permit

The 2013 Permit requires the County to perform the following activities that are not required under either federal law or the 2007 Permit:

### (a) Develop and Implement WOIP

- identify the water quality priorities within each Watershed Management Area that will be addressed by the Water Quality Improvement Plan.<sup>92</sup>
- consider [nine] factors at a minimum, to identify water quality priorities based on impacts of MS4 discharges on receiving water beneficial uses<sup>93</sup>
- consider [six factors] at a minimum, to identify the potential impacts to receiving waters that may be caused or contributed to by discharges from the Copermittees’ MS4s.<sup>94</sup> use the information gathered for Provisions B.2.a and B.2.b to develop a list of priority water quality conditions as pollutants, stressors and/or receiving water conditions that are the highest threat to receiving water quality or that most adversely affect the quality of receiving waters. The list must include

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<sup>91</sup> Statement of Decision, Test Claim 07-TC-09, *Discharge of Stormwater Runoff*, p. 74.

<sup>92</sup> 2013 Permit Provision B.2.a.

<sup>93</sup> 2013 Permit Provision B.2.a.

<sup>94</sup> 2013 Permit Provision B.2.b.

[five elements] for each priority water quality condition.<sup>95</sup>

- identify the highest priority water quality conditions to be addressed by the Water Quality Improvement Plan, and provide a rationale for selecting a subset of the water quality conditions identified pursuant to Provision B.2.c.(1) as the highest priorities.<sup>96</sup>
- identify and prioritize known and suspected sources of storm water and non-storm water pollutants and/or other stressors associated with MS4 discharges that cause or contribute to the highest priority water quality conditions identified under Provision B.2.c. The identification of known and suspected sources of pollutants and/or stressors that cause or contribute to the highest priority water quality conditions as identified for Provision B.2.c must consider [five factors].<sup>97</sup>
- evaluate the findings identified under Provisions B.2.a-d, and identify potential strategies that can result in improvements to water quality in MS4 discharges and/or receiving waters within the Watershed Management Area. Potential water quality improvement strategies that may be implemented within the Watershed Management Area must include [three factors].<sup>98</sup>
- identify and develop specific water quality improvement goals and strategies to address the highest priority water quality conditions identified within a Watershed Management Area. The water quality improvement goals and strategies must address the highest priority water quality conditions by effectively prohibiting non-storm water discharges to the MS4, reducing pollutants in storm water discharges from the MS4 to the MEP, and protecting the water quality standards of receiving waters.<sup>99</sup>
- develop and incorporate numeric goals into the Water Quality Improvement Plan. Numeric goals must be used to support Water Quality Improvement Plan implementation and measure reasonable progress towards addressing the highest priority water quality conditions identified under Provision B.2.c. The Copermittees must establish and incorporate [final and interim] numeric goals in the Water Quality Improvement Plan.<sup>100</sup>
- develop and incorporate schedules for achieving the numeric goals into the Water Quality Improvement Plan. The schedules must

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<sup>95</sup> 2013 Permit Provision B.2.c.(1).

<sup>96</sup> 2013 Permit Provision B.2.c.(2).

<sup>97</sup> 2013 Permit Provision B.2.d.(1)-(5).

<sup>98</sup> 2013 Permit Provision B.2.e.

<sup>99</sup> 2013 Permit Provision B.3.

<sup>100</sup> 2013 Permit Provision B.3.a.(1).

demonstrate reasonable progress toward achieving the final numeric goals required for Provision B.3.a.(1). The Copermittees must incorporate the schedules for achieving the numeric goals into the Water Quality Improvement Plan based on final and interim dates for achieving final and interim numeric goals based on eight considerations specified in Provision B.3.a.(2).(a).(i)-(iv) and Provision B.3.a.(2).(b).(i)-(iv).<sup>101</sup>

- identify the strategies that will be implemented in each Watershed Management Area as follows:
  - (1) Jurisdictional Strategies ...<sup>102</sup>
  - (2) Watershed Management Area Strategies . . .<sup>103</sup>
  - (3) Schedules for Implementing Strategies.<sup>104</sup>
- develop and incorporate an integrated monitoring and assessment program into the Water Quality Improvement Plan.<sup>105</sup>
- implement the iterative approach pursuant to Provision A.4 to adapt the Water Quality Improvement Plan, monitoring and assessment program, and jurisdictional runoff management programs to become more effective toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a, and must include the following
  - re-evaluation of priority water quality conditions . . .
  - adaptation of goals, strategies and schedules . . .
  - adaptation of monitoring and assessment.<sup>106</sup>

**(b) Update WOIPs**

- develop and implement a public participation process to obtain data, information and recommendations for updating the Water Quality Improvement Plan. The public participation process must provide for a publicly available and noticed schedule of opportunities for the public to participate and provide comments during the development of updates to the Water Quality Improvement Plan;
- consult with the Water Quality Improvement Consultation Panel on

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<sup>101</sup> 2013 Permit Provision B.3.a.(2).  
<sup>102</sup> 2013 Permit Provision B.3.b.(1).  
<sup>103</sup> 2013 Permit Provision B.3.b.(2).  
<sup>104</sup> 2013 Permit Provision B.3.b.  
<sup>105</sup> 2013 Permit Provision B.4.  
<sup>106</sup> 2013 Permit Provision B.5.

proposed updates of the Water Quality Improvement Plan, and consider the Water Quality Improvement Consultation Panel's recommendations in finalizing the proposed updates;

- submit 1) proposed updates to the Water Quality Improvement Plan and supporting rationale, and 2) recommendations received from the public and the Water Quality Improvement Consultation Panel and the rationale for the requested updates, either in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b;
- revise the requested updates as directed by the San Diego Water Board Executive Officer; and
- make the updated Water Quality Improvement Plans available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of acceptance of the requested updates by the San Diego Water Board.

(c) **Report on WOIPs**

- submit a Water Quality Improvement Plan Annual Report for each reporting period no later than January 31 of the following year, which includes the following:
  - The receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1 and D.2, summarized and presented in tabular and graphical form;
  - The progress of the special studies required pursuant to Provision D.3, and the findings, interpretations and conclusions of a special study, or each phase of a special study, upon its completion;
  - The findings, interpretations and conclusions from the assessments required pursuant to Provision D.4;
  - The progress of implementing the Water Quality Improvement Plan, including, but not limited to, the following:
    - (i) The progress toward achieving the interim and final numeric goals for the highest water quality priorities for the Watershed Management Area;
    - (ii) The water quality improvement strategies that were implemented and/or no longer implemented by each of

the Copermittees during the reporting period and previous reporting periods;

(iii) The water quality improvement strategies planned for implementation during the next reporting period;

(iv) Proposed modifications to the water quality improvement strategies, the public comments received and the supporting rationale for the proposed modifications;

(v) Previous modifications or updates incorporated into the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document and implemented by the Copermittees in the Watershed Management Area; and

(vi) Proposed modifications or updates to the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document;

- A completed Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D to this Order or a revised form accepted by the San Diego Water Board) for each Copermittee in the Watershed Management Area, certified by a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative; and
- Any data or documentation utilized in developing the Water Quality Improvement Plan Annual Report upon request by the San Diego Water Board. Any Copermittee monitoring data utilized in developing the Water Quality Improvement Plan Annual Report must be uploaded to the California Environmental Data Exchange Network (CEDEN).<sup>29</sup> Any Copermittee monitoring and assessment data utilized in developing the Water Quality Improvement Plan Annual Report must be available for access on the Regional Clearinghouse required pursuant to Provision F.4.

## **5. Actual and Estimated Reimbursable Costs**

To comply with the 2013 Permit's WQIP requirements, the County must expend resources each year to develop, administer, and maintain costly programs for each WQIP in which it participates. This includes costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. Any of these cost types may include staffing, materials and supplies, and contract work. To date, the County

has expended \$740,550 in FY 2013/14 and \$780,395 in FY 2014/15 toward the development of seven individual WQIPs. The County expects to expend an additional \$1,897,071 during FY 2015/16 through FY 2017/18 for ongoing WQIP planning, implementation, reporting, and assessment.

**D. NEW REQUIREMENTS RELATING TO HYDROMODIFICATION, CRITICAL SEDIMENT YIELD AREAS AND UPDATES TO THE BMP DESIGN MANUAL IN PROVISIONS E.3.c.(2), E.3.d AND F.2.b OF THE 2013 PERMIT ARE UNFUNDED STATE MANDATES**

**1. Challenged Program Requirements**

Provisions E.3.c.(2), E.3.d, and F.2.b of the 2013 Permit, entitled “Hydromodification Management BMP Requirements” and “BMP Design Manual Update,” respectively, impose several new State-mandated programs on the County that are not required by federal law without providing funding for the new mandatory programs.

Specifically, Provision E.3.c.(2) of the 2013 Permit requires the following:

(2) Hydromodification Management BMP Requirements

Each Copermittee must require each Priority Development Project to implement onsite BMPs to manage hydromodification that may be caused by storm water runoff discharged from a project as follows: . . .

(b) Each Priority Development Project must avoid critical sediment yield areas known to the Copermittee or identified by the optional Watershed Management Area Analysis pursuant to Provision B.3.b.(4), or implement measures that allow critical coarse sediment to be discharged to receiving waters, such that there is no net impact to the receiving water.

Provision E.3.d requires the County to “update its BMP Design Manual . . . [to] include the following:

- (1) Updated procedures to determine the nature and extent of storm water requirements applicable to a potential development or redevelopment projects. . . .
- (2) Updated procedures to identify pollutants and conditions of concern for selecting the most appropriate structural BMPs that consider, at a minimum, the following:
  - (a) Receiving water quality (including pollutants for which receiving waters are listed as impaired under the CWA section 303(d) List);

- (b) Pollutants, stressors, and/or receiving water conditions that cause or contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;
  - (c) Land use type of the project and pollutants associated with that land use type; and
  - (d) Pollutants expected to be present onsite.
- (3) Updated procedures for designing structural BMPs, including any updated performance requirements to be consistent with the requirements of Provision E.3.c for all structural BMPs listed in the BMP Design Manual.
  - (4) Long-term maintenance criteria for each structural BMP listed in the BMP Design Manual; and
  - (5) Alternative compliance criteria, in accordance with the requirements under Provision E.3.c(3), if the Copermittee elects to allow Priority Development Projects within its jurisdiction to utilize alternative compliance.

Provision F.2.b of the 2013 Permit requires the following:

**b. BMP DESIGN MANUAL UPDATES**

Each Copermittee must update its BMP Design Manual in accordance with the following requirements:

- (1) Each Copermittee must update its BMP Design Manual to incorporate the requirements of Provisions E.3.a-d concurrent with the submittal of the Water Quality Improvement Plan. Each Copermittee must correct any deficiencies in the BMP Design Manual based on comments received from the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report;
- (2) Subsequent updates to the BMP Design Manual must be consistent with the requirements of Provisions E.3.a-d and must be submitted as part of the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b; and
- (3) Updated BMP Design Manuals must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of completing the update.

## 2. Requirements of Federal Law

Nothing in the CWA, its regulations, or case law requires local agencies to implement onsite BMPs to manage hydromodification that may be caused by storm water runoff discharged from a project or to create and update a BMP Design Manual to include specific procedures and criteria.<sup>107</sup> Indeed, the Commission has already considered whether the requirement to review and update BMPs in local guidance materials, such as a Standard Stormwater Mitigation Plan (“SSMP”) is required by federal law or regulation.<sup>108</sup> This Commission decided “nothing in the federal regulation requires agencies to update local or model SSMPs.”<sup>109</sup> In addition, the Commission has already determined that the hydromodification requirement constitutes “a state-mandated, new program or higher level of service.”<sup>110</sup>

The Commission also considered and decided that nothing in federal law or regulation requires updated guidance documents to incorporate minimum LID and other BMP requirements for incorporation into local plans.<sup>111</sup> The CWA only requires MS4 permits to impose controls that reduce the discharge of pollutants to the maximum extent practicable (“MEP”).<sup>112</sup> MEP is not defined, but the CWA suggests management practices, control techniques, and system, design, and engineering methods as options for attaining the maximum reduction possible.<sup>113</sup> When suggestions are no longer merely being suggested as options for consideration “but are required acts, [t]hese requirements constitute a higher level of service.”<sup>114</sup>

Federal regulations require part of a permit application to include a plan for developing, implementing and enforcing controls to reduce the discharge from MS4s that originate in areas of new development.<sup>115</sup> Requiring post-construction controls to limit pollutant discharges originating in areas of new development may be within the requirements of Section 122.26(d)(2)(iv)(A) of the federal regulations, but the specific requirements contained in the 2013 Permit are not required in this Section. By adopting permit provisions that require the County to implement onsite BMPs to manage hydromodification that may be caused by storm water runoff discharged from a project or to create and update a BMP Design Manual to include specific procedures and criteria, the state has freely chosen<sup>116</sup> to impose requirements and related costs that are not federally mandated and that, when mandated by the state, constitute a new program or higher level of service.<sup>117</sup>

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<sup>107</sup> 33 U.S.C. § 1342, subd. (p); 40 C.F.R. § 122.26; see also Statement of Decision, Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 51.

<sup>108</sup> Statement of Decision, Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, p. 51.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Id.* at p. 97.

<sup>111</sup> *Id.* at p. 51.

<sup>107</sup> 33 U.S.C. § 1342, subd. (p)(3)(B)(iii).

<sup>113</sup> Statement of Decision, Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, p. 51.

<sup>114</sup> *Ibid.*; see also *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173.

<sup>115</sup> 40 C.F.R. § 122.26, subd. (d)(2)(iv)(A)(2).

<sup>116</sup> See *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594.

<sup>117</sup> Statement of Decision, Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 51.



### **3. Requirements of Previous Permits**

The 2001 Permit did not impose any requirements relating to a hydromodification plan. The 2007 Permit required the County to collaborate in the development and implementation of a hydromodification management plan to manage increases in runoff discharge rates and durations from Priority Development Projects meeting specified criteria. This requirement was subject to a challenge in a separate test claim and is incorporated herein by this reference. Previous permits did not require the specific onsite BMPs to manage hydromodification that may be caused by storm water runoff discharged from County projects or to create and update a BMP Design Manual to include the specific procedures and criteria now required.

### **4. Mandated Activities in 2013 Permit**

As set forth in Section IV.D.1, above, Provisions E.3.c.(2), E.3.d, and F.2.b in the 2013 Permit require the County to update the BMP Design Manual to include specific procedures and criteria, to collaborate with other permittees and to hire a consultant to establish defensible standards for determining when Priority Development Projects meet various criteria to use hydromodification management BMPs established by the 2013 Permit. The County has further been required to collaborate with other copermittees in the 2013 Permit to update the BMP Design Manual for submission concurrent with the submission of each Water Quality Improvement Plan.<sup>118</sup>

### **5. Actual and Estimated Reimbursable Costs**

To comply with the 2013 Permit's stricter onsite requirements for Priority Development Projects, the County must expend resources to update its BMP Design Manual (a.k.a. Standard Urban Stormwater Mitigation Plan under the 2007 Permit) to include specific standards, procedures, and criteria. The County must first collaborate with other permittees to update the regional Model BMP Design Manual for submission concurrent with each Water Quality Improvement Plan, and then modify its own local BMP Design Manual to implement the minimum standards of the regional Model. This includes costs needed to conduct modeling, studies, and investigations, to plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Permit Section E.3.d. To date, the County has expended \$170,205 in FY 2013/14 and \$298,335 in FY 2014/15 toward the update of the regional Model BMP Design Manual. The County has also contracted an additional \$34,446 toward updating its local BMP Design Manual in FY 2015/16. Additional costs related to the completion, implementation, review, and modification of the County's BMP Design Manual through FY 2017/18 are not currently known, but the County reasonably expects them to exceed \$100,000 per year.

The County must also develop and implement standards and programs to manage discharges from areas of critical coarse sediment yield on Priority Development Project sites. This includes costs needed to conduct modeling and studies, plan and implement new program

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<sup>118</sup> 2013 Permit, provision F.2.b.

activities, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Permit Section E.3.c.(2)(b). Any of these cost types may include staffing, materials and supplies, and contract work. To date, the County has expended \$37,360 in FY 2014/15 toward the development of standards and guidelines for the management of critical coarse sediment. The County expects to expend an additional \$120,786 toward the completion of these deliverables in FY 2015/16. Additional costs related to the completion, implementation, review, and modification of these approaches are not currently known, but the County reasonably expects them to exceed \$100,000 per year.

## **E. NEW RESIDENTIAL INSPECTIONS PROGRAM IN PROVISION E.5.c OF THE 2013 PERMIT IS AN UNFUNDED MANDATE**

### **1. Challenged Program Requirement**

Provisions E.5.a, E.5.c.(1)(a), E.5.c.(2)(a), and E.5.c.(3) of the 2013 Permit, generally entitled “Existing Development Management” impose several new State-mandated programs on the County that are not required by federal law without providing funding for the new mandatory programs.

Provision E.5.a of the 2013 Permit requires the County to maintain and update a watershed-based inventory of the existing development that may discharge a pollutant load to and from the MS4. The inventory must include:

- the [n]ame, location (hydrological subarea and address, if applicable) of . . . residential areas;
- a description of the facility or area, including . . . identification if a residential area is or includes a Common Interest Area / Home Owner Association, or mobile home park; [and]
- the identification of pollutants generated and potentially generated by the [residential] area. ....

Provision E.5.(a)(3) requires the County to annually update a map showing the location of inventoried existing development, watershed boundaries, and water bodies.

Provision E.5.c of the 2013 Permit also requires the County to maintain and update a watershed-based inventory of the existing development that may discharge a pollutant load to and from the MS4. This Provision requires the following:

### **c. EXISTING DEVELOPMENT INSPECTIONS**

Each Copermittee must conduct inspections of inventoried existing development to ensure compliance with applicable local ordinances and permits, and the requirements of this Order.

#### **(1) Inspection Frequency**

(a) Each Copermittee must establish appropriate inspection frequencies for inventoried existing development in accordance with the following requirements:

(i) At a minimum, inventoried existing development must be inspected once every five years utilizing one or more of the following methods:

[a] Drive-by inspections by Copermittee municipal and contract staff;

[b] Onsite inspections by Copermittee municipal and contract staff; and/or

[c] Visual inspections of publicly accessible inventoried facilities or areas by volunteer monitoring or patrol programs that have been trained by the Copermittee;

(ii) The frequency of inspections must be appropriate to confirm that BMPs are being implemented to reduce the discharge of pollutants in storm water from the MS4 to the MEP and effectively prohibit non-storm water discharges to the MS4;

(iii) The frequency of inspections must be based on the potential for a facility or area to discharge non-storm water and pollutants in storm water, and should reflect the priorities set forth in the Water Quality Improvement Plan;

(iv) Each Copermittee must annually perform onsite inspections of an equivalent of at least 20 percent of the commercial facilities and areas, industrial facilities, and municipal facilities in its inventoried existing development;28 and

(v) Inventoried existing development must be inspected by the Copermittee, as needed, in response to valid public complaints.

(b) Based upon inspection findings, each Copermittee must implement all follow-up actions (i.e. education and outreach, re-inspection, enforcement).

## (2) Inspection Content

(a) Inspections of existing development must include, at a minimum:

(i) Visual inspections for the presence of actual non-storm water discharges;

(ii) Visual inspections for the presence of actual or potential discharge of pollutants;

(iii) Visual inspections for the presence of actual or potential illicit connections; and

(iv) Verification that the description of the facility or area in the inventory, required pursuant to Provision E.5.a.(2), has not changed.

(b) Onsite inspections of existing development by the Copermittee must include, at a minimum:

(i) Assessment of compliance with its applicable local ordinances and permits related to non-storm water and storm water discharges and runoff;

(ii) Assessment of the implementation of the designated BMPs;

(iii) Verification of coverage under the Industrial General Permit, when applicable; and

(iv) If any problems or violations are found, inspectors must take and document appropriate actions in accordance with the Enforcement Response Plan pursuant to Provision E.6.

### (3) Inspection Tracking and Records

Each Copermittee must track all inspections and re-inspections at all inventoried existing development. The Copermittee must retain all inspection records in an electronic database or tabular format, which must be made available to the San Diego Water Board upon request. Inspection records must include, at a minimum:

(a) Name and location of the facility or area (address and hydrologic subarea) consistent with the inventory name and location, pursuant to Provision E.5.a.(1);

(b) Inspection and re-inspection date(s);

(c) Inspection method(s) (i.e. drive-by, onsite);

(d) Observations and findings from the inspection(s);

(e) For onsite inspections of existing development by Copermittee municipal or contract staff, the records must also include, as applicable:

- (i) Description of any problems or violations found during the inspection(s);
- (ii) Description of enforcement actions issued in accordance with the Enforcement Response Plan pursuant to Provision E.6; and
- (iii) The date problems or violations were resolved.

## 2. Requirements of Federal Law

The CWA and federal regulations do not require MS4 dischargers to maintain and update a watershed-based inventory of existing residential development or to conduct inspections of residential areas. The Commission has previously considered whether permit requirements to inspect commercial and industrial facilities constituted unfunded state mandates.<sup>119</sup> Based on the plain language of the federal regulations, which are silent on the types of facilities at issue in that permit, the Commission held that performing inspections “as specified in the permit, is not a federal mandate.”<sup>120</sup> Federal law and regulations are likewise silent on inspections of residential properties. The requirement in the 2013 Permit to inspect residential properties is an activity, as in the *Long Beach Unified School Dist.* case discussed above, that is “a specified action going beyond the federal requirement for inspections ‘to prevent illicit discharges to the municipal separate storm sewer system.’ [Citation] As such, the inspections are not federally mandated.”<sup>121</sup>

Unlike the regulatory fee that may be available to fund commercial and industrial inspection programs, the County has no authority to impose a fee on residential property for the sake of inspecting residential property.<sup>122</sup> Such a fee would constitute a “property-related” fee for a property-related service and would be subject to voter approval.<sup>123</sup> The Commission has already determined that “a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners.”<sup>124</sup>

Further, since the Commission’s decision in *Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182*, voters approved Proposition 26 (2010). Proposition 26 added Article XIII C, section 1(e) to the California Constitution and prohibits charging a fee for a service that is also of benefit to others who are not charged.<sup>125</sup> If the County charges a user fee to comply with the 2013 Permit requirements, it must be charged to all users in the watershed who drain into the MS4. If it charges a smaller class of users than all those who benefit from the stormwater program, such as residential properties, it will run afoul of Proposition 26 for

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<sup>119</sup> Statement of Decision, Test Claim Nos. 03-TC-04, 03-TC-19, 03 TC-20, 03-TC-21, *Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182 NPDES Permit CAS004001*, 36 (appeal pending).

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*; *Long Beach Unified School Dist. v. State of California*, supra, 225 Cal.App.3d 155.

<sup>122</sup> Cf. Statement of Decision, Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182, 55-56.

<sup>123</sup> *Howard Jarvis Taxpayer Assoc. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1354.

<sup>124</sup> Statement of Decision, Test Claim 07-TC-09, *Discharge of Stormwater Runoff*, p. 106.

<sup>125</sup> Cal. Const. art. XIII C, § 1, subd. (e)(2).

charging a smaller class than those who benefit from the MS4 service. For these reasons, the County does not have authority to impose a fee on residential properties for the sake of complying with the inspection requirements in the 2013 Permit.

### **3. Requirements of Previous Permits**

No previous permit mandated a residential inspection program. The most analogous section in the 2007 Permit “encouraged” permittees to “evaluate their methods used for oversight of residential areas . . . [and] consider various oversight and inspection approaches to identify an effective . . . approach for residential areas and activities.”<sup>126</sup> By “encouraging” permittees to consider various approaches for effective oversight of residential activities, the 2007 Permit encouraged a *voluntary* inspection and evaluation program. The 2007 Permit, however, did not establish a mandatory inspection program now present in the 2013 Permit.

### **4. Mandated Activities in 2013 Permit**

To comply with the residential inspection program requirements in the 2013 Permit, the County will need to create and maintain a watershed-based inventory of existing residential development that includes the name, location (by hydrological subarea and address) of every residential area in the County’s jurisdiction, a description of the residential area, including a description of whether the residential area is or includes a Common Interest Area / Home Owner Association, or mobile home park; and identification of pollutants generated and potentially generated by the residential area. The County will then need to conduct inspections of every residential area at least once every 5 years, and possibly more often, to inspect for the presence of actual non-storm water discharges, discharge of pollutants, illicit connections, whether there have been any changes to the area, assessment of compliance with local regulations, and assessment of BMPs. Each inspection must be tracked in an electronic database or tabular format and must include five types of information as specified in the Permit.

### **5. Actual and Estimated Reimbursable Costs**

The County must expend significant resources to develop, administer, and maintain a costly new program to comply with the 2013 Permit’s residential inspection requirements. This includes costs needed to conduct studies and investigations (mapping, modeling, pilot studies, etc.), plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Permit Sections E.5.a and E.5.c. Any of these cost types may include staffing, materials and supplies, and contract work. To date, the County has expended \$566,575 in FY 2013/14 and \$685,084 in FY 2014/15 toward the planning and development of a residential inspection program to comply with Permit Sections E.5.a and E.5.c. The County expects to expend an additional \$1,560,232 for studies and investigations, program planning, implementation, reporting, and assessment during FY 2015/16 through FY 2017/18.

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<sup>126</sup> 2007 Permit, D.3.c.(4).

## **F. NEW REQUIREMENT TO RETROFIT AND REHABILITATE STREAMS IN PROVISION E.5.e OF THE 2013 PERMIT IS AN UNFUNDED MANDATE**

### **1. Challenged Program Requirement**

Provision E.5.e of the 2013 Permit, entitled “Retrofitting and Rehabilitating Areas of Existing Development” imposes several new State-mandated programs on the County that are not required by federal law without providing funding for the new mandatory programs.

Specifically, Provision E.5.e.(1) requires the County to retrofit areas of existing development, stating:

#### **(1) Retrofitting Areas of Existing Development**

Each Copermittee must describe in its jurisdictional runoff management program document, a program to retrofit areas of existing development within its jurisdiction to address identified sources of pollutants and/or stressors that contribute to the highest priority water quality conditions in the Watershed Management Area. The program must be implemented as follows:

- (a) Each Copermittee must identify areas of existing development as candidates for retrofitting, focusing on areas where retrofitting will address pollutants and/or stressors that contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;
- (b) Candidates for retrofitting projects may be utilized to reduce pollutants that may be discharged in storm water from areas of existing development, and/or address storm water runoff flows and durations from areas of existing development that cause or contribute to hydromodification in receiving waters;
- (c) Each Copermittee must develop a strategy to facilitate the implementation of retrofitting projects in areas of existing development identified as candidates;
- (d) Each Copermittee should identify areas of existing development where Priority Development Projects may be allowed or should be encouraged to implement or contribute toward the implementation of alternative compliance retrofitting projects; and
- (e) Where retrofitting projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the Water Quality Improvement Plan, the Copermittee should collaborate and cooperate with other Copermittees and/or entities in the Watershed Management Area to identify, develop, and implement regional retrofitting projects (i.e.

projects that can receive and/or treat storm water from one or more areas of existing development and will result in a net benefit to water quality and the environment) adjacent to and/or downstream of the areas of existing development.

Provision E.5.e.(2) requires the County to rehabilitate streams, channels, and habitats in areas of existing development, stating:

(2) Stream, Channel and/or Habitat Rehabilitation in Areas of Existing Development

Each Copermittee must describe in its jurisdictional runoff management program document, a program to rehabilitate streams, channels, and/or habitats in areas of existing development within its jurisdiction to address the highest priority water quality conditions in the Watershed Management Area. The program must be implemented as follows:

- (a) Each Copermittee must identify streams, channels, and/or habitats in areas of existing development as candidates for rehabilitation, focusing on areas where stream, channel, and/or habitat rehabilitation projects will address the highest priority water quality conditions identified in the Water Quality Improvement Plan;
- (b) Candidates for stream, channel, and/or habitat rehabilitation projects may be utilized to address storm water runoff flows and durations from areas of existing development that cause or contribute to hydromodification in receiving waters, rehabilitate channelized or hydromodified streams, restore wetland and riparian habitat, restore watershed functions, and/or restore beneficial uses of receiving waters;
- (c) Each Copermittee must develop a strategy to facilitate the implementation of stream, channel, and/or habitat rehabilitation projects in areas of existing development identified as candidates;
- (d) Each Copermittee should identify areas of existing development where Priority Development Projects may be allowed or should be encouraged to implement or contribute toward the implementation of alternative compliance stream, channel, and/or habitat rehabilitation projects; and
- (e) Where stream, channel, and/or habitat rehabilitation projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the Water Quality Improvement Plan, the Copermittee should collaborate and cooperate with other Copermittees and/or entities in the Watershed Management Area to identify, develop, and implement regional stream, channel, and/or habitat rehabilitation projects (i.e. projects that can receive storm water from one or more areas of existing



development and will result in a net benefit to water quality and the environment).

## **2. Requirements of Federal Law**

Nothing in the CWA, its regulations, or case law requires local agencies to develop, fund, and implement a retrofitting and rehabilitation program. The most analogous provisions in the US EPA regulations require municipal NPDES permits to include “[a] description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible.”<sup>127</sup> This requirement however applies only to structural flood control devices and simply would not apply to the type of comprehensive retrofitting and rehabilitation programs required in the 2013 Permit.

## **3. Requirements of Previous Permits**

Nothing in the 2007 Permit required a retrofitting program. The most analogous section in the 2002 Permit, Part D.3.a.(2)(d) stated, in its entirety, “Each Copermittee shall evaluate existing flood control devices to determine if retrofitting the device to provide additional pollutant removal from urban runoff is feasible. When conducting flood control device retrofit projects, each Copermittee shall incorporate permanent pollutant removal measures into the projects, where feasible.”

The 2007 Permit did not impose any stream, channel and/or habitat rehabilitation program requirements.

## **4. Mandated Activities in 2013 Permit**

Provision E.5.e.(1) of the 2013 Permit requires the County to develop and implement a program to retrofit areas of existing development. Implementation of the retrofitting program requires the County to identify areas of existing development as candidates for retrofitting; develop a strategy to facilitate the implementation of retrofitting projects in areas of existing development identified as candidates; identify areas of existing development where Priority Development Projects may be allowed to implement or contribute toward the implementation of alternative compliance retrofitting projects; and, where retrofitting projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the Water Quality Improvement Plan, to collaborate and cooperate with other Copermittees and/or entities in the Watershed Management Area to identify, develop, and implement regional retrofitting projects.

Provision E.5.e.(2) of the 2013 Permit requires the County to develop and implement a program to rehabilitate streams, channels, and/or habitats in areas of existing development. Implementation of the rehabilitation program requires the County to identify streams, channels, and/or habitats in areas of existing development as candidates for rehabilitation; develop a strategy to facilitate the implementation of rehabilitation projects in areas of existing

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<sup>127</sup> 40 C.F.R. § 122.26, subd. (d)(2)(iv)(A)(1).

development identified as candidates; identify areas of existing development where Priority Development Projects may be allowed or should be encouraged to implement or contribute toward the implementation of alternative compliance stream, channel, and/or habitat rehabilitation projects; and, where stream, channel, and/or habitat rehabilitation projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the Water Quality Improvement Plan, collaborate and cooperate with other Copermittees and/or entities in the Watershed Management Area to identify, develop, and implement regional stream, channel, and/or habitat rehabilitation projects.

## **5. Actual and Estimated Reimbursable Costs**

The County must expend significant resources to develop, administer, and maintain a costly new program to comply with the 2013 Permit's retrofit and stream rehabilitation requirements. This includes costs needed to conduct studies and investigations (mapping, modeling, etc.), plan and implement program activities (identification, evaluation, and prioritization of candidate projects; selection of projects for implementation; project design and engineering; coordination with regulatory agencies; outreach and coordination with stakeholders and project partners; acquisition and management of project funding; etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Permit Section E.5.e. Any of these cost types may include staffing, materials and supplies, and contract work. To date, the County has expended \$55,000 in FY 2013/14 and \$55,000 in FY 2014/15 toward the planning and development of a retrofit and stream rehabilitation program. The additional costs of carrying out these new requirements during FY 2015/16 through FY 2017/18 are not currently known, but the County reasonably expects them to exceed \$200,000 per year.

## **G. NEW REQUIREMENT TO UPDATE JURISDICTIONAL URBAN RUNOFF MANAGEMENT PLAN TO INCORPORATE NEW PERMIT PROVISIONS IN PROVISION F.2.a IS AN UNFUNDED MANDATE**

### **1. Challenged Program Requirement**

Provision F.2.a of the 2013 Permit, entitled "Jurisdictional Runoff Management Program Document Updates" impose new requirements to update the Jurisdictional Urban Runoff Management Plan on the County that are not mandated by federal law and without providing funding for the new mandated provisions.

Specifically, Provision F.2.a requires the following:

Each Copermittee must update its jurisdictional runoff management program document in accordance with the following requirements:

- (1) Each Copermittee is encouraged to seek public and key stakeholder participation and comments, as early and often as possible during the process of developing updates to its jurisdictional runoff management program document;
- (2) Each Copermittee must update its jurisdictional runoff management program document to incorporate the [eight] requirements of Provision E

concurrent with the submittal of the Water Quality Improvement Plan. Each Copermittee must correct any deficiencies in the jurisdictional runoff management program document based on comments received from the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report;

- (3) Each Copermittee must submit updates to its jurisdictional runoff management program, with the supporting rationale for the modifications, either in the Water Quality Improvement Plan Annual Report required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b;
- (4) The Copermittee must revise proposed modifications to its jurisdictional runoff management program as directed by the San Diego Water Board Executive Officer; and
- (5) Updated jurisdictional runoff management program documents must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of submitting the Water Quality Improvement Plan Annual Report.

## **2. Requirements of Federal Law**

Nothing in the CWA, its regulations, or case law requires local agencies to create, review and update a Jurisdictional Urban Runoff Management Plan consisting of at least eight elements (legal authority establishment and enforcement, illicit discharge detection and elimination, development planning, construction management, existing development management, enforcement response plans, public education and participation, and fiscal analysis) and supporting rationale for modifications or to provide public and stakeholder input during the update process and provide a regional clearinghouse for the plan. The Commission considered whether certain elements in a Jurisdictional Urban Runoff Management Plan are state mandates in 2007 and also whether the requirement in the 2007 Permit to review and update BMP requirements listed in Standard Urban Stormwater Management Plans (“SUSMP”) and to develop, submit and implement an updated Model SUSMP constituted a state mandate. The Commission determined that that nothing in federal law or regulations requires updates to the SUSMP and likewise determined that the requirements to collaborate with other Copermittees in the development of standards, to undertake street sweeping and conveyance system cleaning, and to undertake educational activities in the Jurisdictional Urban Runoff Management Plan also constituted state mandates. Likewise, nothing in federal law or regulation requires the County to update its Jurisdictional Urban Runoff Management plans, to include supporting rationale for modifications, to provide public stakeholder input during the update process, or to create and provide a regional clearinghouse for the plan.

## **3. Requirements of Previous Permits**

Provision D of the 2007 Permit required the County to update its Jurisdictional Runoff Management Plan. As noted above, the Commission considered the permittees’ challenge to that

requirement in the 2007 Permit and to requirements to update similar plans and determined the requirements constituted state mandates.

#### **4. Mandated Activities in 2013 Permit**

To comply with the requirements in the 2013 Permit, the County will need to develop new programs and modify existing programs. Specifically, the County has had to revise ordinances to expand legal authority, modify policies, procedures and regulations applicable to development planning, modify its inspection procedures and standards, develop an enforcement response plan, increase public education activities, and expand its illicit discharge detection and elimination programs. As part of each of these modifications, the County also has had to establish a public participation and stakeholder involvement process.

#### **5. Actual and Estimated Reimbursable Costs**

In compliance with Permit Section F.2, the County expended an estimated \$242,146 to update its Jurisdictional Urban Runoff Program (JRMP) document during FY 2014/15. The County must also submit updates to its jurisdictional runoff management program, with the supporting rationale for the modifications, either in the Water Quality Improvement Plan Annual Report required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. The costs associated with these subsequent updates are not currently known, but the County reasonably expects them to exceed \$50,000 per year. These costs include: meetings and correspondence to coordinate content development with staff; developing, distributing, and revising draft content; and monitoring, assessing, reporting on, and modifying programs and activities as necessary to maintain compliance with the Permit. Any of these cost types may include staffing, materials and supplies, and contract work.

### **H. NEW REQUIREMENT TO APPEAR BEFORE THE REGIONAL BOARD ON REQUEST IN PROVISION F.3.a IS AN UNFUNDED MANDATE**

#### **1. Challenged Program Requirement**

Provision F.3.a of the 2013 Permit, entitled “Progress Report Presentations” requires the County to appear before the Regional Board on request by the Board and to provide progress reports on implementation of WQIPs and jurisdictional runoff management programs. These appearances and presentations are in addition to annual reports on the jurisdictional runoff management program, monitoring and assessment program, and WQIP.

Specifically, Provision F.3.a provides:

#### **a. PROGRESS REPORT PRESENTATIONS**

The Copermittees for each Watershed Management Area must periodically appear before the San Diego Water Board, as requested by the Board, to provide progress reports on the implementation of the Water Quality Improvement Plan and jurisdictional runoff management programs.

## **2. Requirements of Federal Law**

Nothing in the CWA, its regulations, or case law authorizes a state agency to compel a local agency to appear before a WQCB and make presentations or to provide progress reports on plan implementation at intervals other than annual reports. The most analogous provision in the federal regulations requires a permittee to provide “information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the Director upon request, copies of records required to be kept by this permit.”<sup>128</sup> This federal regulation requiring submission of information does not compel physical attendance and oral presentation at meetings of the Regional Board.

## **3. Requirements of Previous Permits**

Nothing in the 2007 Permit required a local agency to appear before the Regional Board and make presentations or to provide progress reports on plan implementation at intervals other than annual reports. The most analogous provision in the 2007 Permit required permittees to provide information to regulatory agencies that requested such information in accordance with 40 C.F.R. 122.41(h), discussed above.<sup>129</sup>

## **4. Mandated Activities in 2013 Permit**

To comply with the 2013 Permit, County staff members will be required to prepare presentations on any topic, to attend meetings of the Regional Board when requested by the Board, and to present information to the Board on any Permit topic, when requested. Preparation of such presentations may require the County to collaborate with Copermittees, conduct research, write materials for distribution to the public at Regional Board meetings, and undertake other, as of yet, undetermined activities.

## **5. Actual and Estimated Reimbursable Costs**

The County will be required to expend an unknown amount of time and resources each year to develop to comply with the 2013 Permit’s provision compelling attendance at Regional Board meetings and preparation of presentations for the meetings. The exact cost to the County is unknown at this time, but a reasonable estimate of costs to the County for a single compelled attendance and presentation exceeds \$1,000.

## **V. STATEWIDE COST ESTIMATE**

The 2013 Permit only relates to the MS4 dischargers located within San Diego County and therefore the cost estimates provided relate only to the County’s costs. Those costs are detailed in the declaration submitted in support of this Test Claim.

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<sup>128</sup> 40 C.F.R. § 122.41.

<sup>129</sup> 2007 Permit, Attachment B, Provision 5(a).

## **VI. FUNDING SOURCES**

### **A. THE COUNTY DOES NOT HAVE FEE AUTHORITY TO OFFSET ITS COSTS**

The ability of a local government to impose fees or taxes on individuals residing, owning property or conducting business within its jurisdiction is limited by various provisions within the California Constitution. Any fee or tax imposed by the County would have to comply with the relevant Constitutional requirements. As explained below those Constitutional provisions would effectively prevent the County from recouping the costs in implementing any of the challenged provisions by imposing fees. Any tax or jurisdiction-wide property related fee to fund costs associated with the County's stormwater management program could only be imposed if approved by a vote of the electorate and would likely require approval by a supermajority or 2/3 vote.

#### **1. County's Activities Mandated By The 2013 Permit Do Not Convey Unique Benefits On Or Deal With Unique Burdens Being Imposed On The MS4 By Individual Persons, Businesses Or Property Owners.**

The provisions of the 2013 Permit that are the subject of this claim involve requirements to develop programs and perform activities that apply throughout the jurisdiction and are not related to services being performed directly for individual businesses property owners, or residents. The programs are intended to improve the overall water quality of receiving water which benefits all persons within the jurisdiction. It would be impossible to identify benefits that any individual resident, business or property owner within the jurisdiction is receiving that are distinct from benefits that all persons within the jurisdictions are receiving. The County, therefore, cannot develop a fee structure that allocates the total costs of complying with the mandates in the 2013 Permit to individuals that would be based on the unique benefit that such individuals are receiving from that program or activity.

The 2013 Permit is intended to deal with water quality impacts from stormwater that is being conveyed by the County's MS4 and reduce pollutants being discharged from the MS4 to the maximum extent practicable. Most of the requirements in the Permit involve developing programs to minimize the likelihood of pollutants being carried by runoff into the MS4 and to otherwise reduce those pollutants before being discharged into receiving waters.

The vast majority of the water that enters MS4 enters as runoff after flowing over properties being put to a vast array of uses. Except in rare cases it would be difficult to identify the volume of water or amount of pollutants attributable to an individual property owner. Unlike a sanitary sewer system where water is being discharged directly into the sanitary sewer and the operator of a sanitary sewer can measure or reasonably approximate the volume being discharged into its conveyance system and thus approximate the burden being placed on its system by an individual property, the operator of an MS4 cannot approximate the individual burden being placed on the MS4 by an individual property owner. It is therefore difficult, if not impossible, for the County to develop a fee structure that is based on the burden that an individual property is placing on the MS4.

As explained below, because of the impossibility to develop a fee structure based on the benefits enjoyed or burdens imposed by prospective payors, and because none of the activities being performed in response to the Permit requirements at issue in this claim are being provided directly to any prospective payor, the County would not have the authority to charge a fee to recoup the costs of complying with the mandates in the Permit.

## **2. Article XIII C of the California Constitution Limits the County's Power to Impose Fees**

Proposition 26 amended Article XIII C of the California Constitution and defines virtually any revenue device enacted by a local government as a tax requiring voter approval unless it falls within certain enumerated exceptions.

Article XIII C § 2(d)<sup>130</sup> provides that:

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. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

Article XIII C § 1(d) defines special tax as

... any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund

Article XIII C § 1(e) defines a tax as

... any levy, charge, or exaction of any kind imposed by a local government, except the following:

(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

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<sup>130</sup>

All future references are to the California Constitution unless otherwise noted.

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.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, 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.

Valid fees therefore must recover no more than the amount necessary to recover costs of the governmental program being funded by the fee. The person or business being charged the fee, the payor, may only be charged a fee based on the portion of the total government costs attributable to burdens being placed on the government by that payor or an amount based on the direct benefits the payor receives from the program or facility being funded by the fee. The services and work products produced by the County in response to the requirements of the Permit are not being provided directly to any individual or are related to a specific benefit conferred on any individual. Any fee charged by the County for costs related to the requirements of the Permit at issue in this claim, therefore would not meet the requirement of Article XIII C §§ 1(e) (1) and 1(e) (2) and would not be a valid fee.

### **3. Any Fee or Tax Charged By the County Not Based On Benefits Received or Burdens Imposed By Payor Must Be Approved By a Vote Of The Electorate**

A fee or charge that does not fall within the seven exceptions listed in Article XIII C § 1(e) and does not meet the other requirements of Article XIII C is automatically deemed a tax, which must be approved by the voters.

Any tax that is intended to fund a specific program such as a stormwater management program is a "special tax." subject to the requirements of Article XIII A § 4, and Article XIII C § 2(d). If a fee were imposed on owners or occupants or real property that is triggered by their ownership or use of property within the jurisdiction it would constitute a property related fee governed by Article XIII D of the California Constitution.

Article XIII A § 4 and Article XIII C § 2(d) require Special Taxes be approved by 2/3 of the voters of the portion of the jurisdiction subject to the fee.



Article XIII D requires voter approval of most property related fees. Relevant portions of Article XIII D § 3(a) provides that:

(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 except ... (2) Any special tax receiving a two-thirds vote pursuant to § 4 of Article XIII A ... (4) Fees or charges for property related services as provided by this article....”

Article XIII D § 2(e) defines 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.”

Article XIII D § 2(h) defines property-related service as “... a public service having a direct relationship to property ownership.”

Article XIII D § 6(c) requires voter approval for most new or increased fees and charges. It provides “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 case of *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 struck down a fee that the City of Salinas attempted to enact to fund the city’s stormwater program. The Court held in that case that a stormwater fee was a property related fee governed by Article XIII D and that that such a fee could not be imposed unless it was approved by the voters.

The fee at issue in that case was a storm drainage fee enacted by the Salinas City Council (City). It was enacted by the City Council but not approved by the voters of the City. The purpose of the fee was to fund and maintain a program put in place to comply with the City’s obligations under its MS4 Permit. The fee would be imposed on “users of the storm water drainage system,” and the City characterized the fee as a user fee recovering the costs incurred by the City for the use of the City’s storm and surface water management system by property owners and occupants.

The City attempted to develop a methodology that based the fee on the amount of runoff leaving certain classes of property. The fee was charged to the owners and occupiers of all developed parcels and the amount of the fee was based on the impervious area of the parcel. The rationale used by the City for basing the fee on impervious area was that the impervious area of a property most accurately measured the degree to which the property contributed runoff to the City’s drainage facilities. Undeveloped parcels and developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the

City's storm drainage facilities were required to pay in proportion to the amount they did contribute runoff or used the City's treatment services.

The City asserted that the fee did not require voter approval requirements of Article XIII D § 6(c) on two grounds. The first ground was that the fee was not a "property related" fee but rather a "user fee" which the property owner could avoid simply by maintaining a storm water management facility on the property. The City argued that because it was possible to own property without being subject to the fee that it was not a fee imposed "as an incident of property ownership."<sup>131</sup> The second ground asserted by the City was that, even if the fee could be characterized as a property related fee, it was exempted from the voter approval requirements by provisions of Article XIII D § 6(c) that allow local governments to enact fees for sewer and water services without prior voter approval.<sup>132</sup> The Court rejected both arguments.

The *Salinas* Court found that because the fee was not directly based on or measured by use, comparable to the metered use of water or the operation of a business, it could not be characterized as a use fee. Rather the fee was based on ownership or occupancy of a parcel and was based on the size of the parcel and therefore must be viewed as a property related fee.<sup>133</sup>

The Court also found that the "Proportional Reduction" provision of the City's fee did not alter the nature of the fee as a property related fee. A property owner's operation of a private storm drain system reduced the amount owed to the City to the extent that runoff into the City's system is reduced but did not eliminate the need to pay a fee. The reduction was not proportional to the amount of services requested or used by the occupant, but rather was based on the physical properties of the parcel. Thus, the Court determined that the fee was ultimately a fee for a public service having a direct relationship to the ownership of developed property. The court concluded that the storm drainage fee "burden[s] landowners *as landowners*," and thus it was in reality a property related fee subject to the requirements of Article XIII D and not a user fee. The fee was therefore subject to the voter-approval requirements of Article XIII D unless one of the exceptions in section 6(c) of that section applied.<sup>134</sup>

The Court then went on to reject that the City's contention that the fee fell within exemption from the voter-approval requirement applicable to fees for sewer or water services. The court concluded that that the term "sewer services" was ambiguous in the context of both § 6(c) and Article XIII D as a whole. The Court found that, because Article XIII D was enacted through the initiative process, the rule of judicial construction that an enactment must be strictly construed required the court to take a narrow reading of the sewer exemption. The Court went on to hold that the sewer services exception in Article XIII D § 6(c) was applicable only to sanitary sewerage and *not* to services related to stormwater.<sup>135</sup>

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<sup>131</sup> *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351,1354.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Id.* at p. 1355.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Id.* at pp.1357-1358.

The Court observed:

The City itself treats storm drainage differently from its other sewer systems. The stated purpose of [the City storm drainage fee ordinance] was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of “non-storm water” into the storm drainage system, which channels storm water into state waterways ... the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water..<sup>136</sup>

The Court likewise rejected the argument that the storm drainage fee fell within provisions of Article XIII D § 6(c) exempting fees for water services from the voter approval requirements. The court held:

...[W]e cannot subscribe to the City's suggestion that the storm drainage fee is “for . . . water services.” *Government Code section 53750*, enacted to explain some of the terms used in articles XIII C and XIII D, defines “[w]ater” “ as “any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water.” (Gov. Code, § 53750, subd. (m).) The average voter would envision “water service” as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.<sup>137</sup>

#### **4. Conclusion**

In summary, Articles XIII A, XIII C, and XIII D of the California Constitution severely limit the County’s power to impose fees. Any fees developed by the County to fund the portions of the MS4 Permit that are the subject of this unfunded mandate claim could only be imposed by some form of special tax or property related fee that would require approval by either a 2/3 vote of the electorate subject to the tax; or a majority vote of the property owners subject to the property related fee.

#### **B. THE COUNTY DOES NOT HAVE OTHER FUNDING SOURCES**

The County is not aware of any state, federal or non-local agency funds that are or will be available to fund these new activities.

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<sup>136</sup> *Id.* at p. 1358.

<sup>137</sup> *Ibid.*

## **VII. PRIOR MANDATE DETERMINATIONS**

### **A. LOS ANGELES COUNTY**

In 2003 and 2007, the County of Los Angeles and 14 cities within the county (the Los Angeles claimants) submitted test claims 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21. The test claims asserted that provisions of Los Angeles Water Board Order 01-182 constitute reimbursable state mandates. Order 01-182 was the 2001 renewal of the existing MS4 Permit. Order 01-182 was the MS4 Permit for Los Angeles County and most of its incorporated cities, and served as an NPDES permit. The permit provisions required the Los Angeles claimants to install and maintain trash receptacles at specified transit stops and to inspect certain industrial, construction, and commercial facilities for compliance with local and/or state storm water requirements.

On September 3, 2009, the Commission issued a final decision entitled *In re Test Claim On: Los Angeles Regional Quality Control Board Order No. 01-182, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21* (“Los Angeles Decision”). The Los Angeles Decision partially approved the test claims. The Commission found the trash receptacle requirement to be a reimbursable State mandate. The Commission’s decision was appealed and is pending before the California Supreme Court.

### **B. SAN DIEGO COUNTY**

In 2007, the County of San Diego and 21 cities within the county (the San Diego claimants) submitted test claim 07-TC-09. The test claim asserted that many provisions of San Diego Water Board Order R9-2007-0001 constitute reimbursable State mandates. Order R9-2007-0001 renewed the municipal storm water permit for San Diego County and many of its incorporated cities, and served as an NPDES permit until the adoption of the 2013 Permit. The challenged permit provisions required the San Diego claimants to: (1) conduct and report on street sweeping activities; (2) clean and report on storm sewer cleaning; (3) implement a regional urban runoff management program; (4) assess program effectiveness; (5) conduct public education and outreach; (6) collaborate among Permittees to implement the program; (7) implement hydromodification management plans; and (8) implement plans for low impact development.

On March 30, 2010, the Commission issued a final decision entitled *In re Test Claim on: San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Case No. 07-TC-09* (San Diego Decision). The San Diego Decision partially approved the test claim. The Commission’s decision took the relatively narrow Los Angeles Decision to its logical conclusion. The Commission found the following permit requirements to be reimbursable State mandates:

1. Street Sweeping
2. Street Sweeping Reporting
3. Conveyance System Cleaning
4. Conveyance System Cleaning Reporting

5. Public Education Requirements with Specific Target Communities and Specified Topics
6. Mandatory Watershed Activities and Collaboration in Watershed Urban Management Program
7. Regional Urban Runoff Management Program
8. Program Effectiveness Assessment
9. Long-term Effectiveness Assessment
10. Permittee Collaboration

The Commission also found the hydromodification and low impact development requirements in the San Diego Permit to be State mandates, but not reimbursable mandates because the local agencies could charge fees to pay for these programs. The San Diego Decision has been appealed, is fully briefed and is pending resolution.

## **VIII. CONCLUSION**

The 2013 Permit imposes many new mandated activities and programs on the County that are not required to be imposed on local governments under federal law. As detailed above the costs to develop and implement these new programs and activities are substantial. Yet, the County does not have the ability/authority to develop and impose fees to fund any of these new State mandated programs. The costs incurred and to be incurred to comply with these State mandated programs all satisfy the criteria for reimbursable mandates, and the County respectfully requests that the Commission make such findings as to each of the mandated programs and activities set forth herein, and find that they require funding under the State Constitution.

**SECTION 6**

**DECLARATION OF JON VAN RHYN**

**IN SUPPORT OF TEST CLAIM**

**IN RE**

**SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD**

**ORDER NO. R9-2013-0001**

**NPDES NO. CAS 0109266**

**OF**

**COUNTY OF SAN DIEGO**

**DECLARATION OF JON VAN RHYN ON BEHALF OF THE COUNTY OF SAN  
DIEGO IN SUPPORT OF TEST CLAIM**

I, Jon Van Rhyn, declare as follows:

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

2. I have received the following degrees and certifications: Bachelor of Science in Geological Sciences; Master of Public Health, Environmental Health Emphasis; and EPA Water Quality Academy certification.

3. I am employed by the County of San Diego as a Water Resources Manager.

4. I have held my current position for approximately seventeen years. My duties include operational oversight of ten program staff in several key program areas, including construction and development, watershed structural treatment controls, regulatory reporting and program assessment. I also coordinate the County's stormwater compliance efforts with the twenty other municipal stormwater co-permittees.

5. I have reviewed the California Regional Water Quality Control Board ("RWQCB"), San Diego Region, Order No. R9-2013-0001 (NPDES No. CAS0109266) the "2013 Permit" and I know and understand the requirements of the Permit.

6. I have also reviewed and I know and understand the requirements of Order No. 2001-01 (NPDES CAS0108758) issued by the San Diego RWQCB on February 21, 2001 (the "2001 Permit") and the requirements of Order No. R9-2007-0001 (NPDES CAS0108758) issued by the San Diego RWQCB ("2007 Permit").

7. Based on my understanding of the requirements of the 2001 Permit, the 2007 Permit and the requirements of the 2003 Permit, I believe the 2013 Permit requires the County to perform new activities and/or expanded services that are unique to local governmental entities that are not required by the 2001 Permit, the 2007 Permit, or federal law. The Permit became effective on June 27, 2013, during fiscal year 2012-2013. The Permit was effective for only three days during fiscal year 2012-2013, and for this reason, the County did not incur any costs to comply with the Permit during fiscal year 2012-2013. The County first incurred costs to comply with the Permit and its new and expanded mandates during fiscal year 2013-2014. Further, the County did not incur all costs related to the new and increased mandates during fiscal year 2013-2014. Some of these costs were first incurred during fiscal year 2014-2015, and some costs have not yet been incurred. The relevant fiscal year in which new or increased costs were first incurred or are expected to occur is set forth in the discussion of each mandated activity in the following paragraphs and is further set forth in the chart attached as Exhibit A to this Declaration.

8. These new activities include the following:

a. Receiving Water Limitations. Provision A.2 of the 2013 Permit requires the County to strictly comply with Receiving Water Limitations. Compliance with the receiving water limitations of Provision A.2 of the 2013 Permit will require the County to significantly increase its existing resource commitments to develop, administer, and maintain a multitude of costly program elements. Meeting these requirements would require a significant expansion of all existing program activities, as well as the construction and operation of treatment control BMPs throughout the unincorporated County. Required activities include conducting studies and investigations, planning and implementing new program activities (research, meetings,



stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. The costs of carrying out new and expanded programs at a level sufficient to meet these standards are not currently known, but the County reasonably expects them to exceed \$250,000,000 per year.

b. Numeric Effluent Limitations in TMDLs. Provision A.3.B and Attachment E of the 2013 Permit requires the County to strictly comply with interim and final numeric effluent limitations and to undertake specified monitoring and reporting requirements. To comply with the 2013 Permit's Total Maximum Daily Load ("TMDL") requirements, the County must expend resources each year to develop, administer, and maintain a costly program. This includes costs needed to conduct studies and investigations, plan and implement new program activities (research, meetings, stakeholder coordination, etc.), and to monitor, assess, report on, and modify these programs as necessary to achieve and maintain compliance with the TMDL requirements. Any of these cost types may include staffing, materials and supplies, and contract work. To date, the County has expended \$1,179,055 in FY 2013/14 and \$1,377,473 in FY 2014/15 to conduct special studies and investigations needed to plan and implement the TMDL requirements. The County expects to expend an additional \$1,297,839 for studies and investigations during FY 2015/16 through FY 2017/18, plus additional costs related to program planning, implementation, reporting, and assessment. The actual costs of carrying out the activities necessary to comply with the numeric effluent limitation and the specified monitoring and reporting requirements are not currently known, but the County reasonably expects them to exceed \$35,000,000 per year.

c. Water Quality Improvement Plans. Provision B of the Permit currently requires the County to develop, implement, and update seven Water Quality Improvement Plans

("WQIPs"). To comply with these Provisions, the County must expend resources each year to develop, administer, and maintain costly programs for each WQIP in which it participates. This includes costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. Any of these cost types may include staffing, materials and supplies, and contract work. To date, the County has expended \$740,550 in FY 2013/14 and \$780,395 in FY 2014/15 toward the development of seven individual WQIPs. The County expects to expend an additional \$1,897,071 during FY 2015/16 through FY 2017/18 for ongoing WQIP planning, implementation, reporting, and assessment.

d. Hydromodification and BMP Design Manual. Provisions E.3.c.(2) and E.3.d of the Permit require the County to implement hydromodification management programs and update a BMP Design Manual with specific criteria and procedures. To comply with the 2013 Permit's stricter onsite requirements for Priority Development Projects, the County must expend resources to update its BMP Design Manual (a.k.a. Standard Urban Stormwater Mitigation Plan under the 2007 Permit) to include specific standards, procedures, and criteria. The County must first collaborate with other permittees to update the regional Model BMP Design Manual for submission concurrent with each WQIP, and then modify its own local BMP Design Manual to implement the minimum standards of the regional Model. This includes costs needed to conduct modeling, studies, and investigations, to plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify

these programs as necessary to maintain compliance with Permit Provision E.3.d. To date, the County has expended \$170,205 in FY 2013/14 and \$298,335 in FY 2014/15 toward the update of the regional Model BMP Design Manual. The County has also contracted an additional \$34,446 toward updating its local BMP Design Manual in FY 2015/16. Additional costs related to the completion, implementation, review, and modification of the County's BMP Design Manual through FY 2017/18 are not currently known, but the County reasonably expects them to exceed \$100,000 per year.

The County must also develop and implement standards and programs to manage discharges from areas of critical coarse sediment yield on Priority Development Project sites. This includes costs needed to conduct modeling and studies, plan and implement new program activities, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Permit Provision E.3.c.(2)(b). Any of these cost types may include staffing, materials and supplies, and contract work. To date, the County has expended \$37,360 in FY 2014/15 toward the development of standards and guidelines for the management of critical coarse sediment. The County expects to expend an additional \$120,786 toward the completion of these deliverables in FY 2015/16. Additional costs related to the completion, implementation, review, and modification of these approaches are not currently known, but the County reasonably expects them to exceed \$100,000 per year.

e. Residential Inspection Program. Provision E.5.c of the Permit requires the County to develop and implement a residential inspection program. To comply with these Provisions, the County must expend significant resources to develop, administer, and maintain a costly new program to comply with the 2013 Permit's residential inspection requirements. This includes costs needed to conduct studies and investigations (mapping, modeling, pilot studies,

etc.), plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Permit Provision E.5.C. Any of these cost types may include staffing, materials and supplies, and contract work. To date, the County has expended \$566,575 in FY 2013/14 and \$685,084 in FY 2014/15 toward the planning and development of a residential inspection program to comply with Permit Provision E.5.C. The County expects to expend an additional \$1,560,322 for studies and investigations, program planning, implementation, reporting, and assessment during FY 2015/16 through FY 2017/18.

f. Retrofit and Rehabilitation Program. Provision E.5.e of the Permit requires the County to develop and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the County must expend significant resources to develop, administer, and maintain a costly new program to comply with the 2013 Permit's retrofit and stream rehabilitation requirements. This includes costs needed to conduct studies and investigations (mapping, modeling, etc.), plan and implement program activities (identification, evaluation, and prioritization of candidate projects; selection of projects for implementation; project design and engineering; coordination with regulatory agencies; outreach and coordination with stakeholders and project partners; acquisition and management of project funding; etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Permit Provision E.5.e. Any of these cost types may include staffing, materials and supplies, and contract work. To date, the County has expended \$55,000 in FY 2013/14 and \$55,000 in FY 2014/15 toward the planning and development of a retrofit and stream rehabilitation program. The additional costs of carrying

out these new requirements during FY 2015/16 through FY 2017/18 are not currently known, but the County reasonably expects them to exceed \$200,000 per year.

g. Jurisdictional Urban Runoff Management Program Update. In compliance with Permit Provision F.2, the County expended an estimated \$242,146 to update its Jurisdictional Urban Runoff Program (JRMP) document during FY 2014/15. The County must also submit updates to its jurisdictional runoff management program, with the supporting rationale for the modifications, either in the Water Quality Improvement Plan Annual Report required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. The costs associated with these subsequent updates are not currently known, but the County reasonably expects them to exceed \$50,000 per year. These costs include: meetings and correspondence to coordinate content development with staff; developing, distributing, and revising draft content; and monitoring, assessing, reporting on, and modifying programs and activities as necessary to maintain compliance with the Permit. Any of these cost types may include staffing, materials and supplies, and contract work.

h. Progress Report Presentations. Provision II.F.3.a of the 2013 Permit requires the Copermittees for each Watershed Management Area to periodically appear before the San Diego Water Board, as requested by the Board, to provide progress reports on the implementation of the Water Quality Improvement Plan and jurisdictional runoff management programs. The additional costs of preparing for and appearing before the RWQCB are not currently known, but a reasonable estimate of costs to the County for a single compelled attendance and presentation exceeds \$1,000.

9. The actual increased costs incurred by the County in FY 2013/14 to comply with the mandated activities required by the 2013 Permit will be \$2,711,385, and are detailed in Exhibit A to this declaration.

10. The estimated increased costs that the County expects to incur in FY 2014/15 are expected to be \$3,475,793, and are also detailed in Exhibit A to this declaration.

11. The estimated increased costs that the County expects to incur during each year of the remaining term of the 2013 Permit are also detailed in Exhibit A to this declaration.

12. I am not aware of any dedicated state or federal funds that are or will be available to pay for these increased costs.

13. I am not aware of any non-local agency funds that are or will be available to pay for these increased costs.

14. I am not aware of any authority to assess a fee to offset these increased costs.

15. I believe that the only available source to pay these increased costs are and will be the County's general purpose funds.

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

Executed this 13th day of July, 2015, in San Diego, California.

  
\_\_\_\_\_  
JON VAN RHYNE

**EXHIBIT A**

**TO DECLARATION OF JON VAN RHYN**

**IN SUPPORT OF TEST CLAIM**

**IN RE**

**SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD**

**ORDER NO. R9-2013-0001**

**NPDES NO. CAS 0109266**

**OF**

**COUNTY OF SAN DIEGO**

	FY13/14	FY14/15	FY15/16	FY16/17	FY17/18
Receiving Water Limitations			\$250,000,000	\$250,000,000	\$250,000,000
Numeric Effluent Limitations for Bacteria TMDL	\$1,179,055	\$1,377,473	\$35,732,304	\$35,282,401	\$35,283,134
Water Quality Improvement Plans	\$740,550	\$780,395	\$702,304	\$674,237	\$520,530
Hydromodification and BMP Design Manual	\$170,205	\$298,335	\$34,446	\$100,000	\$100,000
		\$37,360	\$120,786	\$100,000	\$100,000
Residential Inspection Program	\$566,575	\$685,084	\$630,678	\$464,822	\$464,822
Retrofit and Rehabilitation Program	\$55,000	\$55,000	\$200,000	\$200,000	\$200,000
Progress Report Presentations			\$1,000 per presentation	\$1,000 per presentation	\$1,000 per presentation
Jurisdictional Urban Runoff Management Program Update		\$242,146	\$50,000	\$50,000	\$50,000
<b>TOTALS</b>	<b>\$2,711,385</b>	<b>\$3,475,793</b>	<b>\$287,471,518</b>	<b>\$286,872,460</b>	<b>\$286,719,486</b>

**SECTION 7  
DOCUMENTATION  
IN SUPPORT OF TEST CLAIM  
IN RE  
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD  
ORDER NO. R9-2013-0001  
NPDES NO. CAS 0109266  
OF  
COUNTY OF SAN DIEGO  
VOLUME I  
EXECUTIVE ORDER  
AND SUPPORTING DOCUMENTATION**



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

**ORDER NO. R9-2013-0001  
NPDES NO. CAS0109266**

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT  
AND WASTE DISCHARGE REQUIREMENTS FOR  
DISCHARGES FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s)  
DRAINING THE WATERSHEDS WITHIN THE SAN DIEGO REGION**

The San Diego County Copermittees in [Table 1a](#) are subject to waste discharge requirements set forth in this Order.

**Table 1a. San Diego County Copermittees**

City of Carlsbad	City of Oceanside
City of Chula Vista	City of Poway
City of Coronado	City of San Diego
City of Del Mar	City of San Marcos
City of El Cajon	City of Santee
City of Encinitas	City of Solana Beach
City of Escondido	City of Vista
City of Imperial Beach	County of San Diego
City of La Mesa	San Diego County Regional Airport Authority
City of Lemon Grove	San Diego Unified Port District
City of National City	

After the San Diego Water Board receives and considers the Orange County Copermittees' Report of Waste Discharge and makes any necessary changes to this Order, the Orange County Copermittees in [Table 1b](#) will become subject to waste discharge requirements set forth in this Order after expiration of Order No. R9-2009-0002, NPDES No. CAS0108740 on or after December 16, 2014.

**Table 1b. Orange County Copermittees**

City of Aliso Viejo	City of Rancho Santa Margarita
City of Dana Point	City of San Clemente
City of Laguna Beach	City of San Juan Capistrano
City of Laguna Hills	City of Laguna Woods
City of Laguna Niguel	County of Orange
City of Lake Forest	Orange County Flood Control District
City of Mission Viejo	

After the San Diego Water Board receives and considers the Riverside County Copermittees' Report of Waste Discharge and makes any necessary changes to this Order, the Riverside County Copermittees in **Table 1c** will become subject to waste discharge requirements set forth in this Order after expiration of Order No. R9-2010-0016, NPDES No. CAS0108766 on or after November 10, 2015.

**Table 1c. Riverside County Copermittees**

City of Murrieta	County of Riverside
City of Temecula	Riverside County Flood Control and Water Conservation District
City of Wildomar	

The Orange County Copermittees and Riverside County Copermittees may become subject to the requirements of this Order at a date earlier than the expiration date of their current Orders subject to the conditions described in Provision F.6 of this Order if the Copermittees in the respective county receive a notification of coverage from the San Diego Water Board.

The term Copermittee in this Order refers to any San Diego County, Orange County, or Riverside County Copermittee covered under this Order, unless specified otherwise.

This Order provides permit coverage for the Copermittee discharges described in **Table 2**.

**Table 2. Discharge Locations and Receiving Waters**

Discharge Points	Locations throughout San Diego Region
Discharge Description	Municipal Separate Storm Sewer System (MS4) Discharges
Receiving Waters	Inland Surface Waters, Enclosed Bays and Estuaries, and Coastal Ocean Waters of the San Diego Region

**Table 3. Administrative Information**

This Order was adopted by the San Diego Water Board on:	<b>May 8, 2013</b>
This Order will become effective on:	<b>June 27, 2013</b>
This Order will expire on:	<b>June 27, 2018</b>
The Copermittees 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.	

I, David W. Gibson, Executive Officer, do hereby certify that this Order with all attachments is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on May 8, 2013.



David W. Gibson  
Executive Officer

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Attachment C - Acronyms, Abbreviations and Definitions ..... C-1

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## I. FINDINGS

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board), finds that:

### *JURISDICTION*

- 1. MS4 Ownership or Operation.** Each of the Copermittees owns or operates an MS4, through which it discharges storm water and non-storm water into waters of the U.S. within the San Diego Region. These MS4s fall into one or more of the following categories: (1) a medium or large MS4 that services a population of greater than 100,000 or 250,000 respectively; or (2) a small MS4 that is "interrelated" to a medium or large MS4; or (3) an MS4 which contributes to a violation of a water quality standard; or (4) an MS4 which is a significant contributor of pollutants to waters of the U.S.
- 2. Legal and Regulatory Authority.** This Order is issued pursuant to section 402 of the federal Clean Water Act (CWA) and implementing regulations (Code of Federal Regulations [CFR] Title 40, Part 122 [40 CFR 122]) adopted by the United States Environmental Protection Agency (USEPA), and chapter 5.5, division 7 of the California Water Code (CWC) (commencing with section 13370). This Order serves as an NPDES permit for discharges from MS4s to surface waters. This Order also serves as waste discharge requirements (WDRs) pursuant to article 4, chapter 4, division 7 of the CWC (commencing with section 13260).

The San Diego Water Board has the legal authority to issue a regional MS4 permit pursuant to its authority under CWA section 402(p)(3)(B) and 40 CFR 122.26(a)(1)(v). The USEPA also made it clear that the permitting authority, in this case the San Diego Water Board, has the flexibility to establish system- or region-wide permits (55 Federal Register [FR] 47990, 48039-48042). The regional nature of this Order will ensure consistency of regulation within watersheds and is expected to result in overall cost savings for the Copermittees and San Diego Water Board.

The federal regulations make it clear that the Copermittees need only comply with permit conditions relating to discharges from the MS4s for which they are operators (40 CFR 122.26(a)(3)(vi)). This Order does not require the Copermittees to manage storm water outside of their jurisdictional boundaries, but rather to work collectively to improve storm water management within watersheds.

- 3. CWA NPDES Permit Conditions.** Pursuant to CWA section 402(p)(3)(B), NPDES permits for storm water discharges from MS4s must include requirements to effectively prohibit non-storm water discharges into MS4s, and require controls to reduce the discharge of pollutants in storm water to the maximum extent practicable (MEP), and to require other provisions as the San Diego Water Board determines are appropriate to control such pollutants. This Order prescribes conditions to assure compliance with the CWA requirements for owners and operators of MS4s to

effectively prohibit non-storm water discharges into the MS4s, and require controls to reduce the discharge of pollutants in storm water from the MS4s to the MEP.

- 4. CWA and CWC Monitoring Requirements.** CWA section 308(a) and 40 CFR 122.41(h),(j)-(l) and 122.48 require that NPDES permits must specify monitoring and reporting requirements. Federal regulations applicable to large and medium MS4s also specify additional monitoring and reporting requirements in 40 CFR 122.26(d)(1)(iv)(D), 122.26(d)(1)(v)(B), 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)(D), 122.26(d)(2)(iv)(B)(2) and 122.42(c). CWC section 13383 authorizes the San Diego Water Board to establish monitoring, inspection, entry, reporting and recordkeeping requirements. This Order establishes monitoring and reporting requirements to implement federal and State requirements.
- 5. Total Maximum Daily Loads.** CWA section 303(d)(1)(A) requires that “[e]ach state shall identify those waters within its boundaries for which the effluent limitations...are not stringent enough to implement any water quality standard 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 Clean Water Act Section 303(d) List of Water Quality Limited Segments, commonly referred to as the 303(d) List. The CWA requires the 303(d) List to be updated every two years.

TMDLs are numerical calculations of the maximum amount of a pollutant that a water body can assimilate and still meet water quality standards. A TMDL is the sum of the allowable loads of a single pollutant from all contributing point sources (waste load allocations or WLAs) and non-point sources (load allocations or LAs), background contribution, plus a margin of safety. Discharges from MS4s are point source discharges. The federal regulations (40 CFR 122.44(d)(1)(vii)(B)) require that NPDES permits incorporate water quality based effluent limitations (WQBELs) developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, consistent with the assumptions and requirements of any available WLA for the discharge. Requirements of this Order implement the TMDLs adopted by the San Diego Water Board and approved by USEPA as of the time this Order is issued. This Order establishes WQBELs consistent with the assumptions and requirements of all available TMDL WLAs assigned to discharges from the Copermittees’ MS4s.

- 6. Non-Storm Water Discharges.** Pursuant to CWA section 402(p)(3)(B)(ii), this Order requires each Copermittee to effectively prohibit discharges of non-storm water into its MS4. Nevertheless, non-storm water discharges into and from the MS4s continue to be reported to the San Diego Water Board by the Copermittees and other persons. Monitoring conducted by the Copermittees, as well as the 303(d) List, have identified dry weather, non-storm water discharges from the MS4s as a source of pollutants causing or contributing to receiving water quality impairments in the San Diego Region. The federal regulations (40 CFR 122.26(d)(2)(iv)(B)(1)) require the Copermittees to have a program to prevent illicit discharges to the MS4.

The federal regulations, however, allow for specific categories of non-storm water discharges or flows to be addressed as illicit discharges only where such discharges are identified as sources of pollutants to waters of the U.S.

- 7. In-Stream Treatment Systems.** Pursuant to federal regulations (40 CFR 131.10(a)), in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. Authorizing the construction of a runoff treatment facility within a water of the U.S., or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Runoff treatment must occur prior to the discharge of runoff into receiving waters. Treatment control best management practices (BMPs) must not be constructed in waters of the U.S. Construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body.

#### *DISCHARGE CHARACTERISTICS AND RUNOFF MANAGEMENT*

- 8. Point Source Discharges of Pollutants.** Discharges from the MS4s contain waste, as defined in the CWC, and pollutants that adversely affect the quality of the waters of the state. A discharge from an MS4 is a “discharge of pollutants from a point source” into waters of the U.S. as defined in the CWA. Storm water and non-storm water discharges from the MS4s contain pollutants that cause or threaten to cause a violation of surface water quality standards, as outlined in the Water Quality Control Plan for the San Diego Basin (Basin Plan). Storm water and non-storm water discharges from the MS4s are subject to the conditions and requirements established in the Basin Plan for point source discharges.
- 9. Potential Beneficial Use Impairment.** The discharge of pollutants and/or increased flows from MS4s may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives and impair or threaten to impair designated beneficial uses resulting in a condition of pollution, contamination, or nuisance.
- 10. Pollutants Generated by Land Development.** Land development has created and continues to create new sources of non-storm water discharges and pollutants in storm water discharges as human population density increases. This brings higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, and trash. Pollutants from these sources are dumped or washed off the surface by non-storm water or storm water flows into and from the MS4s. When development converts natural vegetated pervious ground cover to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost. Therefore, runoff leaving a developed area without BMPs that can maintain pre-development runoff conditions will contain greater pollutant loads and have significantly greater runoff volume, velocity, and peak flow rate than pre-development runoff conditions from the same area.



- 11. Runoff Discharges to Receiving Waters.** The MS4s discharge runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within the eleven hydrologic units comprising the San Diego Region. Historic and current development makes use of natural drainage patterns and features as conveyances for runoff. Rivers, streams and creeks in developed areas used in this manner are part of the Copermittees' MS4s regardless of whether they are natural, anthropogenic, or partially modified features. In these cases, the rivers, streams and creeks in the developed areas of the Copermittees' jurisdictions are both an MS4 and receiving water. Numerous receiving water bodies and water body segments have been designated as impaired by the San Diego Water Board pursuant to CWA section 303(d).
- 12. Pollutants in Runoff.** The most common pollutants in runoff discharged from the MS4s include total suspended solids, sediment, pathogens (e.g., bacteria, viruses, protozoa), heavy metals (e.g., cadmium, copper, lead, and zinc), petroleum products and polynuclear aromatic hydrocarbons, synthetic organics (e.g., pesticides, herbicides, and PCBs), nutrients (e.g., nitrogen and phosphorus), oxygen-demanding substances (e.g., decaying vegetation, animal waste), detergents, and trash. As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or otherwise control. These discharges may cause or contribute to a condition of pollution or a violation of water quality standards.
- 13. Human Health and Aquatic Life Impairment.** Pollutants in runoff discharged from the MS4s can threaten and adversely affect human health and aquatic organisms. Adverse responses of organisms to chemicals or physical agents in runoff range from physiological responses such as impaired reproduction or growth anomalies to mortality. Increased volume, velocity, rate, and duration of storm water runoff greatly accelerate the erosion of downstream natural channels. This alters stream channels and habitats and can adversely affect aquatic and terrestrial organisms.
- 14. Water Quality Effects.** The Copermittees' water quality monitoring data submitted to date documents persistent exceedances of Basin Plan water quality objectives for runoff-related pollutants at various watershed monitoring stations. Persistent toxicity has also been observed at several watershed monitoring stations. In addition, bioassessment data indicate that the majority of the monitored receiving waters have Poor to Very Poor Index of Biological Integrity (IBI) ratings. These findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in the San Diego Region. Non-storm water discharges from the MS4s have been shown to contribute significant levels of pollutants and flow in arid, developed Southern California watersheds, and contribute significantly to exceedances of applicable receiving water quality objectives.

- 15. Non-Storm Water and Storm Water Discharges.** Non-storm water discharges from the MS4s are not considered storm water discharges and therefore are not subject to the MEP standard of CWA section 402(p)(3)(B)(iii), which is explicitly for “Municipal ... *Stormwater Discharges* (emphasis added)” from the MS4s. Pursuant to CWA 402(p)(3)(B)(ii), non-storm water discharges into the MS4s must be effectively prohibited.
- 16. Best Management Practices.** Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the U.S. unless they are removed. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. For this reason, pollutants in storm water discharges from the MS4s can be and must be effectively reduced in runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Pollution prevention is the reduction or elimination of pollutant generation at its source and is the best “first line of defense”. Source control BMPs (both structural and non-structural) minimize the contact between pollutants and runoff, therefore keeping pollutants onsite and out of receiving waters. Treatment control BMPs remove pollutants that have been mobilized by storm water or non-storm water flows.
- 17. BMP Implementation.** Runoff needs to be addressed during the three major phases of development (planning, construction, and use) in order to reduce the discharge of storm water pollutants to the MEP, effectively prohibit non-storm water discharges, and protect receiving waters. Development which is not guided by water quality planning policies and principles can result in increased pollutant load discharges, flow rates, and flow durations which can negatively affect receiving water beneficial uses. Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. Existing development can generate substantial pollutant loads which are discharged in runoff to receiving waters. Retrofitting areas of existing development with storm water pollutant control and hydromodification management BMPs is necessary to address storm water discharges from existing development that may cause or contribute to a condition of pollution or a violation of water quality standards.
- 18. Water Quality Improvements.** Since 1990, the Copermittees have been developing and implementing programs and BMPs intended to effectively prohibit non-storm water discharges to the MS4s and control pollutants in storm water discharges from the MS4s to receiving waters. As a result, several water body / pollutant combinations have been de-listed from the CWA Section 303(d) List, beach closures have been significantly reduced, and public awareness of water quality issues has increased. The Copermittees have been able to achieve improvements in water quality in some respects, but significant improvements to the quality of receiving waters and discharges from the MS4s are still necessary to meet the requirements and objectives of the CWA.

**19. Long Term Planning and Implementation.** Federal regulations require municipal storm water permits to expire 5 years from adoption, after which the permit must be renewed and reissued. The San Diego Water Board recognizes that the degradation of water quality and impacts to beneficial uses of the waters in the San Diego Region occurred over several decades. The San Diego Water Board further recognizes that a decade or more may be necessary to realize demonstrable improvement to the quality of waters in the San Diego Region. This Order includes a long term planning and implementation approach that will require more than a single permit term to complete.

#### *WATER QUALITY STANDARDS*

**20. Basin Plan.** The San Diego Water Board adopted the Water Quality Control Plan for the San Diego Basin (Basin Plan) on September 8, 1994 that designates beneficial uses, establishes water quality objectives, and contains implementation programs and policies to achieve those objectives for receiving waters addressed through the plan. The Basin Plan was subsequently approved by the State Water Resources Control Board (State Water Board) on December 13, 1994. Subsequent revisions to the Basin Plan have also been adopted by the San Diego Water Board and approved by the State Water Board. Requirements of this Order implement the Basin Plan.

The Basin Plan identifies the following existing and potential beneficial uses for inland surface waters in the San Diego Region: Municipal and Domestic Supply (MUN), Agricultural Supply (AGR), Industrial Process Supply (PROC), Industrial Service Supply (IND), Ground Water Recharge (GWR), Contact Water Recreation (REC1), Non-contact Water Recreation (REC2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Rare, Threatened, or Endangered Species (RARE), Freshwater Replenishment (FRSH), Hydropower Generation (POW), and Preservation of Biological Habitats of Special Significance (BIOL). The following additional existing and potential beneficial uses are identified for coastal waters of the San Diego Region: Navigation (NAV), Commercial and Sport Fishing (COMM), Estuarine Habitat (EST), Marine Habitat (MAR), Aquaculture (AQUA), Migration of Aquatic Organisms (MIGR), Spawning, Reproduction, and/or Early Development (SPWN), and Shellfish Harvesting (SHELL).

**21. Ocean Plan.** The State Water Board adopted the Water Quality Control Plan for Ocean Waters of California, California Ocean Plan (Ocean Plan) in 1972 and amended it in 1978, 1983, 1988, 1990, 1997, 2000, and 2005. The State Water Board adopted the latest amendment on April 21, 2005 and it became effective on February 14, 2006. The Ocean Plan is applicable, in its entirety, to point source discharges to the ocean. Requirements of this Order implement the Ocean Plan.

The Ocean Plan identifies the following beneficial uses of ocean waters of the state to be protected: Industrial water supply; water contact and non-contact recreation, including aesthetic enjoyment; navigation; commercial and sport fishing; mariculture;

preservation and enhancement of designated Areas of Special Biological Significance; rare and endangered species; marine habitat; fish spawning and shellfish harvesting

**22. Sediment Quality Control Plan.** On September 16, 2008, the State Water Board adopted the Water Quality Control Plan for Enclosed Bays and Estuaries – Part 1 Sediment Quality (Sediment Quality Control Plan). The Sediment Quality Control Plan became effective on August 25, 2009. The Sediment Quality Control Plan establishes: 1) narrative sediment quality objectives for benthic community protection from exposure to contaminants in sediment and to protect human health, and 2) a program of implementation using a multiple lines of evidence approach to interpret the narrative sediment quality objectives. Requirements of this Order implement the Sediment Quality Control Plan.

**23. National Toxics Rule and California Toxics Rule.** USEPA adopted the National Toxics Rule (NTR) on December 22, 1992, and later amended it on May 4, 1995 and November 9, 1999. About forty criteria in the NTR applied in California. On May 18, 2000, USEPA adopted the California Toxics Rule (CTR). The CTR promulgated new toxics criteria for California and, in addition, incorporated the previously adopted NTR criteria that were applicable in the state. The CTR was amended on February 13, 2001. These rules contain water quality criteria for priority pollutants.

**24. Antidegradation Policy.** This Order is in conformance with the federal Antidegradation Policy described in 40 CFR 131.12, and State Water Board Resolution No. 68-16, *Statement of Policy with Respect to Maintaining High Quality Waters in California*. Federal regulations at 40 CFR 131.12 require that the State water quality standards include an antidegradation policy consistent with the federal policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16. State Water Board Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. State Water Board Resolution No. 68-16 requires that existing quality of waters be maintained unless degradation is justified based on specific findings. The Basin Plan implements, and incorporates by reference, both the State and federal antidegradation policies.

**25. Anti-Backsliding Requirements.** Section 402(o)(2) of the CWA and federal regulations at 40 CFR 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. All effluent limitations in this Order are at least as stringent as effluent limitations in the previous permits.

#### *CONSIDERATIONS UNDER FEDERAL AND STATE LAW*

**26. Coastal Zone Act Reauthorization Amendments.** 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 source

pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point source pollution: agriculture, silviculture, urban, marinas, and hydromodification. This Order addresses the management measures required for the urban category, with the exception of septic systems. The runoff management programs developed pursuant to this Order fulfill the need for coastal cities to develop a runoff non-point source plan identified in the Non-Point Source Program Strategy and Implementation Plan. The San Diego Water Board addresses septic systems through the administration of other programs.

**27. Endangered Species Act.** This Order does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the Federal Endangered Species Act (16 USC sections 1531 to 1544). This Order requires compliance with receiving water limits, and other requirements to protect the beneficial uses of waters of the State. The Copermitees are responsible for meeting all requirements of the applicable Endangered Species Act.

**28. Report of Waste Discharge Process.** The waste discharge requirements set forth in this Order are based upon the Report of Waste Discharge submitted by the San Diego County Copermitees prior to the expiration of Order No. R9-2007-0001 (NPDES No. CAS0109266). The Orange County and Riverside County Copermitees are not immediately covered by the waste discharge requirements in this Order. The San Diego Water Board understands that each municipality is unique although the Counties share watersheds and/or geographical boundaries. The Order will continue to use the Report of Waste Discharge process prior to initially making Orange County or Riverside County Copermitees subject to the requirements of this Order.

The federal regulations (40 CFR 122.21(d)(2)) and CWC section 13376 impose a duty on the Copermitees to reapply for continued coverage through submittal of a Report of Waste Discharge no later than 180 days prior to expiration of a currently effective permit. This requirement is set forth in the Orange County Copermitees' and Riverside County Copermitees' currently effective permits at Provisions K.2.b and K.2.c, respectively. The Orange County Permit, Order No. R9-2009-0002 (NPDES No. CAS0108740) expires on December 16, 2014 and the Riverside County MS4 Permit, Order No. R9-2010-0016 (NPDES No. CAS0108766) expires on November 10, 2015.

Unless the Orange County or Riverside County Copermitees apply for and receive early coverage under this Order, the Orange County Copermitees' and the Riverside County Copermitees' respective permits will be superseded by this Order upon expiration of their respective permits, subject to any necessary revisions to the requirements of this Order made after the San Diego Water Board considers their respective Reports of Waste Discharge through the public process provided in 40 CFR Part 124.

**29. Integrated Report and Clean Water Act Section 303(d) List.** The San Diego Water Board and State Water Board submit an Integrated Report to USEPA to comply with the reporting requirements of CWA sections 303(d), 305(b) and 314, which lists the attainment status of water quality standards for water bodies in the San Diego Region. USEPA issued its *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act* on July 29, 2005, which advocates the use of a five category approach for classifying the attainment status of water quality standards for water bodies in the Integrated Report. Water bodies included in Category 5 in the Integrated Report indicate at least one beneficial use is not being supported or is threatened, and a TMDL is required. Water bodies included in Category 5 in the Integrated Report are placed on the 303(d) List.

Water bodies with available data and/or information that indicate at least one beneficial use is not being supported or is threatened, but a TMDL is not required, are included in Category 4 in the Integrated Report. Impaired surface water bodies may be included in Category 4 if a TMDL has been adopted and approved (Category 4a); if other pollution control requirements required by a local, state or federal authority are stringent enough to implement applicable water quality standards within a reasonable period of time (Category 4b); or, if the failure to meet an applicable water quality standard is not caused by a pollutant, but caused by other types of pollution (Category 4c).

Implementation of the requirements of this Order may allow the San Diego Water Board to include surface waters impaired by discharges from the Copermittees' MS4s in Category 4 in the Integrated Report for consideration during the next 303(d) List submittal by the State to USEPA.

**30. Economic Considerations.** The California Supreme Court has ruled that although CWC section 13263 requires the State and Regional Water Boards (collectively Water Boards) to consider factors set forth in CWC section 13241 when issuing an NPDES permit, the Water Board may not consider the factors to justify imposing pollutant restrictions that are less stringent than the applicable federal regulations require. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4<sup>th</sup> 613, 618, 626-627.) However, when pollutant restrictions in an NPDES permit are more stringent than federal law requires, CWC section 13263 requires that the Water Boards consider the factors described in CWC section 13241 as they apply to those specific restrictions.

As noted in the following finding, the San Diego Water Board finds that the requirements in this Order are not more stringent than the minimum federal requirements. Therefore, a CWC section 13241 analysis is not required for permit requirements that implement the effective prohibition on the discharge of non-storm water into the MS4 or for controls to reduce the discharge of pollutants in storm water to the MEP, or other provisions that the San Diego Water Board has determined appropriate to control such pollutants, as those requirements are mandated by federal law. Notwithstanding the above, the San Diego Water Board has developed an economic analysis of the requirements in this Order. The economic analysis is provided in the Fact Sheet.

**31. Unfunded Mandates.** 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:

- a. This Order implements federally mandated requirements under CWA section 402 (33 USC section 1342(p)(3)(B)).
- b. The local agency Copermittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental and new dischargers who are issued NPDES permits for storm water and non-storm water discharges.
- c. The local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order.
- d. The Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA section 301(a) (33 USC section 1311(a)) and in lieu of numeric restrictions on their MS4 discharges (i.e. effluent limitations).
- e. 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.
- f. The provisions of this Order to implement TMDLs are federal mandates. The CWA requires TMDLs to be developed for water bodies that do not meet federal water quality standards (33 USC section 1313(d)). Once the USEPA or a state develops a TMDL, federal law requires that permits must contain water quality based effluent limitations consistent with the assumptions and requirements of any applicable wasteload allocation (40 CFR 122.44(d)(1)(vii)(B)).

See the Fact Sheet for further discussion of unfunded mandates.

**32. California Environmental Quality Act.** The issuance of waste discharge requirements and an NPDES permit for the discharge of runoff from MS4s to waters of the U.S. is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, section 21000 et seq.) in accordance with CWC section 13389.

#### STATE WATER BOARD DECISIONS

**33. Compliance with Prohibitions and Limitations.** The receiving water limitation language specified in this Order is consistent with language recommended by the USEPA and established in State Water Board Order WQ 99-05, *Own Motion Review of the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03, NPDES Permit No. CAS0108740*, adopted by the

State Water Board on June 17, 1999. The receiving water limitation language in this Order requires storm water discharges from MS4s to not cause or contribute to a violation of water quality standards, which is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time. Implementation of the iterative approach to comply with receiving water limitations based on applicable water quality standards is necessary to ensure that storm water discharges from the MS4 will not ultimately cause or contribute to violations of water quality standards and will not create conditions of pollution, contamination, or nuisance.

**34. Special Conditions for Areas of Special Biological Significance.** On March 20, 2012, the State Water Board approved Resolution No. 2012-0012 approving an exception to the Ocean Plan prohibition against discharges to Areas of Special Biological Significance (ASBS) for certain nonpoint source discharges and NPDES permitted municipal storm water discharges. State Water Board Resolution No. 2012-0012 requires monitoring and testing of marine aquatic life and water quality in several ASBS to protect California's coastline during storms when rain water overflows into coastal waters. Specific terms, prohibitions, and special conditions were adopted to provide special protections for marine aquatic life and natural water quality in ASBS. The City of San Diego's municipal storm water discharges to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach's municipal storm water discharges to the Heisler Park ASBS are subject terms and conditions of State Water Board Resolution No. 2012-0012. The Special Protections contained in Attachment B to Resolution No. 2012-0012, applicable to these discharges, are hereby incorporated into this Order as if fully set forth herein.

#### *ADMINISTRATIVE FINDINGS*

**35. Executive Officer Delegation of Authority.** 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 section 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 section 13223 or this Order explicitly states otherwise.

**36. Standard Provisions.** Standard Provisions, which apply to all NPDES permits in accordance with 40 CFR 122.41, and additional conditions applicable to specified categories of permits in accordance with 40 CFR 122.42, are provided in [Attachment B](#) to this Order.

**37. Fact Sheet.** The Fact Sheet for this Order contains background information, regulatory and legal citations, references and additional explanatory information and data in support of the requirements of this Order. The Fact Sheet is hereby incorporated into this Order and constitutes part of the Findings of this Order.



- 38. Public Notice.** In accordance with State and federal laws and regulations, the San Diego Water Board notified the Copermitees, and interested agencies and persons of its intent to prescribe waste discharge requirements for the control of discharges into and from the MS4s to waters of the U.S. and has provided them with an opportunity to submit their written comments and recommendations. Details of notification are provided in the Fact Sheet.
- 39. Public Hearing.** The San Diego Water Board held a public hearing on April 10 and 11, 2013, that was continued to May 8, 2013 and heard and considered all comments pertaining to the terms and conditions of this Order. Details of the public hearing are provided in the Fact Sheet.
- 40. Effective Date.** This Order serves as an NPDES permit pursuant to CWA section 402 or amendments thereto, and becomes effective fifty (50) days after the date of its adoption, provided that the Regional Administrator, USEPA, Region IX, does not object to this Order.
- 41. Review by the State Water Board.** Any person aggrieved by this action of the San Diego Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050, et seq. The State Water Board must receive the petition by 5:00 p.m., 30 days after the San Diego Water Board action, except that if the thirtieth day following the action falls on a Saturday, Sunday or State holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: [http://www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality](http://www.waterboards.ca.gov/public_notices/petitions/water_quality) or will be provided upon request.

**THEREFORE, IT IS HEREBY ORDERED** that the Copermittees, in order to meet the provisions contained in division 7 of the CWC (commencing with section 13000) and regulations adopted thereunder, and the provisions of the CWA and regulations adopted thereunder, must each comply with the requirements of this Order. This action in no way prevents the San Diego Water Board from taking enforcement action for past violations of the previous Order. If any part of this Order is subject to a temporary stay of enforcement, unless otherwise specified, the Copermittees must comply with the analogous portions of the previous Order, which will remain in effect for all purposes during the pendency of the stay.

## **II. PROVISIONS**

### **A. PROHIBITIONS AND LIMITATIONS**

The purpose of this provision is to describe the conditions under which storm water and non-storm water discharges into and from MS4s are prohibited or limited. The goal of the prohibitions and limitations is to protect the water quality and designated beneficial uses of waters of the state from adverse impacts caused or contributed to by MS4 discharges. This goal will be accomplished through the implementation of water quality improvement strategies and runoff management programs that effectively prohibit non-storm water discharges into the Copermittees' MS4s, and reduce pollutants in storm water discharges from the Copermittees' MS4s to the MEP.

#### **1. Discharge Prohibitions**

- a.** Discharges from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters of the state are prohibited.
- b.** Non-storm water discharges into MS4s are to be effectively prohibited, through the implementation of Provision [E.2](#), unless such discharges are authorized by a separate NPDES permit.
- c.** Discharges from MS4s are subject to all waste discharge prohibitions in the Basin Plan, included in [Attachment A](#) to this Order.
- d.** Storm water discharges from the City of San Diego's MS4 to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach's MS4 to the Heisler Park ASBS are authorized under this Order subject to the Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012 applicable to these discharges, included in [Attachment A](#) to this Order. All other discharges from the Copermittees' MS4s to ASBS are prohibited.

## 2. Receiving Water Limitations

- a. Discharges from MS4s must not cause or contribute to the violation of water quality standards in any receiving waters, including but not limited to all applicable provisions contained in:
- (1) The San Diego Water Board's Basin Plan, including beneficial uses, water quality objectives, and implementation plans;
  - (2) State Water Board plans for water quality control including the following:
    - (a) Water Quality Control Plan for Control of Temperature in the Coastal and Interstate Waters and Enclosed Bays and Estuaries (Thermal Plan), and
    - (b) The Ocean Plan, including beneficial uses, water quality objectives, and implementation plans;
  - (3) State Water Board policies for water and sediment quality control including the following:
    - (a) Water Quality Control Policy for the Enclosed Bays and Estuaries of California,
    - (b) Sediment Quality Control Plan which includes the following narrative objectives for bays and estuaries:
      - (i) Pollutants in sediments shall not be present in quantities that, alone or in combination, are toxic to benthic communities, and
      - (ii) Pollutants shall not be present in sediments at levels that will bioaccumulate in aquatic life to levels that are harmful to human health,
    - (c) The Statement of Policy with Respect to Maintaining High Quality of Waters in California;<sup>1</sup>
  - (4) Priority pollutant criteria promulgated by the USEPA through the following:
    - (a) National Toxics Rule (NTR)<sup>2</sup> (promulgated on December 22, 1992 and amended on May 4, 1995), and
    - (b) California Toxics Rule (CTR).<sup>3,4</sup>
- b. Discharges from MS4s composed of storm water runoff must not alter natural ocean water quality in an ASBS.

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<sup>1</sup> State Water Board Resolution No. 68-16

<sup>2</sup> 40 CFR 131.36

<sup>3</sup> 65 Federal Register 31682-31719 (May 18, 2000), adding Section 131.38 to 40 CFR

<sup>4</sup> If a water quality objective and a CTR criterion are in effect for the same priority pollutant, the more stringent of the two applies.

### 3. Effluent Limitations

#### a. TECHNOLOGY BASED EFFLUENT LIMITATIONS

Pollutants in storm water discharges from MS4s must be reduced to the MEP.<sup>5</sup>

#### b. WATER QUALITY BASED EFFLUENT LIMITATIONS

Each Copermittee must comply with applicable WQBELs established for the TMDLs in [Attachment E](#) to this Order, pursuant to the applicable TMDL compliance schedules.

### 4. Compliance with Discharge Prohibitions and Receiving Water Limitations

Each Copermittee must achieve compliance with Provisions [A.1.a](#), [A.1.c](#) and [A.2.a](#) of this Order through timely implementation of control measures and other actions as specified in Provisions [B](#) and [E](#) of this Order, including any modifications. The Water Quality Improvement Plans required under Provision [B](#) must be designed and adapted to ultimately achieve compliance with Provisions [A.1.a](#), [A.1.c](#) and [A.2.a](#).

- a. If exceedance(s) of water quality standards persist in receiving waters notwithstanding implementation of this Order, the Copermittees must comply with the following procedures:
- (1) For exceedance(s) of a water quality standard in the process of being addressed by the Water Quality Improvement Plan, the Copermittee(s) must implement the Water Quality Improvement Plan as accepted by the San Diego Water Board, and update the Water Quality Improvement Plan, as necessary, pursuant to Provision [F.2.c](#);
  - (2) Upon a determination by either the Copermittees or the San Diego Water Board that discharges from the MS4 are causing or contributing to a new exceedance of an applicable water quality standard not addressed by the Water Quality Improvement Plan, the Copermittees must submit the following updates to the Water Quality Improvement Plan pursuant to Provision [F.2.c](#) or as part of the Water Quality Improvement Plan Annual Report required under Provision [F.3.b](#), unless the San Diego Water Board directs an earlier submittal:
    - (a) The water quality improvement strategies being implemented that are effective and will continue to be implemented,

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<sup>5</sup> This does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants in storm water discharges to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer). Runoff treatment must occur prior to the discharge of runoff into receiving waters per Finding [7](#).

- (b) Water quality improvement strategies (i.e. BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs, etc.) that will be implemented to reduce or eliminate any pollutants or conditions that are causing or contributing to the exceedance of water quality standards,
    - (c) Updates to the schedule for implementation of the existing and additional water quality improvement strategies, and
    - (d) Updates to the monitoring and assessment program to track progress toward achieving compliance with Provisions [A.1.a](#), [A.1.c](#) and [A.2.a](#) of this Order;
  - (3) The San Diego Water Board may require the incorporation of additional modifications to the Water Quality Improvement Plan required under Provision [B](#). The applicable Copermittees must submit any modifications to the update to the Water Quality Improvement Plan within 90 days of notification that additional modifications are required by the San Diego Water Board, or as otherwise directed;
  - (4) Within 90 days of the San Diego Water Board determination that the modifications to the Water Quality Improvement Plan required under Provision [A.4.a.\(3\)](#) meet the requirements of this Order, the applicable Copermittees must revise the jurisdictional runoff management program documents to incorporate the modified water quality improvement strategies that have been and will be implemented, the implementation schedule, and any additional monitoring required; and
  - (5) Each Copermittee must implement the updated Water Quality Improvement Plan.
- b.** The procedure set forth above to achieve compliance with Provisions [A.1.a](#), [A.1.c](#) and [A.2.a](#) of this Order do not have to be repeated for continuing or recurring exceedances of the same water quality standard(s) following implementation of scheduled actions unless directed to do otherwise by the San Diego Water Board.
- c.** Nothing in Provisions [A.4.a](#) and [A.4.b](#) prevents the San Diego Water Board from enforcing any provision of this Order while the applicable Copermittees prepare and implement the above update to the Water Quality Improvement Plan and jurisdictional runoff management programs.

## B. WATER QUALITY IMPROVEMENT PLANS

The purpose of this provision is to develop Water Quality Improvement Plans that guide the Copermittees' jurisdictional runoff management programs towards achieving the outcome of improved water quality in MS4 discharges and receiving waters. The goal of the Water Quality Improvement Plans is to further the Clean Water Act's objective to protect, preserve, enhance, and restore the water quality and designated beneficial uses of waters of the state. This goal will be accomplished through an adaptive planning and management process that identifies the highest priority water quality conditions within a watershed and implements strategies through the jurisdictional runoff management programs to achieve improvements in the quality of discharges from the MS4s and receiving waters.

### 1. Watershed Management Areas

The Copermittees must develop a Water Quality Improvement Plan for each of the Watershed Management Areas in [Table B-1](#). A total of ten Water Quality Improvement Plans must be developed for the San Diego Region.

**Table B-1. Watershed Management Areas**

Hydrologic Unit(s)	Watershed Management Area	Major Surface Water Bodies	Responsible Copermittees
San Juan (901.00)	South Orange County	<ul style="list-style-type: none"> <li>- Aliso Creek</li> <li>- San Juan Creek</li> <li>- San Mateo Creek</li> <li>- Pacific Ocean</li> <li>- Heisler Park ASBS</li> </ul>	<ul style="list-style-type: none"> <li>- City of Aliso Viejo<sup>1</sup></li> <li>- City of Dana Point<sup>1</sup></li> <li>- City of Laguna Beach<sup>1</sup></li> <li>- City of Laguna Hills<sup>1</sup></li> <li>- City of Laguna Niguel<sup>1</sup></li> <li>- City of Laguna Woods<sup>1</sup></li> <li>- City of Lake Forest<sup>1</sup></li> <li>- City of Mission Viejo<sup>1</sup></li> <li>- City of Rancho Santa Margarita<sup>1</sup></li> <li>- City of San Clemente<sup>1</sup></li> <li>- City of San Juan Capistrano<sup>1</sup></li> <li>- County of Orange<sup>1</sup></li> <li>- Orange County Flood Control District<sup>1</sup></li> </ul>
Santa Margarita (902.00)	Santa Margarita River	<ul style="list-style-type: none"> <li>- Murrieta Creek</li> <li>- Temecula Creek</li> <li>- Santa Margarita River</li> <li>- Santa Margarita Lagoon</li> <li>- Pacific Ocean</li> </ul>	<ul style="list-style-type: none"> <li>- City of Murrieta<sup>2</sup></li> <li>- City of Temecula<sup>2</sup></li> <li>- City of Wildomar<sup>2</sup></li> <li>- County of Riverside<sup>2</sup></li> <li>- County of San Diego<sup>3</sup></li> <li>- Riverside County Flood Control and Water Conservation District<sup>2</sup></li> </ul>
San Luis Rey (903.00)	San Luis Rey River	<ul style="list-style-type: none"> <li>- San Luis Rey River</li> <li>- San Luis Rey Estuary</li> <li>- Pacific Ocean</li> </ul>	<ul style="list-style-type: none"> <li>- City of Oceanside</li> <li>- City of Vista</li> <li>- County of San Diego</li> </ul>

**Table B-1. Watershed Management Areas**

Hydrologic Unit(s)	Watershed Management Area	Major Surface Water Bodies	Responsible Copermittees
Carlsbad (904.00)	Carlsbad	- Loma Alta Slough - Buena Vista Lagoon - Agua Hedionda Lagoon - Batiquitos Lagoon - San Elijo Lagoon - Pacific Ocean	- City of Carlsbad - City of Encinitas - City of Escondido - City of Oceanside - City of San Marcos - City of Solana Beach - City of Vista - County of San Diego
San Dieguito (905.00)	San Dieguito River	- San Dieguito River - San Dieguito Lagoon - Pacific Ocean	- City of Del Mar - City of Escondido - City of Poway - City of San Diego - City of Solana Beach - County of San Diego
Penasquitos (906.00)	Penasquitos	- Los Penasquitos Lagoon - Pacific Ocean	- City of Del Mar - City of Poway - City of San Diego - County of San Diego
	Mission Bay	- Mission Bay - Pacific Ocean - San Diego Marine Life Refuge ASBS	- City of San Diego
San Diego (907.00)	San Diego River	- San Diego River - Pacific Ocean	- City of El Cajon - City of La Mesa - City of San Diego - City of Santee - County of San Diego
Pueblo San Diego (908.00) Sweetwater (909.00) Otay (910.00)	San Diego Bay	- Sweetwater River - Otay River - San Diego Bay - Pacific Ocean	- City of Chula Vista - City of Coronado - City of Imperial Beach - City of La Mesa - City of Lemon Grove - City of National City - City of San Diego - County of San Diego - San Diego County Regional Airport Authority - San Diego Unified Port District
Tijuana (911.00)	Tijuana River	- Tijuana River - Tijuana Estuary - Pacific Ocean	- City of Imperial Beach - City of San Diego - County of San Diego

**Notes:**

1. The Orange County Copermittees will be covered under this Order after expiration of Order No. R9-2009-0002, or earlier if the Orange County Copermittees meet the conditions in Provision [F.6](#).
2. The Riverside County Copermittees will be covered under this Order after expiration of Order No. R9-2010-0016, or earlier if the Riverside County Copermittees meet the conditions in Provision [F.6](#).
3. The County of San Diego is not required to implement the requirements of Provision [B](#) for its jurisdiction within the Santa Margarita River Watershed Management Area until the Riverside County Copermittees have been notified of coverage under this Order. The County of San Diego is required to implement the requirements of Provisions [D](#), [F.3.b](#), and [Attachment E](#) until the Riverside County Copermittees have been notified of coverage under this Order.

## 2. Priority Water Quality Conditions

The Copermittees must identify the water quality priorities within each Watershed Management Area that will be addressed by the Water Quality Improvement Plan. Where appropriate, Watershed Management Areas may be separated into subwatersheds to focus water quality prioritization and jurisdictional runoff management program implementation efforts by receiving water.

### a. ASSESSMENT OF RECEIVING WATER CONDITIONS

The Copermittees must consider the following, at a minimum, to identify water quality priorities based on impacts of MS4 discharges on receiving water beneficial uses:

- (1) Receiving waters listed as impaired on the CWA Section 303(d) List of Water Quality Limited Segments (303(d) List);
- (2) TMDLs adopted and under development by the San Diego Water Board;
- (3) Receiving waters recognized as sensitive or highly valued by the Copermittees, including estuaries designated under the National Estuary Program under CWA section 320, wetlands defined by the State or U.S. Fish and Wildlife Service's National Wetlands Inventory as wetlands, waters having the Preservation of Biological Habitats of Special Significance (BIOL) beneficial use designation, and receiving waters identified as ASBS subject to the provisions of Attachment B to State Water Board Resolution No. 2012-0012 (see [Attachment A](#));
- (4) The receiving water limitations of Provision [A.2](#);
- (5) Known historical versus current physical, chemical, and biological water quality conditions;
- (6) Available, relevant, and appropriately collected and analyzed physical, chemical, and biological receiving water monitoring data, including, but not limited to, data describing:
  - (a) Chemical constituents,
  - (b) Water quality parameters (i.e. pH, temperature, conductivity, etc.),
  - (c) Toxicity Identification Evaluations for both receiving water column and sediment,
  - (d) Trash impacts,



- (e) Bioassessments, and
  - (f) Physical habitat;
- (7) Available evidence of erosional impacts in receiving waters due to accelerated flows (i.e. hydromodification);
  - (8) Available evidence of adverse impacts to the chemical, physical, and biological integrity of receiving waters; and
  - (9) The potential improvements in the overall condition of the Watershed Management Area that can be achieved.

**b. ASSESSMENT OF IMPACTS FROM MS4 DISCHARGES**

The Copermittees must consider the following, at a minimum, to identify the potential impacts to receiving waters that may be caused or contributed to by discharges from the Copermittees' MS4s:

- (1) The discharge prohibitions of Provision [A.1](#) and effluent limitations of Provision [A.3](#); and
- (2) Available, relevant, and appropriately collected and analyzed storm water and non-storm water monitoring data from the Copermittees' MS4 outfalls;
- (3) Locations of each Copermittee's MS4 outfalls that discharge to receiving waters;
- (4) Locations of MS4 outfalls that are known to persistently discharge non-storm water to receiving waters likely causing or contributing to impacts on receiving water beneficial uses;
- (5) Locations of MS4 outfalls that are known to discharge pollutants in storm water causing or contributing to impacts on receiving water beneficial uses; and
- (6) The potential improvements in the quality of discharges from the MS4 that can be achieved.

**c. IDENTIFICATION OF PRIORITY WATER QUALITY CONDITIONS**

- (1) The Copermittees must use the information gathered for Provisions [B.2.a](#) and [B.2.b](#) to develop a list of priority water quality conditions as pollutants, stressors and/or receiving water conditions that are the highest threat to receiving water quality or that most adversely affect the quality of receiving waters. The list must include the following information for each priority water quality condition:

- (a) The beneficial use(s) associated with the priority water quality condition;
  - (b) The geographic extent of the priority water quality condition within the Watershed Management Area, if known;
  - (c) The temporal extent of the priority water quality condition (e.g., dry weather and/or wet weather);
  - (d) The Copermittees with MS4s discharges that may cause or contribute to the priority water quality condition; and
  - (e) An assessment of the adequacy of and data gaps in the monitoring data to characterize the conditions causing or contributing to the priority water quality condition, including a consideration of spatial and temporal variation.
- (2) The Copermittees must identify the highest priority water quality conditions to be addressed by the Water Quality Improvement Plan, and provide a rationale for selecting a subset of the water quality conditions identified pursuant to Provision [B.2.c.\(1\)](#) as the highest priorities.

**d. IDENTIFICATION OF MS4 SOURCES OF POLLUTANTS AND/OR STRESSORS**

The Copermittees must identify and prioritize known and suspected sources of storm water and non-storm water pollutants and/or other stressors associated with MS4 discharges that cause or contribute to the highest priority water quality conditions identified under Provision [B.2.c](#). The identification of known and suspected sources of pollutants and/or stressors that cause or contribute to the highest priority water quality conditions as identified for Provision [B.2.c](#) must consider the following:

- (1) Pollutant generating facilities, areas, and/or activities within the Watershed Management Area, including:
  - (a) Each Copermittee's inventory of construction sites, commercial facilities or areas, industrial facilities, municipal facilities, and residential areas,
  - (b) Publicly owned parks and/or recreational areas,
  - (c) Open space areas,
  - (d) All currently operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, and

- (e) Areas not within the Copermittees' jurisdictions (e.g., Phase II MS4s, tribal lands, state lands, federal lands) that are known or suspected to be discharging to the Copermittees' MS4s;
- (2) Locations of the Copermittees' MS4s, including the following:
    - (a) All MS4 outfalls that discharge to receiving waters, and
    - (b) Locations of major structural controls for storm water and non-storm water (e.g., retention basins, detention basins, major infiltration devices, etc.);
  - (3) Other known and suspected sources of non-storm water or pollutants in storm water discharges to receiving waters within the Watershed Management Area, including the following:
    - (a) Other MS4 outfalls (e.g., Phase II Municipal and Caltrans),
    - (b) Other NPDES permitted discharges,
    - (c) Any other discharges that may be considered point sources (e.g., private outfalls), and
    - (d) Any other discharges that may be considered non-point sources (e.g., agriculture, wildlife or other natural sources);
  - (4) Review of available data, including but not limited to:
    - (a) Findings from the Copermittees' illicit discharge detection and elimination programs,
    - (b) Findings from the Copermittees' MS4 outfall discharge monitoring,
    - (c) Findings from the Copermittees' receiving water monitoring,
    - (d) Findings from the Copermittees' MS4 outfall discharge and receiving water assessments, and
    - (e) Other available, relevant, and appropriately collected data, information, or studies related to pollutant sources and/or stressors that contribute to the highest priority water quality conditions as identified for Provision [B.2.c](#).
  - (5) The adequacy of the available data to identify and prioritize sources and/or stressors associated with MS4 discharges that cause or contribute to the highest priority water quality conditions identified under Provision [B.2.c](#).

**e. IDENTIFICATION OF POTENTIAL WATER QUALITY IMPROVEMENT STRATEGIES**

The Copermittees must evaluate the findings identified under Provisions [B.2.a-d](#), and identify potential strategies that can result in improvements to water quality

in MS4 discharges and/or receiving waters within the Watershed Management Area. Potential water quality improvement strategies that may be implemented within the Watershed Management Area must include the following:

- (1) Structural BMPs, non-structural BMPs, incentives, or programs that can potentially be implemented to address the highest priority water quality conditions identified under Provision [B.2.c](#), or MS4 sources of pollutants or stressors identified under Provision [B.2.d](#),
- (2) Retrofitting projects in areas of existing development within the Watershed Management Area that can potentially be implemented to reduce MS4 sources of pollutants or stressors identified under Provision [B.2.d](#) causing or contributing to the highest priority water quality conditions identified under Provision [B.2.c](#), and
- (3) Stream, channel, and/or habitat rehabilitation projects within the Watershed Management Area that can potentially be implemented to protect and/or improve conditions in receiving waters from MS4 pollutants and/or stressors identified under Provision [B.2.d](#) causing or contributing to the highest priority water quality conditions identified under Provision [B.2.c](#).

### **3. Water Quality Improvement Goals, Strategies and Schedules**

The Copermittees must identify and develop specific water quality improvement goals and strategies to address the highest priority water quality conditions identified within a Watershed Management Area. The water quality improvement goals and strategies must address the highest priority water quality conditions by effectively prohibiting non-storm water discharges to the MS4, reducing pollutants in storm water discharges from the MS4 to the MEP, and protecting the water quality standards of receiving waters.

#### **a. WATER QUALITY IMPROVEMENT GOALS AND SCHEDULES**

##### **(1) Numeric Goals**

The Copermittees must develop and incorporate numeric goals<sup>6</sup> into the Water Quality Improvement Plan. Numeric goals must be used to support Water Quality Improvement Plan implementation and measure reasonable progress towards addressing the highest priority water quality conditions identified under Provision [B.2.c](#). The Copermittees must establish and

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<sup>6</sup> Interim and final numeric goals may take a variety of forms such as TMDL established WQBELs, action levels, pollutant concentration, load reductions, number of impaired water bodies delisted from the List of Water Quality Impaired Segments, Index of Biotic Integrity (IBI) scores, or other appropriate metrics. Interim and final numeric goals are not necessarily limited to one criterion or indicator, but may include multiple criteria and/or indicators. Except for TMDL established WQBELs, interim and final numeric goals and corresponding schedules may be revised through the adaptive management process under Provision [B.5](#).

incorporate the following numeric goals in the Water Quality Improvement Plan:

- (a) Final numeric goals must be based on measurable criteria or indicators capable of demonstrating one or more of the following:
  - (i) Discharges from the Copermittees' MS4s will not cause or contribute to exceedances of water quality standards in receiving waters, AND/OR
  - (ii) The conditions of receiving waters and associated habitat are protected from MS4 discharges, AND/OR
  - (iii) Beneficial uses of receiving waters are protected from MS4 discharges and will be supported.
  
- (b) Interim numeric goals must be based on measurable criteria or indicators capable of demonstrating reasonable incremental progress toward achieving the final numeric goals in the receiving waters and/or MS4 discharges as follows:
  - (i) One or more interim numeric goals may be established to demonstrate progress toward achieving each final numeric goal,
  - (ii) For each final numeric goal, at least one interim numeric goal must be expressed as a reasonable increment toward achievement of the final numeric goal,
  - (iii) For each final numeric goal, reasonable interim numeric goals must be established to be accomplished during each 5 year period between the acceptance of the Water Quality Improvement Plan and the achievement of the final numeric goals.

## (2) Schedules for Achieving Numeric Goals

The Copermittees must develop and incorporate schedules for achieving the numeric goals into the Water Quality Improvement Plan. The schedules must demonstrate reasonable progress toward achieving the final numeric goals required for Provision [B.3.a.\(1\)](#). The Copermittees must incorporate the schedules for achieving the numeric goals into the Water Quality Improvement Plan based on the following considerations:

- (a) Final dates for achieving all final numeric goals must be established considering the following:
  - (i) Final compliance dates for any applicable TMDLs in [Attachment E](#) to this Order;
  - (ii) Compliance schedules for any ASBS subject to the provisions of [Attachment B](#) to State Water Board Resolution No. 2012-0012 (see [Attachment A](#));

- (iii) Achievement of the final numeric goals for the highest water quality priorities must be as soon as possible;
  - (iv) Final dates for achieving the final numeric goals must reflect a realistic assessment of the shortest practicable time required based on the temporal and spatial extent and factors associated with the highest priority water quality conditions identified under Provision [B.2.c](#), and taking into account the time reasonably required to implement the water quality improvement strategies required pursuant to Provision [B.3.b](#).
- (b) Interim dates for achieving all interim numeric goals must be established considering the following:
- (i) Interim compliance dates for any applicable TMDLs in [Attachment E](#) to this Order;
  - (ii) Compliance schedules for any ASBS subject to the provisions of Attachment B to State Water Board Resolution No. 2012-0012 (see [Attachment A](#));
  - (iii) Interim dates for achieving the interim numeric goals must reflect a realistic assessment of the shortest practicable time reasonably required, taking into account the time needed to implement new or significantly expanded programs and securing financing, if necessary; and
  - (iv) For each final numeric goal, at least one interim numeric goal must be established that the Copermittees will work toward achieving within the term of this Order.

#### **b. WATER QUALITY IMPROVEMENT STRATEGIES AND SCHEDULES**

Based on the likely effectiveness and efficiency of the potential water quality improvement strategies identified under Provision [B.2.e](#) to effectively prohibit non-storm water discharges to the MS4, reduce pollutants in storm water discharges from the MS4 to the MEP, protect the beneficial uses of receiving waters from MS4 discharges, and/or achieve the interim and final numeric goals identified under Provision [B.3.a](#), the Copermittees must identify the strategies that will be implemented in each Watershed Management Area as follows:

##### **(1) Jurisdictional Strategies**

- (a) Each Copermittee in the Watershed Management Area must identify the strategies that will be implemented within its jurisdiction as part of its jurisdictional runoff management program requirements under Provisions [E.2](#) through [E.7](#), including descriptions of the following:

- (i) For each of the inventories developed for its jurisdiction, as required under Provisions [D.2.a.\(1\)](#), [E.3.e.\(2\)](#), [E.4.b](#), and [E.5.a](#), each Copermittee must identify the known and suspected areas or sources causing or contributing to the highest priority water quality conditions in the Watershed Management Area that the Copermittee will focus on in its efforts to effectively prohibit non-storm water discharges to its MS4, reduce pollutants in storm water discharges from its MS4 to the MEP, and achieve the interim and final numeric goals identified under Provision [B.3.a](#);
  - (ii) BMPs that each Copermittee will implement, or require to be implemented, as applicable, for those areas or sources within its jurisdiction;
  - (iii) Education programs that each Copermittee will implement, as applicable, for those areas or sources within its jurisdiction;
  - (iv) Frequencies that each Copermittee will conduct inspections on those areas or sources within its jurisdiction;
  - (v) Incentive and enforcement programs that each Copermittee will implement, as applicable, for those areas or sources within its jurisdiction; and
  - (vi) Any other BMPs, incentives, or programs that each Copermittee will implement for those areas or sources within its jurisdiction.
- (b) Identify the optional jurisdictional strategies that each Copermittee will implement within its jurisdiction, as necessary, to effectively prohibit non-storm water discharges to its MS4, reduce pollutants in storm water discharges from its MS4 to the MEP, protect the beneficial uses of receiving waters from MS4 discharges, and/or achieve the interim and final numeric goals identified under Provision [B.3.a](#). Descriptions of the optional jurisdictional strategies must include:
- (i) BMPs, incentives, or programs that may be implemented by the Copermittee within its jurisdiction in addition to the requirements of Provisions [B.3.b.\(1\)\(a\)](#);
  - (ii) Incentives or programs that may be implemented by the Copermittee to encourage or implement projects to retrofit areas of existing development within its jurisdiction;
  - (iii) Incentives or programs that may be implemented by the Copermittee to encourage or implement projects that will rehabilitate the conditions of channels or habitats within its jurisdiction;
  - (iv) The funds and/or resources that must be secured by the Copermittee to implement the optional strategies described for Provisions [B.3.b.\(1\)\(b\)\(i\)-\(iii\)](#) within its jurisdiction; and

- (v) The circumstances necessary to trigger implementation of the optional jurisdictional strategies, in addition to the requirements of Provision [B.3.b.\(1\)\(a\)](#), to achieve the interim and final numeric goals within the schedules established under Provision [B.3.a](#).

- (c) Identify the strategies that will be implemented by the Copermittee in coordination with or with the cooperation of other agencies (e.g. Caltrans, water districts, school districts) and/or entities (e.g. non-governmental organizations) within its jurisdiction.

## (2) Watershed Management Area Strategies

The Copermittees must identify the optional regional or multi-jurisdictional strategies that will be implemented in the Watershed Management Area, as necessary, to effectively prohibit non-storm water discharges to the MS4, reduce pollutants in storm water discharges from the MS4 to the MEP, protect the beneficial uses of receiving waters from MS4 discharges, and/or achieve the interim and final numeric goals identified under Provision [B.3.a](#).

Descriptions of the optional regional or multi-jurisdictional strategies must include:

- (a) Regional or multi-jurisdictional BMPs, incentives, or programs that may be implemented by the Copermittees in the Watershed Management Area;
- (b) Incentives or programs that may be implemented by the Copermittees in the Watershed Management Area to encourage or implement regional or multi-jurisdictional projects to retrofit areas of existing development;
- (c) Incentives or programs that may be implemented by the Copermittees to encourage or implement regional or multi-jurisdictional projects that will rehabilitate the conditions of channels, streams, or habitats within the Watershed Management Area;
- (d) The funds and/or resources that must be secured by the Copermittees to implement the optional strategies described for Provisions [B.3.b.\(2\)\(a\)-\(c\)](#) within the Watershed Management Area; and
- (e) The circumstances necessary to trigger implementation of the optional regional or multi-jurisdictional strategies to achieve the interim and final numeric goals within the schedules established under Provision [B.3.a](#).

## (3) Schedules for Implementing Strategies

The Copermittees must develop reasonable schedules for implementing the water quality improvement strategies identified under Provisions [B.3.b.\(1\)](#) and [B.3.b.\(2\)](#) to achieve the interim and final numeric goals identified and



schedules established under Provision [B.3.a](#). The Copermittees must incorporate the schedules to implement the water quality improvement strategies into the Water Quality Improvement Plan as follows:

- (a) Each Copermittee must develop schedules for the jurisdictional strategies identified pursuant to Provisions [B.3.b.\(1\)\(a\)-\(b\)](#). Each schedule must specify:
- (i) If each jurisdictional strategy identified pursuant to Provision [B.3.b.\(1\)\(a\)](#) will or will not be initiated upon acceptance of the Water Quality Improvement Plan;
  - (ii) For each jurisdictional strategy identified pursuant to Provision [B.3.b.\(1\)\(a\)](#) that will not be initiated upon approval of the Water Quality Improvement Plan, the shortest practicable time in which each jurisdictional strategy will be initiated after acceptance of the Water Quality Improvement Plan;
  - (iii) For each optional jurisdictional strategy identified pursuant to Provision [B.3.b.\(1\)\(b\)](#), a realistic assessment of the shortest practicable time required to:
    - [a] Secure the resources needed to fund the optional jurisdictional strategy, and
    - [b] Procure the resources, materials, labor, and applicable permits necessary to initiate implementation of the optional jurisdictional strategy;
  - (iv) If each jurisdictional strategy identified pursuant to Provisions [B.3.b.\(1\)\(a\)-\(b\)](#) is expected to be continuously implemented (e.g. inspections) or completed within a schedule (e.g. construction of structural BMP); and
  - (v) If a jurisdictional strategy identified pursuant to Provisions [B.3.b.\(1\)\(a\)-\(b\)](#) is expected to be completed within a schedule, the anticipated time to complete based on a realistic assessment of the shortest practicable time required.
- (b) The Copermittees in the Watershed Management Area must develop schedules for the regional or multi-jurisdictional strategies identified pursuant to Provision [B.3.b.\(2\)](#). Each schedule must specify:
- (i) A realistic assessment of the shortest practicable time to:
    - [a] Secure the resources needed to fund the optional regional or multi-jurisdictional strategy, and
    - [b] Procure the resources, materials, labor, and permits necessary to initiate the implementation of the optional regional or multi-jurisdictional strategy;

- (ii) If each regional or multi-jurisdictional strategy identified pursuant to Provision [B.3.b.\(2\)](#) is expected to be continuously implemented (e.g. inspections) or completed within a schedule (e.g. construction of structural BMP); and
- (iii) If a regional or multi-jurisdictional strategy and/or activity identified pursuant to Provisions [B.3.b.\(2\)](#) is expected to be completed within a schedule, the anticipated time to complete based on a realistic assessment of the shortest practicable time required.

#### (4) Optional Watershed Management Area Analysis

- (a) For each Watershed Management Area, the Copermittees have the option to perform a Watershed Management Area Analysis for the purpose of developing watershed-specific requirements for structural BMP implementation, as described in Provision [E.3.c.\(3\)](#). The Watershed Management Area Analysis must include GIS layers (maps) as output. The analysis must include the following information, to the extent it is available, in order to characterize the Watershed Management Areas:
  - (i) A description of dominant hydrologic processes, such as areas where infiltration or overland flow likely dominates;
  - (ii) A description of existing streams in the watershed, including bed material and composition, and if they are perennial or ephemeral;
  - (iii) Current and anticipated future land uses;
  - (iv) Potential coarse sediment yield areas; and
  - (v) Locations of existing flood control structures and channel structures, such as stream armoring, constrictions, grade control structures, and hydromodification or flood management basins.
- (b) The Copermittees must use the results of the Watershed Management Area Analysis performed pursuant to Provision [B.3.b.\(4\)\(a\)](#) to identify and compile a list of candidate projects that could potentially be used as alternative compliance options for Priority Development Projects, to be implemented in lieu of onsite structural BMP performance requirements described in Provisions [E.3.c.\(1\)](#) and [E.3.c.\(2\)](#). Specifically, the Copermittees must identify opportunities to be included in the list of candidate projects in each Watershed Management Area, such as:
  - (i) Stream or riparian area rehabilitation;
  - (ii) Retrofitting existing infrastructure to incorporate storm water retention or treatment;
  - (iii) Regional BMPs;

- (iv) Groundwater recharge projects;
  - (v) Water supply augmentation projects; and
  - (vi) Land purchases to preserve floodplain functions.
- (c) The Copermittees must use the results of the Watershed Management Area Analysis performed pursuant to Provision [B.3.b.\(4\)\(a\)](#) to identify areas within the Watershed Management Area where it is appropriate to allow Priority Development Projects to be exempt from the hydromodification management BMP performance requirements described in Provision [E.3.c.\(2\)](#), including supporting rationale.

#### **4. Water Quality Improvement Monitoring and Assessment Program**

- a. The Copermittees in each Watershed Management Area must develop and incorporate an integrated monitoring and assessment program into the Water Quality Improvement Plan that assesses: 1) the progress toward achieving the numeric goals and schedules, 2) the progress toward addressing the highest priority water quality conditions for each Watershed Management Area, and 3) each Copermittee's overall efforts to implement the Water Quality Improvement Plan.
- b. The monitoring and assessment program must incorporate the monitoring and assessment requirements of Provision [D](#), which may allow the Copermittees to modify the program to be consistent with and focus on the highest priority water quality conditions for each Watershed Management Area.
- c. For Watershed Management Areas with applicable TMDLs, the monitoring and assessment program must incorporate the specific monitoring and assessment requirements of [Attachment E](#).
- d. For Watershed Management Areas with any ASBS, the water quality monitoring and assessment program must incorporate the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012 (see [Attachment A](#)).

#### **5. Iterative Approach and Adaptive Management Process**

The Copermittees in each Watershed Management Area must implement the iterative approach pursuant to Provision [A.4](#) to adapt the Water Quality Improvement Plan, monitoring and assessment program, and jurisdictional runoff management programs to become more effective toward achieving compliance with Provisions [A.1.a](#), [A.1.c](#) and [A.2.a](#), and must include the following:

- PROVISION B: WATER QUALITY IMPROVEMENT PLANS
- B.3. Water Quality Improvement Goals, Strategies and Schedules
- B.4. Water Quality Improvement Monitoring and Assessment Program
- B.5. Iterative Approach and Adaptive Management Process

**a. RE-EVALUATION OF PRIORITY WATER QUALITY CONDITIONS**

The priority water quality conditions and potential water quality improvement strategies included in the Water Quality Improvement Plan pursuant to Provisions [B.2.c](#) and [B.2.e](#) may be re-evaluated by the Copermittees as needed during the term of this Order as part of the Water Quality Improvement Plan Annual Report. Re-evaluation and recommendations for modifications to the priority water quality conditions and potential water quality improvement strategies must be provided in the Report of Waste Discharge, and must consider the following:

- (1) Achieving the outcome of improved water quality in MS4 discharges and receiving waters through implementation of the water quality improvement strategies identified in the Water Quality Improvement Plan;
- (2) New information developed when the requirements of Provisions [B.2.a-c](#) have been re-evaluated;
- (3) Spatial and temporal accuracy of monitoring data collected to inform prioritization of water quality conditions and implementation strategies to address the highest priority water quality conditions;
- (4) Availability of new information and data from sources other than the jurisdictional runoff management programs within the Watershed Management Area that informs the effectiveness of the actions implemented by the Copermittees;
- (5) San Diego Water Board recommendations; and
- (6) Recommendations for modifications solicited through a public participation process.

**b. ADAPTATION OF GOALS, STRATEGIES AND SCHEDULES**

The water quality improvement goals, strategies and schedules, included in the Water Quality Improvement Plan pursuant to Provisions [B.3](#), must be re-evaluated and adapted as new information becomes available to result in more effective and efficient measures to address the highest priority water quality conditions identified pursuant to Provision [B.2.c](#). Re-evaluation of and modifications to the water quality improvement goals, strategies and schedules must be provided in the Water Quality Improvement Plan Annual Report, and must consider the following:

- (1) Modifications to the priority water quality conditions based on Provision [B.5.a](#);

- (2) Progress toward achieving interim and final numeric goals in receiving waters and MS4 discharges for the highest priority water quality conditions in the Watershed Management Area,
- (3) Progress toward achieving outcomes according to established schedules;
- (4) New policies or regulations that may affect identified numeric goals;
- (5) Measurable or demonstrable reductions of non-storm water discharges to and from each Copermittee's MS4;
- (6) Measurable or demonstrable reductions of pollutants in storm water discharges from each Copermittee's MS4 to the MEP;
- (7) New information developed when the requirements of Provisions [B.2.b](#) and [B.2.d](#) have been re-evaluated;
- (8) Efficiency in implementing the Water Quality Improvement Plan;
- (9) San Diego Water Board recommendations; and
- (10) Recommendations for modifications solicited through a public participation process.

**c. ADAPTATION OF MONITORING AND ASSESSMENT PROGRAM**

The water quality improvement monitoring and assessment program, included in the Water Quality Improvement Plan pursuant to Provision [B.4](#), must be re-evaluated and adapted when new information becomes available. Re-evaluation and recommendations for modifications to the monitoring and assessment program, pursuant to the requirements of Provision [D](#), may be provided in the Water Quality Improvement Plan Annual Report, but must be provided in the Report of Waste Discharge.

**6. Water Quality Improvement Plan Submittal, Updates, and Implementation**

- a. The Copermittees must submit and commence implementation of the Water Quality Improvement Plans in accordance with the requirements of Provision [F.1](#).
- b. The Copermittees must submit proposed updates to the Water Quality Improvement Plan for acceptance by the San Diego Water Board Executive Officer in accordance with the requirements of Provision [F.2.c](#).

## C. ACTION LEVELS

The purpose of this provision is for the Copermittees to incorporate numeric action levels in the Water Quality Improvement Plans. The goal of the action levels is to guide Water Quality Improvement Plan implementation efforts and measure progress towards the protection of water quality and designated beneficial uses of waters of the state from adverse impacts caused or contributed to by MS4 discharges. This goal will be accomplished through monitoring and assessing the quality of the MS4 discharges during the implementation of the Water Quality Improvement Plans.

### 1. Non-Storm Water Action Levels<sup>7</sup>

The Copermittees must develop and incorporate numeric non-storm water action levels (NALs) into the Water Quality Improvement Plan to: 1) support the development and prioritization of water quality improvement strategies for effectively prohibiting non-storm water discharges to the MS4s, 2) assess the effectiveness of the water quality improvement strategies toward addressing MS4 non-storm water discharges, required pursuant to Provision [D.4.b.\(1\)](#), and 3) support the detection and elimination of non-storm water and illicit discharges to the MS4, required pursuant to Provision [E.2](#).<sup>8</sup>

a. The following NALs must be incorporated:

(1) Non-Storm Water Discharges from MS4s to Ocean Surf Zone

**Table C-1. Non-Storm Water Action Levels for Discharges from MS4s to Ocean Surf Zone**

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Total Coliform	MPN/100 ml	1,000	-	10,000/1,000 <sup>1</sup>	OP
Fecal Coliform	MPN/100 ml	200 <sup>2</sup>	-	400	OP
<i>Enterococci</i>	MPN/100 ml	35	-	104 <sup>3</sup>	OP

Abbreviations/Acronyms

AMAL – average monthly action level  
OP – Ocean Plan water quality objective

MDAL – maximum daily action level  
MPN/100 ml – most probable number per 100 milliliters

Notes:

- Total coliform density NAL is 1,000 MPN/100 ml when the fecal/total coliform ratio exceeds 0.1.
- Fecal coliform density NAL is 200 MPN per 100 ml during any 30 day period.
- This value has been set to the Basin Plan water quality objective for saltwater “designated beach areas.”

<sup>7</sup> NALs incorporated into the Water Quality Improvement Plans are not considered by the San Diego Water Board to be enforceable effluent limitations, unless the NAL is based on a WQBEL expressed as an interim or final effluent limitation for a TMDL in [Attachment E](#) and the interim or final compliance date has passed.

<sup>8</sup> The Copermittees may utilize NALs or other benchmarks currently established by the Copermittees as interim NALs until the Water Quality Improvement Plans are accepted by the San Diego Water Board Executive Officer.

## (2) Non-Storm Water Discharges from MS4s to Bays, Harbors, and Lagoons/Estuaries

**Table C-2. Non-Storm Water Action Levels for Discharges from MS4s to Bays, Harbors, and Lagoons/Estuaries**

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Turbidity	NTU	75	-	225	OP
pH	Units	Within limit of 6.0 to 9.0 at all times			OP
Fecal Coliform	MPN/100 ml	200 <sup>1</sup>	-	400 <sup>2</sup>	BP
<i>Enterococci</i>	MPN/100 ml	35	-	104 <sup>3</sup>	BP
Priority Pollutants	µg/L	See <a href="#">Table C-3</a>			

## Abbreviations/Acronyms:

AMAL – average monthly action level  
 OP – Ocean Plan water quality objective  
 NTU – Nephelometric Turbidity Units  
 µg/L – micrograms per liter

MDAL – maximum daily action level  
 BP – Basin Plan water quality objective  
 MPN/100 ml – most probable number per 100 milliliters

## Notes:

1. Based on a minimum of not less than five samples for any 30-day period.
2. The NAL is reached if more than 10 percent of total samples exceed 400 MPN per 100 ml during any 30 day period.
3. This value has been set to the Basin Plan water quality objective for saltwater “designated beach areas” and is not applicable to water bodies that are not designated with the water contact recreation (REC-1) beneficial use.

**Table C-3. Non-Storm Water Action Levels for Priority Pollutants**

Parameter	Units	Freshwater (CTR)		Saltwater (CTR)	
		MDAL	AMAL	MDAL	AMAL
Cadmium	µg/L	**	**	16	8
Copper	µg/L	*	*	5.8	2.9
Chromium III	µg/L	**	**	-	-
Chromium VI	µg/L	16	8.1	83	41
Lead	µg/L	*	*	14	2.9
Nickel	µg/L	**	**	14	6.8
Silver	µg/L	*	*	2.2	1.1
Zinc	µg/L	*	*	95	47

## Abbreviations/Acronyms:

CTR – California Toxic Rule  
 AMAL – average monthly action level  
 µg/L – micrograms per liter  
 MDAL – maximum daily action level

## Notes:

- \* Action levels developed on a case-by-case basis (see below)  
 \*\* Action levels developed on a case-by-case basis (see below), but calculated criteria are not to exceed Maximum Contaminant Levels (MCLs) under the California Code of Regulations, Title 22, Division 4, Chapter 15, Article 4, Section 64431

The Cadmium, Copper, Chromium (III), Lead, Nickel, Silver and Zinc NALs for MS4 discharges to freshwater receiving waters will be developed on a case-by-case basis based on site-specific water quality data (receiving water hardness). For these priority pollutants, refer to 40 CFR 131.38(b)(2).

## (3) Non-Storm Water Discharges from MS4s to Inland Surface Waters

**Table C-4. Non-Storm Water Action Levels for Discharges from MS4s to Inland Surface Waters**

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Dissolved Oxygen	mg/L	Not less than 5.0 in WARM waters and not less than 6.0 in COLD waters			BP
Turbidity	NTU	-	20	See MDAL	BP
pH	Units	Within limit of 6.5 to 8.5 at all times			BP
Fecal Coliform	MPN/100 ml	200 <sup>1</sup>	-	400 <sup>2</sup>	BP
<i>Enterococci</i>	MPN/100 ml	33	-	61 <sup>3</sup>	BP
Total Nitrogen	mg/L	-	1.0	See MDAL	BP
Total Phosphorus	mg/L	-	0.1	See MDAL	BP
MBAS	mg/L	-	0.5	See MDAL	BP
Iron	mg/L	-	0.3	See MDAL	BP
Manganese	mg/L	-	0.05	See MDAL	BP
Priority Pollutants	µg/L	See <a href="#">Table C-3</a>			

## Abbreviations/Acronyms:

AMAL – average monthly action level  
 BP – Basin Plan water quality objective  
 COLD – cold freshwater habitat beneficial use  
 NTU – Nephelometric Turbidity Units  
 mg/L – milligrams per liter

MDAL – maximum daily action level  
 WARM – warm freshwater habitat beneficial use  
 MBAS – Methylene Blue Active Substances  
 MPN/100 ml – most probable number per 100 milliliters  
 µg/L – micrograms per liter

## Notes:

1. Based on a minimum of not less than five samples for any 30-day period.
2. The NAL is reached if more than 10 percent of total samples exceed 400 MPN per 100 ml during any 30 day period.
3. This value has been set to the Basin Plan water quality objective for freshwater “designated beach areas” and is not applicable to water bodies that are not designated with the water contact recreation (REC-1) beneficial use.

- b. If not identified in Provision [C.1.a](#), NALs must be identified, developed and incorporated in the Water Quality Improvement Plan for any pollutants or waste constituents that cause or contribute, or are threatening to cause or contribute to a condition of pollution or nuisance in receiving waters associated with the highest priority water quality conditions related to non-storm water discharges from the MS4s. NALs must be based on:

- (1) Applicable water quality standards which may be dependent upon site-specific or receiving water-specific conditions or assumptions to be identified by the Copermittees; or
- (2) Applicable numeric WQBELs required to meet the WLAs established for the TMDLs in [Attachment E](#) to this Order.

- c. For the NALs incorporated into the Water Quality Improvement Plan, the Copermittees may develop and incorporate secondary NALs specific to the Watershed Management Area at levels greater than the NALs required by Provisions [C.1.a](#) and [C.1.b](#) which can be utilized to further refine the prioritization and assessment of water quality improvement strategies for effectively prohibiting non-storm water discharges to the MS4s, as well as the detection and elimination of non-storm water and illicit discharges to and from the MS4. The



secondary NALs may be developed using an approach acceptable to the San Diego Water Board.

- d. Dry weather monitoring data from MS4 outfalls collected in accordance with Provision [D.2.b](#) may be utilized to develop or revise NALs based on watershed-specific data, subject to San Diego Water Board Executive Officer approval.

## 2. Storm Water Action Levels<sup>9</sup>

The Copermittees must develop and incorporate numeric storm water action levels (SALs) in the Water Quality Improvement Plans to: 1) support the development and prioritization of water quality improvement strategies for reducing pollutants in storm water discharges from the MS4s, and 2) assess the effectiveness of the water quality improvement strategies toward reducing pollutants in storm water discharges, required pursuant to Provision [D.4.b.\(2\)](#).<sup>10</sup>

- a. The following SALs for discharges of storm water from the MS4 must be incorporated:

**Table C-5. Storm Water Action Levels for Discharges from MS4s to Receiving Waters**

Parameter	Units	Action Level
Turbidity	NTU	126
Nitrate & Nitrite (Total)	mg/L	2.6
Phosphorus (Total P)	mg/L	1.46
Cadmium (Total Cd)*	µg/L	3.0
Copper (Total Cu)*	µg/L	127
Lead (Total Pb)*	µg/L	250
Zinc (Total Zn)*	µg/L	976

Abbreviations/Acronyms:

NTU – Nephelometric Turbidity Units

mg/L – milligrams per liter

µg/L – micrograms per liter

Notes:

- \* The sampling must include a measure of receiving water hardness at each MS4 outfall. If a total metal concentration exceeds the corresponding metals SAL in [Table C-5](#), that concentration must be compared to the California Toxics Rule criteria and the USEPA 1-hour maximum concentration for the detected level of receiving water hardness associated with that sample. If it is determined that the sample's total metal concentration for that specific metal exceeds that SAL, but does not exceed the applicable USEPA 1-hour maximum concentration criterion for the measured level of hardness, then the sample result will not be considered above the SAL for that measurement.

<sup>9</sup> SALs incorporated into the Water Quality Improvement Plans are not considered by the San Diego Water Board to be enforceable effluent limitations, unless the SAL is based on a WQBEL expressed as an interim or final effluent limitation for a TMDL in [Attachment E](#) and the interim or final compliance date has passed.

<sup>10</sup> The Copermittees may utilize SALs or other benchmarks currently established by the Copermittees as interim SALs until the Water Quality Improvement Plans are accepted by the San Diego Water Board Executive Officer.

- b.** If not identified in Provision [C.2.a](#), SALs must be identified, developed and incorporated in the Water Quality Improvement Plan for pollutants or waste constituents that cause or contribute, or are threatening to cause or contribute to a condition of pollution or nuisance in receiving waters associated with the highest priority water quality conditions related to storm water discharges from the MS4s. SALs must be based on:
- (1) Federal and State water quality guidance and/or water quality standards; and
  - (2) Site-specific or receiving water-specific conditions; or
  - (3) Applicable numeric WQBELs required to meet the WLAs established for the TMDLs in [Attachment E](#) to this Order.
- c.** For the SALs incorporated into the Water Quality Improvement Plan, the Copermitees may develop and incorporate secondary SALs specific to the Watershed Management Area at levels greater than the SALs required by Provisions [C.2.a](#) and [C.2.b](#) which can be utilized to further refine the prioritization and assessment of water quality improvement strategies for reducing pollutants in storm water discharges from the MS4s. The secondary SALs may be developed based on the approaches recommended by the State Water Board's Storm Water Panel<sup>11</sup> or using an approach acceptable to the San Diego Water Board.
- d.** Wet weather monitoring data from MS4 outfalls collected in accordance with Provision [D.2.c](#) may be used to develop or revise SALs based upon watershed-specific data, subject to San Diego Water Board Executive Officer approval.

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<sup>11</sup> Storm Water Panel Recommendations to the California State Water Resources Control Board: The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (June 2006)

## **D. MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS**

The purpose of this provision is for the Copermitees to monitor and assess the impact on the conditions of receiving waters caused by discharges from the Copermitees' MS4s under wet weather and dry weather conditions. The goal of the monitoring and assessment program is to inform the Copermitees about the nexus between the health of receiving waters and the water quality condition of the discharges from their MS4s. This goal will be accomplished through monitoring and assessing the conditions of the receiving waters, discharges from the MS4s, pollutant sources and/or stressors, and effectiveness of the water quality improvement strategies implemented as part of the Water Quality Improvement Plans.

### **1. Receiving Water Monitoring Requirements**

The Copermitees must develop and conduct a program to monitor the condition of the receiving waters in each Watershed Management Area during dry weather and wet weather. Following San Diego Water Board acceptance of the Water Quality Improvement Plans for each Watershed Management Area, the Copermitees must conduct long-term receiving water monitoring during implementation of the Water Quality Improvement Plan to assess the long term trends and determine if conditions in receiving waters are improving. Any available monitoring data not collected specifically for this Order that meet the quality assurance criteria of the Copermitees and the monitoring requirements of this Order may be utilized by the Copermitees. The Copermitees must conduct the following receiving water monitoring procedures:

#### **a. TRANSITIONAL RECEIVING WATER MONITORING**

Until the monitoring requirements and schedules of Provisions [D.1.b-e](#) are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board pursuant to Provision [F.1.b](#), the Copermitees must conduct the following receiving water monitoring in the Watershed Management Area:

- (1) Continue the receiving water monitoring programs required in Order Nos. R9-2007-0001 (Monitoring and Reporting Program No. R9-2007-0001 Sections II.A.1-A.5), R9-2009-0002, and R9-2010-0016;
- (2) Continue the monitoring in the Hydromodification Management Plans approved by the San Diego Water Board;
- (3) Participate in the following regional receiving water monitoring programs, as applicable to the Watershed Management Area:
  - (a) Storm Water Monitoring Coalition Regional Monitoring,
  - (b) Southern California Bight Regional Monitoring, and

(c) Sediment Quality Monitoring;

- (4) Implement the monitoring programs developed as part of any implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) for the TMDLs in [Attachment E](#) to this Order; and
- (5) For Watershed Management Areas with ASBS, implement the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012, included in [Attachment A](#) to this Order.

**b. LONG-TERM RECEIVING WATER MONITORING STATIONS**

The Copermittees must select at least one long-term receiving water monitoring station from among the existing mass loading stations, temporary watershed assessment stations, bioassessment stations, and stream assessment stations previously established by the Copermittees to be representative of the receiving water quality in the Watershed Management Area. Additional long-term receiving water monitoring stations must be selected where necessary to support the implementation and adaptation of the Water Quality Improvement Plan.

**c. DRY WEATHER RECEIVING WATER MONITORING**

During the term of the Order, the Copermittees must perform monitoring during at least three dry weather monitoring events at each of the long-term receiving water monitoring stations. At least one monitoring event must be conducted during the dry season (May 1 – September 30) and at least one monitoring event must be conducted during a dry weather period during the wet season (October 1 – April 30), after the first wet weather event of the season, with an antecedent dry period of at least 72 hours following a storm event producing measureable rainfall of greater than 0.1 inch.

(1) Dry Weather Receiving Water Field Observations

For each dry weather monitoring event, the Copermittees must record field observations consistent with [Table D-1](#) at each long-term receiving water monitoring station.

**Table D-1. Field Observations for Receiving Water Monitoring Stations**

Field Observations
<ul style="list-style-type: none"> <li>• Station identification and location</li> <li>• Presence of flow, or pooled or ponded water</li> <li>• If flow is present:               <ul style="list-style-type: none"> <li>- Flow estimation (i.e. width of water surface, approximate depth of water, approximate flow velocity, flow rate)</li> <li>- Flow characteristics (i.e. presence of floatables, surface scum, sheens, odor, color)</li> </ul> </li> <li>• If pooled or ponded water is present:               <ul style="list-style-type: none"> <li>- Characteristics of pooled or ponded water (i.e. presence of floatables, surface scum, sheens, odor, color)</li> </ul> </li> <li>• Station description (i.e. deposits or stains, vegetation condition, structural condition, and observable biology)</li> <li>• Presence and assessment of trash in and around station</li> </ul>

**(2) Dry Weather Receiving Water Field Monitoring**

For each dry weather monitoring event, if conditions allow the collection of the data, the Copermittees must monitor and record the parameters in [Table D-2](#) at each long-term receiving water monitoring station.

**Table D-2. Field Monitoring Parameters for Receiving Water Monitoring Stations**

Parameters
<ul style="list-style-type: none"> <li>• pH</li> <li>• Temperature</li> <li>• Specific conductivity</li> <li>• Dissolved oxygen</li> <li>• Turbidity</li> </ul>

**(3) Dry Weather Receiving Water Analytical Monitoring**

For each dry weather monitoring event, the Copermittees must collect and analyze samples from each long-term receiving water monitoring station as follows:

- (a) Analytes that are field measured are not required to be analyzed by a laboratory;
- (b) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;
- (c) Grab samples may be collected for pH, temperature, specific conductivity, dissolved oxygen, turbidity, hardness, and indicator bacteria;

- (d) For all other constituents, composite samples must be collected for a duration adequate to be representative of changes in pollutant concentrations and runoff flows using one of the following techniques:
- (i) Time-weighted composites composed of 24 discrete hourly samples, which may be collected through the use of automated equipment, or
  - (ii) Flow-weighted composites collected over a typical 24-hour period, which may be collected through the use of automated equipment;
- (e) Only one analysis of the composite of aliquots is required;
- (f) Analysis for the following constituents is required:
- (i) Constituents contributing to the highest priority water quality conditions identified in the Water Quality Improvement Plan,
  - (ii) Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,
  - (iii) Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in [Attachment E](#) to this Order,
  - (iv) Applicable NAL constituents, and
  - (v) Constituents listed in [Table D-3](#).

**Table D-3. Analytical Monitoring Constituents for Receiving Water Monitoring Stations**

Conventionals, Nutrients	Metals (Total and Dissolved)	Pesticides	Indicator Bacteria
<ul style="list-style-type: none"> <li>• Total Dissolved Solids</li> <li>• Total Suspended Solids</li> <li>• Turbidity</li> <li>• Total Hardness</li> <li>• Total Organic Carbon</li> <li>• Dissolved Organic Carbon</li> <li>• Sulfate</li> <li>• Methylene Blue Active Substances (MBAS)</li>   <li>• Total Phosphorus</li> <li>• Orthophosphate</li> <li>• Nitrite<sup>1</sup></li> <li>• Nitrate<sup>1</sup></li> <li>• Total Kjeldhal Nitrogen</li> <li>• Ammonia</li> </ul>	<ul style="list-style-type: none"> <li>• Arsenic</li> <li>• Cadmium</li> <li>• Chromium</li> <li>• Copper</li> <li>• Iron</li> <li>• Lead</li> <li>• Mercury</li> <li>• Nickel</li> <li>• Selenium</li> <li>• Thallium</li> <li>• Zinc</li> </ul>	<ul style="list-style-type: none"> <li>• Organophosphate Pesticides</li> <li>• Pyrethroid Pesticides</li> </ul>	<ul style="list-style-type: none"> <li>• Total Coliform</li> <li>• Fecal Coliform<sup>2</sup></li> <li>• <i>Enterococcus</i></li> </ul>

Notes:

1. Nitrite and nitrate may be combined and reported as nitrite+nitrate.
2. *E. Coli* may be substituted for Fecal Coliform.

**(4) Dry Weather Receiving Water Toxicity Monitoring**

For each dry weather monitoring event, the Copermittees must collect grab or composite samples from each long-term receiving water monitoring station to be analyzed for aquatic toxicity in accordance with [Table D-4](#). When the State Water Board's Policy for Toxicity Assessment and Control (Toxicity Policy) is approved and in effect, the San Diego Water Board Executive Officer may direct the Copermittees to replace current toxicity program elements with standardized procedures in the Toxicity Policy.

**Table D-4. Dry Weather Chronic<sup>1</sup> Toxicity Testing for Receiving Water Monitoring Stations**

Organism	Units	Test	USEPA Protocol
<b>Freshwater</b>			
<i>Pimephales promelas</i> (Fathead Minnow)	Pass / Fail	Larval Survival and Growth	EPA-821-R-02-013
<i>Ceriodaphnia dubia</i> (Daphnid)	Pass / Fail	Survival and Production	EPA-821-R-02-013
<i>Selenastrum capricornutum</i> (Green Algae)	Pass / Fail	Growth	EPA-821-R-02-013
<b>Marine and Estuarine</b>			
<i>Strongylocentrotus purpuratus</i> (Purple Sea Urchin)	Pass / Fail	Embryo-Larval Development	EPA-600-R-95-136

Notes:

1. Chronic toxicity testing is not required at receiving water monitoring stations located at mass loading stations if the channel flows are diverted year-round during dry weather conditions to the sanitary sewer for treatment.

(a) **Freshwater Test Species and Methods:** If samples are collected in receiving waters with salinity less than 1 ppt, the Copermittees must follow the methods for chronic toxicity tests as established in 40 CFR 136.3 using a single-concentration test design for routine monitoring, or a five-concentration test design for additional toxicity testing if the limitation is exceeded. The Copermittees must estimate the critical life stage chronic toxicity on undiluted samples in accordance with species and short term test methods in Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms (EPA-821-R-02-013; Table IA, 40 CFR 136). Additional test species may be used by the Copermittees if approved by the San Diego Water Board Executive Officer. The Copermittees must conduct:

- (i) A static renewal toxicity test with the fathead minnow, *Pimephales promelas* (Larval Survival and Growth Test Method 1000.0);
- (ii) A static renewal toxicity test with the daphnid, *Ceriodaphnia dubia* (Survival and Reproduction Test Method 1002.0); and
- (iii) A static renewal toxicity test with the green alga, *Selenastrum capricornutum* (also named *Raphidocelis subcapitata*) (Growth Test Method 1003.0).

- (b) Marine and Estuarine Test Species and Methods: If samples are collected in receiving waters with salinity greater or equal to 1 ppt, the Copermittees must follow the methods for chronic toxicity tests as established in 40 CFR 136.3 using a single-concentration test design for routine monitoring, or a five-concentration test design for additional toxicity testing if the limitation is exceeded. The Copermittees must conduct the following critical life state chronic toxicity tests on undiluted samples in accordance with species and short term test methods in Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to West Coast Marine and Estuarine Organisms (EPA-600-R-95-136; 1995). Artificial sea salts must be used to increase sample salinity. The Copermittees must conduct a static non-renewal toxicity test with the purple sea urchin, *Strongylocentrotus purpuratus* (Embryo-larval Development Test Method). Additional species may be used by the Copermittees if approved by the San Diego Water Board Executive Officer.
- (c) Holding Times: All toxicity tests must be conducted as soon as possible following sample collection. The 36-hour sample holding time for test initiation shall be targeted. However, no more than 72 hours shall elapse before the conclusion of sample collection and test initiation.
- (d) Test Species Sensitivity Screening: To determine the most sensitive test species for freshwater, the Copermittees must screen 2 wet weather and 2 dry weather toxicity tests with a vertebrate, an invertebrate, and a plant species. After this screening period, subsequent monitoring must be conducted using the most sensitive test species. Alternatively, if a sensitive test species has already been determined, or if there is prior knowledge of potential toxicant(s) and a test species is sensitive to such toxicant(s), then monitoring must be conducted using only that test species. Sensitive test species determinations must also consider the most sensitive test species used for proximal receiving water monitoring. Rescreening must occur once each permit term.
- (e) Chronic toxicity test biological endpoint data must be analyzed using the Test of Significant Toxicity t-test approach specified in *National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document* (USEPA, Office of Wastewater Management, Washington, D.C., EPA-833-R-10-003, 2010). For this monitoring program, the critical chronic instream waste concentration (IWC) is set at 100 percent receiving water (i.e. no dilution) for receiving water samples. A 100 percent receiving water and a control must be tested.
- (f) Toxicity Identification Evaluation (TIE) / Toxicity Reduction Evaluation (TRE): If chronic toxicity is detected in receiving waters, the Copermittees must discuss the need for conducting a TIE/TRE in the assessments required under Provision [D.4.a.\(2\)](#), and develop a plan for implementing the TIE/TRE to be incorporated in the Water Quality Improvement Plan.



### (5) Dry Weather Receiving Water Bioassessment Monitoring

Bioassessment monitoring for each long-term receiving water monitoring station is required at least once during the term of this Order. The Copermittees must conduct bioassessment monitoring during at least one dry weather monitoring event at each long-term receiving water monitoring station as follows:

- (a) The following bioassessment samples and measurements must be collected:
  - (i) Macroinvertebrate samples must be collected in accordance with the “Reachwide Benthos (Multihabitat) Procedure” in the most current Surface Water Ambient Monitoring Program (SWAMP) Bioassessment Standard Operating Procedures (SOP), and amendments, as applicable;<sup>12</sup>
  - (ii) The “Full” suite of physical habitat characterization measurements must be collected in accordance with the most current SWAMP Bioassessment SOP, and as summarized in the SWAMP Stream Habitat Characterization Form – Full Version;<sup>13</sup> and
  - (iii) Freshwater algae samples must be collected in accordance with the SWAMP Standard Operating Procedures for Collecting Algae Samples.<sup>14</sup> Analysis of samples must include algal taxonomic composition (diatoms and soft algae) and algal biomass.
- (b) The bioassessment samples, measurements, and appropriate water chemistry data must be used to calculate the following:
  - (i) An Index of Biological Integrity (IBI) for macroinvertebrates for each monitoring station where bioassessment monitoring was conducted, based on the most current calculation method;<sup>15</sup> and

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<sup>12</sup> Ode, P.R.. 2007. Standard operating procedures for collecting macroinvertebrate samples and associated physical and chemical data for ambient bioassessments in California. California State Water Resources Control Board Surface Water Ambient Monitoring Program (SWAMP) Bioassessment SOP 001. [http://www.swrcb.ca.gov/water\\_issues/programs/swamp/tools.shtml#monitoring](http://www.swrcb.ca.gov/water_issues/programs/swamp/tools.shtml#monitoring)

<sup>13</sup> Available at: [http://www.waterboards.ca.gov/water\\_issues/programs/swamp/docs/reports/fieldforms\\_fullversion052908.pdf](http://www.waterboards.ca.gov/water_issues/programs/swamp/docs/reports/fieldforms_fullversion052908.pdf)

<sup>14</sup> Fetscher et al. 2009. Standard Operating Procedures for Collecting Stream Algae Samples and Associated Physical Habitat and Chemical Data for Ambient Bioassessments in California.

<sup>15</sup> The most current calculation method at the time the Order was adopted is outlined in “A Quantitative Tool for Assessing the Integrity of Southern California Coastal Streams” (Ode, et al. 2005. Environmental Management. Vol. 35, No. 1, pp. 1-13). If an updated or new calculation method is developed, either both (i.e. current and updated/new) methods must be used, or historical IBIs must be recalculated with the updated or new calculation method.

- (ii) An IBI for algae for each monitoring station where bioassessment monitoring was conducted, when a calculation method is developed.<sup>16</sup>
- (c) In lieu of the requirements of Provision [D.1.c.\(5\)\(a\)](#), the Copermittees may conduct the bioassessment monitoring in accordance with the “Triad” assessment approach<sup>17</sup> to calculate the IBIs required for Provision [D.1.c.\(5\)\(b\)](#). The Copermittees must conduct sampling, analysis, and reporting of specified in-stream biological and habitat data according to the protocols specified in the SCCWRP Technical Report No. 539, or subsequent protocols, if developed.

(6) Dry Weather Receiving Water Hydromodification Monitoring

In addition to the hydromodification monitoring conducted as part of the Copermittees’ Hydromodification Management Plans, hydromodification monitoring for each long-term receiving water monitoring station is required at least once during the term of this Order. The Copermittees must collect the following hydromodification monitoring observations and measurements within an appropriate domain of analysis during at least one dry weather monitoring event for each long-term receiving water monitoring station:

- (a) Channel conditions, including:
  - (i) Channel dimensions,
  - (ii) Hydrologic and geomorphic conditions, and
  - (iii) Presence and condition of vegetation and habitat;
- (b) Location of discharge points;
- (c) Habitat integrity;
- (d) Photo documentation of existing erosion and habitat impacts, with location (i.e. latitude and longitude coordinates) where photos were taken;
- (e) Measurement or estimate of dimensions of any existing channel bed or bank eroded areas, including length, width, and depth of any incisions; and

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<sup>16</sup> When a calculation method is developed, IBIs must be calculated for all available and appropriate historical data.

<sup>17</sup> Stormwater Monitoring Coalition Model Monitoring Technical Committee, 2004. Model Monitoring Program for Municipal Separate Storm Sewer Systems in Southern California. Technical Report #419. August 2004.

- (f) Known or suspected cause(s) of existing downstream erosion or habitat impact, including flow, soil, slope, and vegetation conditions, as well as upstream land uses and contributing new and existing development.

**d. WET WEATHER RECEIVING WATER MONITORING**

During the term of the Order, the Copermitees must perform monitoring during at least three wet weather monitoring events at each long-term receiving water monitoring station. At least one wet weather monitoring event must be conducted during the first wet weather event of the wet season (October 1 – April 30), and at least one wet weather monitoring event during a wet weather event that occurs after February 1.

**(1) Wet Weather Receiving Water Field Observations**

For each wet weather monitoring event, the following narrative descriptions and observations must be recorded at each long-term receiving water monitoring station:

- (a) A narrative description of the station that includes the location, date and duration of the storm event(s) sampled, rainfall estimates of the storm event, and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;
- (b) The flow rates and volumes measured or estimated (data from nearby USGS gauging stations may be utilized, or flow rates may be measured or estimated in accordance with the USEPA Storm Water Sampling Guidance Document (EPA-833-B-92-001), section 3.2.1, or other method proposed by the Copermitees that is acceptable to the San Diego Water Board);
- (c) Station condition (i.e. deposits or stains, vegetation condition, structural condition, observable biology); and
- (d) Presence and assessment of trash in and around station.

**(2) Wet Weather Receiving Water Field Monitoring**

For each wet weather monitoring event, the Copermitees must monitor and record the parameters in [Table D-2](#) at each long-term receiving water monitoring station.

**(3) Wet Weather Receiving Water Analytical Monitoring**

For each wet weather monitoring event, the Copermitees must collect and analyze samples from each long-term receiving water monitoring station as follows:

- (a) Analytes that are field measured are not required to be analyzed by a laboratory;
- (b) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;
- (c) Grab samples may be collected for pH, temperature, specific conductivity, dissolved oxygen, turbidity, hardness, and indicator bacteria;
- (d) For all other constituents, composite samples must be collected for a duration adequate to be representative of changes in pollutant concentrations and runoff flows using one of the following techniques:
  - (i) Time-weighted composites composed of 24 discrete hourly samples, which may be collected through the use of automated equipment, or
  - (ii) Flow-weighted composites collected over the length of the storm event or a typical 24-hour period, which may be collected through the use of automated equipment;
- (e) Only one analysis of the composite of aliquots is required;
- (f) Analysis for the following constituents is required:
  - (i) Constituents contributing to the highest priority water quality conditions identified in the Water Quality Improvement Plan,
  - (ii) Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,
  - (iii) Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in [Attachment E](#) to this Order,
  - (iv) Applicable SAL constituents, and
  - (v) Constituents listed in [Table D-3](#).

#### (4) Wet Weather Receiving Water Toxicity Monitoring

For each wet weather monitoring event, the Copermittees must collect grab or composite samples from each long-term receiving water monitoring station to be analyzed for chronic aquatic toxicity in accordance with Provisions [D.1.c.\(4\)\(a\)-\(f\)](#).

**e. OTHER RECEIVING WATER MONITORING REQUIREMENTS****(1) Regional Monitoring**

The Copermittees must participate in the following regional receiving waters monitoring programs, as applicable to the Watershed Management Area:

- (a) Storm Water Monitoring Coalition Regional Monitoring; and
- (b) Southern California Bight Regional Monitoring.

**(2) Sediment Quality Monitoring**

The Copermittees must perform sediment monitoring to assess compliance with sediment quality receiving water limits applicable to MS4 discharges to enclosed bays and estuaries. The monitoring may be performed either by individual or multiple Copermittees to assess compliance with receiving water limits, or through participation in a water body monitoring coalition. A Sediment Monitoring Plan which satisfies the requirements of the State Water Board's Water Quality Control Plan for Enclosed Bays and Estuaries of California – Part 1 Sediment Quality (Sediment Control Plan) must be submitted as part of the monitoring and assessment program in the Water Quality Improvement Plan.

- (a) The Sediment Monitoring Plan design must include the following:
  - (i) The elements required under Section VII.D (Receiving Water Limits Monitoring Frequency) and Section VII.E (Sediment Monitoring) of the Sediment Control Plan;
  - (ii) A Quality Assurance Project Plan (QAPP) describing the project objectives and organization, functional activities, and quality assurance/quality control protocols for the water and sediment monitoring; and
  - (iii) A schedule for completion of all sample collection and analysis activities and submission of Sediment Monitoring Reports.
- (b) The Copermittees must implement the Sediment Monitoring Plan in accordance with the schedule contained in the Sediment Monitoring Plan, unless otherwise directed in writing by the San Diego Water Board Executive Officer.
- (c) The Copermittees must incorporate a Sediment Monitoring Report as part of the Water Quality Improvement Plan Annual Report in accordance with the schedule contained in the Sediment Monitoring Plan, unless otherwise directed in writing by the San Diego Water Board Executive Officer. The Sediment Monitoring Report must contain the following information:

- (i) **Analysis:** An evaluation, interpretation and tabulation of the water and sediment monitoring data, including interpretations and conclusions as to whether applicable Receiving Water Limitations in this Order have been attained at each sample station;
  - (ii) **Sample Location Map:** The locations, type, and number of samples must be identified and shown on a site map; and
  - (iii) **California Environmental Data Exchange Network:** A statement certifying that the monitoring data and results have been uploaded into the California Environmental Data Exchange Network (CEDEN).
- (d) Based on the Sediment Monitoring Report conclusions the San Diego Water Board may require a human health risk assessment to determine if the human health objective contained in Receiving Water Limitations in Provision [A.2.a.\(3\)\(b\)\(ii\)](#) has been attained at each sample station. In conducting a risk assessment, the Copermittees must consider any applicable and relevant information, including California Environmental Protection Agency's (Cal/EPA) Office of Environmental Health Hazard Assessment (OEHHA) policies for fish consumption and risk assessment, Cal/EPA's Department of Toxic Substances Control (DTSC) Risk Assessment, and USEPA Human Health Risk Assessment policies.

### (3) ASBS Monitoring

For Watershed Management Areas with ASBS, the Copermittees must implement the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012, included in [Attachment A](#) to this Order.

## f. **ALTERNATIVE WATERSHED MONITORING REQUIREMENTS**

The San Diego Water Board may direct the Copermittees to participate in an effort to develop alternative watershed monitoring with other regulated entities, other interested parties, and the San Diego Water Board to refine, coordinate, and implement regional monitoring and assessment programs to determine the status and trends of water quality conditions in 1) coastal waters, 2) enclosed bays, harbors, estuaries, and lagoons, and 3) streams.

## 2. **MS4 Outfall Discharge Monitoring Requirements**

The Copermittees must develop and conduct a program to monitor the discharges from the MS4 outfalls in each Watershed Management Area during dry weather and wet weather. Following San Diego Water Board acceptance of the Water Quality Improvement Plans for each Watershed Management Area, the Copermittees must conduct MS4 outfall discharge monitoring during implementation of the Water Quality Improvement Plan to assess the effectiveness of their jurisdictional runoff

### PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS

#### D.1. Receiving Water Monitoring Requirements

#### D.2. MS4 Outfall Discharge Monitoring Requirements

management programs toward effectively prohibiting non-storm water discharges into the MS4 and reducing pollutants in storm water discharges from their MS4s to the MEP. Any available monitoring data not collected specifically for this Order that meet the quality assurance criteria of the Copermittees and the monitoring requirements of this Order may be utilized by the Copermittees. The Copermittees must conduct the following MS4 outfall monitoring procedures:

**a. TRANSITIONAL MS4 OUTFALL DISCHARGE MONITORING**

Until the monitoring requirements and schedules of Provisions [D.2.b-c](#) are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board pursuant to Provision [F.1.b](#), the Copermittees must conduct the following MS4 outfall discharge monitoring in the Watershed Management Area:

(1) MS4 Outfall Discharge Monitoring Station Inventory

Each Copermittee must identify all major MS4 outfalls that discharge directly to receiving waters within its jurisdiction and geo-locate those outfalls on a map of the MS4 pursuant to Provision [E.2.b.\(1\)](#). This information must be compiled into a MS4 outfall discharge monitoring station inventory, and must include the following information:

- (a) Latitude and longitude of MS4 outfall point of discharge;
- (b) Watershed Management Area;
- (c) Hydrologic subarea;
- (d) Outlet size;
- (e) Accessibility (i.e. safety and without disturbance of critical habitat);
- (f) Approximate drainage area; and
- (g) Classification of whether the MS4 outfall is known to have persistent dry weather flows, transient dry weather flows, no dry weather flows, or unknown dry weather flows.

(2) Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring

Until the monitoring requirements and schedules of Provision [D.2.b](#) are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board pursuant to Provision [F.1.b](#), each Copermittee must perform dry weather MS4 outfall field screening monitoring to identify non-storm water and illicit discharges within its jurisdiction in accordance with

Provision [E.2.c](#), to determine which discharges are transient flows and which are persistent flows, and prioritize the dry weather MS4 discharges that will be investigated and eliminated in accordance with Provision [E.2.d](#).

(a) Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring Frequency

Each Copermittee must field screen the MS4 outfalls in its inventory developed pursuant to Provision [D.2.a.\(1\)](#) as follows:

- (i) For Copermittees with less than 125 major MS4 outfalls that discharge to receiving waters within a Watershed Management Area, at least 80 percent of the outfalls must be visually inspected two times per year during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision [D.2.a.\(2\)\(a\)\(iv\)](#).
- (ii) For Copermittees with 125 major MS4 outfalls or more, but less than or equal to 500 that discharge to receiving waters within a Watershed Management Area, all the outfalls must be visually inspected at least annually during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision [D.2.a.\(2\)\(a\)\(iv\)](#).
- (iii) For Copermittees with more than 500 major MS4 outfalls that discharge to receiving waters within a Watershed Management Area, at least 500 outfalls must be visually inspected at least annually during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision [D.2.a.\(2\)\(a\)\(iv\)](#). Copermittees with more than 500 major MS4 outfalls within a Watershed Management Area must identify and prioritize at least 500 outfalls to be inspected considering the following:
  - [a] Assessment of connectivity of the discharge to a flowing receiving water;
  - [b] Reported exceedances of NALs in water quality monitoring data;
  - [c] Surrounding land uses;
  - [d] Presence of constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List; and
  - [e] Flow rate.
- (iv) For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major MS4 outfalls within its jurisdiction, at least 500 major MS4 outfalls within its inventory must be visually inspected at least annually during dry



weather conditions. Copermittees with more than 500 major MS4 outfalls in more than one Watershed Management Area must identify and prioritize at least 500 outfalls to be inspected considering the following:

- [a] Assessment of connectivity of the discharge to a flowing receiving water;
  - [b] Reported exceedances of NALs in water quality monitoring data;
  - [c] Surrounding land uses;
  - [d] Presence of constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List; and
  - [e] Flow rate.
- (v) Inspections of major MS4 outfalls conducted in response to public reports and staff or contractor reports and notifications may count toward the required visual inspections of MS4 outfall discharge monitoring stations.
- (b) Transitional Dry Weather MS4 Outfall Discharge Field Screening Visual Observations
- (i) An antecedent dry period of at least 72 hours following any storm event producing measurable rainfall greater than 0.1 inch is required prior to conducting field screening visual observations during a field screening monitoring event.
  - (ii) During the field screening monitoring event, each Copermittee must record visual observations consistent with [Table D-5](#) at each MS4 outfall discharge monitoring station inspected.

**Table D-5. Field Screening Visual Observations for MS4 Outfall Discharge Monitoring Stations**

Field Observations
<ul style="list-style-type: none"> <li>• Station identification and location</li> <li>• Presence of flow, or pooled or ponded water</li> <li>• If flow is present:                             <ul style="list-style-type: none"> <li>- Flow estimation (i.e. width of water surface, approximate depth of water, approximate flow velocity, flow rate)</li> <li>- Flow characteristics (i.e. presence of floatables, surface scum, sheens, odor, color)</li> <li>- Flow source(s) suspected or identified from non-storm water source investigation</li> <li>- Flow source(s) eliminated during non-storm water source identification</li> </ul> </li> <li>• If pooled or ponded water is present:                             <ul style="list-style-type: none"> <li>- Characteristics of pooled or ponded water (i.e. presence of floatables, surface scum, sheens, odor, color)</li> <li>- Known or suspected source(s) of pooled or ponded water</li> </ul> </li> <li>• Station description (i.e. deposits or stains, vegetation condition, structural condition, observable biology)</li> <li>• Presence and assessment of trash in and around station</li> <li>• Evidence or signs of illicit connections or illegal dumping</li> </ul>

- (iii) Each Copermittee must implement the requirements of Provisions [E.2.d.\(2\)\(c\)-\(e\)](#) based on the field observations required pursuant to Provision [D.2.a.\(2\)\(b\)\(ii\)](#).
  - (iv) Each Copermittee must evaluate field observations together with existing information available from prior reports, inspections and monitoring results to determine whether any observed flowing, pooled, or ponded waters are likely to be transient or persistent flow.<sup>18</sup>
- (c) Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring Records

Based upon the results of the transitional dry weather MS4 outfall discharge field screening monitoring conducted pursuant to Provisions [D.2.a.\(2\)\(a\)-\(b\)](#), each Copermittee must update its MS4 outfall discharge monitoring station inventory, compiled pursuant to Provision [D.2.a.\(1\)](#), with any new information on the classification of whether the MS4 outfall produces persistent flow, transient flow, or no dry weather flow.

### (3) Transitional Wet Weather MS4 Outfall Discharge Monitoring

Until the monitoring requirements and schedules of Provision [D.2.c](#) are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board pursuant to Provision [F.1.b](#), the Copermittees must conduct the following wet weather MS4 outfall discharge monitoring within the Watershed Management Area:

#### (a) Transitional Wet Weather MS4 Outfall Discharge Monitoring Stations

The Copermittees must select wet weather MS4 outfall discharge monitoring stations from the inventories developed pursuant to Provision [D.2.a.\(1\)](#) for each Watershed Management Area as follows:

- (i) At least five wet weather MS4 outfall discharge monitoring stations that are representative of storm water discharges from areas consisting primarily of residential, commercial, industrial, and typical mixed-use land uses present within the Watershed Management Area;
- (ii) At least one wet weather MS4 outfall discharge monitoring station for each Copermittee within the Watershed Management Area; and

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<sup>18</sup> Persistent flow is defined as the presence of flowing, pooled, or ponded water more than 72 hours after a measureable rainfall event of 0.1 inch or greater during three consecutive monitoring and/or inspection events. All other flowing, pooled, or ponded water is considered transient.

- (iii) The County of San Diego may select at least two (2) wet weather MS4 outfall discharge monitoring stations for the portion of the Santa Margarita River Watershed Management Area within its jurisdiction to be monitored during the transitional period until the Riverside County Copermittees are notified of coverage under this Order. After the Riverside County Copermittees are notified of coverage under this Order, the Copermittees in the Watershed Management Area must select wet weather MS4 outfall discharge monitoring stations consistent with the requirements above.

(b) Transitional Wet Weather MS4 Outfall Discharge Monitoring Frequency

Each wet weather MS4 outfall discharge monitoring station selected pursuant to Provision [D.2.a.\(3\)\(a\)](#) must be monitored once during the wet season (October 1 – April 30). The wet weather monitoring events must be selected to be representative of the range of hydrological conditions experienced in the region. At least 10 percent of samples must be conducted during the first wet weather event of the wet season, to include at least one such sample in each Watershed Management Area..

(c) Transitional Wet Weather MS4 Outfall Discharge Field Observations

For each wet weather monitoring event, the following narrative descriptions and observations must be recorded at each wet weather MS4 outfall discharge monitoring station:

- (i) A narrative description of the station that includes the location, date and duration of the storm event(s) sampled, rainfall estimates of the storm event, and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and
- (ii) The flow rates and volumes measured or estimated from the MS4 outfall (data from nearby USGS gauging stations may be utilized, or flow rates may be measured or estimated in accordance with the USEPA Storm Water Sampling Guidance Document (EPA-833-B-92-001), section 3.2.1, or other method proposed by the Copermittees that is acceptable to the San Diego Water Board);

(d) Transitional Wet Weather MS4 Outfall Discharge Field Monitoring

For each wet weather monitoring event, the Copermittees must monitor and record the parameters in [Table D-2](#) at each wet weather MS4 outfall discharge monitoring station.

(e) Transitional Wet Weather MS4 Outfall Discharge Analytical Monitoring

For each wet weather monitoring event, the Copermittees must collect and analyze samples from each wet weather MS4 outfall discharge monitoring station as follows:

- (i) Analytes that are field measured are not required to be analyzed by a laboratory;
- (ii) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;
- (iii) Grab samples may be collected for pH, temperature, specific conductivity, dissolved oxygen, turbidity, and indicator bacteria;
- (iv) For all other constituents, composite samples must be collected for a duration adequate to be representative of changes in pollutant concentrations and runoff flows using one of the following techniques:
  - [a] Time-weighted composites collected over the length of the storm event or the first 24 hour period whichever is shorter, composed of discrete samples, which may be collected through the use of automated equipment, or
  - [b] Flow-weighted composites collected over the length of the storm event or a typical 24 hour period, whichever is shorter, which may be collected through the use of automated equipment, or
  - [c] If automated compositing is not feasible, a composite sample may be collected using a minimum of 4 grab samples, collected during the first 24 hours of the storm water discharge, or for the entire storm water discharge if the storm event is less than 24 hours;
- (v) Only one analysis of the composite of aliquots is required;
- (vi) The samples must be analyzed for the following constituents:
  - [a] Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,
  - [b] Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in [Attachment E](#) to this Order, and
  - [c] Constituents listed in in [Table D-6](#).

**Table D-6. Analytical Monitoring Constituents for Wet Weather MS4 Outfall Discharge Monitoring Stations**

Conventionals, Nutrients	Metals (Total and Dissolved)	Indicator Bacteria
<ul style="list-style-type: none"> <li>• Total Dissolved Solids</li> <li>• Total Suspended Solids</li> <li>• Turbidity</li> <li>• Total Hardness</li> <li>• Total Organic Carbon</li> <li>• Dissolved Organic Carbon</li> <li>• Sulfate</li> <li>• Methylene Blue Active Substances (MBAS)</li> <li>• Total Phosphorus</li> <li>• Orthophosphate</li> <li>• Nitrite<sup>1</sup></li> <li>• Nitrate<sup>1</sup></li> <li>• Total Kjeldhal Nitrogen</li> <li>• Ammonia</li> </ul>	<ul style="list-style-type: none"> <li>• Arsenic</li> <li>• Cadmium</li> <li>• Chromium</li> <li>• Copper</li> <li>• Iron</li> <li>• Lead</li> <li>• Nickel</li> <li>• Selenium</li> <li>• Thallium</li> <li>• Zinc</li> </ul>	<ul style="list-style-type: none"> <li>• Total Coliform</li> <li>• Fecal Coliform<sup>2</sup></li> <li>• <i>Enterococcus</i></li> </ul>

Notes:

1. Nitrite and nitrate may be combined and reported as nitrite+nitrate.
2. *E. Coli* may be substituted for Fecal Coliform.

(f) Other Transitional Wet Weather MS4 Outfall Discharge Monitoring

The San Diego County Copermittees must continue the wet weather MS4 outfall monitoring program developed under Order No. R9-2007-0001, as approved by the San Diego Water Board, through its planned completion.

**b. DRY WEATHER MS4 OUTFALL DISCHARGE MONITORING**

Each Copermittee must perform dry weather MS4 outfall monitoring to identify non-storm water and illicit discharges within its jurisdiction pursuant to Provision [E.2.c](#), and to prioritize the dry weather MS4 discharges that will be investigated and eliminated pursuant to Provision [E.2.d](#). Each Copermittee must conduct the following dry weather MS4 outfall discharge monitoring within its jurisdiction:

(1) Dry Weather MS4 Outfall Discharge Field Screening Monitoring

Each Copermittee must continue to perform the dry weather MS4 outfall discharge field screening monitoring in accordance with the requirements of Provision [D.2.a.\(2\)](#). The Copermittee may adjust the field screening monitoring frequencies and locations for the MS4 outfalls in its inventory, as needed, to identify and eliminate sources of persistent flow non-storm water discharges in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan, provided the number of visual inspections performed is equivalent to the number of visual inspections required under Provision [D.2.a.\(2\)\(a\)](#).

## (2) Non-Storm Water Persistent Flow MS4 Outfall Discharge Monitoring

Each Copermittee must perform non-storm water persistent flow MS4 outfall discharge monitoring to determine which persistent non-storm water discharges contain concentrations of pollutants below NALs, and which persistent non-storm water discharges impact receiving water quality during dry weather. Each Copermittee must conduct the following non-storm water persistent flow MS4 outfall discharge monitoring within its jurisdiction:

### (a) Prioritization of Non-Storm Water Persistent Flow MS4 Outfalls

Based upon the dry weather MS4 outfall discharge field screening monitoring records developed pursuant to Provision [D.2.a.\(2\)\(c\)](#), each Copermittee must identify and prioritize the MS4 outfalls with persistent flows based on the highest priority water quality conditions identified in the Water Quality Improvement Plan and any additional criteria developed by the Copermittee, which may include historical data and data from sources other than what the Copermittee collects.

### (b) Non-Storm Water Persistent Flow MS4 Outfall Discharge Monitoring Frequency

- (i) Based on the prioritization of major MS4 outfalls developed under Provision [D.2.b.\(2\)\(a\)](#), each Copermittee must identify, at a minimum, the 5 highest priority major MS4 outfalls with non-storm water persistent flows that the Copermittee will monitor within its jurisdiction in each Watershed Management Area. For Responsible Copermittees identified by a TMDL in [Attachment E](#) to this Order, if the 5 chosen outfall locations are not sufficient to determine compliance with the TMDL(s), then each Responsible Copermittee must identify additional MS4 outfall monitoring locations within its jurisdiction sufficient to address compliance with the TMDL(s). If a Copermittee has less than 5 major outfalls within a Watershed Management Area, then the Copermittee must monitor all of its major MS4 outfalls with persistent flows within each Watershed Management Area. The location of the highest priority non-storm water persistent flow MS4 outfall monitoring stations must be identified on the map required pursuant to Provision [E.2.b.\(1\)](#). The map must specify which MS4 outfalls are being monitored for compliance with a TMDL.
- (ii) Each of the highest priority non-storm water persistent flow MS4 outfall monitoring stations identified pursuant to Provision [D.2.b.\(2\)\(b\)\(i\)](#) must be monitored under dry weather conditions at least semi-annually until one of the following occurs:

- [a] The non-storm water discharges have been effectively eliminated (i.e. no flowing, pooled, or ponded water) for three consecutive dry weather monitoring events; or
  - [b] The source(s) of the persistent flows has been identified as a category of non-storm water discharges that does not require an NPDES permit and does not have to be addressed as an illicit discharge because it was not identified as a source of pollutants (i.e. constituents in non-storm water discharge do not exceed NALs), and the persistent flow can be re-prioritized to a lower priority; or
  - [c] The constituents in the persistent flow non-storm water discharge do not exceed NALs, and the persistent flow can be re-prioritized to a lower priority; or
  - [d] The source(s) of the persistent flows has been identified as a non-storm water discharge authorized by a separate NPDES permit.
- (iii) Where the criteria under Provision [D.2.b.\(2\)\(b\)\(ii\)](#) are not met, but the threat to water quality has been reduced by the Copermittee, the highest priority persistent flow MS4 outfall monitoring stations may be reprioritized accordingly for continued dry weather MS4 outfall discharge field screening monitoring required pursuant to Provision [D.2.b.\(1\)](#).
- (iv) Each Copermittee must document removal or re-prioritization of the highest priority persistent flow MS4 outfall monitoring stations identified under Provision [D.2.b.\(2\)\(a\)](#) in the Water Quality Improvement Plan Annual Report. Persistent flow MS4 outfall monitoring stations that have been removed must be replaced with the next highest prioritized major MS4 outfall in the Watershed Management Area within its jurisdiction, unless there are no remaining qualifying major MS4 outfalls within the Copermittee's jurisdiction in the Watershed Management Area.
- (c) Non-Storm Water Persistent Flow MS4 Outfall Discharge Field Observations

During each semi-annual monitoring event, each Copermittee must record field observations consistent with [Table D-5](#) at each of the highest priority persistent flow MS4 outfall monitoring stations within its jurisdiction.

- (d) Non-Storm Water Persistent Flow MS4 Outfall Discharge Field Monitoring

During each semi-annual monitoring event, if conditions allow the collection of the data, each Copermittee must monitor and record the parameters in [Table D-2](#) at each of the highest priority persistent flow MS4 outfall monitoring stations within its jurisdiction.

(e) Non-Storm Water Persistent Flow MS4 Outfall Discharge Analytical Monitoring

During each semi-annual monitoring event in which measurable flow is present, each Copermittee must collect and analyze samples from each of the highest priority persistent flow MS4 outfall monitoring stations within its jurisdiction as follows:

- (i) Analytes that are field measured are not required to be analyzed by a laboratory;
- (ii) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;
- (iii) Collect grab or composite samples to be analyzed at a qualified laboratory for the following constituents:
  - [a] Constituents contributing to the highest priority water quality conditions identified in the Water Quality Improvement Plan,
  - [b] Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,
  - [c] Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in [Attachment E](#) to this Order,
  - [d] Applicable NAL constituents, and
  - [e] Constituents listed in [Table D-7](#). The Copermittees may adjust the list of constituents for the Watershed Management Area if historical data or supporting information can be provided that demonstrates or justifies the analysis of a constituent is not necessary.

**Table D-7. Analytical Monitoring Constituents for Persistent Flow MS4 Outfall Discharge Monitoring Stations**

Conventionals, Nutrients	Metals (Total and Dissolved)	Indicator Bacteria
<ul style="list-style-type: none"> <li>• Total Dissolved Solids</li> <li>• Total Suspended Solids</li> <li>• Total Hardness</li>   <li>• Total Phosphorus</li> <li>• Orthophosphate</li> <li>• Nitrite<sup>1</sup></li> <li>• Nitrate<sup>1</sup></li> <li>• Total Kjeldhal Nitrogen</li> <li>• Ammonia</li> </ul>	<ul style="list-style-type: none"> <li>• Cadmium</li> <li>• Copper</li> <li>• Lead</li> <li>• Zinc</li> </ul>	<ul style="list-style-type: none"> <li>• Total Coliform</li> <li>• Fecal Coliform<sup>2</sup></li> <li>• <i>Enterococcus</i></li> </ul>

Notes:

- 1. Nitrite and nitrate may be combined and reported as nitrite+nitrate.
- 2. *E. Coli* may be substituted for Fecal Coliform.



- (iv) If the Copermittee identifies and eliminates the source of the persistent flow non-storm water discharge, analysis of the sample is not required.

### **c. WET WEATHER MS4 OUTFALL DISCHARGE MONITORING**

The Copermittees must perform wet weather MS4 outfall monitoring to identify pollutants in storm water discharges from the MS4s, to guide pollutant source identification efforts, and to determine compliance with the WQBELs associated with the applicable TMDLs in [Attachment E](#) to this Order. The Copermittees must conduct the following wet weather MS4 outfall discharge monitoring within the Watershed Management Area:

#### **(1) Wet Weather MS4 Outfall Discharge Monitoring Stations**

The Copermittees may adjust the wet weather MS4 outfall discharge monitoring locations in the Watershed Management Area, as needed, to identify pollutants in storm water discharges from MS4s, to guide pollutant source identification efforts, and to determine compliance with the WQBELs associated with the applicable TMDLs in [Attachment E](#) to this Order in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan, provided the number of stations is at least equivalent to the number of stations required under Provision [D.2.a.\(3\)\(a\)](#). Additional outfall monitoring locations, above the minimum per jurisdiction, may be required to demonstrate compliance with the WQBELs associated with the applicable TMDLs in [Attachment E](#).

#### **(2) Wet Weather MS4 Outfall Discharge Monitoring Frequency**

The Copermittees must monitor the wet weather MS4 outfall discharge monitoring stations in the Watershed Management Area at least once (1) per year. The Copermittees may need to increase the frequency of monitoring in order to identify pollutants in storm water discharges from the MS4s causing or contributing to the highest priority water quality conditions, to guide pollutant source identification efforts, or to determine compliance with the WQBELs associated with the applicable TMDLs in [Attachment E](#) to this Order.

#### **(3) Wet Weather MS4 Outfall Discharge Field Observations**

For each wet weather monitoring event, the following narrative descriptions and observations must be recorded at each wet weather MS4 outfall discharge monitoring station:

- (a) A narrative description of the station that includes the location, date and duration of the storm event(s) sampled, rainfall estimates of the storm

event, and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and

- (b) The flow rates and volumes measured or estimated (data from nearby USGS gauging stations may be utilized, or flow rates may be measured or estimated in accordance with the USEPA Storm Water Sampling Guidance Document (EPA-833-B-92-001), section 3.2.1, or other method proposed by the Copermittees that is acceptable to the San Diego Water Board);

(4) Wet Weather MS4 Outfall Discharge Field Monitoring

For each wet weather monitoring event, the Copermittees must monitor and record the parameters in [Table D-2](#) at each wet weather MS4 outfall discharge monitoring station.

(5) Wet Weather MS4 Outfall Discharge Analytical Monitoring

For each wet weather monitoring event, the Copermittees must collect and analyze samples from each wet weather MS4 outfall discharge monitoring station as follows:

- (a) Analytes that are field measured are not required to be analyzed by a laboratory;
- (b) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;
- (c) Grab samples may be collected for pH, temperature, specific conductivity, dissolved oxygen, turbidity, hardness, and indicator bacteria;
- (d) For all other constituents, composite samples must be collected for a duration adequate to be representative of changes in pollutant concentrations and runoff flows using one of the following techniques:
  - (i) Time-weighted composites collected over the length of the storm event or the first 24 hour period, whichever is shorter, composed of discrete samples, which may be collected through the use of automated equipment, or
  - (ii) Flow-weighted composites collected over the length of the storm event or a typical 24 hour period, whichever is shorter, which may be collected through the use of automated equipment, or
  - (iii) If automated compositing is not feasible, a composite sample may be collected using a minimum of 4 grab samples, collected during the first 24 hours of the storm water discharge, or for the entire storm water discharge if the storm event is less than 24 hours.

- (e) Only one analysis of the composite of aliquots is required;
- (f) Analysis for the following constituents is required:
  - (i) Constituents contributing to the highest priority water quality conditions identified in the Water Quality Improvement Plan,
  - (ii) Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,
  - (iii) Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in [Attachment E](#) to this Order,
  - (iv) Applicable SAL constituents, and
  - (v) The Copermittees may adjust the analytical monitoring required for the Watershed Management Area, if the Copermittees have historical data or supporting information that can demonstrate or provide justification that the analysis of a constituent is not necessary.

### 3. Special Studies

- a. Within the term of this Order, the Copermittees must initiate the following special studies:
  - (1) At least two special studies in each Watershed Management Area to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address the pollutants and/or stressors that cause or contribute to highest priority water quality conditions identified in the Water Quality Improvement Plan.
  - (2) At least one special study for the San Diego Region to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address the pollutants and/or stressors that are impacting receiving waters on a regional basis in the San Diego Region.
  - (3) One of the two special studies in each Watershed Management Area required pursuant to Provision [D.3.a.\(1\)](#) may be replaced by a special study implemented pursuant to Provision [D.3.a.\(2\)](#).
- b. The special studies must, at a minimum, be in conformance with the following criteria:

- (1) The special studies must be related to the highest priority water quality conditions identified by the Copermittees in the Watershed Management Area and/or for the entire San Diego Region;
  - (2) The special studies developed pursuant to Provision [D.3.a.\(1\)](#) must:
    - (a) Be implemented within the applicable Watershed Management Area, and
    - (b) Require some form of participation by all the Copermittees within the Watershed Management Area;
  - (3) The special studies developed pursuant to Provision [D.3.a.\(2\)](#) must:
    - (a) Be implemented within the San Diego Region, and
    - (b) Require some form of participation by all Copermittees covered under the requirements of this Order.
  - (4) The Copermittees are encouraged to partner with environmental groups or third parties knowledgeable of watershed conditions to complete the required special studies.
- c. Special studies developed to identify sources of pollutants and/or stressors should be pollutant and/or stressor specific and based on historical monitoring data and monitoring performed pursuant to Provisions [D.1](#) and [D.2](#). Development of source identification special studies should include the following:
- (1) A compilation of known information on the specific pollutant and/or stressor, including data on potential sources and movement of the pollutant and/or stressor within the watershed. Data generated by the Copermittees and others, as well as information available from a literature research on the pollutant and/or stressor should be compiled and analyzed as appropriate.
  - (2) An identification of data gaps, based on the compiled information generated on the specific pollutant and/or stressor identified in Provision [D.3.c.\(1\)](#). Source identification special studies should be developed to fill identified data gaps.
  - (3) A monitoring plan that will collect and provide data the Copermittees can utilize to do the following:
    - (a) Quantify the relative loading or impact of a pollutant and/or stressor from a particular source or pollutant generating activity;
    - (b) Improve understanding of the fate of a pollutant and/or stressor in the environment;

- (c) Develop an inventory of known and suspected sources of a pollutant and/or stressor in the Watershed Management Area; and/or
  - (d) Prioritize known and suspected sources of a pollutant and/or stressor based on relative magnitude in discharges, geographical distribution (i.e., regional or localized), frequency of occurrence in discharges, human health risk, and controllability.
- d. Special studies initiated prior to the effective date of this Order that meet the requirements of Provision [D.3.b](#) and are implemented during the term of this Order as part of the Water Quality Improvement Plan may be utilized to fulfill the special study requirements of Provision [D.3.a](#). Special studies completed before the effective date of this Order cannot be utilized to fulfill the special study requirements of Provision [D.3.a](#).
  - e. The Copermittees must submit the monitoring plans for the special studies in the Water Quality Improvement Plans required pursuant to Provision [F.1](#).
  - f. The Copermittees are encouraged to share the results of the special studies regionally among the Copermittees to provide information useful in improving and adapting the management of non-storm water and storm water runoff through the implementation of the Water Quality Improvement Plans.

#### 4. Assessment Requirements

Each Copermittee must evaluate the data collected pursuant to Provisions [D.1](#), [D.2](#) and [D.3](#), and information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision [E](#), to assess the progress of the water quality improvement strategies in the Water Quality Improvement Plan toward achieving compliance with Provisions [A.1.a](#), [A.1.c](#) and [A.2.a](#). Assessments must be performed as described in the following provisions:

##### a. RECEIVING WATERS ASSESSMENTS

- (1) The Copermittees must assess and report the conditions of the receiving waters in the Watershed Management Area as follows:
  - (a) Based on data collected pursuant to Provision [D.1.a](#), the assessments under Provision [D.4.a.\(2\)](#) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision [F.3.b.\(2\)](#).
  - (b) Based on the data collected pursuant to Provisions [D.1.a-e](#), the assessments required under Provision [D.4.a.\(2\)](#) must be included in the Report of Waste Discharge required pursuant to Provision [F.5.b](#).

- (2) The Copermittees must assess the status and trends of receiving water quality conditions in 1) coastal waters, 2) enclosed bays, harbors, estuaries, and lagoons, and 3) streams under dry weather and wet weather conditions. For each of the three types of receiving waters in each Watershed Management Area the Copermittees must:
- (a) Determine whether or not the conditions of the receiving waters are meeting the numeric goals established pursuant to Provision [B.3.a](#);
  - (b) Identify the most critical beneficial uses that must be protected to ensure overall health of the receiving water;
  - (c) Determine whether or not those critical beneficial uses are being protected;
  - (d) Identify short-term and/or long-term improvements or degradation of those critical beneficial uses;
  - (e) Determine whether or not the strategies established in the Water Quality Improvement Plan contribute towards progress in achieving the interim and final numeric goals of the Water Quality Improvement Plan; and
  - (f) Identify data gaps in the monitoring data necessary to assess Provisions [D.4.a.\(2\)\(a\)-\(e\)](#).

**b. MS4 OUTFALL DISCHARGES ASSESSMENTS**

(1) Non-Storm Water Discharges Reduction Assessments

- (a) Each Copermittee must assess and report the progress of its illicit discharge detection and elimination program, required to be implemented pursuant to Provision [E.2](#), toward effectively prohibiting non-storm water and illicit discharges into the MS4 within its jurisdiction as follows:
  - (i) Based on data collected pursuant to Provisions [D.2.a.\(2\)](#), the assessments under Provision [D.4.b.\(1\)\(b\)](#) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision [F.3.b.\(2\)](#).
  - (ii) Based on the data collected pursuant to Provisions [D.2.b](#), the assessments required under Provision [D.4.b.\(1\)\(c\)](#) must be included in the Water Quality Improvement Plan Annual Reports required pursuant to Provision [F.3.b.\(3\)](#).
  - (iii) Based on the data collected pursuant to Provisions [D.2.b](#), the assessment required under Provision [D.4.b.\(1\)\(c\)](#) must be included in the Report of Waste Discharge required pursuant to [F.5.b](#).

- (b) Based on the transitional dry weather MS4 outfall discharge field screening monitoring required pursuant to Provision [D.2.a.\(2\)](#), each Copermittee must assess and report the following:
- (i) Identify the known and suspected controllable sources (e.g. facilities, areas, land uses, pollutant generating activities) of transient and persistent flows within the Copermittee's jurisdiction in the Watershed Management Area;
  - (ii) Identify sources of transient and persistent flows within the Copermittee's jurisdiction in the Watershed Management Area that have been reduced or eliminated; and
  - (iii) Identify modifications to the field screening monitoring locations and frequencies for the MS4 outfalls in its inventory necessary to identify and eliminate sources of persistent flow non-storm water discharges pursuant to Provision [D.2.b](#).
- (c) Based on the dry weather MS4 outfall discharge field screening monitoring required pursuant to Provision [D.2.b.\(1\)](#), each Copermittee must assess and report the following:
- (i) The assessments required pursuant to Provision [D.4.b.\(1\)\(b\)](#);
  - (ii) Based on the data collected and applicable NALs in the Water Quality Improvement Plan, rank the MS4 outfalls in the Copermittee's jurisdiction according to potential threat to receiving water quality, and produce a prioritized list of major MS4 outfalls for follow-up action to update the Water Quality Improvement Plan, with the goal of eliminating persistent flow non-storm water discharges and/or pollutant loads in order of the ranked priority list through targeted programmatic actions and source investigations;
  - (iii) For the highest priority major MS4 outfalls with persistent flows that are in exceedance of NALs, identify the known and suspected sources within the Copermittee's jurisdiction in the Watershed Management Area that may cause or contribute to the NAL exceedances;
  - (iv) Each Copermittee must analyze the data collected pursuant to Provision [D.2.b](#), and utilize a model or other method, to calculate or estimate the non-storm water volumes and pollutant loads collectively discharged from all the major MS4s outfalls in its jurisdiction identified as having persistent dry weather flows during the monitoring year. These calculations or estimates must be updated annually.
    - [a] Each Copermittee must calculate or estimate the annual non-storm water volumes and pollutant loads collectively discharged

- from the Copermittee's major MS4 outfalls to receiving waters within the Copermittee's jurisdiction, with an estimate of the percent contribution from each known source for each MS4 outfall;
- [b] Each Copermittee must annually identify and quantify (i.e. volume and pollutant loads) sources of non-storm water not subject to the Copermittee's legal authority that are discharged from the Copermittee's major MS4 outfalls to downstream receiving waters.
- (v) Each Copermittee must review the data collected pursuant to Provision [D.2.b](#) and findings from the assessments required pursuant to Provision [D.4.b.\(1\)\(c\)\(i\)-\(iv\)](#) at least once during the term of this Order to:
- [a] Identify reductions and progress in achieving reductions in non-storm water and illicit discharges to the Copermittee's MS4 in the Watershed Management Area;
- [b] Assess the effectiveness of water quality improvement strategies being implemented by the Copermittees within the Watershed Management Area toward reducing or eliminating non-storm water and pollutant loads discharging from the MS4 to receiving waters within its jurisdiction, with an estimate, if possible, of the non-storm water volume and/or pollutant load reductions attributable to specific water quality strategies implemented by the Copermittee; and
- [c] Identify modifications necessary to increase the effectiveness of the water quality improvement strategies implemented by the Copermittee in the Watershed Management Area toward reducing or eliminating non-storm water and pollutant loads discharging from the MS4 to receiving waters within its jurisdiction.
- (vi) Identify data gaps in the monitoring data necessary to assess Provisions [D.4.b.\(1\)\(c\)\(i\)-\(v\)](#).

## (2) Storm Water Pollutant Discharges Reduction Assessments

- (a) The Copermittees must assess and report the progress of the water quality improvement strategies, required to be implemented pursuant to Provisions [B](#) and [E](#), toward reducing pollutants in storm water discharges from the MS4s within the Watershed Management Area as follows:
- (i) Based on data collected pursuant to Provisions [D.2.a.\(3\)](#), the assessments under Provision [D.4.b.\(2\)\(b\)](#) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision [F.3.b.\(2\)](#).
- (ii) Based on the data collected pursuant to Provisions [D.2.c](#), the assessments required under Provision [D.4.b.\(2\)\(c\)](#) must be included



- in the Water Quality Improvement Plan Annual Reports required pursuant to Provision [F.3.b.\(3\)](#).
- (iii) Based on the data collected pursuant to Provisions [D.2.c](#), the assessment required under Provisions [D.4.b.\(2\)\(c\)-\(d\)](#) must be included in the Report of Waste Discharge required pursuant to [F.5.b](#).
- (b) Based on the transitional wet weather MS4 outfall discharge monitoring required pursuant to Provision [D.2.a.\(3\)](#) the Copermittees must assess and report the following:
- (i) The Copermittees must analyze the monitoring data collected pursuant to Provision [D.2.a.\(3\)](#), and utilize a watershed model or other method, to calculate or estimate the following for each monitoring year:
- [a] The average storm water runoff coefficient for each land use type within the Watershed Management Area;
- [b] The volume of storm water and pollutant loads discharged from each of the Copermittee's monitored MS4 outfalls in its jurisdiction to receiving waters within the Watershed Management Area for each storm event with measurable rainfall greater than 0.1 inch;
- [c] The total flow volume and pollutant loadings discharged from the Copermittee's jurisdiction within the Watershed Management Area over the course of the wet season, extrapolated from the data produced from the monitored MS4 outfalls; and
- [d] The percent contribution of storm water volumes and pollutant loads discharged from each land use type within each hydrologic subarea with a major MS4 outfall to receiving waters or within each major MS4 outfall to receiving waters in the Copermittee's jurisdiction within the Watershed Management Area for each storm event with measurable rainfall greater than 0.1 inch.
- (ii) Identify modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies necessary to identify pollutants in storm water discharges from the MS4s in the Watershed Management Area pursuant to Provision [D.2.c.\(1\)](#).
- (c) Based on the wet weather MS4 outfall discharge monitoring required pursuant to Provision [D.2.c](#) the Copermittees must assess and report the following:
- (i) The assessments required pursuant to Provision [D.4.b.\(2\)\(b\)](#);
- (ii) Based on the data collected and applicable SALs in the Water Quality Improvement Plan, analyze and compare the monitoring data to the analyses and assumptions used to develop the Water Quality

Improvement Plans, including strategies developed pursuant to Provision B.3, and evaluate whether those analyses and assumptions should be updated as a component of the adaptive management efforts pursuant to Provision B.5 for follow-up action to update the Water Quality Improvement Plan;

- (iii) The Copermittees must review the data collected pursuant to Provision D.2.c and findings from the assessments required pursuant to Provisions D.4.b.(2)(c)(i)-(ii) at least once during the term of this Order to:
  - [a] Identify reductions or progress in achieving reductions in pollutant concentrations and/or pollutant loads from different land uses and/or drainage areas discharging from the Copermittees' MS4s in the Watershed Management Area;
  - [b] Assess the effectiveness of water quality improvement strategies being implemented by the Copermittees within the Watershed Management Area toward reducing pollutants in storm water discharges from the MS4s to receiving waters within the Watershed Management Area to the MEP, with an estimate, if possible, of the pollutant load reductions attributable to specific water quality strategies implemented by the Copermittees; and
  - [c] Identify modifications necessary to increase the effectiveness of the water quality improvement strategies implemented by the Copermittees in the Watershed Management Area toward reducing pollutants in storm water discharges from the MS4s to receiving waters in the Watershed Management Area to the MEP.
- (iv) Identify data gaps in the monitoring data necessary to assess Provisions D.4.b.(2)(c)(i)-(iii).
- (d) The Copermittees must evaluate all the data collected pursuant to Provision D.2.c, and incorporate new outfall monitoring data into time series plots for each long-term monitoring constituent for the Watershed Management Area, and perform statistical trends analysis on the cumulative long-term wet weather MS4 outfall discharge water quality data set.

#### **c. SPECIAL STUDIES ASSESSMENTS**

The Copermittees must annually evaluate the results and findings from the special studies developed and implemented pursuant to Provision D.3, and assess their relevance to the Copermittees' efforts to characterize receiving water conditions, understand sources of pollutants and/or stressors, and control and reduce the discharges of pollutants from the MS4 outfalls to receiving waters in the Watershed Management Area. The Copermittees must report the results of the special studies assessments applicable to the Watershed Management Area, and identify any necessary modifications or updates to the Water Quality

Improvement Plan based on the results in the Water Quality Improvement Plan Annual Reports required pursuant to Provision [F.3.b.\(3\)](#).

**d. INTEGRATED ASSESSMENT OF WATER QUALITY IMPROVEMENT PLAN**

As part of the iterative approach and adaptive management process required for the Water Quality Improvement Plan pursuant to Provision [B.5](#), the Copermittees in each Watershed Management Area must integrate the data collected pursuant to Provisions [D.1-D.3](#), the findings from the assessments required pursuant to Provisions [D.4.a-c](#), and information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision [E](#) to assess the effectiveness of, and identify necessary modifications to, the Water Quality Improvement Plan as follows:

- (1) The Copermittees must re-evaluate the priority water quality conditions and numeric goals for the Watershed Management Area, as needed, during the term of this Order pursuant to Provision [B.5.a](#). The re-evaluation and recommendations for modifications to the priority water quality conditions, and/or numeric goals and corresponding schedules may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision [F.3.b.\(3\)](#), but must at least be provided in the Report of Waste Discharge pursuant to Provision [F.5.b](#). The priority water quality conditions and numeric goals for the Watershed Management Area must be re-evaluated as follows:
  - (a) Re-evaluate the receiving water conditions in the Watershed Management Area in accordance with Provision [B.2.a](#);
  - (b) Re-evaluate the impacts on receiving waters in the Watershed Management Area from MS4 discharges in accordance with Provision [B.2.b](#);
  - (c) Re-evaluate the identification of MS4 sources of pollutants and/or stressors in accordance with Provision [B.2.d](#);
  - (d) Identify beneficial uses of the receiving waters that are protected in accordance with Provision [D.4.a](#);
  - (e) Evaluate the progress toward achieving the interim and final numeric goals for protecting impacted beneficial uses in the receiving waters.
- (2) The Copermittees must re-evaluate the water quality improvement strategies for the Watershed Management Area during the term of this Order pursuant to Provision [B.5.b](#). The re-evaluation and recommendations for modifications to the water quality improvement strategies and schedules may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision [F.3.b.\(3\)](#), but must at least be provided in the Report of Waste Discharge pursuant to Provision [F.5.b](#). The water quality improvement

strategies for the Watershed Management Area must be re-evaluated as follows:

- (a) Identify the non-storm water and storm water pollutant loads from the Copermittees' MS4 outfalls in the Watershed Management Area, calculated or estimated pursuant to Provisions [D.4.b](#);
  - (b) Identify the non-storm water and storm water pollutant load reductions, or other improvements to receiving water or water quality conditions, that are necessary to attain the interim and final numeric goals identified in the Water Quality Improvement Plan for protecting beneficial uses in the receiving waters;
  - (c) Identify the non-storm water and storm water pollutant load reductions, or other improvements to the quality of MS4 discharges, that are necessary for the Copermittees to demonstrate that non-storm water and storm water discharges from their MS4s are not causing or contributing to exceedances of receiving water limitations;
  - (d) Evaluate the progress of the water quality improvement strategies toward achieving the interim and final numeric goals identified in the Water Quality Improvement Plan for protecting beneficial uses in the receiving waters.
- (3) The Copermittees must re-evaluate and adapt the water quality monitoring and assessment program for the Watershed Management Area when new information becomes available to improve the monitoring and assessment program pursuant to Provision [B.5.c](#). The re-evaluation and recommendations for modifications to the monitoring and assessment program may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision [F.3.b.\(3\)](#), but must at least be provided in the Report of Waste Discharge pursuant to Provision [F.5.b](#). Modifications to the water quality monitoring and assessment program must be consistent with the requirements of Provision [D.1-D.3](#). The re-evaluation of the water quality monitoring and assessment program for the Watershed Management Area must consider the data gaps identified by the assessments required pursuant to Provisions [D.4.a-b](#), and results of the special studies implemented pursuant to Provision [D.4.c](#).

## 5. Monitoring Provisions

Each Copermittee must comply with all the monitoring, reporting, and recordkeeping provisions of the Standard Permit Provisions and General Provisions contained in [Attachment B](#) to this Order.

## **E. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS**

The purpose of this provision is for each Copermittee to implement a program to control the contribution of pollutants to and the discharges from the MS4 within its jurisdiction. The goal of the jurisdictional runoff management programs is to implement strategies that effectively prohibit non-storm water discharges to the MS4 and reduce the discharge of pollutants in storm water to the MEP. This goal will be accomplished through implementing the jurisdictional runoff management programs in accordance with the strategies identified in the Water Quality Improvement Plans.

Each Copermittee must update its jurisdictional runoff management program document, in accordance with Provision [F.2.a](#), to incorporate all the requirements of Provision [E](#). Until the Copermittee has updated its jurisdictional runoff management program document with the requirements of Provision [E](#), the Copermittee must continue implementing its current jurisdictional runoff management program.

### **1. Legal Authority Establishment and Enforcement**

- a.** Each Copermittee must establish, maintain, and enforce adequate legal authority within its jurisdiction to control pollutant discharges into and from its MS4 through statute, ordinance, permit, contract, order, or similar means. This legal authority must, at a minimum, authorize the Copermittee to:
  - (1) Prohibit and eliminate all illicit discharges and illicit connections to its MS4;
  - (2) Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites, including industrial and construction sites which have coverage under the statewide General Permit for Discharges of Storm Water Associated with Industrial Activities (Industrial General Permit) or General Permit for Discharges of Storm Water Associated with Construction Activities (Construction General Permit), as well as to those sites which do not;
  - (3) Control the discharge of spills, dumping, or disposal of materials other than storm water into its MS4;
  - (4) Control through interagency agreements among Copermittees the contribution of pollutants from one portion of the MS4 to another portion of the MS4;
  - (5) Control, by coordinating and cooperating with other owners of the MS4 such as Caltrans, the U.S. federal government, or sovereign Native American Tribes through interagency agreements, where possible, the contribution of pollutants from their portion of the MS4 to the portion of the MS4 within the Copermittee's jurisdiction;

- (6) Require compliance with conditions in its statutes, ordinances, permits, contracts, orders, or similar means to hold dischargers to its MS4 accountable for their contributions of pollutants and flows;
  - (7) Require the use of BMPs to prevent or reduce the discharge of pollutants in storm water from its MS4 to the MEP;
  - (8) Require documentation on the effectiveness of BMPs implemented to prevent or reduce the discharge of pollutants in storm water from its MS4 to the MEP;
  - (9) Utilize enforcement mechanisms to require compliance with its statutes, ordinances, permits, contracts, orders, or similar means; and
  - (10) Carry out all inspections, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with its statutes, ordinances, permits, contracts, orders, or similar means and with the requirements of this Order, including the prohibition of illicit discharges and connections to its MS4; the Copermittee must also have authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from industrial facilities, including construction sites, discharging into its MS4.
- b.** With the first Water Quality Improvement Plan Annual Report required pursuant to Provision [F.3.b.\(3\)](#), each Copermittee must submit a statement certified by its Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative that the Copermittee has taken the necessary steps to obtain and maintain full legal authority within its jurisdiction to implement and enforce each of the requirements contained in this Order.

## **2. Illicit Discharge Detection and Elimination**

Each Copermittee must implement a program to actively detect and eliminate illicit discharges and improper disposal into the MS4, or otherwise require the discharger to apply for and obtain a separate NPDES permit. The illicit discharge detection and elimination program must be implemented in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision [B.3.b.\(1\)](#) and include, at a minimum, the following requirements:

### **a. NON-STORM WATER DISCHARGES**

Each Copermittee must address all non-storm water discharges as illicit discharges unless a non-storm water discharge is either identified as a discharge authorized by a separate NPDES permit, or identified as a category of non-storm water discharges or flows that must be addressed pursuant to the following requirements:

#### PROVISION E: JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS

##### E.1. Legal Authority Establishment and Enforcement

##### E.2. Illicit Discharge Detection and Elimination

- (1) Discharges of non-storm water to the MS4 from the following categories must be addressed as illicit discharges unless the discharge has coverage under NPDES Permit No. CAG919001 (Order No. R9-2007-0034, or subsequent order) for discharges to San Diego Bay, or NPDES Permit No. CAG919002 (Order No. R9-2008-0002, or subsequent order) for discharges to surface waters other than San Diego Bay:
  - (1) Uncontaminated pumped ground water;
  - (2) Discharges from foundation drains;<sup>19</sup>
  - (3) Water from crawl space pumps; and
  - (4) Water from footing drains.<sup>19</sup>
- (2) Discharges of non-storm water from water line flushing and water main breaks to the MS4 must be addressed as illicit discharges unless the discharge has coverage under NPDES Permit No. CAG 679001 (Order No. R9-2010-0003 or subsequent order). This category includes water line flushing and water main break discharges from water purveyors issued a water supply permit by the California Department of Public Health or federal military installations. Discharges from recycled or reclaimed water lines to the MS4 must be addressed as illicit discharges, unless the discharges have coverage under a separate NPDES permit.
- (3) Discharges of non-storm water to the MS4 from the following categories must be addressed by the Copermittee as illicit discharges only if the Copermittee or the San Diego Water Board identifies the discharge as a source of pollutants to receiving waters:
  - (a) Diverted stream flows;
  - (b) Rising ground waters;
  - (c) Uncontaminated ground water infiltration to MS4s;
  - (d) Springs;
  - (e) Flows from riparian habitats and wetlands;
  - (f) Discharges from potable water sources;

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<sup>19</sup> Provision E.2.a.(1) only applies to this category of non-storm water if the system is designed to be located at or below the groundwater table to actively or passively extract groundwater during any part of the year.

- (g) Discharges from foundation drains;<sup>20</sup> and
- (h) Discharges from footing drains.<sup>20</sup>
- (4) Discharges of non-storm water to the MS4 from the following categories must be controlled by the requirements given below through statute, ordinance, permit, contract, order, or similar means. Discharges of non-storm water to the MS4 from the following categories not controlled by the requirements given below through statute, ordinance, permit, contract, order, or similar means must be addressed by the Copermittee as illicit discharges.
- (a) Air conditioning condensation
- The discharge of air conditioning condensation should be directed to landscaped areas or other pervious surfaces, or to the sanitary sewer, where feasible.
- (b) Individual residential vehicle washing
- (i) The discharge of wash water should be directed to landscaped areas or other pervious surfaces where feasible; and
- (ii) The minimization of water, washing detergent and other vehicle wash products used for residential vehicle washing, and the implementation of other practices or behaviors that will prevent the discharge of pollutants associated with individual residential vehicle washing from entering the MS4 must be encouraged.
- (c) Dechlorinated swimming pool discharges
- (i) Residual chlorine, algaecide, filter backwash, or other pollutants from swimming pools must be eliminated prior to discharging to the MS4; and
- (ii) The discharge of saline swimming pool water must be directed to the sanitary sewer, landscaped areas, or other pervious surfaces that can accommodate the volume of water, unless the saline swimming pool water can be discharged via a pipe or concrete channel directly to a naturally saline water body (e.g. Pacific Ocean).
- (5) Firefighting discharges to the MS4 must be addressed by the Copermittee as illicit discharges only if the Copermittee or the San Diego Water Board identifies the discharge as a significant source of pollutants to receiving waters. Firefighting discharges to the MS4 not identified as a significant source of pollutants to receiving waters, must be addressed, at a minimum, as follows:

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<sup>20</sup> Provision [E.2.a.\(3\)](#) only applies to this category of non-storm water discharge if the system is designed to be located above the groundwater table at all times of the year, and the system is only expected to discharge non-storm water under unusual circumstances.



(a) Non-emergency firefighting discharges

- (i) Building fire suppression system maintenance discharges (e.g. sprinkler line flushing) to the MS4 must be addressed as illicit discharges unless BMPs are implemented to prevent pollutants associated with such discharges to the MS4.
- (ii) Non-emergency firefighting discharges (i.e., discharges from controlled or practice blazes, firefighting training, and maintenance activities not associated with building fire suppression systems) must be addressed by a program, to be developed and implemented by the Copermittee, to reduce or eliminate pollutants in such discharges from entering the MS4.

(b) Emergency firefighting discharges

Each Copermittee should develop and encourage implementation of BMPs to reduce or eliminate pollutants in emergency firefighting discharges to the MS4s and receiving waters within its jurisdiction. During emergency situations, priority of efforts should be directed toward life, property, and the environment (in descending order). BMPs should not interfere with immediate emergency response operations or impact public health and safety.

- (6) If the Copermittee or San Diego Water Board identifies any category of non-storm water discharges listed under Provisions [E.2.a.\(1\)-\(4\)](#) as a source of pollutants to receiving waters, the category must be prohibited through ordinance, order, or similar means and addressed as an illicit discharge. Alternatively, the Copermittee may propose controls to be implemented for the category of non-storm water discharges as part of the Water Quality Improvement Plan instead of prohibiting the category of non-storm water discharges, and implement the controls if accepted by the San Diego Water Board as part of the Water Quality Improvement Plan.
- (7) Each Copermittee must, where feasible and priorities and resources allow, reduce or eliminate non-storm water discharges listed under Provisions [E.2.a.\(1\)-\(4\)](#) into its MS4, unless a non-storm water discharge is identified as a discharge authorized by a separate NPDES permit.

**b. PREVENT AND DETECT ILLICIT DISCHARGES AND CONNECTIONS**

Each Copermittee must include the following measures within its program to prevent and detect illicit discharges to the MS4:

- (1) Each Copermittee must maintain an updated map of its entire MS4 and the corresponding drainage areas. The accuracy of the MS4 map must be confirmed during the field screening required pursuant to Provision [E.2.c.](#)

The MS4 map must be included as part of the jurisdictional runoff management program document. Any geographic information system (GIS) layers or files used by the Copermittee to maintain the MS4 map must be made available to the San Diego Water Board upon request. The MS4 map must identify the following:

- (a) All segments of the MS4 owned, operated, and maintained by the Copermittee;
  - (b) All known locations of inlets that discharge and/or collect runoff into the Copermittee's MS4;
  - (c) All known locations of connections with other MS4s not owned or operated by the Copermittee (e.g. Caltrans MS4s);
  - (d) All known locations of MS4 outfalls and private outfalls that discharge runoff collected from areas within the Copermittee's jurisdiction;
  - (e) All segments of receiving waters within the Copermittee's jurisdiction that receive and convey runoff discharged from the Copermittee's MS4 outfalls;
  - (f) Locations of the MS4 outfalls, identified pursuant to Provision [D.2.a.\(1\)](#), within its jurisdiction; and
  - (g) Locations of the non-storm water persistent flow MS4 outfall discharge monitoring stations, identified pursuant to Provision [D.2.b.\(2\)](#), within its jurisdiction.
- (2) Each Copermittee must use Copermittee personnel and contractors to assist in identifying and reporting illicit discharges and connections during their daily employment activities.
- (3) Each Copermittee must promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges to or from the MS4, including the following methods for public reporting:
- (a) Operate a public hotline, which can be Copermittee-specific or shared by the Copermittees, and must be capable of receiving reports in both English and Spanish 24 hours per day and seven days per week; and
  - (b) Designate an e-mail address for receiving electronic reports from the public, which can be Copermittee-specific or shared by the Copermittees, and must be prominently displayed on the Copermittee's webpage and the Regional Clearinghouse required pursuant to Provision [F.4](#).

- (4) Each Copermittee must implement practices and procedures (including a notification mechanism) to prevent, respond to, contain, and clean up any spills that may discharge into the MS4 within its jurisdiction from any source. The Copermittee must coordinate, to the extent possible, with spill response teams to prevent entry of spills into the MS4, and prevent contamination of surface water, ground water, and soil. The Copermittee must coordinate spill prevention, containment, and response activities throughout all appropriate Copermittee departments, programs, and agencies.
- (5) Each Copermittee must implement practices and procedures to prevent and limit infiltration of seepage from sanitary sewers (including private laterals and failing septic systems) to the MS4.
- (6) Each Copermittee must coordinate, when necessary, with upstream Copermittees and/or entities to prevent illicit discharges from upstream sources into the MS4 within its jurisdiction.

**c. FIELD SCREENING**

Each Copermittee must conduct field screening (i.e. visual observations, field testing, and/or analytical testing) of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect non-storm water and illicit discharges and connections to the MS4 in accordance with the dry weather MS4 outfall discharge monitoring requirements in Provisions [D.2.a.\(2\)](#) and [D.2.b.\(1\)](#).

**d. INVESTIGATE AND ELIMINATE ILLICIT DISCHARGES AND CONNECTIONS**

Each Copermittee must include the following measures within its program to investigate and eliminate illicit discharges to the MS4:

- (1) Each Copermittee must prioritize and determine when follow-up investigations will be performed in response to visual observations and/or water quality monitoring data collected during an investigation of a detected non-storm water or illicit discharge to or from the MS4. The criteria for prioritizing investigations must consider the following:
  - (a) Pollutants identified as causing or contributing to the highest water quality priorities identified in the Water Quality Improvement Plan;
  - (b) Pollutants identified as causing or contributing, or threatening to cause or contribute to impairments in water bodies on the 303(d) List and/or in environmentally sensitive areas (ESAs), located within its jurisdiction;
  - (c) Pollutants identified from sources or land uses known to exist within the area, drainage basin, or watershed that discharges to the portion of the MS4 within its jurisdiction included in the investigation;

- (d) Pollutants identified as causing or contributing to an exceedance of a NAL in the Water Quality Improvement Plan; and
  - (e) Pollutants identified as a threat to human health or the environment.
- (2) Each Copermittee must implement procedures to investigate and inspect portions of its MS4 that, based on reports or notifications, field screening, or other appropriate information, indicate a reasonable potential of receiving, containing, or discharging pollutants due to illicit discharges, illicit connections, or other sources of non-storm water. The procedures must include the following:
- (a) Each Copermittee must develop criteria to:
    - (i) Assess the validity of each report or notification received; and
    - (ii) Prioritize the response to each report or notification received.
  - (b) Each Copermittee must prioritize and respond to each valid report or notification (e.g., public reports, staff or contractor reports and notifications, etc.) of an incident in a timely manner.
  - (c) In accordance with the requirements of Provision [E.2.d.\(1\)](#), each Copermittee must investigate and seek to identify the source(s) of discharges of non-storm water where flows are observed in and from the MS4 during the field screening required pursuant to Provision [D.2.b.\(1\)](#) as follows:
    - (i) Obvious illicit discharges must be immediately investigated to identify the source(s) of non-storm water discharges;
    - (ii) The investigation must include field investigations to identify sources or potential sources for the discharge, unless the source or potential source has already been identified during previous investigations; and
    - (iii) The investigation may include follow-up field investigations and/or reviewing Copermittee inventories and other land use data to identify potential sources of the discharge.
  - (d) Each Copermittee must maintain records and a database of the following information:
    - (i) Location of incident, including hydrologic subarea, portion of MS4 receiving the non-storm water or illicit discharge, and point of discharge or potential discharge from MS4 to receiving water;
    - (ii) Source of information initiating the investigation (e.g., public reports, staff or contractor reports and notifications, field screening, etc.);

- (iii) Date the information used to initiate the investigation was received;
  - (iv) Date the investigation was initiated;
  - (v) Dates of follow-up investigations;
  - (vi) Identified or suspected source of the illicit discharge or connection, if determined;
  - (vii) Known or suspected related incidents, if any;
  - (viii) Result of the investigation; and
  - (ix) If a source cannot be identified and the investigation is not continued, document the response pursuant to the requirements of Provision [E.2.d.\(4\)](#).
- (e) Each Copermittee must maintain records and, in accordance with the priorities of the Water Quality Improvement Plan, seek to identify the source(s) of non-storm water discharges from the MS4 where there is evidence of non-storm water having been discharged into or from the MS4 (e.g., pooled water), in accordance with MS4 outfall discharge monitoring requirements in Provisions [D.2.a.\(2\)](#) and [D.2.b.\(1\)](#).
- (3) Each Copermittee must initiate the implementation of procedures, in a timely manner, to eliminate all detected and identified illicit discharges and connections within its jurisdiction. The procedures must include the following responses:
- (a) Each Copermittee must enforce its legal authority, as required under Provision [E.1](#), to eliminate illicit discharges and connections to the MS4.
  - (b) If the Copermittee identifies the source as a controllable source of non-storm water or illicit discharge or connection, the Copermittee must implement its Enforcement Response Plan pursuant to Provision [E.6](#) and enforce its legal authority to prohibit and eliminate illicit discharges and connections to its MS4.
  - (c) If the Copermittee identifies the source of the discharge as a category of non-storm water discharges in Provision [E.2.a](#), and the discharge is in exceedance of NALs in the Water Quality Improvement Plan, then the Copermittee must determine if: (1) this is an isolated incident or set of circumstances that will be addressed through its Enforcement Response Plan pursuant to Provision [E.6](#), or (2) the category of discharge must be addressed through the prohibition of that category of discharge as an illicit discharge pursuant to Provision [E.2.a.\(6\)](#).
  - (d) If the Copermittee suspects the source of the non-storm water discharge as natural in origin (i.e. non-anthropogenically influenced) and in conveyance into the MS4, then the Copermittee must document and

provide the data and evidence necessary to demonstrate to the San Diego Water Board that it is natural in origin and does not require further investigation.

- (e) If the Copermittee is unable to identify and document the source of a recurring non-storm water discharge to or from the MS4, then the Copermittee must address the discharge as an illicit discharge and update its jurisdictional runoff management program to address the common and suspected sources of the non-storm water discharge within its jurisdiction in accordance with the Copermittee's priorities.
- (4) Each Copermittee must submit a summary of the non-storm water discharges and illicit discharges and connections investigated and eliminated within its jurisdiction with each Water Quality Improvement Plan Annual Report required under Provision [F.3.b.\(3\)](#) of this Order.

### 3. Development Planning

Each Copermittee must use their land use and planning authorities to implement a development planning program in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision [B.3.b.\(1\)](#) and includes, at a minimum, the following requirements:

#### a. BMP REQUIREMENTS FOR ALL DEVELOPMENT PROJECTS

Each Copermittee must prescribe the following BMP requirements during the planning process (i.e. prior to project approval and issuance of local permits) for all development projects (regardless of project type or size), where local permits are issued, including unpaved roads and flood management projects:

##### (1) General Requirements

- (a) Onsite BMPs must be located so as to remove pollutants from runoff prior to its discharge to any receiving waters, and as close to the source as possible;
- (b) Structural BMPs must not be constructed within waters of the U.S.
- (c) Onsite BMPs must be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors (e.g. mosquitos, rodents, or flies).

##### (2) Source Control BMP Requirements

The following source control BMPs must be implemented at all development projects where applicable and feasible:

- (a) Prevention of illicit discharges into the MS4;
- (b) Storm drain system stenciling or signage;
- (c) Protect outdoor material storage areas from rainfall, run-on, runoff, and wind dispersal;
- (d) Protect materials stored in outdoor work areas from rainfall, run-on, runoff, and wind dispersal;
- (e) Protect trash storage areas from rainfall, run-on, runoff, and wind dispersal; and
- (f) Any additional BMPs determined to be necessary by the Copermittee to minimize pollutant generation at each project.

(3) Low Impact Development (LID) BMP Requirements

The following LID BMPs must be implemented at all development projects where applicable and feasible:

- (a) Maintenance or restoration of natural storage reservoirs and drainage corridors (including topographic depressions, areas of permeable soils, natural swales, and ephemeral and intermittent streams);<sup>21</sup>
- (b) Buffer zones for natural water bodies (where buffer zones are technically infeasible, require project applicant to include other buffers such as trees, access restrictions, etc.);
- (c) Conservation of natural areas within the project footprint including existing trees, other vegetation, and soils;
- (d) Construction of streets, sidewalks, or parking lot aisles to the minimum widths necessary, provided public safety is not compromised;
- (e) Minimization of the impervious footprint of the project;
- (f) Minimization of soil compaction to landscaped areas;
- (g) Disconnection of impervious surfaces through distributed pervious areas;

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<sup>21</sup> Development projects proposing to dredge or fill materials in waters of the U.S. must obtain a CWA Section 401 Water Quality Certification. Projects proposing to dredge or fill waters of the state must obtain waste discharge requirements.

- (h) Landscaped or other pervious areas designed and constructed to effectively receive and infiltrate, retain and/or treat runoff from impervious areas, prior to discharging to the MS4;
- (i) Small collection strategies located at, or as close as possible to, the source (i.e. the point where storm water initially meets the ground) to minimize the transport of runoff and pollutants to the MS4 and receiving waters;
- (j) Use of permeable materials for projects with low traffic areas and appropriate soil conditions;
- (k) Landscaping with native or drought tolerant species; and
- (l) Harvesting and using precipitation.

#### **b. PRIORITY DEVELOPMENT PROJECTS**

Priority Development Projects are land development projects that fall under the planning and building authority of the Copermittee for which the Copermittee must impose specific requirements, in addition to those described in Provision [E.3.a](#), including the implementation of structural BMPs to meet the performance requirements described in Provision [E.3.c](#).

##### (1) Definition of Priority Development Project

Priority Development Projects include the following:

- (a) New development projects that create 10,000 square feet or more of impervious surfaces (collectively over the entire project site). This includes commercial, industrial, residential, mixed-use, and public development projects on public or private land.
- (b) Redevelopment projects that create and/or replace 5,000 square feet or more of impervious surface (collectively over the entire project site on an existing site of 10,000 square feet or more of impervious surfaces). This includes commercial, industrial, residential, mixed-use, and public development projects on public or private land.
- (c) New and redevelopment projects that create 5,000 square feet or more of impervious surface (collectively over the entire project site), and support one or more of the following uses:
  - (i) 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).



- (ii) Hillside development projects. This category includes development on any natural slope that is twenty-five percent or greater.
  - (iii) Parking lots. This category is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.
  - (iv) Streets, roads, highways, freeways, and driveways. This category is defined as any paved impervious surface used for the transportation of automobiles, trucks, motorcycles, and other vehicles.
- (d) New or redevelopment projects that create or replace 2,500 square feet or more of impervious surface (collectively over the entire project site), and discharging directly to an Environmentally Sensitive Area (ESA). “Discharging directly to” includes flow that is conveyed overland a distance of 200 feet or less from the project to the ESA, or conveyed in a pipe or open channel any distance as an isolated flow from the project to the ESA (i.e. not commingled with flows from adjacent lands).
- (e) New development projects that support one or more of the following uses:
- (i) 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.
  - (ii) 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.
- (f) New or redevelopment projects that result in the disturbance of one or more acres of land and are expected to generate pollutants post construction.

## (2) Special Considerations for Redevelopment Projects

The structural BMP performance requirements of Provision [E.3.c](#) are applicable to redevelopment Priority Development Projects, as defined in [E.3.b.\(1\)](#), as follows:

- (a) Where redevelopment results in the creation or replacement of impervious surface in an amount of less than fifty percent of the surface area of the previously existing development, then the structural BMP performance requirements of Provision [E.3.c](#) apply only to the creation or replacement of impervious surface, and not the entire development; or

- (b) Where redevelopment results in the creation or replacement of impervious surface in an amount of more than fifty percent of the surface area of the previously existing development, then the structural BMP performance requirements of Provision [E.3.c](#) apply to the entire development.

### (3) Priority Development Project Exemptions

Each Copermittee has the discretion to exempt the following projects from being defined as Priority Development Projects:

- (a) New or retrofit paved sidewalks, bicycle lanes, or trails that meet the following criteria:
- (i) Designed and constructed to direct storm water runoff to adjacent vegetated areas, or other non-erodible permeable areas; OR
  - (ii) Designed and constructed to be hydraulically disconnected from paved streets or roads; OR
  - (iii) Designed and constructed with permeable pavements or surfaces in accordance with USEPA Green Streets guidance.<sup>22</sup>
- (b) Retrofitting or redevelopment of existing paved alleys, streets or roads that are designed and constructed in accordance with the USEPA Green Streets guidance.<sup>23</sup>

## **c. PRIORITY DEVELOPMENT PROJECT STRUCTURAL BMP PERFORMANCE REQUIREMENTS**

In addition to the BMP requirements listed for all development projects under Provision [E.3.a](#), Priority Development Projects must also implement structural BMPs that conform to performance requirements described below.

### (1) Storm Water Pollutant Control BMP Requirements

Each Copermittee must require each Priority Development Project to implement onsite structural BMPs to control pollutants in storm water that may be discharged from a project as follows:

- (a) Each Priority Development Project must be required to implement LID BMPs that are designed to retain (i.e. intercept, store, infiltrate, evaporate, and evapotranspire) onsite the pollutants contained in the volume of storm water runoff produced from a 24-hour 85<sup>th</sup> percentile storm event (design capture volume);<sup>24</sup>

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<sup>22</sup> See "Managing Wet Weather with Green Infrastructure – Municipal Handbook: Green Streets" (USEPA, 2008).

<sup>23</sup> Ibid.

<sup>24</sup> This volume is not a single volume to be applied to all areas covered by this Order. The size of the 85<sup>th</sup> percentile storm event is different for various parts of the San Diego Region. The Copermittees are

- (i) If a Copermittee determines that implementing BMPs to retain the full design capture volume onsite for a Priority Development Project is not technically feasible, then the Copermittee may allow the Priority Development Project to utilize biofiltration BMPs. Biofiltration BMPs must be designed to have an appropriate hydraulic loading rate to maximize storm water retention and pollutant removal, as well as to prevent erosion, scour, and channeling within the BMP,<sup>25</sup> and must be sized to:
  - [a] Treat 1.5 times the design capture volume not reliably retained onsite, OR
  - [b] Treat the design capture volume not reliably retained onsite with a flow-thru design that has a total volume, including pore spaces and pre-filter detention volume, sized to hold at least 0.75 times the portion of the design capture volume not reliably retained onsite.
- (ii) If a Copermittee determines that biofiltration is not technically feasible, then the Copermittee may allow the Priority Development Project to utilize flow-thru treatment control BMPs to treat runoff leaving the site, AND mitigate for the design capture volume not reliably retained onsite pursuant to Provision [E.3.c.\(1\)\(b\)](#). Flow thru treatment control BMPs must be sized and designed to:
  - [a] Remove pollutants from storm water to the MEP;
  - [b] Filter or treat either: 1) the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour of a storm event, or 2) the maximum flow rate of runoff produced by the 85<sup>th</sup> percentile hourly rainfall intensity (for each hour of a storm event), as determined from the local historical rainfall record, multiplied by a factor of two;
  - [c] Be ranked with high or medium pollutant removal efficiency for the Priority Development Project's most significant pollutants of concern. Flow-thru treatment control BMPs with a low removal efficiency ranking must only be approved by a Copermittee when a feasibility analysis has been conducted which exhibits that implementation of flow-thru treatment control BMPs with high or medium removal efficiency rankings are infeasible for a Priority Development Project or portion of a Priority Development Project.

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encouraged to calculate the 85<sup>th</sup> percentile storm event for each of its jurisdictions using local rain data pertinent to its particular jurisdiction. In addition, isopluvial maps may be used to extrapolate rainfall data to areas where insufficient data exists in order to determine the volume of the local 85<sup>th</sup> percentile storm event in such areas. Where the Copermittees will use isopluvial maps to determine the 85<sup>th</sup> percentile storm event in areas lacking rain data, the Copermittees must describe their method for using isopluvial maps in its BMP Design Manuals.

<sup>25</sup> As part of the Copermittee's update to its BMP Design Manual, pursuant to Provision [E.3.d](#), the Copermittee must provide guidance for hydraulic loading rates and other biofiltration design criteria necessary to maximize storm water retention and pollutant removal.

- (b) A Priority Development Project may be allowed to utilize alternative compliance under Provision [E.3.c.\(3\)](#) in lieu of complying with the storm water pollutant control BMP performance requirements of Provision [E.3.c.\(1\)\(a\)](#). The Priority Development Project must mitigate for the portion of the pollutant load in the design capture volume not retained onsite if Provision [E.3.c.\(3\)](#) is utilized. If a Priority Development Project is allowed to utilize alternative compliance, flow-thru treatment control BMPs must be implemented to treat the portion of the design capture volume that is not reliably retained onsite. Flow-thru treatment control BMPs must be sized and designed in accordance with Provisions [E.3.c.\(1\)\(a\)\(ii\)\[a\]-\[c\]](#).

## (2) Hydromodification Management BMP Requirements

Each Copermittee must require each Priority Development Project to implement onsite BMPs to manage hydromodification that may be caused by storm water runoff discharged from a project as follows:

- (a) Post-project runoff conditions (flow rates and durations) must not exceed pre-development runoff conditions by more than 10 percent (for the range of flows that result in increased potential for erosion, or degraded instream habitat downstream of Priority Development Projects).
- (i) In evaluating the range of flows that results in increased potential for erosion of natural (non-hardened) channels, the lower boundary must correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks.
- (ii) The Copermittees may use monitoring results collected pursuant to Provision [D.1.a.\(2\)](#) to re-define the range of flows resulting in increased potential for erosion, or degraded instream habitat conditions, as warranted by the data.
- (b) Each Priority Development Project must avoid critical sediment yield areas known to the Copermittee or identified by the optional Watershed Management Area Analysis pursuant to [Provision B.3.b.\(4\)](#), or implement measures that allow critical coarse sediment to be discharged to receiving waters, such that there is no net impact to the receiving water.
- (c) A Priority Development Project may be allowed to utilize alternative compliance under Provision [E.3.c.\(3\)](#) in lieu of complying with the performance requirements of Provision [E.3.c.\(2\)\(a\)](#). The Priority Development Project must mitigate for the post-project runoff conditions not fully managed onsite if Provision [E.3.c.\(3\)](#) is utilized.

(d) Exemptions

Each Copermittee has the discretion to exempt a Priority Development Project from the hydromodification management BMP performance requirements of Provisions [E.3.c.\(2\)](#) where the project discharges storm water runoff to:

- (i) Existing underground storm drains discharging directly to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean;
- (ii) Conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean; or
- (iii) An area identified by the Copermittees as appropriate for an exemption by the optional Watershed Management Area Analysis incorporated into the Water Quality Improvement Plan pursuant to Provision [B.3.b.\(4\)](#).

(3) Alternative Compliance Program to Onsite Structural BMP Implementation

At the discretion of each Copermittee, Priority Development Projects may be allowed to participate in an alternative compliance program in lieu of implementing the onsite structural BMP performance requirements of Provisions [E.3.c.\(1\)](#) and [E.3.c.\(2\)](#), provided that the Water Quality Improvement Plan includes the optional Watershed Management Area Analysis described in Provision [B.3.b.\(4\)](#). The alternative compliance program is available to a Priority Development Project only if the Priority Development Project applicant enters into a voluntary agreement with the Copermittee authorizing this arrangement. In addition to the voluntary agreement, relief from implementing structural BMPs onsite may be authorized by the Copermittee under the following conditions:

(a) Watershed Management Area Analysis Candidate Projects

The Priority Development Project applicant agrees to fund, contribute funds to, or implement a candidate project identified by the Copermittees in the Watershed Management Area Analysis included in the Water Quality Improvement Plan, pursuant to Provisions [B.3.b.\(4\)](#) subject to the following conditions:

- (i) The Copermittee must determine that implementation of the candidate project will have a greater overall water quality benefit for the Watershed Management Area than fully complying with the performance requirements of Provisions [E.3.c.\(1\)](#) and [E.3.c.\(2\)](#) onsite;

- (ii) If the Priority Development Project applicant chooses to fully or partially fund a candidate project, then the in-lieu fee structure described in Provision [E.3.c.\(3\)\(c\)](#) must be followed;
- (iii) If the Priority Development Project applicant chooses to fully or partially fund a candidate project, then the Copermittee must ensure that the funds to be obtained from the Priority Development Project applicant are sufficient to mitigate for impacts caused by not fully implementing structural BMPs onsite, pursuant to the performance requirements described in Provisions [E.3.c.\(1\)](#) and [E.3.c.\(2\)](#);
- (iv) If the Priority Development Project applicant chooses to implement a candidate project, then the Copermittee must ensure that pollutant control and/or hydromodification management within the candidate project are sufficient to mitigate for impacts caused by not implementing structural BMPs fully onsite, pursuant to the performance requirements described in Provisions [E.3.c.\(1\)](#) and [E.3.c.\(2\)](#);
- (v) The voluntary agreement to fund, partially fund, or implement a candidate project must include reliable sources of funding for operation and maintenance of the candidate project;
- (vi) Design of the candidate project must be conducted under an appropriately qualified engineer, geologist, architect, landscape architect, or other professional, licenses where applicable, and competent and proficient in the fields pertinent to the candidate project design;
- (vii) The candidate project must be constructed as soon as possible, but no later than 4 years after the certificate of occupancy is granted for the first Priority Development Project that contributed funds toward the construction of the candidate project, unless a longer period of time is authorized by the San Diego Water Board Executive Officer; and
- (viii) If the candidate project is constructed after the Priority Development Project is constructed, the Copermittee must require temporal mitigation for pollutant loads and altered flows that are discharged from the Priority Development Project.

(b) Project Applicant Proposed Alternative Compliance Projects

The Copermittee may allow a Priority Development Project applicant to propose and fund, contribute funds to, or implement an alternative compliance project not identified by the Watershed Management Area Analysis included in the Water Quality Improvement Plan pursuant to Provisions [B.3.b.\(4\)](#). This option is allowed provided the Copermittee determines that implementation of the alternative compliance project will have a greater overall water quality benefit for the Watershed

Management Area than fully complying with the performance requirements of Provisions E.3.c.(1) and E.3.c.(2) onsite, and is subject to the requirements described in Provisions E.3.c.(3)(a)(ii)-(viii).

(c) Alternative Compliance In-Lieu Fee Structure

If a Copermittee chooses to allow a Priority Development Project applicant to fund, or partially fund a candidate project or an alternative compliance project, then the Copermittee must develop and implement an in-lieu fee structure. This may be developed individually or with other Copermittees and/or entities, as a means for designing, developing, constructing, operating and maintaining offsite alternative compliance projects. The in-lieu fee must be transferred to the Copermittee (for public projects) or an escrow account (for private projects) prior to the construction of the Priority Development Project.

(d) Alternative Compliance Water Quality Credit System Option

The Copermittee may develop and implement an alternative compliance water quality credit system option, individually or with other Copermittees and/or entities, provided that such a credit system clearly exhibits that it will not allow discharges from Priority Development Projects to cause or contribute to a net impact over and above the impact caused by projects meeting the onsite structural BMP performance requirements of Provisions E.3.c.(1) and E.3.c.(2). Any credit system that a Copermittee chooses to implement must be submitted to the San Diego Water Board Executive Officer for review and acceptance as part of the Water Quality Improvement Plan.

(4) Long-Term Structural BMP Maintenance

Each Copermittee must require the project applicant to submit proof of the mechanism under which ongoing long-term maintenance of all structural BMPs will be conducted.

(5) Infiltration and Groundwater Protection

(a) Structural BMPs designed to primarily function as large, centralized infiltration devices (such as large infiltration trenches and infiltration basins) must not cause or contribute to an exceedance of an applicable groundwater quality objective. At a minimum, such infiltration BMPs must be in conformance with the design criteria listed below, unless the development project applicant demonstrates to the Copermittee that one or more of the specific design criteria listed below are not necessary to protect groundwater quality. The design criteria listed below do not apply to small infiltration systems dispersed throughout a development project.

- (i) Runoff must undergo pretreatment such as sedimentation or filtration prior to infiltration;
  - (ii) Pollution prevention and source control BMPs must be implemented at a level appropriate to protect groundwater quality at sites where infiltration BMPs are to be used;
  - (iii) Infiltration BMPs must be adequately maintained to remove pollutants in storm water to the MEP;
  - (iv) The vertical distance from the base of any infiltration BMP to the seasonal high groundwater mark must be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained;
  - (v) The soil through which infiltration is to occur must have physical and chemical characteristics (e.g., appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of runoff for the protection of groundwater beneficial uses;
  - (vi) Infiltration BMPs must not be used for areas of industrial or light industrial activity, and other high threat to water quality land uses and activities as designated by each Copermittee, unless source control BMPs to prevent exposure of high threat activities are implemented, or runoff from such activities is first treated or filtered to remove pollutants prior to infiltration; and
  - (vii) Infiltration BMPs must be located a minimum of 100 feet horizontally from any water supply wells.
- (b) The Copermittee may develop, individually or with other Copermittees, alternative mandatory design criteria to that listed above for infiltration BMPs which are designed to primarily function as centralized infiltration devices. Before implementing the alternative design criteria in the development planning process the Copermittee(s) must:
- (i) Notify the San Diego Water Board of the intent to implement the alternative design criteria submitted; and
  - (ii) Comply with any conditions set by the San Diego Water Board.

#### **d. BMP DESIGN MANUAL UPDATE**

Each Copermittee must update its BMP Design Manual<sup>26</sup> pursuant to Provision [F.2.b](#). Until the Copermittee has updated its BMP Design Manual with the

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<sup>26</sup> The BMP Design Manual was formerly known as the Standard Storm Water Mitigation Plan under Order Nos. R9-2007-0001, R9-2009-0002, and R9-2010-0016.



requirements of Provisions [E.3.a-c](#), the Copermittee must continue implementing its current BMP Design Manual. Unless directed otherwise by the San Diego Water Board, the Copermittee must implement the BMP Design Manual within 180 days of completing the update. The update of the BMP Design Manual must include the following:

- (1) Updated procedures to determine the nature and extent of storm water requirements applicable to a potential development or redevelopment projects. These procedures must inform project applicants of the storm water management requirements applicable to their project including, but not limited to, general requirements for all development projects, structural BMP design procedures and requirements, hydromodification management requirements, requirements specific to phased projects, and procedures specific to private developments and public improvement projects;
- (2) Updated procedures to identify pollutants and conditions of concern for selecting the most appropriate structural BMPs that consider, at a minimum, the following:
  - (a) Receiving water quality (including pollutants for which receiving waters are listed as impaired under the CWA section 303(d) List);
  - (b) Pollutants, stressors, and/or receiving water conditions that cause or contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;
  - (c) Land use type of the project and pollutants associated with that land use type; and
  - (d) Pollutants expected to be present onsite.
- (3) Updated procedures for designing structural BMPs, including any updated performance requirements to be consistent with the requirements of Provision [E.3.c](#) for all structural BMPs listed in the BMP Design Manual;
- (4) Long-term maintenance criteria for each structural BMP listed in the BMP Design Manual; and
- (5) Alternative compliance criteria, in accordance with the requirements under Provision [E.3.c.\(3\)](#), if the Copermittee elects to allow Priority Development Projects within its jurisdiction to utilize alternative compliance.

**e. PRIORITY DEVELOPMENT PROJECT BMP IMPLEMENTATION AND OVERSIGHT**

Each Copermittee must implement a program that requires and confirms structural BMPs on all Priority Development Projects are designed, constructed, and maintained to remove pollutants in storm water to the MEP.

(1) Structural BMP Approval and Verification Process

- (a) Each Copermittee must require and confirm that for all Priority Development Project applications that have not received prior lawful approval by the Copermittee by the time the BMP Design Manual is updated pursuant to Provision E.3.d, the requirements of Provision E.3 are implemented. For project applications that have received prior lawful approval before the BMP Design Manual is updated pursuant to Provision E.3.d, the Copermittee may allow previous land development requirements to apply.
- (b) Each Copermittee must identify the roles and responsibilities of its various municipal departments in implementing the structural BMP requirements, including each stage of a project from application review and approval through BMP maintenance and inspections.
- (c) Each Copermittee must require and confirm that appropriate easements and ownerships are properly recorded in public records and the information is conveyed to all appropriate parties when there is a change in project or site ownership.
- (d) Each Copermittee must require and confirm that prior to occupancy and/or intended use of any portion of the Priority Development Project, each structural BMP is inspected to verify that it has been constructed and is operating in compliance with all of its specifications, plans, permits, ordinances, and the requirements of this Order.

(2) Priority Development Project Inventory and Prioritization

- (a) Each Copermittee must develop, maintain, and update at least annually, a watershed-based database to track and inventory all Priority Development Projects and associated structural BMPs within its jurisdiction. Inventories must be accurate and complete beginning from December 2002 for the San Diego County Copermittees, February 2003 for the Orange County Copermittees, and July 2005 for the Riverside County Copermittees. The use of an automated database system, such as GIS, is highly recommended. The database must include, at a minimum, the following information:
  - (i) Priority Development Project location (address and hydrologic subarea);
  - (ii) Descriptions of structural BMP type(s);
  - (iii) Date(s) of construction;
  - (iv) Party responsible for structural BMP maintenance;

- (v) Dates and findings of structural BMP maintenance verifications; and
  - (vi) Corrective actions and/or resolutions, when applicable.
- (b) Each Copermittee must prioritize the Priority Development Projects with structural BMPs within its jurisdiction. The designation of Priority Development Projects as high priority must consider the following:
- (i) The highest water quality priorities identified in the Water Quality Improvement Plan;
  - (ii) Receiving water quality;
  - (iii) Number and sizes of structural BMPs;
  - (iv) Recommended maintenance frequency of structural BMPs;
  - (v) Likelihood of operation and maintenance issues of structural BMPs;
  - (vi) Land use and expected pollutants generated; and
  - (vii) Compliance record.

### (3) Structural BMP Maintenance Verifications and Inspections

Each Copermittee is required to verify that structural BMPs on each Priority Development Project are adequately maintained, and continue to operate effectively to remove pollutants in storm water to the MEP through inspections, self-certifications, surveys, or other equally effective approaches.

- (a) All (100 percent) of the structural BMPs at Priority Development Projects that are designated as high priority must be inspected directly by the Copermittee annually prior to each rainy season;
- (b) For verifications performed through a means other than direct Copermittee inspection, adequate documentation must be required by the Copermittee to provide assurance that the required maintenance of structural BMPs at each Priority Development Project has been completed; and
- (c) Appropriate follow-up measures (including re-inspections, enforcement, etc.) must be conducted to ensure that structural BMPs at each Priority Development Project continue to reduce pollutants in storm water to the MEP as originally designed.

#### **f. DEVELOPMENT PROJECT ENFORCEMENT**

Each Copermittee must enforce its legal authority established pursuant to Provision [E.1](#) for all development projects, as necessary, to achieve compliance with the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision [E.6](#).

#### 4. Construction Management

Each Copermittee must implement a construction management program in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision [B.3.b.\(1\)](#) and includes, at a minimum, the following requirements:

##### a. PROJECT APPROVAL PROCESS

Prior to issuance of any local permit(s) that allows the commencement of construction projects that involve ground disturbance or soil disturbing activities that can potentially generate pollutants in storm water runoff, each Copermittee must:

- (1) Require a pollution control plan, construction BMP plan, and/or an erosion and sediment control plan, to be submitted by the project applicant to the Copermittee;
- (2) Confirm the pollution control plan, construction BMP plan, and/or erosion and sediment control plan, complies with the local grading ordinance, other applicable local ordinances, and the requirements of this Order;
- (3) Confirm the pollution control, construction BMP, and/or erosion and sediment control plan, includes seasonally appropriate and effective BMPs and management measures described in Provision [E.4.c](#), as applicable to the project; and
- (4) Verify that the project applicant has obtained coverage under the statewide Construction General Permit (Order 2012-0006-DWQ or subsequent Order), if applicable.

##### b. CONSTRUCTION SITE INVENTORY AND TRACKING

- (1) Each Copermittee must maintain and update, at least quarterly, a watershed-based inventory of all construction projects issued a local permit that allows ground disturbance or soil disturbing activities that can potentially generate pollutants in storm water runoff. The use of an automated database system, such as GIS, is highly recommended. The inventory must include:
  - (a) Relevant contact information for each site (e.g., name, address, phone, and email for the owner and contractor);
  - (b) The basic site information including location (address and hydrologic subarea), Waste Discharge Identification (WDID) number (if applicable), size of the site, and approximate area of disturbance;

- (c) Whether or not the site is considered a high threat to water quality, as defined in Provision E.4.b.(2) below;
  - (d) The project start and completion dates;
  - (e) The required inspection frequency, as defined in the Copermittee's jurisdictional runoff management program document;
  - (f) The date the Copermittee accepted or approved the pollution control plan, construction BMP plan, and/or erosion and sediment control plan; and
  - (g) Whether or not there are ongoing enforcement actions administered to the site.
- (2) Each Copermittee must identify all construction sites within its jurisdiction that represent a high threat to downstream surface water quality. The designation of construction sites as high threat to water quality must consider the following:
- (a) Sites located within a hydrologic subarea where sediment is known or suspected to contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;
  - (b) Sites located within the same hydrologic subarea and tributary to a water body segment listed as impaired for sediment on the CWA section 303(d) List;
  - (c) Sites located within, directly adjacent to, or discharging directly to a receiving water within an ESA; and
  - (d) Other sites determined by the Copermittees or the San Diego Water Board as a high threat to water quality.

### **c. CONSTRUCTION SITE BMP IMPLEMENTATION**

Each Copermittee must implement, or require the implementation of effective BMPs to reduce discharges of pollutants in storm water from construction sites to the MEP, and effectively prohibit non-storm water discharges from construction sites into the MS4. These BMPs must be site specific, seasonally appropriate, and construction phase appropriate. BMPs must be implemented at each construction site year round. Dry season BMP implementation must plan for and address unseasonal rain events that may occur during the dry season (May 1 through September 30). Copermittees must implement, or require the implementation of, BMPs in the following categories:

- (1) Project Planning;
- (2) Good Site Management “Housekeeping”, including waste management;
- (3) Non-storm Water Management;
- (4) Erosion Control;
- (5) Sediment Control;
- (6) Run-on and Run-off Control; and
- (7) Active/Passive Sediment Treatment Systems, where applicable.

**d. CONSTRUCTION SITE INSPECTIONS**

Each Copermittee must conduct construction site inspections to require and confirm compliance with its local permits and applicable local ordinances, and the requirements of this Order. Priority for site inspections must consider threat to water quality pursuant to Provision E.4.b as well as the nature of the construction activity, topography, and the characteristics of soils and receiving water quality.

(1) Inspection Frequency

- (a) Each Copermittee must conduct inspections at all inventoried sites, including high threat to water quality sites, at an appropriate frequency for each phase of construction to confirm the site reduces the discharge of pollutants in storm water from construction sites to the MEP, and effectively prohibits non-storm water discharges from entering the MS4.
- (b) Each Copermittee must establish appropriate inspection frequencies for high threat to water quality sites, and all other sites, for each phase of construction. Inspection frequencies appropriate for addressing the highest water quality priorities identified in the Water Quality Improvement Plan, and for complying with the requirements of this Order must be identified in each Copermittee’s jurisdictional runoff management program document.
- (c) Based upon inspection findings, each Copermittee must implement all follow-up actions (i.e., re-inspection, enforcement) necessary to require and confirm site compliance with its local permits and applicable local ordinances, and the requirements of this Order.

(2) Inspection Content

Inspections of construction sites by the Copermittee must include, at a minimum:

- (a) Verification of coverage under the Construction General Permit (Notice of Intent (NOI) and/or WDID number) during initial inspections, when applicable;
- (b) Assessment of compliance with its local permits and applicable local ordinances related to pollution prevention, including the implementation and maintenance of applicable BMPs;
- (c) Assessment of BMP adequacy and effectiveness;
- (d) Visual observations of actual non-storm water discharges;
- (e) Visual observations of actual or potential discharge of sediment and/or construction related materials from the site;
- (f) Visual observations of actual or potential illicit connections; and
- (g) If any violations are found and BMP corrections are needed, inspectors must take and document appropriate actions in accordance with the Enforcement Response Plan pursuant to Provision [E.6](#).

### (3) Inspection Tracking and Records

Each Copermittee must track all inspections and re-inspections at all inventoried construction sites. The Copermittee must retain all inspection records in an electronic database or tabular format, which must be made available to the San Diego Water Board upon request. Inspection records must include, at a minimum:

- (a) Site name, location (address and hydrologic subarea), and WDID number (if applicable);
- (b) Inspection date;
- (c) Approximate amount of rainfall since last inspection;
- (d) Description of problems observed with BMPs and indication of need for BMP addition/repair/replacement and any scheduled re-inspection, and date of re-inspection;
- (e) Descriptions of any other specific inspection comments which must, at a minimum, include rationales for longer compliance time;
- (f) Description of enforcement actions issued in accordance with the Enforcement Response Plan pursuant to Provision [E.6](#); and
- (g) Resolution of problems noted and date problems fixed.

#### **e. CONSTRUCTION SITE ENFORCEMENT**

Each Copermittee must enforce its legal authority established pursuant to Provision [E.1](#) for all its inventoried construction sites, as necessary, to achieve compliance with the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision [E.6](#).

### **5. Existing Development Management**

Each Copermittee must implement an existing development management program in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision [B.3.b.\(1\)](#) and includes, at a minimum, the following requirements:

#### **a. EXISTING DEVELOPMENT INVENTORY AND TRACKING**

Each Copermittee must maintain, and update at least annually, a watershed-based inventory of the existing development within its jurisdiction that may discharge a pollutant load to and from the MS4. The use of an automated database system, such as GIS, is highly recommended. The inventory must, at a minimum, include:

- (1) Name, location (hydrological subarea and address, if applicable) of the following types of existing development with its jurisdiction:
  - (a) Commercial facilities or areas;
  - (b) Industrial facilities;
  - (c) Municipal facilities, including:
    - (i) MS4 and related structures;<sup>27</sup>
    - (ii) Roads, streets, and highways;
    - (iii) Parking facilities;
    - (iv) Municipal airfields;
    - (v) Parks and recreation facilities;
    - (vi) Flood management facilities, flood control devices and structures;
    - (vii) Operating or closed municipal landfills;
    - (viii) Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewer collection systems;
    - (ix) Corporate yards, including maintenance and storage yards for materials, waste, equipment, and vehicles;

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<sup>27</sup> The inventory may refer to the MS4 map required to be maintained pursuant to Provision [E.2.b.\(1\)](#).



- (x) Hazardous waste collection facilities;
  - (xi) Other treatment, storage or disposal facilities for municipal waste; and
  - (xii) Other municipal facilities that the Copermittee determines may contribute a significant pollutant load to the MS4.
- (d) Residential areas, which may be designated by one or more of the following:
- (i) Residential management area;
  - (ii) Drainage basin or area;
  - (iii) Land use (e.g., single family, multi-family, rural);
  - (iv) Neighborhood;
  - (v) Common Interest Area;
  - (vi) Home Owner Association;
  - (vii) Mobile home park; and/or
  - (viii) Other designations accepted by the San Diego Water Board Executive Officer.
- (2) A description of the facility or area, including the following information:
- (a) Classification as commercial, industrial, municipal, or residential;
  - (b) Status of facility or area as active or inactive;
  - (c) Identification if a business is a mobile business;
  - (d) SIC Code or NAICS Code, if applicable;
  - (e) Industrial General Permit NOI and/or WDID number, if applicable;
  - (f) Identification if a residential area is or includes a Common Interest Area / Home Owner Association, or mobile home park;
  - (g) Identification of pollutants generated and potentially generated by the facility or area;
  - (h) Whether the facility or area is adjacent to an ESA;
  - (i) Whether the facility or area is tributary to and within the same hydrologic subarea as a water body segment listed as impaired on the CWA section 303(d) List and generates pollutants for which the water body segment is impaired; and
- (3) An annually updated map showing the location of inventoried existing development, watershed boundaries, and water bodies.

**b. EXISTING DEVELOPMENT BMP IMPLEMENTATION AND MAINTENANCE**

Each Copermittee must designate a minimum set of BMPs required for all inventoried existing development, including special event venues. The designated minimum BMPs must be specific to facility or area types and pollutant generating activities, as appropriate.

**(1) Commercial, Industrial, and Municipal Facilities and Areas****(a) Pollution Prevention**

Each Copermittee must require the use of pollution prevention methods by the commercial, industrial, and municipal facilities and areas in its inventoried existing development to address the priorities and strategies in the Water Quality Improvement Plan.

**(b) BMP Implementation**

Each Copermittee must require the implementation of designated BMPs at commercial facilities and areas, industrial facilities, and implement designated BMPs at municipal facilities in its inventoried existing development.

**(c) BMP Operation and Maintenance**

- (i) Each Copermittee must properly operate and maintain, or require the proper operation and maintenance of designated BMPs at commercial facilities and areas, industrial facilities, and municipal facilities in its inventoried existing development.
- (ii) Each Copermittee must implement a schedule of operation and maintenance activities for its MS4 and related structures (including but not limited to catch basins, storm drain inlets, detention basins, etc.), and verify proper operation of all its municipal structural treatment controls designed to reduce pollutants (including floatables) in storm water discharges to or from its MS4s and related drainage structures. Operation and maintenance activities may include, but is not limited to, the following:
  - [a] Inspections of the MS4 and related structures;
  - [b] Cleaning of the MS4 and related structures; and
  - [c] Proper disposal of materials removed from cleaning of the MS4 and related structures.
- (iii) Each Copermittee must implement a schedule of operation and maintenance for public streets, unpaved roads, paved roads, and paved highways within its jurisdiction to minimize pollutants that can be discharged in storm water.

- (iv) Each Copermittee must implement controls to prevent infiltration of sewage into the MS4 from leaking sanitary sewers. Copermittees that operate both a municipal sanitary sewer system and a MS4 must implement controls and measures to prevent and eliminate seeping sewage from infiltrating the MS4. Copermittees that do not operate both a municipal sanitary sewer system and a MS4 must coordinate with sewerage agencies to keep themselves informed of relevant and appropriate maintenance activities and sanitary sewage projects in their jurisdiction that may cause or contribute to seepage of sewage into the MS4.

(d) Pesticides, Herbicides, and Fertilizers BMPs

Each Copermittee must require the implementation of BMPs to reduce pollutants in storm water discharges to the MEP and effectively prohibit non-storm water discharges associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from commercial facilities and areas and industrial facilities, and implement BMPs at municipal facilities in its inventoried existing development. Such BMPs must include, as appropriate, educational activities, permits, certifications and other measures for applicators and distributors.

(2) Residential Areas

(a) Pollution Prevention

Each Copermittee must promote and encourage the use of pollution prevention methods, where appropriate, by the residential areas in its inventoried existing development.

(b) BMP Implementation

Each Copermittee must promote and encourage the implementation of designated BMPs at residential areas in its inventoried existing development.

(c) BMP Operation and Maintenance

Each Copermittee must properly operate and maintain, or require the proper operation and maintenance of designated BMPs at residential areas in its inventoried existing development.

(d) Pesticides, Herbicides, and Fertilizers BMPs

Each Copermittee must promote and encourage the implementation of BMPs to reduce pollutants in storm water discharges to the MEP and effectively prohibit non-storm water discharges associated with the

application, storage, and disposal of pesticides, herbicides and fertilizers from residential areas in its inventoried existing development.

### **c. EXISTING DEVELOPMENT INSPECTIONS**

Each Copermittee must conduct inspections of inventoried existing development to ensure compliance with applicable local ordinances and permits, and the requirements of this Order.

#### **(1) Inspection Frequency**

- (a) Each Copermittee must establish appropriate inspection frequencies for inventoried existing development in accordance with the following requirements:
- (i) At a minimum, inventoried existing development must be inspected once every five years utilizing one or more of the following methods:
    - [a] Drive-by inspections by Copermittee municipal and contract staff;
    - [b] Onsite inspections by Copermittee municipal and contract staff; and/or
    - [c] Visual inspections of publicly accessible inventoried facilities or areas by volunteer monitoring or patrol programs that have been trained by the Copermittee;
  - (ii) The frequency of inspections must be appropriate to confirm that BMPs are being implemented to reduce the discharge of pollutants in storm water from the MS4 to the MEP and effectively prohibit non-storm water discharges to the MS4;
  - (iii) The frequency of inspections must be based on the potential for a facility or area to discharge non-storm water and pollutants in storm water, and should reflect the priorities set forth in the Water Quality Improvement Plan;
  - (iv) Each Copermittee must annually perform onsite inspections of an equivalent of at least 20 percent of the commercial facilities and areas, industrial facilities, and municipal facilities in its inventoried existing development;<sup>28</sup> and
  - (v) Inventoried existing development must be inspected by the Copermittee, as needed, in response to valid public complaints.
- (b) Based upon inspection findings, each Copermittee must implement all follow-up actions (i.e. education and outreach, re-inspection, enforcement)

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<sup>28</sup> If any commercial, industrial, or municipal facilities or areas require multiple onsite inspections during any given year, those additional inspection may count toward the total annual inspection requirement. This requirement excludes linear municipal facilities (i.e., MS4 linear channels, sanitary sewer collection systems, streets, roads and highways).

necessary to require and confirm compliance with its applicable local ordinances and permits and the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision [E.6](#).

## (2) Inspection Content

(a) Inspections of existing development must include, at a minimum:

- (i) Visual inspections for the presence of actual non-storm water discharges;
- (ii) Visual inspections for the presence of actual or potential discharge of pollutants;
- (iii) Visual inspections for the presence of actual or potential illicit connections; and
- (iv) Verification that the description of the facility or area in the inventory, required pursuant to Provision [E.5.a.\(2\)](#), has not changed.

(b) Onsite inspections of existing development by the Copermittee must include, at a minimum:

- (i) Assessment of compliance with its applicable local ordinances and permits related to non-storm water and storm water discharges and runoff;
- (ii) Assessment of the implementation of the designated BMPs;
- (iii) Verification of coverage under the Industrial General Permit, when applicable; and
- (iv) If any problems or violations are found, inspectors must take and document appropriate actions in accordance with the Enforcement Response Plan pursuant to Provision [E.6](#).

## (3) Inspection Tracking and Records

Each Copermittee must track all inspections and re-inspections at all inventoried existing development. The Copermittee must retain all inspection records in an electronic database or tabular format, which must be made available to the San Diego Water Board upon request. Inspection records must include, at a minimum:

- (a) Name and location of the facility or area (address and hydrologic subarea) consistent with the inventory name and location, pursuant to Provision [E.5.a.\(1\)](#);
- (b) Inspection and re-inspection date(s);

- (c) Inspection method(s) (i.e. drive-by, onsite);
- (d) Observations and findings from the inspection(s);
- (e) For onsite inspections of existing development by Copermittee municipal or contract staff, the records must also include, as applicable:
  - (i) Description of any problems or violations found during the inspection(s);
  - (ii) Description of enforcement actions issued in accordance with the Enforcement Response Plan pursuant to Provision [E.6](#); and
  - (iii) The date problems or violations were resolved.

**d. EXISTING DEVELOPMENT ENFORCEMENT**

Each Copermittee must enforce its legal authority established pursuant to Provision [E.1](#) for all its inventoried existing development, as necessary, to achieve compliance with the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision [E.6](#).

**e. RETROFITTING AND REHABILITATING AREAS OF EXISTING DEVELOPMENT**

(1) Retrofitting Areas of Existing Development

Each Copermittee must describe in its jurisdictional runoff management program document, a program to retrofit areas of existing development within its jurisdiction to address identified sources of pollutants and/or stressors that contribute to the highest priority water quality conditions in the Watershed Management Area. The program must be implemented as follows:

- (a) Each Copermittee must identify areas of existing development as candidates for retrofitting, focusing on areas where retrofitting will address pollutants and/or stressors that contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;
- (b) Candidates for retrofitting projects may be utilized to reduce pollutants that may be discharged in storm water from areas of existing development, and/or address storm water runoff flows and durations from areas of existing development that cause or contribute to hydromodification in receiving waters;
- (c) Each Copermittee must develop a strategy to facilitate the implementation of retrofitting projects in areas of existing development identified as candidates;

- (d) Each Copermittee should identify areas of existing development where Priority Development Projects may be allowed or should be encouraged to implement or contribute toward the implementation of alternative compliance retrofitting projects; and
- (e) Where retrofitting projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the Water Quality Improvement Plan, the Copermittee should collaborate and cooperate with other Copermittees and/or entities in the Watershed Management Area to identify, develop, and implement regional retrofitting projects (i.e. projects that can receive and/or treat storm water from one or more areas of existing development and will result in a net benefit to water quality and the environment) adjacent to and/or downstream of the areas of existing development.

## (2) Stream, Channel and/or Habitat Rehabilitation in Areas of Existing Development

Each Copermittee must describe in its jurisdictional runoff management program document, a program to rehabilitate streams, channels, and/or habitats in areas of existing development within its jurisdiction to address the highest priority water quality conditions in the Watershed Management Area. The program must be implemented as follows:

- (a) Each Copermittee must identify streams, channels, and/or habitats in areas of existing development as candidates for rehabilitation, focusing on areas where stream, channel, and/or habitat rehabilitation projects will address the highest priority water quality conditions identified in the Water Quality Improvement Plan;
- (b) Candidates for stream, channel, and/or habitat rehabilitation projects may be utilized to address storm water runoff flows and durations from areas of existing development that cause or contribute to hydromodification in receiving waters, rehabilitate channelized or hydromodified streams, restore wetland and riparian habitat, restore watershed functions, and/or restore beneficial uses of receiving waters;
- (c) Each Copermittee must develop a strategy to facilitate the implementation of stream, channel, and/or habitat rehabilitation projects in areas of existing development identified as candidates;
- (d) Each Copermittee should identify areas of existing development where Priority Development Projects may be allowed or should be encouraged to implement or contribute toward the implementation of alternative compliance stream, channel, and/or habitat rehabilitation projects; and

- (e) Where stream, channel, and/or habitat rehabilitation projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the Water Quality Improvement Plan, the Copermitttee should collaborate and cooperate with other Copermitttees and/or entities in the Watershed Management Area to identify, develop, and implement regional stream, channel, and/or habitat rehabilitation projects (i.e. projects that can receive storm water from one or more areas of existing development and will result in a net benefit to water quality and the environment).

## **6. Enforcement Response Plans**

Each Copermitttee must develop and implement an Enforcement Response Plan as part of its jurisdictional runoff management program document. The Enforcement Response Plan must describe the applicable approaches and options to enforce its legal authority established pursuant to Provision [E.1](#), as necessary, to achieve compliance with the requirements of this Order. The Enforcement Response Plan must be in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision [B.3.b.\(1\)](#) and include the following:

### **a. ENFORCEMENT RESPONSE PLAN COMPONENTS**

The Enforcement Response Plan must include the following individual components:

- (1) Illicit Discharge Detection and Elimination Enforcement Component;
- (2) Development Planning Enforcement Component;
- (3) Construction Management Enforcement Component; and
- (4) Existing Development Enforcement Component.

### **b. ENFORCEMENT RESPONSE APPROACHES AND OPTIONS**

Each component of the Enforcement Response Plan must describe the enforcement response approaches that the Copermitttee will implement to compel compliance with its statutes, ordinances, permits, contracts, orders, or similar means, and the requirements of this Order. The description must include the protocols for implementing progressively stricter enforcement responses. The enforcement response approaches must include appropriate sanctions to compel compliance, including, at a minimum, the following tools or their equivalent:

- (1) Verbal and written notices of violation;
- (2) Cleanup requirements;



- (3) Fines;
- (4) Bonding requirements;
- (5) Administrative and criminal penalties;
- (6) Liens;
- (7) Stop work orders; and
- (8) Permit and occupancy denials.

**c. CORRECTION OF VIOLATIONS**

- (1) Violations must be corrected in a timely manner with the goal of correcting the violations within 30 calendar days after the violations are discovered, or prior to the next predicted rain event, whichever is sooner.
- (2) If more than 30 calendar days are required to achieve compliance, then a rationale must be recorded in the applicable electronic database or tabular system used to track violations.

**d. ESCALATED ENFORCEMENT**

- (1) The Enforcement Response Plan must include a definition of “escalated enforcement.” Escalated enforcement must include any enforcement scenario where a violation or other non-compliance is determined to cause or contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan. Escalated enforcement may be defined differently for development planning, construction sites, commercial facilities or areas, industrial facilities, municipal facilities, and residential areas.
- (2) Where the Copermittee determines escalated enforcement is not required, a rationale must be recorded in the applicable electronic database or tabular system used to track violations.
- (3) Escalated enforcement actions must continue to increase in severity, as necessary, to compel compliance as soon as possible.

**e. REPORTING OF NON-COMPLIANT SITES**

- (1) Each Copermittee must notify the San Diego Water Board in writing within five (5) calendar days of issuing escalated enforcement (as defined in the Copermittee’s Enforcement Response Plan) to a construction site that poses a significant threat to water quality as a result of violations or other non-compliance with its permits and applicable local ordinances, and the

requirements of this Order. Written notification may be provided electronically by email to the appropriate San Diego Water Board staff.

- (2) Each Copermittee must notify the San Diego Water Board any persons required to obtain coverage under the statewide Industrial General Permit and Construction General Permit and failing to do so, within five (5) calendar days from the time the Copermittee become aware of the circumstances. Written notification may be provided electronically by email to [Nonfilers\\_R9@waterboards.ca.gov](mailto:Nonfilers_R9@waterboards.ca.gov).

## 7. Public Education and Participation

Each Copermittee must implement, individually or with other Copermittees, a public education and participation program in accordance with the strategies identified in the Water Quality Improvement Plan to promote and encourage the development of programs, management practices, and behaviors that reduce the discharge of pollutants in storm water to the MEP, prevent controllable non-storm water discharges from entering the MS4, and protect water quality standards in receiving waters. The public education and participation program must be implemented in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision [B.3.b.\(1\)](#) and include, at a minimum, the following requirements:

### a. PUBLIC EDUCATION

The public education program component implemented within the Copermittee's jurisdiction must include, at a minimum, the following:

- (1) Educational activities, public information activities, and other appropriate outreach activities intended to reduce pollutants associated with the application of pesticides, herbicides and fertilizer and other pollutants of concern in storm water discharges to and from its MS4 to the MEP, as determined and prioritized by the Copermittee(s) by jurisdiction and/or watershed to address the highest priority water quality conditions identified in the Water Quality Improvement Plan;
- (2) Educational activities, public information activities, and other appropriate outreach activities to facilitate the proper management and disposal of used oil and toxic materials; and
- (3) Appropriate education and training measures for specific target audiences, such as construction site operators, residents, underserved target audiences and school-aged children, as determined and prioritized by the Copermittee(s) by jurisdiction and/or watershed, based on high risk behaviors and pollutants of concern.

**b. PUBLIC PARTICIPATION**

The public participation program component implemented within the Copermittee's jurisdiction must include, at a minimum, the following:

- (1) A process for members of the public to participate in updating the highest priority water quality conditions, numeric goals, and water quality improvement strategies in the Water Quality Improvement Plan;
- (2) Opportunities for members of the public to participate in providing the Copermittee recommendations for improving the effectiveness of the water quality improvement strategies implemented within its jurisdiction; and
- (3) Opportunities for members of the public to participate in programs and/or activities that can result in the prevention or elimination of non-storm water discharges to the MS4, reduction of pollutants in storm water discharges from the MS4, and/or protection of the quality of receiving waters.

**8. Fiscal Analysis**

- a. Each Copermittee must secure the resources necessary to meet all the requirements of this Order.
- b. Each Copermittee must conduct an annual fiscal analysis of its jurisdictional runoff management program in its entirety. The fiscal analysis must include the following:
  - (1) Identification of the various categories of expenditures necessary to implement the requirements of this Order, including a description of the specific capital, operation and maintenance, and other expenditure items to be accounted for in each category of expenditures;
  - (2) The staff resources needed and allocated to meet the requirements of this Order, including any development, implementation, and enforcement activities required;
  - (3) The estimated expenditures for Provisions [E.8.b.\(1\)](#) and [E.8.b.\(2\)](#) for the current fiscal year; and
  - (4) The source(s) of funds that are proposed to meet the necessary expenditures described in Provisions [E.8.b.\(1\)](#) and [E.8.b.\(2\)](#), including legal restrictions on the use of such funds, for the current fiscal year and next fiscal year.
- c. Each Copermittee must submit a summary of the annual fiscal analysis with each Water Quality Improvement Plan Annual Report required pursuant to Provision [F.3.b.\(3\)](#).
- d. Each Copermittee must provide the documentation used to develop the summary of the annual fiscal analysis upon request by the San Diego Water Board.

PROVISION E: JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS

E.7. Public Education and Participation

E.8. Fiscal Analysis

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## F. REPORTING

The purpose of this provision is to determine and document compliance with the requirements set forth in this Order. The goal of reporting is to communicate to the San Diego Water Board and the people of the State of California the implementation status of each jurisdictional runoff management program and compliance with the requirements of this Order. This goal is to be accomplished through the submittal of specific deliverables to the San Diego Water Board by the Copermittees.

### 1. Water Quality Improvement Plans

The Copermittees for each Watershed Management Area must develop and submit the Water Quality Improvement Plan in accordance with the following requirements:

#### a. WATER QUALITY IMPROVEMENT PLAN DEVELOPMENT

Each Water Quality Improvement Plan must be developed in accordance with the following process:

##### (1) Public Participation Process

The Copermittees must implement a public participation process to solicit data, information, and recommendations to be utilized in the development of the Water Quality Improvement Plan. The public participation process must include the following:

- (a) The Copermittees must develop a publicly available and noticed schedule of the opportunities for the public to participate and provide comments during the development of the Water Quality Improvement Plan. The schedule may be adjusted as necessary by the Copermittees, provided the public is provided timely notification of the changes to the schedule.
- (b) The Copermittees must form a Water Quality Improvement Consultation Panel to provide recommendations during the development of the Water Quality Improvement Plan. The Water Quality Improvement Consultation Panel must consist of at least the following members:
  - (i) A representative of the San Diego Water Board;
  - (ii) A representative of the environmental community familiar with the water quality conditions of concern of the receiving waters in the Watershed Management Area, preferably from an environmental interest group associated with a water body within the Watershed Management Area; and
  - (iii) A representative of the development community familiar with the opportunities and constraints for implementing structural BMPs, retrofitting projects, and stream, channel or habitat rehabilitation

projects in the Watershed Management Area, preferably with relevant engineering, hydrology, and/or geomorphology experience in the Watershed Management Area.

- (c) The Copermittees must coordinate the schedules for the public participation process among the Watershed Management Areas to provide the public time and opportunity to participate during the development of the Water Quality Improvement Plans.

## (2) Priority Water Quality Conditions

- (a) The Copermittees must solicit data, information and recommendations from the public to be utilized in the development and identification of the priority water quality conditions and potential water quality improvement strategies for the Watershed Management Area.
- (b) The Copermittees must review the priority water quality conditions the Copermittees plan on including in the Water Quality Improvement Plan with the Water Quality Improvement Consultation Panel to receive recommendations or concurrence.
- (c) The Copermittees must consider revisions to the priority water quality conditions based on recommendations from the Water Quality Improvement Consultation Panel.
- (d) The Copermittees must include all the potential water quality improvement strategies identified by the public and the Water Quality Improvement Consultation Panel with the submittal of the priority water quality conditions to the San Diego Water Board.
- (e) The Copermittees must submit the Water Quality Improvement Plan requirements of Provision B.2 to the San Diego Water Board as early as 6 months and no later than 12 months after the commencement of coverage under this Order. Upon receipt, the San Diego Water Board will issue a public notice and release the proposed priority water quality conditions and potential water quality improvement strategies for public review and comment for a minimum of 30 days.
- (f) The Copermittees must consider revisions to the priority water quality conditions and potential water quality improvement strategies developed pursuant to Provision B.2 based on public comments received by the close of the comment period.

## (3) Water Quality Improvement Goals, Strategies and Schedules

- (a) The Copermittees must solicit recommendations from the public on potential numeric goals for the highest priority water quality conditions

identified for the Watershed Management Area, and recommendations on the strategies that should be implemented to achieve the potential numeric goals.

- (b) The Copermittees must consult with the Water Quality Improvement Consultation Panel and consider revisions to the following items based on the Panel's recommendations:
  - (i) The numeric goals and schedules the Copermittees propose to include in the Water Quality Improvement Plan;
  - (ii) The water quality improvement strategies and schedules the Copermittees propose to implement in the Watershed Management Area and include in the Water Quality Improvement Plan; and
  - (iii) If the Copermittees choose to implement Provision [B.3.b.\(4\)](#), the results of the Watershed Management Area Analysis the Copermittees proposed to incorporate into the Water Quality Improvement Plan.
- (c) The Copermittees must submit the Water Quality Improvement Plan requirements of Provision [B.3](#) to the San Diego Water Board as early as 9 months and no later than 18 months after the commencement of coverage under this Order. Upon receipt, the San Diego Water Board will issue a public notice and release the proposed water quality improvement goals, strategies and schedules for public review and comment for a minimum of 30 days.
- (d) The Copermittees must consider revisions to the water quality improvement goals, strategies and schedules developed pursuant to Provision [B.3](#) based on public comments received by the close of the comment period.

**b. WATER QUALITY IMPROVEMENT PLAN SUBMITTAL AND IMPLEMENTATION**

- (1) Within 24 months after the commencement of coverage under this Order, the Copermittees for each Watershed Management Area must submit a complete Water Quality Improvement Plan in accordance with the requirements of Provision [B](#) of this Order to the San Diego Water Board. The San Diego Water Board will issue a public notice and release the Water Quality Improvement Plan for public review and comment for a minimum of 30 days.
- (2) The Copermittees must consider revisions to the Water Quality Improvement Plan based on written comments received by the close of the public comment period.

- (3) The Copermittees must promptly submit any revisions to the Water Quality Improvement Plan to the San Diego Water Board no later than 60 days after the close of the public comment period.
- (4) If issues concerning the Water Quality Improvement Plan are resolved informally through discussions among the Copermittees, the San Diego Water Board and interested parties, the San Diego Water Board Executive Officer may provide written notification of acceptance to the Copermittees that the Water Quality Improvement Plan meets the requirements of Provision **B**. However, if the Executive Officer determines that significant issues with the Water Quality Improvement Plan remain, the matter will be scheduled for San Diego Water Board consideration at a public meeting.
- (5) The Copermittees must commence with implementation of the Water Quality Improvement Plan, in accordance with the water quality improvement strategies and schedules therein, upon written notification of acceptance with the Water Quality Improvement Plan by the San Diego Water Board Executive Officer.
- (6) During implementation of the Water Quality Improvement Plan the Copermittees must correct any deficiencies in the Plan identified by the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report following a request by the Board to do so.
- (7) The Water Quality Improvement Plan must be made available on the Regional Clearinghouse required pursuant to Provision **F.4** within 30 days of receiving notification of acceptance with the Water Quality Improvement Plan by the San Diego Water Board Executive Officer.

## **2. Updates**

### **a. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM DOCUMENT UPDATES**

Each Copermittee must update its jurisdictional runoff management program document in accordance with the following requirements:

- (1) Each Copermittee is encouraged to seek public and key stakeholder participation and comments, as early and often as possible during the process of developing updates to its jurisdictional runoff management program document;
- (2) Each Copermittee must update its jurisdictional runoff management program document to incorporate the requirements of Provision **E** concurrent with the submittal of the Water Quality Improvement Plan. Each Copermittee must correct any deficiencies in the jurisdictional runoff management program document based on comments received from the San Diego Water Board in

the updates submitted with the Water Quality Improvement Plan Annual Report;

- (3) Each Copermittee must submit updates to its jurisdictional runoff management program, with the supporting rationale for the modifications, either in the Water Quality Improvement Plan Annual Report required pursuant to Provision [F.3.b.\(3\)](#), or as part of the Report of Waste Discharge required pursuant to Provision [F.5.b](#);
- (4) The Copermittee must revise proposed modifications to its jurisdictional runoff management program as directed by the San Diego Water Board Executive Officer; and
- (5) Updated jurisdictional runoff management program documents must be made available on the Regional Clearinghouse required pursuant to Provision [F.4](#) within 30 days of submitting the Water Quality Improvement Plan Annual Report.

**b. BMP DESIGN MANUAL UPDATES**

Each Copermittee must update its BMP Design Manual in accordance with the following requirements:

- (1) Each Copermittee must update its BMP Design Manual to incorporate the requirements of Provisions [E.3.a-d](#) concurrent with the submittal of the Water Quality Improvement Plan. Each Copermittee must correct any deficiencies in the BMP Design Manual based on comments received from the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report;
- (2) Subsequent updates to the BMP Design Manual must be consistent with the requirements of Provisions [E.3.a-d](#) and must be submitted as part of the Water Quality Improvement Plan Annual Reports required pursuant to Provision [F.3.b.\(3\)](#), or as part of the Report of Waste Discharge required pursuant to Provision [F.5.b](#); and
- (3) Updated BMP Design Manuals must be made available on the Regional Clearinghouse required pursuant to Provision [F.4](#) within 30 days of completing the update.



**c. WATER QUALITY IMPROVEMENT PLAN UPDATES**

- (1) The Water Quality Improvement Plans must be updated in accordance with the following process:
  - (a) The Copermittees must develop and implement a public participation process to obtain data, information and recommendations for updating the Water Quality Improvement Plan. The public participation process must provide for a publicly available and noticed schedule of opportunities for the public to participate and provide comments during the development of updates to the Water Quality Improvement Plan;
  - (b) The Copermittees must consult with the Water Quality Improvement Consultation Panel on proposed updates of the Water Quality Improvement Plan, and consider the Water Quality Improvement Consultation Panel's recommendations in finalizing the proposed updates;
  - (c) The Copermittees for each Watershed Management Area must submit 1) proposed updates to the Water Quality Improvement Plan and supporting rationale, and 2) recommendations received from the public and the Water Quality Improvement Consultation Panel and the rationale for the requested updates, either in the Water Quality Improvement Plan Annual Reports required pursuant to Provision [F.3.b.\(3\)](#), or as part of the Report of Waste Discharge required pursuant to Provision [F.5.b](#). The updates submitted will be deemed accepted for inclusion in the Water Quality Improvement Plan ninety (90) days after submission unless otherwise directed in writing by the San Diego Water Board Executive Officer;
  - (d) The Copermittees must revise the requested updates as directed by the San Diego Water Board Executive Officer; and
  - (e) Updated Water Quality Improvement Plans must be made available on the Regional Clearinghouse required pursuant to Provision [F.4](#) within 30 days of acceptance of the requested updates by the San Diego Water Board.
- (2) No later than six months following Office of Administrative Law and USEPA approval of any TMDL Basin Plan amendment with wasteload allocations (WLAs) assigned to the Copermittees during the term of this Order, the Copermittees must initiate an update to the applicable Water Quality Improvement Plans in accordance with Provision [F.1](#) or Provision [F.2.c.\(1\)](#) to incorporate the requirements of the TMDL WLAs.

### 3. Progress Reporting

#### a. PROGRESS REPORT PRESENTATIONS

The Copermittees for each Watershed Management Area must periodically appear before the San Diego Water Board, as requested by the Board, to provide progress reports on the implementation of the Water Quality Improvement Plan and jurisdictional runoff management programs.

#### b. ANNUAL REPORTS

##### (1) Transitional Jurisdictional Runoff Management Program Annual Reports

- (a) Each Copermittee must complete and submit a Jurisdictional Runoff Management Program Annual Report Form (contained in [Attachment D](#) to this Order or a revised form accepted by the San Diego Water Board) no later than October 31 of each year for each jurisdictional runoff management program reporting period (i.e. July 1 to June 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted.
- (b) Each Copermittee must submit the information on the Jurisdictional Runoff Management Program Annual Report Form (contained in [Attachment D](#) to this Order or a revised form accepted by the San Diego Water Board) specific to the area within its jurisdiction in each Watershed Management Area.
- (c) In addition to submitting the Jurisdictional Runoff Management Program Annual Report Form during the transitional reporting period, each Copermittee may continue to utilize and submit the jurisdictional runoff management program annual reporting format of its previous NPDES permit until the first Water Quality Improvement Plan Annual Report is required to be submitted.

##### (2) Transitional Monitoring and Assessment Program Annual Reports

The Copermittees for each Watershed Management Area must submit a Transitional Monitoring and Assessment Program Annual Report no later than January 31 for each complete transitional monitoring and assessment program reporting period (i.e. October 1 to September 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted under this Order. The Transitional Monitoring and Assessment Program Annual Reports must include:

- (a) The receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions [D.1.a](#) and [D.2.a](#), summarized and presented in tabular and graphical form; and

- (b) The findings from the assessments required pursuant to Provisions [D.4.a.\(1\)\(a\)](#), [D.4.b.\(1\)\(a\)\(i\)](#), [D.4.b.\(2\)\(a\)\(i\)](#).

(3) Water Quality Improvement Plan Annual Reports

The Copermittees for each Watershed Management Area must submit a Water Quality Improvement Plan Annual Report for each reporting period no later than January 31 of the following year. The annual reporting period consists of two different periods: 1) July 1 to June 30 of the following year for the jurisdictional runoff management programs, 2) October 1 to September 30 of the following year for the monitoring and assessment programs. The Water Quality Improvement Plan Annual Reports must be made available on the Regional Clearinghouse required pursuant to Provision [F.4](#). Each Annual Report must include the following:

- (a) The receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions [D.1](#) and [D.2](#), summarized and presented in tabular and graphical form;
- (b) The progress of the special studies required pursuant to Provision [D.3](#), and the findings, interpretations and conclusions of a special study, or each phase of a special study, upon its completion;
- (c) The findings, interpretations and conclusions from the assessments required pursuant to Provision [D.4](#);
- (d) The progress of implementing the Water Quality Improvement Plan, including, but not limited to, the following:
- (i) The progress toward achieving the interim and final numeric goals for the highest water quality priorities for the Watershed Management Area;
  - (ii) The water quality improvement strategies that were implemented and/or no longer implemented by each of the Copermittees during the reporting period and previous reporting periods;
  - (iii) The water quality improvement strategies planned for implementation during the next reporting period;
  - (iv) Proposed modifications to the water quality improvement strategies, the public comments received and the supporting rationale for the proposed modifications;
  - (v) Previous modifications or updates incorporated into the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document and implemented by the Copermittees in the Watershed Management Area; and

- (vi) Proposed modifications or updates to the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document;
- (e) A completed Jurisdictional Runoff Management Program Annual Report Form (contained in [Attachment D](#) to this Order or a revised form accepted by the San Diego Water Board) for each Copermittee in the Watershed Management Area, certified by a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative; and
- (f) Each Copermittee must provide any data or documentation utilized in developing the Water Quality Improvement Plan Annual Report upon request by the San Diego Water Board. Any Copermittee monitoring data utilized in developing the Water Quality Improvement Plan Annual Report must be uploaded to the California Environmental Data Exchange Network (CEDEN).<sup>29</sup> Any Copermittee monitoring and assessment data utilized in developing the Water Quality Improvement Plan Annual Report must be available for access on the Regional Clearinghouse required pursuant to Provision [F.4](#).

### **C. REGIONAL MONITORING AND ASSESSMENT REPORT**

- (1) The Copermittees must submit a Regional Monitoring and Assessment Report no later than 180 days prior to the expiration date of this Order. The Regional Monitoring and Assessment Report may be submitted as part of the Report of Waste Discharge required pursuant to Provision [F.5.b](#). In preparing the report the Copermittees must consider the receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions [D.1](#) and [D.2](#), and the findings, interpretations, and conclusions from the assessments required pursuant to Provision [D.4](#). Based on these considerations the report must assess the following:
  - (a) The beneficial uses of the receiving waters within the San Diego Region that are supported and not adversely affected by the Copermittees' MS4 discharges;
  - (b) The beneficial uses of the receiving waters within the San Diego Region that are adversely impacted by the Copermittees' MS4 discharges;
  - (c) The progress toward protecting the beneficial uses in the receiving waters within the San Diego Region from the Copermittees' discharges; and

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<sup>29</sup> Data must be uploaded to CEDEN Southern California Regional Data Center (<http://www.sccwrp.org/Data/DataSubmission/SouthernCaliforniaRegionalDataCenter.aspx>) using the templates provided on the CEDEN website.

- (d) Pollutants or conditions of emerging concern that may impact beneficial uses in the receiving waters within the San Diego Region.
- (2) The Regional Monitoring and Assessment Report must include recommendations for improving the implementation and assessment of the Water Quality Improvement Plans and jurisdictional runoff management programs.
- (3) Each Copermittee must provide any data or documentation utilized in developing the Regional Monitoring and Assessment Report upon request by the San Diego Water Board. Any Copermittee monitoring and assessment data utilized in developing the Regional Monitoring and Assessment Report must be available for access on the Regional Clearinghouse required pursuant to Provision [F.4](#).

#### 4. Regional Clearinghouse

The Copermittees must develop, update, and maintain an internet-based Regional Clearinghouse that is made available to the public no later than 18 months after the effective date of this Order.<sup>30</sup>

- a. The Copermittees, through the Regional Clearinghouse, must make the following documents and data available for access, and organized by Watershed Management Area. The documents and data may be linked to other internet-based data portals and databases where the original documents are stored:
  - (1) Water Quality Improvement Plan for the Watershed Management Area, and all updated versions with date of update;
  - (2) Annual Reports for the Watershed Management Area;
  - (3) Jurisdictional Runoff Management Program document for each Copermittee within the Watershed Management Area, and all updated versions with date of update;
  - (4) BMP Design Manual for each Copermittee within the Watershed Management Area, and all updated versions with date of update;
  - (5) Reports from special studies (e.g. source identification, BMP effectiveness assessment) conducted in the Watershed Management Area;

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<sup>30</sup> The Copermittees may develop, update and maintain the clearinghouse(s) of other Copermittees or agencies.

- (6) Monitoring data collected pursuant to Provision D for each Watershed Management Area must be uploaded to CEDEN,<sup>31</sup> with links to the uploaded data; and
  - (7) Available GIS data, layers, and/or shapefiles used to develop the maps generated and maintained by the Copermittees for the Water Quality Improvement Plans, Annual Reports, and jurisdictional runoff management program documents.
- b.** The Copermittees, through the Regional Clearinghouse, must make the following information and documents available for access:
- (1) Contact information (point of contact, phone number, email address, and mailing address) for each Copermittee;
  - (2) Public hotline number for reporting non-storm water and illicit discharges for each Copermittee;
  - (3) Email address for reporting non-storm water and illicit discharges for each Copermittee;
  - (4) Link to each Copermittee's website, if available, where the public may find additional information about the Copermittee's storm water management program and for requesting records for the implementation of its program;
  - (5) Information about opportunities for the public to participate in programs and/or activities that can result in the prevention or elimination of non-storm water discharges to the MS4, reduction of pollutants in storm water discharges from the MS4, and/or protection of the quality of receiving waters; and
  - (6) Reports from regional monitoring programs in which the Copermittees participate (e.g. Southern California Monitoring Coalition, Southern California Coastal Water Research Project Bight Monitoring);
  - (7) Regional Monitoring and Assessment Reports; and
  - (8) Any other information, data, and documents the Copermittees determine as appropriate for making available to the public.

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<sup>31</sup> Data must be uploaded to CEDEN Southern California Regional Data Center (<http://www.sccwrp.org/Data/DataSubmission/SouthernCaliforniaRegionalDataCenter.aspx>) using the templates provided on the CEDEN website.

## 5. Report of Waste Discharge

- a. The Orange County Copermittees and the Riverside County Copermittees are required to submit a complete Report of Waste Discharge pursuant to the requirements of their current Orders. The San Diego Water Board will review and consider the Reports of Waste Discharge to determine whether modification to this Order, pursuant to the requirements of Provision H, will be required prior to the Orange County Copermittees and/or Riverside County Copermittees obtaining coverage under this Order. The current Orders for the Orange County Copermittees and Riverside County Copermittees are rescinded upon the date of effective coverage under this Order except for enforcement purposes.
- b. The Copermittees subject to the requirements of this Order must submit to the San Diego Water Board a complete Report of Waste Discharge as an application for the re-issuance of this Order and NPDES permit. The Report of Waste Discharge must be submitted no later than 180 days in advance of the expiration date of this Order. The Report of Waste Discharge must contain the following minimum information:
  - (1) Names and addresses of the Copermittees;
  - (2) Names and titles of the primary contacts of the Copermittees;
  - (3) Proposed changes to the Copermittees' Water Quality Improvement Plans and the supporting justification;
  - (4) Proposed changes to the Copermittees' jurisdictional runoff management programs and the supporting justification;
  - (5) Any other information necessary for the re-issuance of this Order;
  - (6) Any information to be included as part of the Report of Waste Discharge pursuant to the requirements of this Order; and
  - (7) Any other information required by federal regulations for NPDES permit reissuance.

## 6. Application for Early Coverage

- a. The Orange County Copermittees, collectively, or Riverside County Copermittees, collectively, may apply for early coverage under this Order by submitting a Report of Waste Discharge [Form 200](#), with a written request for early coverage under this Order.
- b. The San Diego Water Board will review the application for early coverage. A notification of coverage under this Order will be issued to the Copermittees in the

respective county by the San Diego Water Board upon completion of the early coverage application requirements. The effective coverage date will be specified in the notification of coverage. The Copermittees in the respective county are authorized to have MS4 discharges pursuant to the requirements of this Order starting on the effective coverage date specified in the notification of coverage. The existing Order for the respective county is rescinded upon the effective coverage date specified in the notification of coverage except for enforcement purposes.

## **7. Reporting Provisions**

Each Copermittee must comply with all the reporting and recordkeeping provisions of the Standard Permit Provisions and General Provisions contained in [Attachment B](#) to this Order.



**G. PRINCIPAL WATERSHED COPERMITTEE RESPONSIBILITIES**

1. The Copermittees within each Watershed Management Area must designate a Principal Watershed Copermittee and notify the San Diego Water Board of the name of the Principal Watershed Copermittee. An individual Copermittee should not be designated a Principal Watershed Copermittee for more than two Watershed Management Areas. The notification may be submitted with the Water Quality Improvement Plan required pursuant to Provision [F.1](#) of this Order.
2. The Principal Watershed Copermittee is responsible for, at a minimum, the following:
  - a. Serving as liaison between the Copermittees in the Watershed Management Area and the San Diego Water Board on general permit issues, and when necessary and appropriate, representing the Copermittees in the Watershed Management Area before the San Diego Water Board;
  - b. Facilitating the development of the Water Quality Improvement Plan in accordance with the requirements of Provision [B](#) of this Order;
  - c. Coordinating the submittal of the deliverables required by Provisions [F.1](#), [F.2](#), [F.3.a](#), and [F.3.b](#) of this Order; and
  - d. Coordinating and developing, with the other Principal Watershed Copermittees, the requirements of Provisions [F.3.c](#), [F.4](#), and [F.5.b](#) of this Order.
3. The Principal Watershed Copermittee is not responsible for ensuring that the other Copermittees within the Watershed Management Area are in compliance with the requirements of this Order. Each Copermittee within the Watershed Management Area is responsible for complying with the requirements of this Order.

## H. MODIFICATION OF ORDER

1. Modifications of the Order may be initiated by the San Diego Water Board or by the Copermittees. Requests by Copermittees must be made to the San Diego Water Board.
2. Minor modifications to the Order may be made by the San Diego Water Board where the proposed modification complies with all the prohibitions and limitations, and other requirements of this Order.
3. This Order may also be re-opened and modified, revoked and, reissued or terminated in accordance with the provisions of 40 CFR 122.44, 122.62 to 122.64, and 124.5. Causes for taking such actions include, but are not limited to, failure to comply with any condition of this Order and permit, and endangerment to human health or the environment resulting from the permitted activity.
4. This Order may be re-opened for modification for cause including but not limited to the following:
  - a. The State Water Board determines that revisions are warranted, and the San Diego Water Board concurs that revisions are necessary to those provisions of the Order addressing compliance with water quality standards in the receiving water and/or those provisions of the Order establishing an iterative process for implementation of management practices to assure compliance with water quality standards in the receiving water;
  - b. An application for early coverage under this Order is received pursuant to Provision [F.6](#);
  - c. Any of the TMDLs in [Attachment E](#) to this Order are amended in the Basin Plan by San Diego Water Board, and the amendment is approved by the State Water Board, Office of Administrative Law, and the USEPA;
  - d. The Basin Plan is amended by the San Diego Water Board to incorporate a new TMDL, and the amendment is approved by the State Water Board, Office of Administrative Law, and the USEPA; or
  - e. Updating or revising the monitoring and reporting requirements is determined to be necessary, at the discretion of the San Diego Water Board. Such modification(s) may include, but is (are) not limited to, revision(s) to: (i) implement recommendations from Southern California Coastal Water Research Project (SCCWRP), (ii) develop, refine, implement, and/or coordinate a regional monitoring program, (iii) develop and implement improved monitoring and assessment programs in keeping with San Diego Water Board Resolution No. R9-2012-0069, Resolution in Support of a Regional Monitoring Framework, and/or (iv) add provisions to require the Copermittees to evaluate and provide information on cost and values of the monitoring and reporting program.

5. The San Diego Water Board, after opportunity for public comment and a public hearing, will re-open and consider modifications to this Order when the Orange County Copermittees or the Riverside County Copermittees submit a complete Report of Waste Discharge pursuant to the requirements of their current Orders.

## **I. STANDARD PERMIT PROVISIONS AND GENERAL PROVISIONS**

Each Copermittee must comply with all the Standard Permit Provisions and General Provisions contained in [Attachment B](#) to this Order.

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## ATTACHMENT A

### DISCHARGE PROHIBITIONS AND SPECIAL PROTECTIONS

#### 1. Basin Plan Waste Discharge Prohibitions

California Water Code Section 13243 provides that a Regional Water Board, in a water quality control plan, may specify certain conditions or areas where the discharge of waste or certain types of waste is not permitted. The following waste discharge prohibitions in the Water Quality Control Plan for the San Diego Basin (Basin Plan) are applicable to any person, as defined by Section 13050(c) of the California Water Code, who is a citizen, domiciliary, or political agency or entity of California whose activities in California could affect the quality of waters of the state within the boundaries of the San Diego Region.

1. The discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in California Water Code Section 13050, is prohibited.
2. The discharge of waste to land, except as authorized by waste discharge requirements or the terms described in California Water Code Section 13264 is prohibited.
3. The discharge of pollutants or dredged or fill material to waters of the United States except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit or a dredged or fill material permit (subject to the exemption described in California Water Code Section 13376) is prohibited.
4. Discharges of recycled water to lakes or reservoirs used for municipal water supply or to inland surface water tributaries thereto are prohibited, unless this San Diego Water Board issues a NPDES permit authorizing such a discharge; the proposed discharge has been approved by the State Department of Health Services (DHS) and the operating agency of the impacted reservoir; and the discharger has an approved fail-safe long-term disposal alternative.
5. The discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited. Allowances for dilution may be made at the discretion of the San Diego Water Board. Consideration would include streamflow data, the degree of treatment provided and safety measures to ensure reliability of facility performance. As an example, discharge of secondary effluent would probably be permitted if streamflow provided 100:1 dilution capability.
6. The discharge of waste in a manner causing flow, ponding, or surfacing on lands not owned or under the control of the discharger is prohibited, unless the discharge is authorized by the San Diego Water Board.

7. The dumping, deposition, or discharge of waste directly into waters of the state, or adjacent to such waters in any manner which may permit its being transported into the waters, is prohibited unless authorized by the San Diego Water Board.
8. Any discharge to a storm water conveyance system that is not composed entirely of "*storm water*" is prohibited unless authorized by the San Diego Water Board. [The federal regulations, 40 CFR 122.26(b)(13), define storm water as storm water runoff, snow melt runoff, and surface runoff and drainage. 40 CFR 122.26(b)(2) defines an illicit discharge as any discharge to a storm water conveyance system that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities.] [§122.26 amended at 56 FR 56553, November 5, 1991; 57 FR 11412, April 2, 1992].
9. The unauthorized discharge of treated or untreated sewage to waters of the state or to a storm water conveyance system is prohibited.
10. The discharge of industrial wastes to conventional septic tank/subsurface disposal systems, except as authorized by the terms described in California Water Code Section 13264, is prohibited.
11. The discharge of radioactive wastes amenable to alternative methods of disposal into the waters of the state is prohibited.
12. The discharge of any radiological, chemical, or biological warfare agent into waters of the state is prohibited.
13. The discharge of waste into a natural or excavated site below historic water levels is prohibited unless the discharge is authorized by the San Diego Water Board.
14. The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited.
15. The discharge of treated or untreated sewage from vessels to Mission Bay, Oceanside Harbor, Dana Point Harbor, or other small boat harbors is prohibited.
16. The discharge of untreated sewage from vessels to San Diego Bay is prohibited.
17. The discharge of treated sewage from vessels to portions of San Diego Bay that are less than 30 feet deep at mean lower low water (MLLW) is prohibited.
18. The discharge of treated sewage from vessels, which do not have a properly functioning US Coast Guard certified Type I or Type II marine sanitation device, to portions of San Diego Bay that are greater than 30 feet deep at mean lower low water (MLLW) is prohibited.

## **2. Attachment B to State Water Board Resolution 2012-0012**

### **Special Protections for Areas of Special Biological Significance, Governing Point Source Discharges of Storm Water and Nonpoint Source Waste Discharges**

#### **I. PROVISIONS FOR POINT SOURCE DISCHARGES OF STORM WATER AND NONPOINT SOURCE WASTE DISCHARGES**

The following terms, prohibitions, and special conditions (hereafter collectively referred to as special conditions) are established as limitations on point source storm water and nonpoint source discharges. These special conditions provide Special Protections for marine aquatic life and natural water quality in Areas of Special Biological Significance (ASBS), as required for State Water Quality Protection Areas pursuant to California Public Resources Code Sections 36700(f) and 36710(f). These Special Protections are adopted by the State Water Board as part of the California Ocean Plan (Ocean Plan) General Exception.

The special conditions are organized by category of discharge. The State Water Resources Control Board (State Water Board) and Regional Water Quality Control Boards (Regional Water Boards) will determine categories and the means of regulation for those categories [e.g., Point Source Storm Water National Pollutant Discharge Elimination System (NPDES) or Nonpoint Source].

#### **A. PERMITTED POINT SOURCE DISCHARGES OF STORM WATER**

##### **1. General Provisions for Permitted Point Source Discharges of Storm Water**

- a. Existing storm water discharges into an ASBS are allowed only under the following conditions:
  - (1) The discharges are authorized by an NPDES permit issued by the State Water Board or Regional Water Board;
  - (2) The discharges comply with all of the applicable terms, prohibitions, and special conditions contained in these Special Protections; and
  - (3) The discharges:
    - (i) Are essential for flood control or slope stability, including roof, landscape, road, and parking lot drainage;
    - (ii) Are designed to prevent soil erosion;
    - (iii) Occur only during wet weather;
    - (iv) Are composed of only storm water runoff.
- b. Discharges composed of storm water runoff shall not alter natural ocean water quality in an ASBS.
- c. The discharge of trash is prohibited.



- d. Only discharges from existing storm water outfalls are allowed. Any proposed or new storm water runoff discharge shall be routed to existing storm water discharge outfalls and shall not result in any new contribution of waste to an ASBS (i.e., no additional pollutant loading). "Existing storm water outfalls" are those that were constructed or under construction prior to January 1, 2005. "New contribution of waste" is defined as any addition of waste beyond what would have occurred as of January 1, 2005. A change to an existing storm water outfall, in terms of re-location or alteration, in order to comply with these special conditions, is allowed and does not constitute a new discharge.
  - e. Non-storm water discharges are prohibited except as provided below:
    - (1) The term "non-storm water discharges" means any waste discharges from a municipal separate storm sewer system (MS4) or other NPDES permitted storm drain system to an ASBS that are not composed entirely of storm water.
    - (2) (i) The following non-storm water discharges are allowed, provided that the discharges are essential for emergency response purposes, structural stability, slope stability or occur naturally:
      - (a) Discharges associated with emergency firefighting operations.
      - (b) Foundation and footing drains.
      - (c) Water from crawl space or basement pumps.
      - (d) Hillside dewatering.
      - (e) Naturally occurring groundwater seepage via a storm drain.
      - (f) Non-anthropogenic flows from a naturally occurring stream via a culvert or storm drain, as long as there are no contributions of anthropogenic runoff.
    - (ii) An NPDES permitting authority may authorize non-storm water discharges to an MS4 with a direct discharge to an ASBS only to the extent the NPDES permitting authority finds that the discharge does not alter natural ocean water quality in the ASBS.
  - (3) Authorized non-storm water discharges shall not cause or contribute to a violation of the water quality objectives in Chapter II of the Ocean Plan nor alter natural ocean water quality in an ASBS.
2. Compliance Plans for Inclusion in Storm Water Management Plans (SWMP) and Storm Water Pollution Prevention Plans (SWPPP).

The discharger shall specifically address the prohibition of non-storm water runoff and the requirement to maintain natural water quality for storm water discharges to an ASBS in an ASBS Compliance Plan to be included in its SWMP or a SWPPP, as appropriate to permit type. If a statewide permit includes a SWMP, then the discharger shall prepare a stand-alone compliance plan for ASBS discharges. The ASBS Compliance Plan is subject to approval by the Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (for permits issued by Regional Water Boards).

- a. The Compliance Plan shall include a map of surface drainage of storm water runoff, showing areas of sheet runoff, prioritize discharges, and describe any structural Best Management Practices (BMPs) already employed and/or BMPs to be employed in the future. Priority discharges are those that pose the greatest water quality threat and which are identified to require installation of structural BMPs. The map shall also show the storm water conveyances in relation to other features such as service areas, sewage conveyances and treatment facilities, landslides, areas prone to erosion, and waste and hazardous material storage areas, if applicable. The SWMP or SWPPP shall also include a procedure for updating the map and plan when changes are made to the storm water conveyance facilities.
- b. The ASBS Compliance Plan shall describe the measures by which all non-authorized non-storm water runoff (e.g., dry weather flows) has been eliminated, how these measures will be maintained over time, and how these measures are monitored and documented.
- c. For Municipal Separate Storm Sewer System (MS4s), the ASBS Compliance Plan shall require minimum inspection frequencies as follows:
  - (1) The minimum inspection frequency for construction sites shall be weekly during rainy season;
  - (2) The minimum inspection frequency for industrial facilities shall be monthly during the rainy season;
  - (3) The minimum inspection frequency for commercial facilities (e.g., restaurants) shall be twice during the rainy season; and
  - (4) Storm water outfall drains equal to or greater than 18 inches (457 mm) in diameter or width shall be inspected once prior to the beginning of the rainy season and once during the rainy season and maintained to remove trash and other anthropogenic debris.
- d. The ASBS Compliance Plan shall address storm water discharges (wet weather flows) and, in particular, describe how pollutant reductions in storm water runoff, that are necessary to comply with these special conditions, will be achieved through BMPs. Structural BMPs need not be installed if the discharger can document to the satisfaction of the State Water Board Executive Director (statewide permits) or Regional Water Board Executive Officer (Regional Water Board permits) that such installation would pose a threat to health or safety. BMPs to control storm water runoff discharges (at the end-of-pipe) during a design storm shall be designed to achieve on average the following target levels:
  - (1) Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan; or
  - (2) A 90% reduction in pollutant loading during storm events, for the applicant's total discharges. The baseline for the reduction is the effective date of the Exception. The baseline for these determinations is the effective date of the Exception, and the

reductions must be achieved and documented within four (4) years of the effective date.

- e. The ASBS Compliance Plan shall address erosion control and the prevention of anthropogenic sedimentation in ASBS. The natural habitat conditions in the ASBS shall not be altered as a result of anthropogenic sedimentation.
- f. The ASBS Compliance Plan shall describe the non-structural BMPs currently employed and planned in the future (including those for construction activities), and include an implementation schedule. The ASBS Compliance Plan shall include non-structural BMPs that address public education and outreach. Education and outreach efforts must adequately inform the public that direct discharges of pollutants from private property not entering an MS4 are prohibited. The ASBS Compliance Plan shall also describe the structural BMPs, including any low impact development (LID) measures, currently employed and planned for higher threat discharges and include an implementation schedule. To control storm water runoff discharges (at the end-of-pipe) during a design storm, permittees must first consider using LID practices to infiltrate, use, or evapotranspire storm water runoff on-site.
- g. The BMPs and implementation schedule shall be designed to ensure that natural water quality conditions in the receiving water are achieved and maintained by either reducing flows from impervious surfaces or reducing pollutant loading, or some combination thereof.
- h. If the results of the receiving water monitoring described in IV.B. of these special conditions indicate that the storm water runoff is causing or contributing to an alteration of natural ocean water quality in the ASBS, the discharger shall submit a report to the State Water Board and Regional Water Board within 30 days of receiving the results.
  - (1) The report shall identify the constituents in storm water runoff that alter natural ocean water quality and the sources of these constituents.
  - (2) The report shall describe BMPs that are currently being implemented, BMPs that are identified in the SWMP or SWPPP for future implementation, and any additional BMPs that may be added to the SWMP or SWPPP to address the alteration of natural water quality. The report shall include a new or modified implementation schedule for the BMPs.
  - (3) Within 30 days of the approval of the report by the State Water Board Executive Director (statewide permits) or Regional Water Board Executive Officer (Regional Water Board permits), the discharger shall revise its ASBS Compliance Plan to incorporate any new or modified BMPs that have been or will be implemented, the implementation schedule, and any additional monitoring required.
  - (4) As long as the discharger has complied with the procedures described above and is implementing the revised SWMP or SWPPP, the discharger does not have to repeat the same procedure for continuing or recurring exceedances of natural ocean water quality conditions due to the same constituent.
  - (5) Compliance with this section does not excuse violations of any term, prohibition, or condition contained in these Special Protections.

### 3. Compliance Schedule

- a. On the effective date of the Exception, all non-authorized non-storm water discharges (e.g., dry weather flow) are effectively prohibited.
- b. Within one year from the effective date of the Exception, the discharger shall submit a written ASBS Compliance Plan to the State Water Board Executive Director (statewide permits) or Regional Water Board Executive Officer (Regional Water Board permits) that describes its strategy to comply with these special conditions, including the requirement to maintain natural water quality in the affected ASBS. The ASBS Compliance Plan shall include a time schedule to implement appropriate non-structural and structural controls (implementation schedule) to comply with these special conditions for inclusion in the discharger's SWMP or SWPPP, as appropriate to permit type.
- c. Within 18 months of the effective date of the Exception, any non-structural controls that are necessary to comply with these special conditions shall be implemented.
- d. Within four (4) years of the effective date of the Exception, any structural controls identified in the ASBS Compliance Plan that are necessary to comply with these special conditions shall be operational.
- e. Within four (4) years of the effective date of the Exception, all dischargers must comply with the requirement that their discharges into the affected ASBS maintain natural ocean water quality. If the initial results of post-storm receiving water quality testing indicate levels higher than the 85<sup>th</sup> percentile threshold of reference water quality data and the pre-storm receiving water levels, then the discharger must re-sample the receiving water, pre- and post-storm. If after re-sampling the post-storm levels are still higher than the 85<sup>th</sup> percentile threshold of reference water quality data, and the pre-storm receiving water levels, for any constituent, then natural ocean water quality is exceeded. See attached Flowchart.
- f. The Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (Regional Water Board permits) may only authorize additional time to comply with the special conditions d. and e., above if good cause exists to do so. Good cause means a physical impossibility or lack of funding.

If a discharger claims physical impossibility, it shall notify the Board in writing within thirty (30) days of the date that the discharger first knew of the event or circumstance that caused or would cause it to fail to meet the deadline in d. or e. The notice shall describe the reason for the noncompliance or anticipated noncompliance and specifically refer to this Section of this Exception. It shall describe the anticipated length of time the delay in compliance may persist, the cause or causes of the delay as well as measures to minimize the impact of the delay on water quality, the measures taken or to be taken by the discharger to prevent or minimize the delay, the schedule by which the measures will be implemented, and the anticipated date of compliance. The discharger shall adopt all reasonable measures to avoid and minimize such delays and their impact on water quality.

The discharger may request an extension of time for compliance based on lack of funding. The request for an extension shall require:

- (1) for municipalities, a demonstration of significant hardship to discharger ratepayers, by showing the relationship of storm water fees to annual household income for residents within the discharger's jurisdictional area, and the discharger has made timely and complete applications for all available bond and grant funding, and either no bond or grant funding is available, or bond and/or grant funding is inadequate; or
- (2) for other governmental agencies, a demonstration and documentation of a good faith effort to acquire funding through that agency's budgetary process.

## **B. NONPOINT SOURCE DISCHARGES**

*[NOT INCLUDED]*

*[PROVISIONS FOR NONPOINT SOURCE DISCHARGES NOT APPLICABLE]*

## **II. ADDITIONAL REQUIREMENTS FOR PARKS AND RECREATION FACILITIES**

*[NOT INCLUDED]*

*[ADDITIONAL REQUIREMENTS FOR PARKS AND RECREATION FACILITIES NOT APPLICABLE]*

## **III. ADDITIONAL REQUIREMENTS – WATERFRONT AND MARINE OPERATIONS**

*[NOT INCLUDED]*

*[ADDITIONAL REQUIREMENTS FOR WATERFRONT AND MARINE OPERATIONS NOT APPLICABLE]*

## **IV. MONITORING REQUIREMENTS**

Monitoring is mandatory for all dischargers to assure compliance with the Ocean Plan. Monitoring requirements include both: (A) core discharge monitoring, and (B) ocean receiving water monitoring. The State and Regional Water Boards must approve sampling site locations and any adjustments to the monitoring programs. All ocean receiving water and reference area monitoring must be comparable with the Water Boards' Surface Water Ambient Monitoring Program (SWAMP).

Safety concerns: Sample locations and sampling periods must be determined considering safety issues. Sampling may be postponed upon notification to the State and Regional Water Boards if hazardous conditions prevail.

Analytical Chemistry Methods: All constituents must be analyzed using the lowest minimum detection limits comparable to the Ocean Plan water quality objectives. For metal analysis, all samples, including storm water effluent, reference samples, and ocean receiving water samples, must be analyzed by the approved analytical method with the lowest minimum detection limits (currently Inductively Coupled Plasma/Mass Spectrometry) described in the Ocean Plan.

**A. CORE DISCHARGE MONITORING PROGRAM**

## 1. General sampling requirements for timing and storm size:

Runoff must be collected during a storm event that is greater than 0.1 inch and generates runoff, and at least 72 hours from the previously measurable storm event. Runoff samples shall be collected when post-storm receiving water is sampled, and analyzed for the same constituents as receiving water and reference site samples (see section IV B) as described below.

## 2. Runoff flow measurements

- a. For municipal/industrial storm water outfalls in existence as of December 31, 2007, 18 inches (457mm) or greater in diameter/width (including multiple outfall pipes in combination having a width of 18 inches, runoff flows must be measured or calculated, using a method acceptable to and approved by the State and Regional Water Boards.
- b. This will be reported annually for each precipitation season to the State and Regional Water Boards.

## 3. Runoff samples – storm events

- a. For outfalls equal to or greater than 18 inches (0.46m) in diameter or width:
  - (1) Samples of storm water runoff shall be analyzed during the same storm as receiving water samples for oil and grease, total suspended solids, and, within the range of the southern sea otter indicator bacteria or some other measure of fecal contamination; and
  - (2) Samples of storm water runoff shall be analyzed for critical life stage chronic toxicity (one invertebrate or algal species) at least once during each storm season when receiving water is sampled in the ASBS
  - (3) If an applicant has no outfall greater than 36 inches, then storm water runoff from the applicant's largest outfall shall be further analyzed during the same storm as receiving water samples for Ocean Plan Table B metals for protection of marine life, Ocean Plan polynuclear aromatic hydrocarbons (PAHs), current use pesticides (pyrethroids and OP pesticides), and nutrients (ammonia, nitrate and phosphates).
- b. For outfalls equal to or greater than 36 inches (0.91m) in diameter or width:
  - (1) Samples of storm water runoff shall be analyzed during the same storm as receiving water samples for oil and grease, total suspended solids, and, within the range of the southern sea otter indicator bacteria or some other measure of fecal contamination; and
  - (2) Samples of storm water runoff shall be further analyzed during the same storm as receiving water samples for Ocean Plan Table B metals for protection of marine life, Ocean Plan polynuclear aromatic hydrocarbons (PAHs), current use pesticides (pyrethroids and OP pesticides), and nutrients (ammonia, nitrate and phosphates) and

- (3) Samples of storm water runoff shall be analyzed for critical life stage chronic toxicity (one invertebrate or algal species) at least once during each storm season when receiving water is sampled in the ASBS.
  - c. For an applicant not participating in a regional monitoring program [see below in Section IV (B)] in addition to (a.) and (b.) above, a minimum of the two largest outfalls or 20 percent of the larger outfalls, whichever is greater, shall be sampled (flow weighted composite samples) at least three times annually during wet weather (storm event) and analyzed for all Ocean Plan Table A constituents, Table B constituents for marine aquatic life protection (except for toxicity, only chronic toxicity for three species shall be required), DDT, PCBs, Ocean Plan PAHs, OP pesticides, pyrethroids, nitrates, phosphates, and Ocean Plan indicator bacteria. For parties discharging to ASBS in more than one Regional Water Board region, at a minimum, one (the largest) such discharge shall be sampled annually in each Region.
4. The Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (Regional Water Board permits) may reduce or suspend core monitoring once the storm runoff is fully characterized. This determination may be made at any point after the discharge is fully characterized, but is best made after the monitoring results from the first permit cycle are assessed.

## **B. OCEAN RECEIVING WATER AND REFERENCE AREA MONITORING PROGRAM**

In addition to performing the Core Discharge Monitoring Program in Section II.A above, all applicants having authorized discharges must perform ocean receiving water monitoring. In order to fulfill the requirements for monitoring the physical, chemical, and biological characteristics of the ocean receiving waters within their ASBS, dischargers may choose either (1) an individual monitoring program, or (2) participation in a regional integrated monitoring program.

1. Individual Monitoring Program: The requirements listed below are for those dischargers who elect to perform an individual monitoring program to fulfill the requirements for monitoring the physical, chemical, and biological characteristics of the ocean receiving waters within the affected ASBS. In addition to Core Discharge Monitoring, the following additional monitoring requirements shall be met:
  - a. Three times annually, during wet weather (storm events), the receiving water at the point of discharge from the outfalls described in section (IV)(A)(3)(c) above shall be sampled and analyzed for Ocean Plan Table A constituents, Table B constituents for marine aquatic life, DDT, PCBs, Ocean Plan PAHs, OP pesticides, pyrethroids, nitrates, phosphates, salinity, chronic toxicity (three species), and Ocean Plan indicator bacteria.

The sample location for the ocean receiving water shall be in the surf zone at the point of discharges; this must be at the same location where storm water runoff is sampled. Receiving water shall be sampled at approximately the same time prior to (pre-storm) and during (or immediately after) the same storm (post storm). Reference water quality shall also be sampled and analyzed for the same constituents pre-storm and post-storm, during the same storms when receiving water is sampled. Reference stations will be determined by the State Water Board's Division of Water Quality and the applicable Regional Water Board(s).

- b. Sediment sampling shall occur at least three times during every five (5) year period. The subtidal sediment (sand or finer, if present) at the discharge shall be sampled and analyzed for Ocean Plan Table B constituents for marine aquatic life, DDT, PCBs, PAHs, pyrethroids, and OP pesticides. For sediment toxicity testing, only an acute toxicity test using the amphipod *Eohaustorius estuarius* must be performed.
  - c. A quantitative survey of intertidal benthic marine life shall be performed at the discharge and at a reference site. The survey shall be performed at least once every five (5) year period. The survey design is subject to approval by the Regional Water Board and the State Water Board's Division of Water Quality. The results of the survey shall be completed and submitted to the State Water Board and Regional Water Board at least six months prior to the end of the permit cycle.
  - d. Once during each five (5) year period, a bioaccumulation study shall be conducted to determine the concentrations of metals and synthetic organic pollutants at representative discharge sites and at representative reference sites. The study design is subject to approval by the Regional Water Board and the State Water Board's Division of Water Quality. The bioaccumulation study may include California mussels (*Mytilus californianus*) and/or sand crabs (*Emerita analoga* or *Blepharipoda occidentalis*). Based on the study results, the Regional Water Board and the State Water Board's Division of Water Quality, may adjust the study design in subsequent permits, or add or modify additional test organisms (such as shore crabs or fish), or modify the study design appropriate for the area and best available sensitive measures of contaminant exposure.
  - e. Marine Debris: Representative quantitative observations for trash by type and source shall be performed along the coast of the ASBS within the influence of the discharger's outfalls. The design, including locations and frequency, of the marine debris observations is subject to approval by the Regional Water Board and State Water Board's Division of Water Quality.
  - f. The monitoring requirements of the Individual Monitoring Program in this section are minimum requirements. After a minimum of one (1) year of continuous water quality monitoring of the discharges and ocean receiving waters, the Executive Director of the State Water Board (statewide permits) or Executive officer of the Regional Water Board (Regional Water Board permits) may require additional monitoring, or adjust, reduce or suspend receiving water and reference station monitoring. This determination may be made at any point after the discharge and receiving water is fully characterized, but is best made after the monitoring results from the first permit cycle are assessed.
2. Regional Integrated Monitoring Program: Dischargers may elect to participate in a regional integrated monitoring program, in lieu of an individual monitoring program, to fulfill the requirements for monitoring the physical, chemical, and biological characteristics of the ocean receiving waters within their ASBS. This regional approach shall characterize natural water quality, pre- and post-storm, in ocean reference areas near the mouths of identified open space watersheds and the effects of the discharges on natural water quality (physical, chemical, and toxicity) in the ASBS receiving waters, and should include benthic marine aquatic life and bioaccumulation components. The design of the ASBS stratum of a regional integrated monitoring program may deviate from the otherwise prescribed individual monitoring approach (in Section IV.B.1) if approved by the State Water Board's Division of Water Quality and the Regional Water Boards.



- a. Ocean reference areas shall be located at the drainages of flowing watersheds with minimal development (in no instance more than 10% development), and shall not be located in CWA Section 303(d) listed waterbodies or have tributaries that are 303(d) listed. Reference areas shall be free of wastewater discharges and anthropogenic non-storm water runoff. A minimum of low threat storm runoff discharges (e.g. stream highway overpasses and campgrounds) may be allowed on a case-by-case basis. Reference areas shall be located in the same region as the ASBS receiving water monitoring occurs. The reference areas for each Region are subject to approval by the participants in the regional monitoring program and the State Water Board's Division of Water Quality and the applicable Regional Water Board(s). A minimum of three ocean reference water samples must be collected from each station, each from a separate storm. A minimum of one reference location shall be sampled for each ASBS receiving water site sampled per responsible party. For parties discharging to ASBS in more than one Regional Water Board region, at a minimum, one reference station and one receiving water station shall be sampled in each region.
  - b. ASBS ocean receiving water must be sampled in the surf zone at the location where the runoff makes contact with ocean water (i.e. at "point zero"). Ocean receiving water stations must be representative of worst-case discharge conditions (i.e. co-located at a large drain greater than 36 inches, or if drains greater than 36 inches are not present in the ASBS then the largest drain greater than 18 inches.) Ocean receiving water stations are subject to approval by the participants in the regional monitoring program and the State Water Board's Division of Water Quality and the applicable Regional Water Board(s). A minimum of three ocean receiving water samples must be collected during each storm season from each station, each from a separate storm. A minimum of one receiving water location shall be sampled in each ASBS per responsible party in that ASBS. For parties discharging to ASBS in more than one Regional Water Board region, at a minimum, one reference station and one receiving water station shall be sampled in each region.
  - c. Reference and receiving water sampling shall commence during the first full storm season following the adoption of these special conditions, and post-storm samples shall be collected when annual storm water runoff is sampled. Sampling shall occur in a minimum of two storm seasons. For those ASBS dischargers that have already participated in the Southern California Bight 2008 ASBS regional monitoring effort, sampling may be limited to only one storm season.
  - d. Receiving water and reference samples shall be analyzed for the same constituents as storm water runoff samples. At a minimum, constituents to be sampled and analyzed in reference and discharge receiving waters must include oil and grease, total suspended solids, Ocean Plan Table B metals for protection of marine life, Ocean Plan PAHs, pyrethroids, OP pesticides, ammonia, nitrate, phosphates, and critical life stage chronic toxicity for three species. In addition, within the range of the southern sea otter, indicator bacteria or some other measure of fecal contamination shall be analyzed.
3. Waterfront and Marine Operations: In addition to the above requirements for ocean receiving water monitoring, additional monitoring must be performed for marinas and boat launch and pier facilities:

- a. For all marina or mooring field operators, in mooring fields with 10 or more occupied moorings, the ocean receiving water must be sampled for Ocean Plan indicator bacteria, residual chlorine, copper, zinc, grease and oil, methylene blue active substances (MBAS), and ammonia nitrogen.
  - (1) For mooring field operators opting for an individual monitoring program (Section IV.B.1 above), this sampling must occur weekly (on the weekend) from May through October.
  - (2) For mooring field operators opting to participate in a regional integrated monitoring program (Section IV.B.2 above), this sampling must occur monthly from May through October on a high use weekend in each month. The Water Boards may allow a reduction in the frequency of sampling, through the regional monitoring program, after the first year of monitoring.
- b. For all mooring field operators, the subtidal sediment (sand or finer, if present) within mooring fields and below piers shall be sampled and analyzed for Ocean Plan Table B metals (for marine aquatic life beneficial use), acute toxicity, PAHs, and tributyltin. For sediment toxicity testing, only an acute toxicity test using the amphipod *Eohaustorius estuarius* must be performed. This sampling shall occur at least three times during a five (5) year period. For mooring field operators opting to participate in a regional integrated monitoring program, the Water Boards may allow a reduction in the frequency of sampling after the first sampling effort's results are assessed.

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## ATTACHMENT B

### STANDARD PERMIT PROVISIONS AND GENERAL PROVISIONS

#### 1. Standard Permit Provisions

Code of Federal Regulations Title 40 Section 122.41 (40 CFR 122.41) includes conditions, or provisions, that apply to all National Pollutant Discharge Elimination System (NPDES) permits. Additional provisions applicable to NPDES permits are in 40 CFR 122.42. All applicable provisions in 40 CFR 122.41 and 40 CFR 122.42 must be incorporated into this Order and NPDES permit. The applicable 40 CFR 122.41 and 40 CFR 122.42 provisions are as follows:

**a. DUTY TO COMPLY** [40 CFR 122.41(a)]

The Copermittee must comply with all of the provisions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act (CWA) and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

- (1) The Copermittee must comply with effluent standards or prohibitions established under Section 307(a) of the CWA for toxic pollutants and with standards for sewage sludge use or disposal established under Section 405(d) of the CWA within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if the permit has not yet been modified to incorporate the requirement. [40 CFR 122.41(a)(1)]
- (2) The CWA provides that any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the CWA, or any permit condition or limitation implementing any such sections in a permit issued under Section 402, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the CWA, is subject to a civil penalty not to exceed \$25,000 per day for each violation. The CWA provides that any person who *negligently* violates Section 301, 302, 306, 307, 308, 318, or 405 of the CWA, or any condition or limitation implementing any of such sections in a permit issued under Section 402 of the CWA, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the CWA, is subject to criminal penalties of \$2,500 to \$25,000 per day of violation, or imprisonment of not more than 1 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 2 years, or both. 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 3 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 6 years, or both. Any person who knowingly violates Section 301, 302, 303, 306, 307, 308, 318 or 405 of the CWA, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the CWA, 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 CWA, 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.

[40 CFR 122.41(a)(2)]

- (3) Any person may be assessed an administrative penalty by the San Diego Regional Water Quality Control Board (San Diego Water Board), State Water Resources Control Board (State Water Board), or United States Environmental Protection Agency (USEPA) for violating Section 301, 302, 306, 307, 308, 318 or 405 of the CWA, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act. Administrative penalties for Class I violations are not to exceed \$10,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed \$25,000. Penalties for Class II violations are not to exceed \$10,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed \$125,000.

[40 CFR 122.41(a)(3)]

**b. DUTY TO REAPPLY** [40 CFR 122.41(b)]

If a Copermittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the Copermittee must apply for and obtain a new permit.

**c. NEED TO HALT OR REDUCE ACTIVITY NOT A DEFENSE** [40 CFR 122.41(c)]

It shall not be a defense for a Copermittee 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.

**d. DUTY TO MITIGATE** [40 CFR 122.41(d)]

The Copermittee must take all reasonable steps to minimize or prevent any discharge or prevent any discharge or sludge use 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** [40 CFR 122.41(e)]

The Copermittee 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 Copermittee 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 that are installed by a Copermittee only when the operation is necessary to achieve compliance with the conditions of this permit.

**f. PERMIT ACTIONS** [40 CFR 122.41(f)]

This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the Copermittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

**g. PROPERTY RIGHTS** [40 CFR 122.41(g)]

This permit does not convey any property rights of any sort, or any exclusive privilege.

**h. DUTY TO PROVIDE INFORMATION** [40 CFR 122.41(h)]

The Copermittee must furnish to the San Diego Water Board, State Water Board, or USEPA within a reasonable time, any information which the San Diego Water Board, State Water Board, or USPEA may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The Copermittee must also furnish to the San Diego Water Board, State Water Board, or USPEA upon request, copies of records required to be kept by this permit.

**i. INSPECTION AND ENTRY** [40 CFR 122.41(i)]

The Copermittee must allow the San Diego Water Board, State Water Board, USEPA, and/or their authorized representative (including an authorized contractor acting as their representative), upon presentation of credentials and other documents as may be required by law, to:

- (1) Enter upon the Copermittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit; [40 CFR 122.41(i)(1)]
- (2) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit; [40 CFR 122.41(i)(2)]
- (3) Inspect and photograph at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; [40 CFR 122.41(i)(3)] and
- (4) Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the CWA, any substances or parameters at any location. [40 CFR 122.41(i)(4)]

**j. MONITORING AND RECORDS** [40 CFR 122.41(j)]

- (1) Samples and measurements taken for the purpose of monitoring must be representative of the monitored activity. [40 CFR 122.41(j)(1)]
- (2) Except for records of monitoring information required by this permit related to the Copermittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five (5) years (or longer as required by 40 CFR Part 503), the

Copermittee 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, and records of all data used to complete the application for this permit, for a period of at least three (3) years from the date of the sample, measurement, report or application. This period may be extended by request of the San Diego Water Board at any time. [40 CFR 122.41(j)(2)]

- (3) Records for monitoring information must include: [40 CFR 122.41(j)(3)]
- (a) The date, exact place, and time of sampling or measurements; [40 CFR 122.41(j)(3)(i)]
  - (b) The individual(s) who performed the sampling or measurements; [40 CFR 122.41(j)(3)(ii)]
  - (c) The date(s) analyses were performed; [40 CFR 122.41(j)(3)(iii)]
  - (d) The individual(s) who performed the analyses; [40 CFR 122.41(j)(3)(iv)]
  - (e) The analytical techniques or methods used; [40 CFR 122.41(j)(3)(v)] and
  - (f) The results of such analyses. [40 CFR 122.41(j)(3)(vi)]
- (4) Monitoring must be conducted according to test procedures under 40 CFR Part 136 unless another method is required under 40 CFR Subchapters N or O. [40 CFR 122.41(j)(4)]

In the case of pollutants for which there are no approved methods under 40 CFR Part 136 or otherwise required under 40 CFR Subchapters N and O, monitoring must be conducted according to a test procedure specified in the permit for such pollutants. [40 CFR 122.44(i)(1)(iv)]

- (5) The CWA 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 2 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 4 years, or both. [40 CFR 122.41(j)(5)]

**k. SIGNATORY REQUIREMENT** [40 CFR 122.41(k)]

- (1) All applications, reports, or information submitted to the San Diego Water Board, State Water Board, or USEPA must be signed and certified. (See 40 CFR 122.22) [40 CFR 122.41(k)(1)]
- (a) *For a municipality, State, Federal, or other public agency.* [All applications must be signed] by either a principal executive officer or ranking elected official. [40 CFR 122.22(a)(3)]
  - (b) All reports required by permits, and other information requested by the San Diego Water Board, State Water Board, or USEPA must be signed by a person described in paragraph (a) of this section, or by a duly authorized representative of that person. A person is a duly authorized representative only if: [40 CFR 122.22(b)]

- (i) The authorization is made in writing by a person described in paragraph (a) of this section; [40 CFR 122.22(b)(1)]
  - (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 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 company, (A duly authorized representative may thus be either a named individual or any individual occupying a named position.) [40 CFR 122.22(b)(2)] and,
  - (iii) The written authorization is submitted to the San Diego Water Board and State Water Board. [40 CFR 122.22(b)(3)]
- (c) *Changes to authorization.* If an authorization under paragraph (b) of this section 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 paragraph (b) of this section must be submitted to the San Diego Water Board prior to or together with any reports, information, or applications to be signed by an authorized representative. [40 CFR 122.22(c)]
- (d) *Certification.* Any person signing a document under paragraph (a) or (b) of 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.” [40 CFR 122.22(d)]
- (2) The CWA 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 6 months per violation, or by both. [40 CFR 122.41(k)(2)]

#### **I. REPORTING REQUIREMENTS** [40 CFR 122.41(l)]

- (1) *Planned changes.* The Copermittee must give notice to the San Diego Water Board as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when: [40 CFR 122.41(l)(1)]
- (a) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in 40 CFR 122.29(b); [40 CFR 122.41(l)(1)(i)] or
  - (b) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which



are subject neither to effluent limitations in the permit, nor to notification requirements under 40 CFR 122.42(a)(1).  
[40 CFR 122.41(l)(1)(ii)]

- (c) The alteration or addition results in a significant change in the Copermitttee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan. [40 CFR 122.41(l)(1)(iii)]
- (2) *Anticipated noncompliance.* The Copermitttee must give advance notice to the San Diego Water Board or State Water Board of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements. [40 CFR 122.41(l)(2)]
- (3) *Transfers.* This permit is not transferable to any person except after notice to the San Diego Water Board. The San Diego Water Board may require modification or revocation and reissuance of the permit to change the name of the Copermitttee and incorporate such other requirements as may be necessary under the CWA. [40 CFR 122.41(l)(3)]
- (4) *Monitoring reports.* Monitoring results must be reported at the intervals specified elsewhere in this permit. [40 CFR 122.41(l)(4)]
  - (a) Monitoring results must be reported on a Discharge Monitoring Report (DMR) form or forms provided or specified by the San Diego Water Board or State Water Board for reporting results of monitoring of sludge use or disposal practices. [40 CFR 122.41(l)(4)(i)]
  - (b) If the Copermitttee monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR Part 136 or another method required for an industry-specific waste stream under 40 CFR Subchapters N or O, the results of this monitoring must be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the San Diego Water Board or State Water Board. [40 CFR 122.41(l)(4)(ii)]
  - (c) Calculations for all limitations which require averaging of measurements must utilize an arithmetic mean unless otherwise specified in the permit. [40 CFR 122.41(l)(4)(iii)]
- (5) *Compliance schedules.* Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit must be submitted no later than 14 days following each schedule date. [40 CFR 122.41(l)(5)]

(6) *Twenty-four hour reporting.*

- (a) The Copermittee must report any noncompliance that may endanger health or the environment. Any information must be provided orally within 24 hours from the time the Copermittee becomes aware of the circumstances. A written submission must also be provided within five (5) days of the time the Copermittee becomes aware of the circumstances. The written submission must contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. [40 CFR 122.41(l)(6)(i)]
- (b) The following must be included as information which must be reported within 24 hours under this paragraph: [40 CFR 122.41(l)(6)(ii)]
  - (i) Any unanticipated bypass that exceeds any effluent limitation in the permit (See 40 CFR 122.41(g)). [40 CFR 122.41(l)(6)(ii)(A)]
  - (ii) Any upset which exceeds any effluent limitation in the permit. [40 CFR 122.41(l)(6)(ii)(B)] and,
  - (iii) Violation of a maximum daily discharge limitation for any of the pollutants listed by the San Diego Water Board in the permit to be reported within 24 hours. (See 40 CFR 122.44(g)) [40 CFR 122.41(l)(6)(ii)(C)]
- (c) The San Diego Water Board may waive the above-required written report on a case-by-case basis if the oral report has been received within 24 hours. [40 CFR 122.41(l)(6)(iii)]

(7) *Other noncompliance.* The Copermittee must report all instances of noncompliance not reported in accordance with the standard provisions required under 40 CFR 122.41(l)(4), (5), and (6), at the time monitoring reports are submitted. The reports must contain the information listed in the standard provisions required under 40 CFR 122.41(l)(6). [40 CFR 122.41(l)(7)]

(8) *Other information.* When the Copermittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the San Diego Water Board, State Water Board, or USEPA, the Copermittee must promptly submit such facts or information. [40 CFR 122.41(l)(8)]

**m. BYPASS** [40 CFR 122.41(m)]

(1) *Definitions.*

- (a) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility. [40 CFR 122.41(m)(1)(i)] or
- (b) "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.  
[40 CFR 122.41(m)(1)(ii)]

- (2) *Bypass not exceeding limitations.* The Copermittee 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. These bypasses are not subject to the standard provisions required under 40 CFR 122.41(m)(3) and (4).  
[40 CFR 122.41(m)(2)]

(3) *Notice.*

- (a) *Anticipated bypass.* If the Copermittee knows in advance of the need for a bypass, it must submit a notice, if possible at least ten days before the date of the bypass. [40 CFR 122.41(m)(3)(i)] or
- (b) *Unanticipated bypass.* The Copermittee must submit notice of an unanticipated bypass in accordance with the standard provisions required under 40 CFR 122.41(l)(6) (24-hour notice).  
[40 CFR 122.41(m)(3)(ii)]

(4) *Prohibition of Bypass.*

- (a) Bypass is prohibited, and the San Diego Water Board may take enforcement action against a Copermittee for bypass, unless:  
[40 CFR 122.41(m)(4)(i)]
- (i) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; [40 CFR 122.41(m)(4)(i)(A)]
- (ii) 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;  
[40 CFR 122.41(m)(4)(i)(B)] and,
- (iii) The Copermittee submitted notice in accordance with the standard provisions required under 40 CFR 122.41(m)(3).  
[40 CFR 122.41(m)(4)(i)(C)]
- (b) The San Diego Water Board may approve an anticipated bypass, after considering its adverse effects, if the San Diego Water Board determines that it will meet the three conditions listed above.  
[40 CFR 122.41(m)(4)(ii)]

**n. UPSET** [40 CFR 122.41(n)]

- (1) *Definition.* "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the Copermittee. 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. [40 CFR 122.41(n)(1)]

- (2) *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 standard provisions required under 40 CFR 122.41(n)(3) are met. 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. [40 CFR 122.41(n)(2)]
- (3) *Conditions necessary for a demonstration of upset.* A Copermittee who wishes to establish the affirmative defense of upset must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:  
[40 CFR 122.41(n)(3)]
  - (a) An upset occurred and that the Copermittee can identify the cause(s) of the upset; [40 CFR 122.41(n)(3)(i)]
  - (b) The permitted facility was at the time being properly operated;  
[40 CFR 122.41(n)(3)(ii)] and
  - (c) The Copermittee submitted notice of the upset in accordance with the standard provisions required under 40 CFR 122.41(l)(6)(ii)(B) (24-hour notice).  
[40 CFR 122.41(n)(3)(iii)]
  - (d) The Copermittee complied with any remedial measures pursuant to the standard provisions required under 40 CFR 122.41(d).  
[40 CFR 122.41(n)(3)(iii)]
- (4) *Burden of proof.* In any enforcement proceeding, the Copermittee seeking to establish the occurrence of an upset has the burden of proof.  
[40 CFR 122.41(n)(4)]

**o. STANDARD PERMIT PROVISIONS FOR MUNICIPAL SEPARATE STORM SEWER SYSTEMS**  
[40 CFR 122.42(c)]

The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the San Diego Water Board or State Water Board under 40 CFR 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. The report must include:

- (1) The status of implementing the components of the storm water management program that are established as permit conditions; [40 CFR 122.42(c)(1)]
- (2) Proposed changes to the storm water management programs that are established as permit conditions. Such proposed changes must be consistent with 40 CFR 122.26(d)(2)(iii); [40 CFR 122.42(c)(2)] and
- (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and (v);  
[40 CFR 122.42(c)(3)]

- (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year; [40 CFR 122.42(c)(4)]
- (5) Annual expenditures and budget for year following each annual report; [40 CFR 122.42(c)(5)]
- (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; [40 CFR 122.42(c)(6)]
- (7) Identification of water quality improvements or degradation. [40 CFR 122.42(c)(7)]

**p. STANDARD PERMIT PROVISIONS FOR STORM WATER DISCHARGES** [40 CFR 122.42(d)]

The initial permits for discharges composed entirely of storm water issued pursuant to 40 CFR 122.26(e)(7) must 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.

## **2. General Provisions**

In addition to the standard provisions required to be incorporated into the Order and NPDES permit pursuant to 40 CFR 122.41 and 40 CFR 122.42, several other general provisions apply to this Order. The general provisions applicable to this Order and NPDES permit are as follows:

**a. DISCHARGE OF WASTE IS A PRIVILEGE**

No discharge of waste into the waters of the State, whether or not such discharge is made pursuant to waste discharge requirements, shall create a vested right to continue such discharge. All discharges of waste into waters of the State are privileges, not rights. [CWC Section 13263(g)]

**b. DURATION OF ORDER AND NPDES PERMIT**

- (1) *Effective date.* This Order and NPDES permit becomes effective on the 50<sup>th</sup> day after its adoption provided the USEPA has no objection. If the USEPA objects to its issuance, this Order shall not become effective until such objection is withdrawn. This Order supersedes Order No. R9-2007-0001 upon the effective date of this Order, and supersedes Order Nos. R9-2009-0002 and R9-2010-0016 upon their expiration or earlier notice of coverage.
- (2) *Expiration.* This Order and NPDES permit expires five years after its effective date. [40 CFR 122.46(a)]
- (3) *Continuation of expired order.* After this Order and NPDES permit expires, the terms and conditions of this Order and NPDES permit 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.

**c. AVAILABILITY**

A copy of this Order must be kept at a readily accessible location and must be available to on-site personnel at all times.

**d. CONFIDENTIALITY OF INFORMATION**

Except as provided for in 40 CFR 122.7, no information or documents submitted in accordance with or in application for this Order will be considered confidential, and all such information and documents shall be available for review by the public at the San Diego Water Board office.

Claims of confidentiality for the following information will be denied:  
[40 CFR 122.7(b)]

- (1) The name and address of any permit applicant or Copermittee;  
[40 CFR 122.7(b)(1)] and
- (2) Permit applications and attachments, permits, and effluent data.  
[40 CFR 122.7(b)(2)]

**e. EFFLUENT LIMITATIONS**

- (1) *Interim effluent limitations.* The Copermittee must comply with any interim effluent limitations as established by addendum, enforcement action, or revised waste discharge requirements which have been, or may be, adopted by the San Diego Water Board.
- (2) *Other effluent limitations and standards.* If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under Section 307(a) of the CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the San Diego Water Board shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. [40 CFR 122.44(b)(1)]

**f. DUTY TO MINIMIZE OR CORRECT ADVERSE IMPACTS**

The Copermittee must take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this Order, including such accelerated or additional monitoring as may be necessary to determine the nature and impact of the noncompliance.

**g. PERMIT ACTIONS**

The filing of a request by the Copermittee for modification, revocation and reissuance, or termination of this Order, or a notification of planned change in or anticipated noncompliance with this Order does not stay any condition of this Order. (See 40 CFR 122.41(f)) In addition, the following provisions apply to this Order:

- (1) Upon application by any affected person, or on its own motion, the San Diego Water Board may review and revise the requirements in this Order. All requirements must be reviewed periodically. [CWC Section 13263(e)]
- (2) This Order may be terminated or modified for cause, including, but not limited to, all of the following: [CWC Section 13381]
  - (a) Violation of any condition contained in the requirements of this Order. [CWC Section 13381(a)]
  - (b) Obtaining the requirements in this Order by misrepresentation, or failure to disclose fully all relevant facts. [CWC Section 13381(b)]
  - (c) A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. [CWC Section 13381(c)]
- (3) When this Order is transferred to a new owner or operator, such requirements as may be necessary under the CWC may be incorporated into this Order.

#### **h. NPDES PERMITTED NON-STORM WATER DISCHARGES**

The San Diego Water Board has, in prior years, issued a limited number of individual NPDES permits for non-storm water discharges to MS4s. The San Diego Water Board or State Water Board may in the future, upon prior notice to the Copermittee(s), issue an NPDES permit for any non-storm water discharge (or class of non-storm water discharges) to an MS4.

#### **i. MONITORING**

In addition to the standard provisions required under 40 CFR 122.41(j) and (l)(4), the following general monitoring provisions apply to this Order:

- (1) Where procedures are not otherwise specified in Order, sampling, analysis and quality assurance/quality control must be conducted in accordance with the Quality Assurance Management Plan (QAMP) for the State of California's Surface Water Ambient Monitoring Program (SWAMP), adopted by the State Water Resources Control Board (State Water Board).
- (2) Pursuant to 40 CFR 122.41(j)(2) and CWC Section 13383(a), each Copermittee 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, and records of all data used to complete the application for this permit, for a period of at least five (5) years from the date of the sample, measurement, report or application. This period may be extended by request of the San Diego Water Board at any time.
- (3) All chemical, bacteriological, and toxicity analyses must be conducted at a laboratory certified for such analyses by the California Department of Public Health or a laboratory approved by the San Diego Water Board.

- (4) For priority toxic pollutants that are identified in the California Toxics Rule (CTR) (65 Fed. Reg. 31682), the Copermittees must instruct their laboratories to establish calibration standards that are equivalent to or lower than the Minimum Levels (MLs) published in Appendix 4 of the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP). If a Copermittee can demonstrate that a particular ML is not attainable, in accordance with procedures set forth in 40 CFR Part 136, the lowest quantifiable concentration of the lowest calibration standard analyzed by a specific analytical procedure (assuming that all the method specified sample weights, volumes, and processing steps have been followed) may be used instead of the ML listed in Appendix 4 of the SIP. The Copermittee must submit documentation from the laboratory to the San Diego Water Board for approval prior to raising the ML for any priority toxic pollutant.

**j. ENFORCEMENT**

- (1) The San Diego Water Board is authorized to enforce the terms of this Order under several provisions of the CWC, including, but not limited to, CWC Sections 13385, 13386, and 13387.
- (2) Nothing in this Order shall be construed to protect the Copermittee from its liabilities under federal, state, or local laws.
- (3) The CWC provides for civil and criminal penalties comparable to, and in some cases greater than, those provided for under the CWA.
- (4) Except as provided in the standard conditions required under 40 CFR 122.41(m) and (n), nothing in this Order shall be construed to relieve the Copermittee from civil or criminal penalties for noncompliance.
- (5) Nothing in this Order shall be construed to preclude the institution of any legal action or relieve the Copermittee from any responsibilities, liabilities, or penalties to which the Copermittee is or may be subject to under Section 311 of the CWA.
- (6) Nothing in this Order shall be construed to preclude institution of any legal action or relieve the Copermittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or regulation under authoring preserved by Section 510 of the CWA.

**k. SEVERABILITY**

The provisions of this Order are severable, and if any provision of this Order, or the application of any provisions of this Order to any circumstance, is held invalid, the application of such provision to other circumstances and the remainder of this Order shall not be affected thereby.

**l. APPLICATIONS**

Any application submitted by a Copermittee for reissuance or modification of this Order must satisfy all applicable requirements specified in federal regulations as well as any additional requirements for submittal of a Report of Waste Discharge specified in the CWC and the California Code of Regulations.



**m. IMPLEMENTATION**

All plans, reports and subsequent amendments submitted in compliance with this Order must be implemented immediately (or as otherwise specified). All submittals by Copermittees must be adequate to implement the requirements of this Order.

**n. REPORT SUBMITTALS**

- (1) All report submittals must include an executive summary, introduction, conclusion, recommendations, and signed certified statement.
- (2) Each Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal.
- (3) The Principal Watershed Copermittee(s) must submit a signed certified statement covering its responsibilities for each applicable submittal and the sections of the submittals for which it is responsible.
- (4) Unless otherwise directed, the Copermittees must submit one hard copy and one electronic copy of each report required under this Order to the San Diego Water Board, and one electronic copy to the USEPA.
- (5) The Copermittees must submit reports and provide notifications as required by this Order to the following:

EXECUTIVE OFFICER  
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION  
9174 SKY PARK COURT, SUITE 100  
SAN DIEGO CA 92123-4340  
Telephone: (858) 467-2952 Fax: (858) 571-6972

EUGENE BROMLEY  
US ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
PERMITS ISSUANCE SECTION (W-5-1)  
75 HAWTHORNE STREET  
SAN FRANCISCO CA 94105

**ATTACHMENT C****ACRONYMS AND ABBREVIATIONS**

AMAL	Average Monthly Action Level
ASBS	Area(s) of Special Biological Significance
BMP	Best Management Practice
Basin Plan	Water Quality Control Plan for the San Diego Basin
CEQA	California Environmental Quality Act
CCR	California Code of Regulations
CFR	Code of Federal Regulations
CWA	Clean Water Act
CWC	California Water Code
CZARA	Coastal Zone Act Reauthorization Amendments of 1990
ESAs	Environmentally Sensitive Areas
GIS	Geographic Information System
IBI	Index of Biological Integrity
LID	Low Impact Development
MDAL	Maximum Daily Action Level
MEP	Maximum Extent Practicable
MS4	Municipal Separate Storm Sewer System
NAL	Non-Storm Water Action Level
NAICS	North American Industry Classification System
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
ROWD	Report of Waste Discharge (application for NPDES reissuance)
SAL	Storm Water Action Level
San Diego Water Board	California Regional Water Quality Control Board, San Diego Region
SIC	Standard Industrial Classification Code
State Water Board	State Water Resources Control Board
TMDL	Total Maximum Daily Load
USEPA	United States Environmental Protection Agency
WDID	Waste Discharge Identification Number
WLA	Waste Load Allocation
WQBEL	Water Quality Based Effluent Limitation

## DEFINITIONS

**Active/Passive Sediment Treatment** - Using mechanical, electrical or chemical means to flocculate or coagulate suspended sediment for removal from runoff from construction sites prior to discharge.

**Anthropogenic Litter** – Trash generated from human activities, not including sediment.

**Average Monthly Action Level** – The highest allowable average of daily discharges over a calendar month.

**Beneficial Uses** - The uses of water necessary for the survival or wellbeing of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. “Beneficial Uses” of the waters of the State that may be protected 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. Existing beneficial uses are uses that were attained in the surface or ground water on or after November 28, 1975; and potential beneficial uses are uses that would probably develop in future years through the implementation of various control measures. “Beneficial Uses” are equivalent to “Designated Uses” under federal law. [California Water Code Section 13050(f)].

**Best Management Practices (BMPs)** - Defined in 40 CFR 122.2 as 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.

**Bioassessment** - The use of biological community information to evaluate the biological integrity of a water body and its watershed. With respect to aquatic ecosystems, bioassessment is the collection and analysis of samples of the benthic macroinvertebrate community together with physical/habitat quality measurements associated with the sampling site and the watershed to evaluate the biological condition (i.e. biotic integrity) of a water body.

**Biofiltration** - Practices that use vegetation and amended soils to detain and treat runoff from impervious areas. Treatment is through filtration, infiltration, adsorption, ion exchange, and biological uptake of pollutants.

**Biological Integrity** - Defined in Karr J.R. and D.R. Dudley. 1981. Ecological perspective on water quality goals. *Environmental Management* 5:55-68 as: “A balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of natural habitat of the region.” Also referred to as ecosystem health.

**BMP Design Manual** – A plan developed to eliminate, reduce, or mitigate the impacts of runoff from development projects, including Priority Development Projects.

**Chronic Toxicity** – A measurement of sublethal effect (e.g. reduced growth, reproduction) to experimental test organisms exposed to an effluent or receiving waters compared to that of the control organisms.

**Clean Water Act Section 303(d) Water Body** - An impaired water body in which water quality does not meet applicable water quality standards and/or is not expected to meet water quality standards, even after the application of technology based pollution controls required by the CWA. The discharge of runoff to these water bodies by the Copermitees is significant because these discharges can cause or contribute to violations of applicable water quality standards.

**Construction Site** – Any project, including projects requiring coverage under the Construction General Permit, that involves soil disturbing activities including, but not limited to, clearing, grading, disturbances to ground such as stockpiling, and excavation.

**Contamination** - As defined in the Porter-Cologne Water Quality Control Act, contamination is “an impairment of the quality of 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.”

**Copermittee** – A permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator [40 CFR 122.26(b)(1)]. For the purposes of this Order, a Copermittee is one of the individual permittees identified in Tables 1a-1c of this Order.

**Copermittees** – All of the individual Copermittees, collectively.

**Critical Channel Flow (Qc)** – The channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Qc, it should be based on the weakest boundary material – either bed or bank.

**Daily Discharge** – Defined as either: (1) the total mass of the constituent discharged over the calendar day or any 24 hour period that reasonably represents a calendar day for purposes of sampling (as specified in the permit), for a constituent with limitations expressed in units of mass or; (2) the unweighted arithmetic mean measurement of the constituent over the day for a constituent with limitations expressed in other units of measurement (e.g. concentration.)

The Daily Discharge may be determined by the analytical results of a composite sample taken over the course of one day (a calendar day, or other 24 hour period other than a day), or by the arithmetic mean of analytical results from one or more grab samples taken over the course of a day.

**Development Projects** - Construction, rehabilitation, redevelopment, or reconstruction of any public or private projects.

**Dry Season** – May 1 to September 30.

**Dry Weather** – Weather is considered dry if the preceding 72 hours has been without measurable precipitation (>0.1 inch).

**Enclosed Bays** – Enclosed bays are indentations along the coast that enclose an area of oceanic water within distinct headlands or harbor works. Enclosed bays include all bays where the narrowest distance between the headlands or outermost bay works is less than 75 percent of the greatest dimension of the enclosed portion of the bay. Enclosed bays do not include inland surface waters or ocean waters.

**Erosion** – 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.

**Environmentally Sensitive Areas (ESAs)** - Areas that include but are not limited to all Clean Water Act Section 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the State Water Board and San Diego Water Board; State Water Quality Protected Areas; water bodies designated with the RARE beneficial use by the State Water Board and San Diego Water Board; areas designated as preserves or their equivalent under the Natural Communities Conservation Program within the Cities and County of Orange; and any other equivalent environmentally sensitive areas which have been identified by the Copermittes.

**Estuaries** – Waters, including coastal lagoons, located at the mouth of streams that serve as areas of mixing fresh and ocean waters. Coastal lagoons and mouths of streams that are temporarily separated from the ocean by sandbars shall be considered estuaries. Estuarine waters shall be considered to extend from a bay or the open ocean to a point upstream where there is no significant mixing of fresh water and ocean water. Estuaries do not include inland surface waters or ocean waters.

**Existing Development** – Any area that has been developed and exists for municipal, commercial, industrial, or residential purposes, uses, or activities. May include areas that are not actively used for its originally developed purpose, but may be re-purposed or redeveloped for another use or activity.

**Flow Duration** – 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). The simplest way to visualize this is to consider a histogram of pre- and post-project flows using long-term records of hourly data. To maintain pre-development flow duration means that the total number of hours (counts) within each range of flows in a flow-duration histogram cannot increase between the pre- and post-development condition. Flow duration within the range of geomorphologically significant flows is important for managing erosion.

**Grading** - The cutting and/or filling of the land surface to a desired slope or elevation.

**Groundwater** – Subsurface water that occurs beneath the water table in soils and geologic formations that are fully saturated.

**Hazardous Material** – Any substance that poses a threat to human health or the environment due to its toxicity, corrosiveness, ignitability, explosive nature or chemical reactivity. These also include materials named by the USEPA in 40 CFR 116 to be reported if a designated quantity of the material is spilled into the waters of the U.S. or emitted into the environment.

**Hazardous Waste** - Hazardous waste is defined as “any waste which, under Section 600 of Title 22 of this code, is required to be managed according to Chapter 30 of Division 4.5 of Title 22 of this code” [CCR Title 22, Division 4.5, Chapter 11, Article 1].

**Household Hazardous Waste** – Paints, cleaning products, and other hazardous wastes generated during home improvement or maintenance activities.

**Hydromodification** – The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, 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, such as stream channelization, concrete lining, 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.

**Illicit Connection** – Any man-made conveyance or drainage system through which a non-storm water discharge to the storm water drainage system occurs or may occur. Any connection to the MS4 that conveys an illicit discharge.

**Illicit Discharge** - 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 CFR 122.26(b)(2)].

**Inactive Areas** – Areas of construction activity that are not active and those that have been active and are not scheduled to be re-disturbed for at least 14 days.

**Infiltration** – In the context of low impact development, infiltration is defined as the percolation of water into the ground. Infiltration is often expressed as a rate (inches per hour), which is determined through an infiltration test. In the context of non-storm water, infiltration is water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow [40 CFR 35.2005(20)].

**Inland Surface Waters** – Includes all surface waters of the State that do not include the ocean, enclosed bays, or estuaries.

**Jurisdictional Runoff Management Program Document** – A written description of the specific jurisdictional runoff management measures and programs that each Copermittee will implement to comply with this Order and ensure that storm water pollutant discharges in runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards.

**Low Impact Development (LID)** – 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.

**Low Impact Development Best Management Practices (LID BMPs)** – LID BMPs include schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States through storm water management and land development strategies that emphasize conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions. LID BMPs include retention practices that do not allow runoff, such as infiltration, rain water harvesting and reuse, and evapotranspiration. LID BMPs also include flow-through practices such as biofiltration that may have some discharge of storm water following pollutant reduction.

**Major Outfall** – As defined in the Code of Federal Regulations, a major outfall is a MS4 outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (i.e. discharge from a single conveyance other than a circular pipe which is associated with a drainage area of more than 50 acres); or, for MS4s that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or equivalent), a MS4 outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (i.e. discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

**Maximum Daily Action Level (MDAL)** –The highest allowable daily discharge of a pollutant, over a calendar day (or 24 hour period). For pollutants with action levels expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with action levels expressed in other units of measurement, the daily discharge is calculated as the arithmetic mean measurement of the pollutant over the day.

**Maximum Extent Practicable (MEP)** – The technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) for storm water that operators of MS4s must meet. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of source control and treatment control BMPs. MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) in combination with treatment methods serving as a backup (additional line of defense). MEP considers economics and is generally, but not necessarily, less stringent than BAT. A definition for MEP is not provided either in the statute or in the regulations. Instead the definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their runoff management programs. Their total collective and individual activities conducted pursuant to the runoff management programs becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for MS4 maintenance). In the absence of a proposal acceptable to the San Diego Water Board, the San Diego Water Board defines MEP.

In a memo dated February 11, 1993, entitled "Definition of Maximum Extent Practicable," Elizabeth Jennings, Senior Staff Counsel, SWRCB addressed the achievement of the MEP standard as follows:

*“To achieve the MEP standard, municipalities must employ whatever Best Management Practices (BMPs) are technically feasible (i.e., are likely to be effective) and are not cost prohibitive. The major emphasis is on technical feasibility. Reducing pollutants to the MEP means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, or the BMPs would not be technically feasible, or the cost would be prohibitive. In selecting BMPs to achieve the MEP standard, the following factors may be useful to consider:*

- a. Effectiveness: Will the BMPs address a pollutant (or pollutant source) of concern?*
- b. Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?*
- c. Public Acceptance: Does the BMP have public support?*
- d. Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?*
- e. Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?*

*The final determination regarding whether a municipality has reduced pollutants to the maximum extent practicable can only be made by the Regional or State Water Boards, and not by the municipal discharger. If a municipality reviews a lengthy menu of BMPs and chooses to select only a few of the least expensive, it is likely that MEP has not been met. On the other hand, if a municipal discharger employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit derived, it would have met the standard. Where a choice may be made between two BMPs that should provide generally comparable effectiveness, the discharger may choose the least expensive alternative and exclude the more expensive BMP. However, it would not be acceptable either to reject all BMPs that would address a pollutant source, or to pick a BMP based solely on cost, which would be clearly less effective. In selecting BMPs the municipality must make a serious attempt to comply and practical solutions may not be lightly rejected. In any case, the burden would be on the municipal discharger to show compliance with its permit. After selecting a menu of BMPs, it is the responsibility of the discharger to ensure that all BMPs are implemented.”*

### **Monitoring Year** – October 1 to September 30

**Municipal Separate Storm Sewer System (MS4)** – 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 designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designated or used for collecting or conveying storm water; (iii) Which is not a combined sewer; (iv) Which is not part of the Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.26.

**National Pollutant Discharge Elimination System (NPDES)** - The national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 318, 402, and 405 of the CWA.

**Non-Storm Water** - All discharges to and from a MS4 that do not originate from precipitation events (i.e., all discharges from a MS4 other than storm water). Non-storm water includes illicit discharges and NPDES permitted discharges.

**Nuisance** - As defined in the Porter-Cologne Water Quality Control Act, a nuisance is “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.”

**Ocean Waters** – The territorial marine waters of the State as defined by California law to the extent these waters are outside of enclosed bays, estuaries, and coastal lagoons. Discharges to ocean waters are regulated in accordance with the State Board’s California Ocean Plan.



**Order** – Unless otherwise specified, refers to this Order, Order No. R9-2013-0001 (NPDES No. CAS0109266)

**Outfall** - 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 US 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 US and are used to convey waters of the US.

**Persistent Flow** - Persistent flow is defined as the presence of flowing, pooled, or ponded water more than 72 hours after a measureable rainfall event of 0.1 inch or greater during three consecutive monitoring and/or inspection events. All other flowing, pooled, or ponded water is considered transient.

**Person** - A person is defined as an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof [40 CFR 122.2].

**Point Source** - 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 operations, landfill leachate collection systems, 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** - 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.

**Pollution** - As defined in the Porter-Cologne Water Quality Control Act, pollution is “the alteration of the quality of the waters of the State by waste, to a degree which unreasonably affects either of the following: 1) The waters for beneficial uses; or 2) Facilities that serve these beneficial uses.” Pollution may include contamination.

**Pollution Prevention** - Pollution prevention is defined as practices and processes that reduce or eliminate the generation of pollutants, in contrast to source control BMPs, treatment control BMPs, or disposal.

**Pre-Development Runoff Conditions** – Approximate flow rates and durations that exist or existed onsite before land development occurs. For new development projects, this equates to runoff conditions immediately before project construction. For redevelopment projects, this equates to runoff conditions from the project footprint assuming infiltration characteristics of the underlying soil, and existing grade. Runoff coefficients of concrete or asphalt must not be used. A redevelopment Priority Development Project must use available information pertaining to existing underlying soil type and onsite existing grade to estimate pre-development runoff conditions.

**Priority Development Projects** - New development and redevelopment projects defined under Provision [E.3.b](#) of Order No. R9-2013-0001.

**Rainy Season (aka Wet Season)** –October 1 to April 30

**Receiving Waters** – Waters of the United States.

**Receiving Water Limitations** - Waste discharge requirements issued by the San Diego Water Board typically include both: (1) “Effluent Limitations” (or “Discharge Limitations”) that specify the technology-based or water-quality-based effluent limitations; and (2) “Receiving Water Limitations” that specify the water quality objectives in the Basin Plan as well as any other limitations necessary to attain those objectives. In summary, the “Receiving Water Limitations” provision is the provision used to implement the requirements of CWA section 402(p)(3)(B).

**Redevelopment** - The creation and/or replacement of impervious surface on an already developed site. Examples include the expansion of a building footprint, road widening, the addition to or replacement of a structure, and creation or addition of impervious surfaces. Replacement of impervious surfaces includes any activity that is not part of a routine maintenance activity where impervious material(s) are removed, exposing underlying soil during construction. Redevelopment does not include trenching and resurfacing associated with utility work; resurfacing existing roadways; new sidewalk construction, pedestrian ramps, or bike lane on existing roads; and routine replacement of damaged pavement, such as pothole repair.

**Regional Clearinghouse** – A central location for the collection and distribution of information developed and maintained by the Copermitttees including, but not limited to, plans, reports, manuals, data, contact information, and/or links to such documents and information.

**Rehabilitation** - Remedial measures or activities for the purpose of improving or restoring the beneficial uses of streams, channels or river systems. Techniques may vary from in-stream restoration techniques to off-line storm water management practices installed in the system corridor or upland areas, or a combination of in-stream and out of stream techniques. Rehabilitation techniques may include, but are not limited to the following: riparian zone restoration, constructed wetlands, channel modifications that improve habitat and stability, and daylighting of drainage systems.

**Reporting Period** – The period of information that is reported in the Water Quality Improvement Plan Annual Report. The reporting period consists of two components: 1) July 1 to June 30, consistent with the fiscal year, for the implementation of the jurisdictional runoff management programs, and 2) October 1 to September 30, consistent with the monitoring year for the monitoring and assessment programs. Together, these two time periods constitute the reporting year for the Water Quality Improvement Plan Annual Report due January 31 following the end of the monitoring year.

**Retain** – Keep or hold in a particular place, condition, or position without discharge to surface waters.

**Retrofitting** – Storm water management practice put into place after development has occurred in watersheds where the practices previously did not exist or are ineffective. Retrofitting of developed areas is intended to improve water quality, protect downstream channels, reduce flooding, or meet other specific objectives. Retrofitting developed areas may include, but is not limited to replacing roofs with green roofs, disconnecting downspouts or impervious surfaces to drain to pervious surfaces, replacing impervious surfaces with pervious surfaces, installing rain barrels, installing rain gardens, and trash area enclosures.

**Runoff** - All flows in a storm water conveyance system that consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water including dry weather flows.

**San Diego Water Board** – As used in this document the term "San Diego Water Board" is synonymous with the term "Regional Board" as defined in Water Code section 13050(b) and is intended to refer to the California Regional Water Quality Control Board for the San Diego Region as specified in Water Code Section 13200.

**Sediment** - Soil, sand, and minerals washed from land into water. Sediment resulting from anthropogenic sources (i.e. human induced land disturbance activities) is considered a pollutant. This Order regulates only the discharges of sediment from anthropogenic sources and does not regulate naturally occurring sources of sediment. Sediment can destroy fish-nesting areas, clog animal habitats, and cloud waters so that sunlight does not reach aquatic plants.

**Source Control BMP** – Land use or site planning practices, or structural or nonstructural measures that aim to prevent runoff pollution by reducing the potential for contamination at the source of pollution. Source control BMPs minimize the contact between pollutants and runoff.

**Storm Water** – Per 40 CFR 122.26(b)(13), means storm water runoff, snowmelt runoff and surface runoff and drainage. Surface runoff and drainage pertains to runoff and drainage resulting from precipitation events.

**Structural BMPs** - A subset of BMPs which detains, retains, filters, removes, or prevents the release of pollutants to surface waters from development projects in perpetuity, after construction of a project is completed.

**Test of Significant Toxicity (TST)** - A statistical approach used to analyze toxicity test data. The TST incorporates a restated null hypothesis, Welch's t-test, and biological effect thresholds for chronic and acute toxicity.

**Total Maximum Daily Load (TMDL)** - The maximum amount of a pollutant that can be discharged into a water body from all sources (point and non-point) and still maintain water quality standards. Under CWA section 303(d), TMDLs must be developed for all water bodies that do not meet water quality standards after application of technology-based controls.

**Toxicity** - Adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies. The water quality objectives for toxicity provided in the Basin Plan, state in part... "All waters shall be free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life.... The survival of aquatic life in surface waters subjected to a waste discharge or other controllable water quality factors, shall not be less than that for the same water body in areas unaffected by the waste discharge."

**Toxicity Identification Evaluation (TIE)** - A set of procedures for identifying the specific chemical(s) responsible for toxicity. These procedures are performed in three phases (characterization, identification, and confirmation) using aquatic organism toxicity tests.

**Toxicity Reduction Evaluation (TRE)** - A study conducted in a step-wise process designed to identify the causative agents of effluent or ambient toxicity, isolate the sources of toxicity, evaluate the effectiveness of toxicity control options, and then confirm the reduction in toxicity. The first steps of the TRE consist of the collection of data relevant to the toxicity, including additional toxicity testing, and an evaluation of facility operations and maintenance practices, and best management practices. A Toxicity Identification Evaluation (TIE) may be required as part of the TRE, if appropriate.

**Treatment Control BMP** – Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants, filtration, biological uptake, media absorption or any other physical, biological, or chemical process.

**Unpaved Road** – Any long, narrow stretch without pavement used for traveling by motor passenger vehicles between two or more points. Unpaved roads are generally constructed of dirt, gravel, aggregate or macadam and may be improved or unimproved.

**Waste** - As defined in CWC Section 13050(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.”

Article 2 of CCR Title 23, Chapter 15 (Chapter 15) contains a waste classification system that applies to solid and semi-solid waste, which cannot be discharged directly or indirectly to water of the state and which therefore must be discharged to land for treatment, storage, or disposal in accordance with Chapter 15. There are four classifications of waste (listed in order of highest to lowest threat to water quality): hazardous waste, designated waste, non-hazardous solid waste, and inert waste.

**Water Quality Objective** - Numerical or narrative limits on constituents or characteristics of water designated to protect designated beneficial uses of the water. [California Water Code Section 13050 (h)]. California’s water quality objectives are established by the State and Regional Water Boards in the Water Quality Control Plans. Numeric or narrative limits for pollutants or characteristics of water designed to protect the beneficial uses of the water. In other words, a water quality objective is the maximum concentration of a pollutant that can exist in a receiving water and still generally ensure that the beneficial uses of the receiving water remain protected (i.e., not impaired). Since water quality objectives are designed specifically to protect the beneficial uses, when the objectives are violated the beneficial uses are, by definition, no longer protected and become impaired. This is a fundamental concept under the Porter Cologne Act. Equally fundamental is Porter Cologne’s definition of pollution. A condition of pollution exists when the water quality needed to support designated beneficial uses has become unreasonably affected or impaired; in other words, when the water quality objectives have been violated. These underlying definitions (regarding beneficial use protection) are the reason why all waste discharge requirements implementing the federal NPDES regulations require compliance with water quality objectives. (Water quality objectives are also called water quality criteria in the CWA.)

**Water Quality Standards** - Water quality standards, as defined in Clean Water Act section 303(c) consist of the beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.) of a water body and criteria (referred to as water quality objectives in the California Water Code) necessary to protect those uses. Under the Water Code, the water boards establish beneficial uses and water quality objectives in water quality control or basin plans. Together with an anti-degradation policy, these beneficial uses and water quality objectives serve as water quality standards under the Clean Water Act. In Clean Water Act parlance, state beneficial uses are called “designated uses” and state water quality objectives are called “criteria.” Throughout this Order, the relevant term is used depending on the statutory scheme.

**Waters of the State** - Any water, surface or underground, including saline waters within the boundaries of the State [CWC section 13050 (e)]. The definition of the Waters of the State is broader than that for the Waters of the United States in that all water in the State is considered to be a Waters of the State regardless of circumstances or condition.

**Waters of the United States** - As defined in the 40 CFR 122.2, the Waters of the U.S. are defined as: “(a) 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; (b) All interstate waters, including interstate “wetlands;” (c) All other waters such as intrastate 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: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition; (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition; (f) The territorial seas; and (g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. 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 the EPA.”

**Watershed** - That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as drainage area, catchment, or river basin).

**Wet Season (aka Rainy Season)** – October 1 to April 30

**Wet Weather** – Weather is considered wet up to 72 hours after a storm event of 0.1 inches and greater, unless otherwise defined by another regulatory mechanism (e.g. a TMDL).

**ATTACHMENT D**  
**JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM**  
**ANNUAL REPORT FORM**

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**JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM  
ANNUAL REPORT FORM  
FY \_\_\_\_\_**

<b>I. COPERMITTEE INFORMATION</b>	
Copermittee Name:	
Copermittee Primary Contact Name:	
Copermittee Primary Contact Information:	
Address:	
City:	County:
State:	Zip:
Telephone:	Fax:
Email:	
<b>II. LEGAL AUTHORITY</b>	
Has the Copermittee established adequate legal authority within its jurisdiction to control pollutant discharges into and from its MS4 that complies with Order No. R9-2013-0001?	YES <input type="checkbox"/> NO <input type="checkbox"/>
A Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative has certified that the Copermittee obtained and maintains adequate legal authority?	YES <input type="checkbox"/> NO <input type="checkbox"/>
<b>III. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM DOCUMENT UPDATE</b>	
Was an update of the jurisdictional runoff management program document required or recommended by the San Diego Water Board?	YES <input type="checkbox"/> NO <input type="checkbox"/>
If YES to the question above, did the Copermittee update its jurisdictional runoff management program document and make it available on the Regional Clearinghouse?	YES <input type="checkbox"/> NO <input type="checkbox"/>
<b>IV. ILLICIT DISCHARGE DETECTION AND ELIMINATION PROGRAM</b>	
Has the Copermittee implemented a program to actively detect and eliminate illicit discharges and connections to its MS4 that complies with Order No. R9-2013-0001?	YES <input type="checkbox"/> NO <input type="checkbox"/>
Number of non-storm water discharges reported by the public	
Number of non-storm water discharges detected by Copermittee staff or contractors	
Number of non-storm water discharges investigated by the Copermittee	
Number of sources of non-storm water discharges identified	
Number of non-storm water discharges eliminated	
Number of sources of illicit discharges or connections identified	
Number of illicit discharges or connections eliminated	
Number of enforcement actions issued	
Number of escalated enforcement actions issued	
<b>V. DEVELOPMENT PLANNING PROGRAM</b>	
Has the Copermittee implemented a development planning program that complies with Order No. R9-2013-0001?	YES <input type="checkbox"/> NO <input type="checkbox"/>
Was an update to the BMP Design Manual required or recommended by the San Diego Water Board?	YES <input type="checkbox"/> NO <input type="checkbox"/>
If YES to the question above, did the Copermittee update its BMP Design Manual and make it available on the Regional Clearinghouse?	YES <input type="checkbox"/> NO <input type="checkbox"/>
Number of proposed development projects in review	
Number of Priority Development Projects in review	
Number of Priority Development Projects approved	
Number of approved Priority Development Projects exempt from any BMP requirements	
Number of approved Priority Development Projects allowed alternative compliance	
Number of Priority Development Projects granted occupancy	
Number of completed Priority Development Projects in inventory	
Number of high priority Priority Development Project structural BMP inspections	
Number of Priority Development Project structural BMP violations	
Number of enforcement actions issued	
Number of escalated enforcement actions issued	



**JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM  
ANNUAL REPORT FORM  
FY \_\_\_\_\_**

**VI. CONSTRUCTION MANAGEMENT PROGRAM**

Has the Copermittee implemented a construction management program that complies with Order No. R9-2013-0001? YES   
NO

Number of construction sites in inventory	
Number of active construction sites in inventory	
Number of inactive construction sites in inventory	
Number of construction sites closed/completed during reporting period	
Number of construction site inspections	
Number of construction site violations	
Number of enforcement actions issued	
Number of escalated enforcement actions issued	

**VII. EXISTING DEVELOPMENT MANAGEMENT PROGRAM**

Has the Copermittee implemented an existing development management program that complies with Order No. R9-2013-0001? YES   
NO

	Municipal	Commercial	Industrial	Residential
Number of facilities or areas in inventory				
Number of existing development inspections				
Number of follow-up inspections				
Number of violations				
Number of enforcement actions issued				
Number of escalated enforcement actions issued				

**VIII. PUBLIC EDUCATION AND PARTICIPATION**

Has the Copermittee implemented a public education program component that complies with Order No. R9-2013-0001? YES   
NO

Has the Copermittee implemented a public participation program component that complies with Order No. R9-2013-0001? YES   
NO

**IX. FISCAL ANALYSIS**

Has the Copermittee attached to this form a summary of its fiscal analysis that complies with Order No. R9-2013-0001? YES   
NO

**X. CERTIFICATION**

I [ Principal Executive Officer  Ranking Elected Official  Duly Authorized Representative] certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Telephone Number

\_\_\_\_\_  
Email

**ATTACHMENT E****SPECIFIC PROVISIONS FOR TOTAL MAXIMUM DAILY LOADS  
APPLICABLE TO ORDER NO. R9-2013-0001**

These provisions implement load allocations (LAs) and wasteload allocations (WLAs) of the Total Maximum Daily Loads (TMDLs) adopted by the San Diego Water Board and approved by USEPA under Clean Water Act section 303(c), applicable to discharges regulated under this Order. The provisions and schedules for implementation of the TMDLs described below must be incorporated into the Water Quality Improvement Plans, required pursuant to Provision B of this Order, for the specified Watershed Management Areas.

1. Total Maximum Daily Load for Diazinon in Chollas Creek Watershed
2. Total Maximum Daily Loads for Dissolved Copper in Shelter Island Yacht Basin
3. Total Maximum Daily Loads for Total Nitrogen and Total Phosphorus in Rainbow Creek Watershed
4. Total Maximum Daily Loads for Dissolved Copper, Lead, and Zinc in Chollas Creek
5. Total Maximum Daily Loads for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay
6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)

## 1. Total Maximum Daily Load for Diazinon in Chollas Creek Watershed

### a. APPLICABILITY

- (1) TMDL Basin Plan Amendment: Resolution No. R9-2002-0123
- (2) TMDL Adoption and Approval Dates:
 

San Diego Water Board Adoption Date:	August 14, 2002
State Water Board Approval Date:	July 16, 2003
Office of Administrative Law Approval Date:	September 11, 2003
US EPA Approval Date:	November 3, 2003
- (3) TMDL Effective Date: September 11, 2003
- (4) Watershed Management Area: San Diego Bay
- (5) Water Body: Chollas Creek
- (6) Responsible Copermittees: City of La Mesa, City of Lemon Grove, City of San Diego, County of San Diego, San Diego Unified Port District

### b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final diazinon TMDL compliance requirements for Chollas Creek consist of the following:

- (1) Final TMDL Compliance Date

The Responsible Copermittees must be in compliance with the final TMDL compliance requirements as of December 31, 2010.

- (2) Final Water Quality Based Effluent Limitations

- (a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations:

**Table 1.1**

*Final Receiving Water Limitations Expressed as Concentrations in Chollas Creek*

Constituent	Exposure Duration	Receiving Water Limitation	Averaging Period
Diazinon	Acute	0.08 µg/L	1 hour
	Chronic	0.05 µg/L	4 days

## (b) Final Effluent Limitations

Discharges from the MS4s containing concentrations that do not exceed the following effluent limitations will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 1.b.(2)(a):

**Table 1.2**

*Final Effluent Limitations Expressed as Concentrations in MS4 Discharges to Chollas Creek*

Constituent	Exposure Duration	Effluent Limitation	Averaging Period
Diazinon	Acute	0.072 µg/L	1 hour
	Chronic	0.045 µg/L	4 days

## (c) Best Management Practices

The following BMPs for Chollas Creek must be incorporated into the Water Quality Improvement Plan for the San Diego Bay Watershed Management Area and implemented by the Responsible Copermittees:

- (i) The Responsible Copermittees must implement BMPs to achieve the receiving water limitations under Specific Provision 1.b.(2)(a) and/or the effluent limitations under Specific Provision 1.b.(2)(b) for Chollas Creek.
- (ii) The Responsible Copermittees must implement the Diazinon Toxicity Control Plan and Diazinon Public Outreach/Education Program as described in the report titled, *Technical Report for Total Maximum Daily Load for Diazinon in Chollas Creek Watershed, San Diego County*, dated August 14, 2002, including subsequent modifications, in order to achieve the receiving water limitations under Specific Provision 1.b.(2)(a) and/or the effluent limitations under Specific Provision 1.b.(2)(b).
- (iii) The Responsible Copermittees should coordinate any BMPs implemented to address this TMDL with Caltrans as possible.

## (3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance date, may be demonstrated via one of the following methods:

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision 1.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

- (c) There are no exceedances of the final effluent limitations under Specific Provision [1.b.\(2\)\(b\)](#) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:
  - (i) Incorporate the BMPs required under Specific Provision [1.b.\(2\)\(c\)](#) as part of the Water Quality Improvement Plan,
  - (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision [1.b.\(2\)\(c\)](#) achieves compliance with Specific Provisions [1.b.\(3\)\(a\)](#), [1.b.\(3\)\(b\)](#) and/or [1.b.\(3\)\(c\)](#),
  - (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
  - (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision [1.b.\(2\)\(c\)](#), AND
  - (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision [1.d](#), to demonstrate compliance with Specific Provisions [1.b.\(3\)\(a\)](#), [1.b.\(3\)\(b\)](#) and/or [1.b.\(3\)\(c\)](#).

#### **c. INTERIM TMDL COMPLIANCE REQUIREMENTS**

The Responsible Copermittees must be in compliance with the final diazinon TMDL compliance requirements as of December 31, 2010.

#### **d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS**

- (1) The Responsible Copermittees must implement the monitoring and assessment requirements issued under Investigation Order No. R9-2004-0277, *California Department of Transportation and San Diego Municipal Separate Storm Sewer System Copermittees Responsible for the Discharge of Diazinon into the Chollas Creek Watershed*. The monitoring reports required under Investigation Order No. R9-2004-0277 must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision [F.3.b](#) of this Order.
- (2) The Responsible Copermittees must monitor the effluent of the MS4 outfalls for diazinon within the Chollas Creek watershed, and calculate or estimate the annual diazinon loads, in accordance with the requirements of Provisions [D.2](#), [D.4.b.\(1\)](#), and [D.4.b.\(2\)](#) of this Order. The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision [F.3.b](#) of this Order.

- (3) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision [1.b.\(2\)\(b\)](#), dry and wet weather discharge concentrations may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

## 2. Total Maximum Daily Loads for Dissolved Copper in Shelter Island Yacht Basin

### a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2005-0019

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	February 9, 2005
State Water Board Approval Date:	September 22, 2005
Office of Administrative Law Approval Date:	December 2, 2005
US EPA Approval Date:	February 8, 2006

(3) TMDL Effective Date: December 2, 2005

(4) Watershed Management Area: San Diego Bay

(5) Water Body: Shelter Island Yacht Basin

(6) Responsible Copermittee: City of San Diego

### b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final dissolved copper TMDL compliance requirements for Shelter Island Yacht Basin consist of the following:

(1) Final TMDL Compliance Date

The Responsible Copermittee must be in compliance with the final TMDL compliance requirements as of December 2, 2005.

(2) Final Water Quality Based Effluent Water Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations:

**Table 2.1**

*Final Receiving Water Limitations Expressed as Concentrations in Shelter Island Yacht Basin*

Constituent	Exposure Duration	Receiving Water Limitation	Averaging Period
Dissolved Copper	Acute	4.8 µg/L x WER*	1 hour
	Chronic	3.1 µg/L x WER*	4 days

Notes:

\* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.

**(b) Final Effluent Limitations**

Discharges from the MS4s containing pollutant loads that do not exceed the following effluent limitations will not cause or contribute to exceedances of the receiving water limitations under Specific Provision [2.b.\(3\)\(a\)](#):

**Table 2.2**

*Final Effluent Limitations as Expressed as Annual Loads in MS4 Discharges to Shelter Island Yacht Basin*

Constituent	Effluent Limitation
Dissolved Copper	30 kg/yr*

\* If the water quality objectives for dissolved copper in Shelter Island Yacht Basin are changed in the future, then the margin of safety (MOS), TMDL and allocations will be recalculated using the *Method for Recalculation of the Total Maximum Daily Load for Dissolved Copper in the Shelter Island Yacht Basin, San Diego Bay* in the Basin Plan (p. 7-14).

**(c) Best Management Practices**

The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision [2.b.\(2\)\(a\)](#) and/or the effluent limitations under Specific Provision [2.b.\(2\)\(b\)](#) for Shelter Island Yacht Basin. The BMPs must be incorporated into the Water Quality Improvement Plan for the San Diego Bay Watershed Management Area.

**(3) Final TMDL Compliance Determination**

Compliance with the final WQBELs, on or after the final TMDL compliance date, may be demonstrated via one of the following methods:

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision [2.b.\(2\)\(a\)](#) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision [2.b.\(2\)\(b\)](#) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The Responsible Copermittee develops and implements the Water Quality Improvement Plan as follows:
  - (i) Incorporate the BMPs required under Specific Provision [2.b.\(2\)\(c\)](#) as part of the Water Quality Improvement Plan,
  - (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate



that the implementation of the BMPs required under Provision [2.b.\(2\)\(c\)](#) achieves compliance with Specific Provisions [2.b.\(3\)\(a\)](#), [2.b.\(3\)\(b\)](#) and/or [2.b.\(3\)\(c\)](#),

- (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
- (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision [2.b.\(2\)\(c\)](#), AND
- (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision [2.d](#), to demonstrate compliance with Specific Provisions [2.b.\(3\)\(a\)](#), [2.b.\(3\)\(b\)](#) and/or [2.b.\(3\)\(c\)](#).

**c. INTERIM TMDL COMPLIANCE REQUIREMENTS**

The Responsible Copermittees must be in compliance with the final dissolved copper TMDL compliance requirements as of December 2, 2005.

**d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS**

The Responsible Copermittee must monitor the effluent of its MS4 outfalls for dissolved copper, and calculate or estimate the monthly and annual dissolved copper loads, in accordance with the requirements of Provisions [D.2](#), [D.4.b.\(1\)](#), and [D.4.\(b\)\(2\)](#) of this Order. The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision [F.3.b](#) of this Order.

### 3. Total Maximum Daily Loads for Total Nitrogen and Total Phosphorus in Rainbow Creek Watershed

#### a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2005-0036

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	February 9, 2005
State Water Board Approval Date:	November 16, 2005
Office of Administrative Law Approval Date:	February 1, 2006
US EPA Approval Date:	March 22, 2006

(3) TMDL Effective Date: February 1, 2006

(4) Watershed Management Area: Santa Margarita River

(5) Water Body: Rainbow Creek

(6) Responsible Copermittee: County of San Diego

#### b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final total nitrogen and total phosphorus TMDL compliance requirements for Rainbow Creek consist of the following

(1) Final TMDL Compliance Date

The Responsible Copermittee must comply with final TMDL compliance requirements by December 31, 2021.

(2) Final Water Quality Based Effluent Water Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance date under Specific Provision [3.b.\(1\)](#):

**Table 3.1**

*Final Receiving Water Limitations Expressed as Concentrations in Rainbow Creek*

Constituent	Receiving Water Limitation
Nitrate (as N)	10 mg/L
Total Nitrogen	1 mg/L
Total Phosphorus	0.1 mg/L

## (b) Final Effluent Limitations

- (i) Discharges from the MS4s containing concentrations that do not exceed the following effluent limitations by the compliance date under Specific Provision 3.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 3.b.(2)(a):

**Table 3.2**

*Final Effluent Limitations Expressed as Concentrations in MS4 Discharges to Rainbow Creek*

Constituent	Effluent Limitation
Nitrate (as N)	10 mg/L
Total Nitrogen	1 mg/L
Total Phosphorus	0.1 mg/L

- (ii) Annual pollutant loads from given land uses discharging to and from the MS4s that do not exceed the following annual loads by the compliance date under Specific Provision 3.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 3.b.(2)(a):

**Table 3.3**

*Final Effluent Limitations Expressed as Annual Loads in MS4 Discharges to Rainbow Creek*

Land Use	Total N	Total P
Commercial nurseries	116 kg/yr	3 kg/yr
Park	3 kg/yr	0.1 kg/yr
Residential areas	149 kg/yr	12 kg/yr
Urban areas	27 kg/yr	6 kg/yr

## (c) Best Management Practices

- (i) The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision 3.b.(2)(a) and/or the effluent limitations under Specific Provision 3.b.(2)(b) for Rainbow Creek.
- (ii) The Responsible Copermittee should coordinate any BMPs implemented to address this TMDL with Caltrans and other sources as possible.

(3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance date, may be demonstrated via one of the following methods:

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision 3.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

- (c) There are no exceedances of the final effluent limitations under Specific Provision 3.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The annual pollutant loads from given land uses discharging to and from the MS4s do not exceed the final effluent limitations under Specific Provision 3.b.(2)(b)(ii); OR
- (e) The Responsible Copermittee develops and implements the Water Quality Improvement Plan as follows:
  - (i) Incorporate the BMPs required under Specific Provision 3.b.(2)(c) as part of the Water Quality Improvement Plan,
  - (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Specific Provision 3.b.(2)(c) achieves compliance with Specific Provisions 3.b.(3)(a), 3.b.(3)(b), 3.b.(3)(c) and/or 3.b.(3)(d),
  - (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
  - (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 3.b.(2)(c), AND
  - (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 3.d, to demonstrate compliance with Specific Provisions 3.b.(3)(a), 3.b.(3)(b), 3.b.(3)(c) and/or 3.b.(3)(d).

### **c. INTERIM TMDL COMPLIANCE REQUIREMENTS**

The interim total nitrogen and total phosphorus TMDL compliance requirements for Rainbow Creek consist of the following:

#### **(1) Interim Compliance Dates and WQBELs**

The Responsible Copermittee must comply with the interim WQBELs, expressed as annual loads, by December 31 of the interim compliance year given in [Table 3.4](#).

**Table 3.4**

*Interim Water Quality Based Effluent Limitations Expressed as Annual Loads in MS4 Discharges from Specific Land Uses to Rainbow Creek*

Land Use	Total N Interim Effluent Limitations (kg/yr)			Total P Interim Effluent Limitations (kg/yr)		
	Interim Compliance Date			Interim Compliance Date		
	2009	2013	2017	2009	2013	2017
Commercial nurseries	390	299	196	20	16	10
Park	5	3	3	0.15	0.10	0.10
Residential areas	507	390	260	99	74	47
Urban areas	40	27	27	9	6	6

## (2) Interim TMDL Compliance Determination

Compliance with interim WQBELs, on or after the interim TMDL compliance dates, may be demonstrated via one of the following methods:

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision 3.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision 3.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The annual pollutant loads from given land uses discharging to and from the MS4s do not exceed the final effluent limitations under Specific Provision 3.b.(2)(b)(ii); OR
- (e) The annual pollutant loads from given land uses discharging to and from the MS4s do not exceed the interim effluent limitations under Specific Provision 3.c.(1); OR
- (f) The Responsible Copermittee has submitted and is fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance dates.

### **d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS**

- (1) The Responsible Copermittee must incorporate into the Water Quality Improvement Plan and implement the Sampling and Analysis Plan for Rainbow Creek Nutrient Reduction TMDL Implementation Water Quality Monitoring, dated January 2010.

- (2) The results of any monitoring conducted during the reporting period, and assessment of whether the interim and final TMDL compliance requirements have been achieved must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision [F.3.b](#) of this Order.
- (3) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision [3.b.\(2\)\(b\)\(i\)](#), dry and wet weather discharge concentrations may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

#### 4. Total Maximum Daily Loads for Dissolved Copper, Lead, and Zinc in Chollas Creek

##### a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2007-0043

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	June 13, 2007
State Water Board Approval Date:	July 15, 2008
Office of Administrative Law Approval Date:	October 22, 2008
US EPA Approval Date:	December 18, 2008

(3) TMDL Effective Date: October 22, 2008

(4) Watershed Management Area: San Diego Bay

(5) Water Body: Chollas Creek

(6) Responsible Copermittees: City of La Mesa, City of Lemon Grove, City of San Diego, County of San Diego, San Diego Unified Port District

##### b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final dissolved copper, lead, and zinc TMDL compliance requirements for Chollas Creek consist of the following:

(1) Final TMDL Compliance Date

The Responsible Copermittees must comply with the final TMDL compliance requirements by October 22, 2028.

(2) Final Water Quality Based Effluent Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance date under Specific Provision [4.b.\(1\)](#):

**Table 4.1***Final Receiving Water Limitations Expressed as Concentrations in Chollas Creek*

Constituent	Exposure Duration	Receiving Water Limitation (µg/L)	Averaging Period
Dissolved Copper	Acute	$(0.96) \times e^{[0.9422 \times \ln(\text{hardness}) - 1.700]} \times \text{WER}^*$	1 hour
	Chronic	$(0.96) \times e^{[0.8545 \times \ln(\text{hardness}) - 1.702]} \times \text{WER}^*$	4 days
Dissolved Lead	Acute	$[1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 1.460]} \times \text{WER}^*$	1 hour
	Chronic	$[1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 4.705]} \times \text{WER}^*$	4 days
Dissolved Zinc	Acute	$(0.978) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	1 hour
	Chronic	$(0.986) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	4 days

Notes:

\* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.

**(b) Final Effluent Limitations**

Discharges from the MS4s containing pollutant loads that do not exceed the following effluent limitations by the compliance date under Specific Provision 4.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 4.b.(2)(a):

**Table 4.2***Final Effluent Limitations as Expressed Concentrations in MS4 Discharges to Chollas Creek*

Constituent	Exposure Duration	Effluent Limitation (µg/L)	Averaging Period
Dissolved Copper	Acute	$90\% \times (0.96) \times e^{[0.9422 \times \ln(\text{hardness}) - 1.700]} \times \text{WER}^*$	1 hour
	Chronic	$90\% \times (0.96) \times e^{[0.8545 \times \ln(\text{hardness}) - 1.702]} \times \text{WER}^*$	4 days
Dissolved Lead	Acute	$90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 1.460]} \times \text{WER}^*$	1 hour
	Chronic	$90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 4.705]} \times \text{WER}^*$	4 days
Dissolved Zinc	Acute	$90\% \times (0.978) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	1 hour
	Chronic	$90\% \times (0.986) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	4 days

Notes:

\* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.



(c) Best Management Practices

- (i) The Responsible Copermitees must implement BMPs to achieve the receiving water limitations under Specific Provision 4.b.(2)(a) and/or the effluent limitations under Specific Provision 4.b.(2)(b) for Chollas Creek.
- (ii) The Responsible Copermitees should coordinate any BMPs implemented to address this TMDL with Caltrans and the U.S. Navy as possible.

(3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance date, may be demonstrated via one of the following methods:

- (a) There is no direct or indirect discharge from the Responsible Copermitee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision 4.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermitee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision 4.b.(2)(b) at the Responsible Copermitee's MS4 outfalls; OR
- (d) The Responsible Copermitees develop and implement the Water Quality Improvement Plan as follows:
  - (i) Incorporate the BMPs required under Specific Provision 4.b.(2)(c) as part of the Water Quality Improvement Plan,
  - (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 4.b.(2)(c) achieves compliance with Specific Provisions 4.b.(3)(a), 4.b.(3)(b) and/or 4.b.(3)(c),
  - (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
  - (iv) The Responsible Copermitees continue to implement the BMPs required under Specific Provision 4.b.(2)(c), AND
  - (v) The Responsible Copermitees continue to perform the specific monitoring and assessments specified in Specific Provision 4.d, to demonstrate compliance with Specific Provisions 4.b.(3)(a), 4.b.(3)(b) and/or 4.b.(3)(c).

### c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The interim dissolved copper, lead, and zinc TMDL compliance requirements for Chollas Creek consist of the following:

#### (1) Interim Compliance Date and WQBELs

The Responsible Copermittee must comply with the interim WQBELs, expressed as concentrations, by the interim compliance date given in [Table 4.3](#):

**Table 4.3**

*Interim Water Quality Based Effluent Limitations Expressed as Concentrations in MS4 Discharges to Chollas Creek*

Interim Compliance Date	Constituent	Exposure Duration	Effluent Limitation (µg/L)	Averaging Period
October 22, 2018	Dissolved Copper	Acute	$1.2 \times 90\% \times (0.96) \times e^{[0.9422 \times \ln(\text{hardness}) - 1.700]} \times \text{WER}^*$	1 hour
		Chronic	$1.2 \times 90\% \times (0.96) \times e^{[0.8545 \times \ln(\text{hardness}) - 1.702]} \times \text{WER}^*$	4 days
	Dissolved Lead	Acute	$1.2 \times 90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 1.460]} \times \text{WER}^*$	1 hour
		Chronic	$1.2 \times 90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 4.705]} \times \text{WER}^*$	4 days
	Dissolved Zinc	Acute	$1.2 \times 90\% \times (0.978) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	1 hour
		Chronic	$1.2 \times 90\% \times (0.986) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	4 days

Notes:

\* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.

#### (2) Interim TMDL Compliance Determination

Compliance with interim WQBELs, on or after the interim TMDL compliance date, may be demonstrated via one of the following methods:

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the applicable receiving water limitations under Specific Provision [4.b.\(2\)\(a\)](#) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision [4.b.\(2\)\(b\)](#) at the Responsible Copermittee's MS4 outfalls; OR
- (d) There are no exceedances of the interim effluent limitations under Specific Provision [4.c.\(1\)](#) at the Responsible Copermittee's MS4 outfalls; OR

- (e) The Responsible Copermittees have submitted and is fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance date.

**d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS**

- (1) The Responsible Copermittees must implement the monitoring and assessment requirements issued under Investigation Order No. R9-2004-0277, *California Department of Transportation and San Diego Municipal Separate Storm Sewer System Copermittees Responsible for the Discharge of Diazinon into the Chollas Creek Watershed*, when it is amended to include monitoring requirements for the Total Maximum Daily Loads for Dissolved Copper, Lead, and Zinc in Chollas Creek. The monitoring reports required under Investigation Order No. R9-2004-0277 must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision [F.3.b](#) of this Order.
- (2) The Responsible Copermittees must monitor the effluent of the MS4 outfalls discharging to Chollas Creek for dissolved copper, lead, and zinc, and calculate or estimate the monthly and annual dissolved copper, lead, and zinc loads, in accordance with the requirements of Provisions [D.2](#), [D.4.b.\(1\)](#), and [D.4.b.\(2\)](#) of this Order. The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision [F.3.b](#) of this Order.
- (3) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision [4.b.\(2\)\(b\)](#) or [4.c.\(1\)](#), dry and wet weather discharge concentrations may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

## 5. Total Maximum Daily Loads for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay

### a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2008-0027

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	June 11, 2008
State Water Board Approval Date:	June 16, 2009
Office of Administrative Law Approval Date:	September 15, 2009
US EPA Approval Date:	October 26, 2009

(3) TMDL Effective Date: September 15, 2009

(4) Watershed Management Areas: See [Table 5.0](#)

(5) Water Bodies: See [Table 5.0](#)

(6) Responsible Copermittees: See [Table 5.0](#)

#### **Table 5.0**

*Applicability of Total Maximum Daily Loads for Indicator Bacteria  
Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay*

Watershed Management Area	Water Body	Segment or Area	Responsible Copermittees
South Orange County	Dana Point Harbor	Baby Beach	-City of Dana Point -County of Orange
San Diego Bay	San Diego Bay	Shelter Island Shoreline Park	- San Diego Unified Port District

### b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final indicator bacteria TMDL compliance requirements for segments or areas of the water bodies listed in [Table 5.0](#) consist of the following:

(1) Final TMDL Compliance Dates

(a) Baby Beach in Dana Point Harbor

The Responsible Copermittees for MS4 discharges to Baby Beach must be in compliance with the final TMDL compliance requirements according to the following compliance dates:

**Table 5.1**

*Compliance Dates to Achieve Final TMDL Compliance Requirements For Baby Beach in Dana Point Harbor*

<b>Constituent</b>	<b>Dry Weather WLA Compliance Date</b>	<b>Wet Weather WLA Compliance Date</b>
Total Coliform	September 15, 2014	September 15, 2009
Fecal Coliform		September 15, 2009
<i>Enterococcus</i>		September 15, 2019

(b) Shelter Island Shoreline Park in San Diego Bay

The Responsible Copermittee for MS4 discharges to Shelter Island Shoreline Park must be in compliance with the final TMDL compliance requirements as of December 31, 2012.

(2) Final Water Quality Based Effluent Water Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance dates under Specific Provision 5.b.(1):

**Table 5.2**

*Final Receiving Water Limitations Expressed as Bacteria Densities in the Water Body*

<b>Receiving Water Limitations</b>		
<b>Constituent</b>	<b>Single Sample Maximum<sup>1,2</sup></b>	<b>30-Day Geometric Mean<sup>2</sup></b>
Total Coliform	10,000 MPN/100mL	1,000 MPN/100mL
Fecal Coliform	400 MPN/100mL	200 MPN/100mL
<i>Enterococcus</i>	104 MPN/100mL	35 MPN/100mL

Notes:

1. During wet weather days, only the single sample maximum receiving water limitations are required to be achieved.
2. During dry weather days, the single sample maximum and 30-day geometric mean receiving water limitations are required to be achieved.

## (b) Final Effluent Limitations

- (i) Discharges from the MS4s containing indicator bacteria densities that do not exceed the following effluent limitations by the compliance dates under Specific Provision 5.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 5.b.(2)(a):

**Table 5.3a**

*Final Effluent Limitations as Expressed as Bacteria Densities in MS4 Discharges to the Water Body*

Effluent Limitations		
Constituent	Single Sample Maximum <sup>1,2</sup>	30-Day Geometric Mean <sup>2</sup>
Total Coliform	10,000 MPN/100mL	1,000 MPN/100mL
Fecal Coliform	400 MPN/100mL	200 MPN/100mL
<i>Enterococcus</i>	104 MPN/100mL	35 MPN/100mL

Notes:

1. During wet weather days, only the single sample maximum effluent limitations are required to be achieved.
2. During dry weather days, the single sample maximum and 30-day geometric mean effluent limitations are required to be achieved.

- (ii) Discharges from the MS4s containing indicator bacteria loads that do not exceed the following effluent limitations by the compliance dates under Specific Provision 5.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 5.b.(2)(a):

**Table 5.4a**

*Final Effluent Limitations Expressed as Bacteria Loads in MS4 Discharges to the Baby Beach in Dana Point Harbor*

Constituent	Dry Weather	Wet Weather
	Final Effluent Limitation	Final Effluent Limitation
Total Coliform	0.86x10 <sup>9</sup> MPN/day	3,254x10 <sup>9</sup> MPN/30days
Fecal Coliform	0.17x10 <sup>9</sup> MPN/day	112x10 <sup>9</sup> MPN/30days
<i>Enterococcus</i>	0.03x10 <sup>9</sup> MPN/day	114x10 <sup>9</sup> MPN/30days

**Table 5.4b**

*Final Effluent Limitations Expressed as Bacteria Loads in MS4 Discharges to the Shelter Island Shoreline Park in San Diego Bay*

Constituent	Dry Weather	Wet Weather
	Final Effluent Limitation	Final Effluent Limitation
Total Coliform	0 MPN/day	198x10 <sup>9</sup> MPN/30days
Fecal Coliform	0 MPN/day	8x10 <sup>9</sup> MPN/30days
<i>Enterococcus</i>	0 MPN/day	26x10 <sup>9</sup> MPN/30days

- (iii) Indicator bacteria percent load reductions from the Responsible Copermittees' MS4s that are greater than or equal to the following effluent limitations by the compliance dates under Specific Provision [5.b.\(1\)](#) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision [5.b.\(2\)\(a\)](#):

**Table 5.5a**

*Final Effluent Limitations Expressed as Percent Load Reductions\* in MS4 Discharges to Baby Beach in Dana Point Harbor*

Constituent	Dry Weather	Wet Weather
	Final Effluent Limitation	Final Effluent Limitation
Total Coliform	90.4%	0%
Fecal Coliform	82.7%	0%
<i>Enterococcus</i>	96.2%	62.2%

Notes:

\* The percent load reductions are relative to data collected between 1996-2002. For pollutant load reductions of 0%, pollutant loads discharged from the Responsible Copermittees' MS4s must not exceed the loads in [Table 5.4a](#), unless an updated model or analysis, accepted by the San Diego Water Board, identifies a different allowable pollutant load that can be discharged from the Responsible Copermittee's MS4s to the water body.

**Table 5.5b**

*Final Effluent Limitations Expressed as Percent Load Reductions\*\* in MS4 Discharges to Shelter Island Shoreline Park in San Diego Bay*

Constituent	Dry Weather	Wet Weather
	Final Effluent Limitation	Final Effluent Limitation
Total Coliform	0%	0%
Fecal Coliform	0%	0%
<i>Enterococcus</i>	0%	0%

Notes:

\* The percent load reductions are relative to data collected between 1999-2004. For pollutant load reductions of 0%, pollutant loads discharged from the Responsible Copermittee's MS4s must not exceed the loads in [Table 5.4b](#), unless an updated model or analysis, accepted by the San Diego Water Board, identifies a different allowable pollutant load that can be discharged from the Responsible Copermittee's MS4s to the water body.

### (c) Best Management Practices

- (i) The Water Quality Improvement Plans for the applicable Watershed Management Areas in [Table 5.0](#) must incorporate the Bacteria Load Reduction Plan (BLRP) required to be developed pursuant to Resolution No. R9-2008-0027.
- (ii) The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision [5.b.\(2\)\(a\)](#) and/or the effluent limitations under Specific Provision [5.b.\(2\)\(b\)](#) for the segments or areas of the water bodies listed in [Table 5.0](#)

### (3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance dates, may be demonstrated via one of the following methods:

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision [5.b.\(2\)\(a\)](#) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision [5.b.\(2\)\(b\)\(i\)](#) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The pollutant loads discharging from the Responsible Copermittees' MS4 outfalls do not exceed the final effluent limitations under Specific Provision [5.b.\(2\)\(b\)\(ii\)](#); OR
- (e) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the final effluent limitations under Specific Provision [5.b.\(2\)\(b\)\(iii\)](#); OR
- (f) The Responsible Copermittees can demonstrate that exceedances of the final receiving water limitations under Specific Provision [5.b.\(2\)\(a\)](#) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermittees' MS4s are not causing or contributing to the exceedances; OR
- (g) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:
  - (i) Incorporate the BMPs required under Specific Provision [5.b.\(2\)\(c\)](#) as part of the Water Quality Improvement Plan,
  - (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision [5.b.\(2\)\(c\)](#) achieves compliance with Specific Provisions [5.b.\(3\)\(a\)](#), [5.b.\(3\)\(b\)](#), [5.b.\(3\)\(c\)](#), [5.b.\(3\)\(d\)](#), [5.b.\(3\)\(e\)](#) and/or [5.b.\(3\)\(f\)](#),
  - (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
  - (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision [5.b.\(2\)\(c\)](#), AND



- (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 5.d, to demonstrate compliance with Specific Provisions 5.b.(3)(a), 5.b.(3)(b), 5.b.(3)(c), 5.b.(3)(d), 5.b.(3)(e) and/or 5.b.(3)(f).

### c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The interim indicator bacteria TMDL compliance requirements for segments or areas of the water bodies listed in Table 5.0 consist of the following:

#### (1) Baby Beach in Dana Point Harbor

##### (a) Interim TMDL Compliance Dates and WQBELS

The Responsible Copermittees for MS4 discharges to Baby Beach must comply with the following interim WQBELS by the interim compliance dates given in Tables 5.6a and/or 5.6b:

**Table 5.6a**

*Interim Water Quality Based Effluent Limitations Expressed as Bacteria Loads in MS4 Discharges to Baby Beach in Dana Point Harbor*

Constituent	Interim Compliance Dates	Dry Weather	Wet Weather
		Interim Effluent Limitation	Interim Effluent Limitation
Total Coliform	September 15, 2012	4.93x10 <sup>9</sup> MPN/day	3,254x10 <sup>9</sup> MPN/30days*
Fecal Coliform	September 15, 2012	0.59x10 <sup>9</sup> MPN/day	112x10 <sup>9</sup> MPN/30days*
<i>Enterococcus</i>	September 15, 2012	0.42x10 <sup>9</sup> MPN/day	301x10 <sup>9</sup> MPN/30days
	September 15, 2016	0.03x10 <sup>9</sup> MPN/day *	207x10 <sup>9</sup> MPN/30days

Notes:

\* Same as the final effluent limitations in Table 5.4a.

**Table 5.6b**

*Interim Water Quality Based Effluent Limitations Expressed as Percent Load Reductions\* in MS4 Discharges to Baby Beach in Dana Point Harbor*

Constituent	Interim Compliance Dates	Dry Weather	Wet Weather
		Interim Effluent Limitation	Interim Effluent Limitation
Total Coliform	September 15, 2012	45.2%	0%**
Fecal Coliform	September 15, 2012	41.4%	0%**
<i>Enterococcus</i>	September 15, 2012	48.1%	0%
	September 15, 2016	96.2%**	31.1%

Notes:

\* The percent load reductions are relative to data collected between 1996-2002. For pollutant load reductions of 0%, pollutant loads discharged from the Responsible Copermittees' MS4s must not exceed the loads in Table 5.6a, unless an updated model or analysis, accepted by the San Diego Water Board, identifies a different allowable pollutant load that can be discharged from the Responsible Copermittee's MS4s to the waterbody.

\*\* Same as the final effluent limitations in Table 5.5a.

(b) Interim Compliance Determination

Compliance with interim WQBELs, on or after the interim TMDL compliance dates, may be demonstrated via one of the following methods:

- (i) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (ii) There are no exceedances of the final receiving water limitations under Specific Provision [5.b.\(2\)\(a\)](#) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (iii) There are no exceedances of the final effluent limitations under Specific Provision [5.b.\(2\)\(b\)\(i\)](#) at the Responsible Copermittee's MS4 outfalls; OR
- (iv) The pollutant loads discharging from the Responsible Copermittees' MS4 outfalls do not exceed the final effluent limitations under Specific Provision [5.b\(2\)\(b\)\(ii\)](#); OR
- (v) The Responsible Copermittees can demonstrate that exceedances of the applicable receiving water limitations under Specific Provision [5.b.\(2\)\(a\)](#) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermittees' MS4s are not causing or contributing to the exceedances; OR
- (vi) The pollutant loads discharging from the Responsible Copermittees' MS4 outfalls do not exceed the interim effluent limitations under [Table 5.6a](#) of Specific Provision [5.c.\(1\)\(a\)](#); OR
- (vii) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the interim effluent limitations under [Table 5.6b](#) of Specific Provision [5.c.\(1\)\(a\)](#); OR
- (viii) The Responsible Copermittees have submitted and are fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance dates.

(2) Shelter Island Shoreline Park in San Diego Bay

The Responsible Copermittee for MS4 discharges to Shelter Island Shoreline Park must be in compliance with the final indicator bacteria TMDL requirements as of December 31, 2012.

**d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS****(1) Monitoring Stations**

Monitoring locations should consist of, at a minimum, the same locations used to collect data required pursuant to Order Nos. R9-2007-0001 and R9-2009-0002, and beach monitoring for Health and Safety Code section 115880.<sup>32</sup> If discharges of bacteria from the MS4 exceed the applicable interim or final WQBELs, additional monitoring locations and/or other source identification methods must be implemented to identify the sources causing the exceedances. The additional monitoring locations must also be used to demonstrate that the bacteria loads from the identified anthropogenic sources have been addressed and are no longer causing exceedances in the receiving waters.

**(2) Monitoring Procedures**

- (a) The Responsible Copermittees must collect dry weather monitoring samples from the receiving water monitoring stations at least monthly. Dry weather samples collected from additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified anthropogenic sources have been addressed and are no longer causing exceedances in the receiving waters.
- (b) The Responsible Copermittees must collect wet weather monitoring samples within the first 24 hours of a storm event<sup>33</sup> of the rainy season (i.e. October 1 through April 30). Wet weather samples collected from receiving water stations and any additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified sources have been addressed and are no longer causing exceedances in the receiving waters.
- (c) Samples must be analyzed for total coliform, fecal coliform, and *Enterococcus* indicator bacteria.

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<sup>32</sup> Commonly referred to as AB 411 monitoring

<sup>33</sup> Wet weather days are defined by the TMDL as storm events of 0.2 inches or greater and the following 72 hours. The Responsible Copermittees may choose to limit their wet weather sampling requirements to storm events of 0.2 inches or greater, or also include storm events of 0.1 inches or greater as defined by the federal regulations [40CFR122.26(d)(2)(iii)(A)(2)].

### (3) Assessment and Reporting Requirements

- (a) The Responsible Copermittees must analyze the dry weather and wet weather monitoring data to assess whether the interim and final WQBELs have been achieved.
- (b) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision [5.b.\(2\)\(b\)\(i\)](#), dry and wet weather discharge bacteria densities may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.
- (c) The Responsible Copermittees must analyze the dry weather and wet weather monitoring data to correlate elevated bacteria levels with known or suspected sewage spills from wastewater collection systems and treatment plants or boats.
- (d) The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision [F.3.b](#) of this Order.

## 6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)

### a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2010-0001

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	February 10, 2010
State Water Board Approval Date:	December 14, 2010
Office of Administrative Law Approval Date:	April 4, 2011
US EPA Approval Date:	June 22, 2011

(3) TMDL Effective Date: April 4, 2011

(4) Watershed Management Areas: See [Table 6.0](#)

(5) Water Bodies: See [Table 6.0](#)

(6) Responsible Copermittees: See [Table 6.0](#)

**Table 6.0**

*Applicability of Total Maximum Daily Loads for Indicator Bacteria*

*Project I - Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)*

Watershed Management Area and Watershed	Water Body	Segment or Area	Responsible Copermittees
<b>South Orange County</b>  San Joaquin Hills HSA (901.11) and Laguna Beach HSA (901.12)	Pacific Ocean Shoreline	Cameo Cove at Irvine Cove Drive – Riviera Way	-City of Laguna Beach -County of Orange -Orange County Flood Control District
		at Heisler Park - North	
	Pacific Ocean Shoreline	at Main Laguna Beach	-City of Aliso Viejo -City of Laguna Beach -City of Laguna Woods -County of Orange -Orange County Flood Control District
		Laguna Beach at Ocean Avenue	
		Laguna Beach at Cleo Street	
	Arch Cove at Bluebird Canyon Road		
	Laguna Beach at Dumond Drive		
<b>South Orange County</b>  Aliso HSA (901.13)	Pacific Ocean Shoreline	Laguna Beach at Lagunita Place / Blue Lagoon Place at Aliso Beach	-City of Aliso Viejo -City of Laguna Beach -City of Laguna Hills -City of Laguna Niguel -City of Laguna Woods -City of Lake Forest -City of Mission Viejo -County of Orange -Orange County Flood Control District
	Aliso Creek	Entire reach (7.2 miles) and associated tributaries: - Aliso Hills Channel - English Canyon Creek - Dairy Fork Creek - Sulfur Creek - Wood Canyon Creek	
	Aliso Creek Mouth	at mouth	

ATTACHMENT E: SPECIFIC PROVISIONS FOR TOTAL MAXIMUM DAILY LOADS

6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I –  
 Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)

**Table 6.0 (Cont'd)***Applicability of Total Maximum Daily Loads for Indicator Bacteria**Project I - Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)*

<b>Watershed Management Area and Watershed</b>	<b>Water Body</b>	<b>Segment or Area</b>	<b>Responsible Copermittees</b>
<b>South Orange County</b>  Dana Point HSA (901.14)	Pacific Ocean Shoreline	Aliso Beach at West Street	-City of Dana Point -City of Laguna Beach -City of Laguna Niguel -County of Orange -Orange County Flood Control District
		Aliso Beach at Table Rock Drive	
		100 Steps Beach at Pacific Coast Hwy at hospital (9 <sup>th</sup> Avenue)	
		at Salt Creek (large outlet)	
		Salt Creek Beach at Salt Creek service road	
		Salt Creek Beach at Strand Road	
<b>South Orange County</b>  Lower San Juan HSA (901.27)	Pacific Ocean Shoreline	at San Juan Creek	-City of Dana Point -City of Laguna Hills -City of Laguna Niguel -City of Mission Viejo -City of Rancho Santa Margarita -City of San Juan Capistrano -County of Orange -Orange County Flood Control District
	San Juan Creek	lower 1 mile	
	San Juan Creek Mouth	at mouth	
<b>South Orange County</b>  San Clemente HA (901.30)	Pacific Ocean Shoreline	at Poche Beach	-City of Dana Point -City of San Clemente -County of Orange -Orange County Flood Control District
		Ole Hanson Beach Club Beach at Pico Drain	
		San Clemente City Beach at El Portal Street Stairs	
		San Clemente City Beach at Mariposa Street	
		San Clemente City Beach at Linda Lane	
		San Clemente City Beach at South Linda Lane	
		San Clemente City Beach at Lifeguard Headquarters	
		under San Clemente Municipal Pier	
		San Clemente City Beach at Trafalgar Canyon (Trafalgar Lane)	
		San Clemente State Beach at Riviera Beach	
		Can Clemente State Beach at Cypress Shores	

## ATTACHMENT E: SPECIFIC PROVISIONS FOR TOTAL MAXIMUM DAILY LOADS

6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I –  
Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)

**Table 6.0 (Cont'd)***Applicability of Total Maximum Daily Loads for Indicator Bacteria**Project I - Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)*

<b>Watershed Management Area and Watershed</b>	<b>Water Body</b>	<b>Segment or Area</b>	<b>Responsible Copermittees</b>
<b>San Luis Rey River</b> San Luis Rey HU (903.00)	Pacific Ocean Shoreline	at San Luis Rey River mouth	-City of Oceanside -City of Vista -County of San Diego
<b>Carlsbad</b> San Marcos HA (904.50)	Pacific Ocean Shoreline	at Moonlight State Beach	-City of Carlsbad -City of Encinitas -City of Escondido -City of San Marcos -County of San Diego
<b>San Dieguito River</b> San Dieguito HU (905.00)	Pacific Ocean Shoreline	at San Dieguito Lagoon mouth	-City of Del Mar -City of Escondido -City of Poway -City of San Diego -City of Solana Beach -County of San Diego
<b>Penasquitos</b> Miramar Reservoir HA (906.10)	Pacific Ocean Shoreline	Torrey Pines State Beach at Del Mar (Anderson Canyon)	-City of Del Mar -City of Poway -City of San Diego -County of San Diego
<b>Mission Bay</b> Scripps HA (906.30)	Pacific Ocean Shoreline	La Jolla Shores Beach at El Paseo Grande	-City of San Diego
		La Jolla Shores Beach at Caminito del Oro	
		La Jolla Shores Beach at Vallecitos	
		La Jolla Shores Beach at Avenida de la Playa	
		at Casa Beach, Children's Pool	
		South Casa Beach at Coast Boulevard	
		Whispering Sands Beach at Ravina Street	
		Windansea Beach at Vista de la Playa	
		Windansea Beach at Bonair Street	
		Windansea Beach at Playa del Norte	
		Windansea Beach at Palomar Avenue	
		at Tourmaline Surf Park	
Pacific Beach at Grand Avenue			
<b>Mission Bay</b> Tecolote HA (906.50)	Tecolote Creek	Entire reach and tributaries	

## ATTACHMENT E: SPECIFIC PROVISIONS FOR TOTAL MAXIMUM DAILY LOADS

6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I –  
Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)

**Table 6.0 (Cont'd)***Applicability of Total Maximum Daily Loads for Indicator Bacteria**Project I- Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)*

<b>Watershed Management Area and Watershed</b>	<b>Water Body</b>	<b>Segment or Area</b>	<b>Responsible Copermittees</b>
<b>San Diego River</b>	Forrester Creek	lower 1 mile	-City of El Cajon -City of Santee -County of San Diego
Mission San Diego HSA (907.11) and Santee HSA (907.12)	San Diego River	lower 6 miles	-City of El Cajon -City of La Mesa -City of San Diego -City of Santee -County of San Diego
	Pacific Ocean Shoreline	at San Diego River mouth at Dog Beach	-City of La Mesa -City of Lemon Grove -City of San Diego -County of San Diego - San Diego Unified Port District
<b>San Diego Bay</b>	Chollas Creek	lower 1.2 miles	-City of La Mesa -City of Lemon Grove -City of San Diego -County of San Diego - San Diego Unified Port District
Chollas HSA (908.22)			

**b. FINAL TMDL COMPLIANCE REQUIREMENTS**

The final indicator bacteria TMDL compliance requirements for the water bodies listed in [Table 6.0](#) consist of the following:

**(1) Final TMDL Compliance Dates**

The Responsible Copermittees for MS4 discharges to the water bodies listed in [Table 6.0](#) must be in compliance with the final TMDL compliance requirements according to the following compliance dates:

**Table 6.1***Compliance Dates to Achieve Final TMDL Compliance Requirements*

<b>Constituent</b>	<b>Dry Weather TMDL Compliance Date</b>	<b>Wet Weather TMDL Compliance Date</b>
Total Coliform	April 4, 2021	April 4, 2031
Fecal Coliform		
<i>Enterococcus</i>		



(2) Final Water Quality Based Effluent Limitations

## (a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance dates under Specific Provision 6.b.(1):

**Table 6.2a**

*Final Receiving Water Limitations Expressed as Bacteria Densities and Allowable Exceedance Frequencies for Beaches*

Constituent	Wet Weather Days		Dry Weather Days	
	Single Sample Maximum <sup>a,b</sup> (MPN/100mL)	Single Sample Maximum Allowable Exceedance Frequency <sup>c</sup>	30-Day Geometric Mean <sup>b</sup> (MPN/100mL)	30-Day Geometric Mean Allowable Exceedance Frequency
Total Coliform	10,000	22%	1,000	0%
Fecal Coliform	400	22%	200	0%
<i>Enterococcus</i>	104	22%	35	0%

Notes:

- During wet weather days, only the single sample maximum receiving water limitations are required to be achieved.
- During dry weather days, the single sample maximum and 30-day geometric mean receiving water limitations are required to be achieved.
- The 22% single sample maximum allowable exceedance frequency only applies to wet weather days. For dry weather days, the dry weather bacteria densities must be consistent with the single sample maximum REC-1 water quality objectives in the Ocean Plan.

**Table 6.2b**

*Final Receiving Water Limitations Expressed as Bacteria Densities and Allowable Exceedance Frequencies for Creeks*

Constituent	Wet Weather Days		Dry Weather Days	
	Single Sample Maximum <sup>a,b</sup> (MPN/100mL)	Single Sample Maximum Allowable Exceedance Frequency <sup>c</sup>	30-Day Geometric Mean <sup>b</sup> (MPN/100mL)	30-Day Geometric Mean Allowable Exceedance Frequency
Fecal Coliform	400	22%	200	0%
<i>Enterococcus</i>	61 (104)	22%	33	0%

Notes:

- During wet weather days, only the single sample maximum receiving water limitations are required to be achieved.
- During dry weather days, the single sample maximum and 30-day geometric mean receiving water limitations are required to be achieved.
- The 22% single sample maximum allowable exceedance frequency only applies to wet weather days. For dry weather days, the dry weather bacteria densities must be consistent with the single sample maximum REC-1 water quality objectives in the Basin Plan.
- A single sample maximum of 104 MPN/100ml for *Enterococcus* may be applied as a receiving water limitation for creeks, instead of 61 MPN/100mL, if one or more of the creeks addressed by these TMDLs (San Juan Creek, Aliso Creek, Tecolote Creek, Forrester Creek, San Diego River, and/or Chollas Creek) is designated with a "moderately to lightly used area" or less frequent usage frequency in the Basin Plan. Otherwise, the single sample maximum of 61 MPN/100mL for *Enterococcus* must be used to assess compliance with the allowable exceedance frequency.

## (b) Final Effluent Limitations

- (i) Discharges from the MS4s containing indicator bacteria densities that do not exceed the following effluent limitations by the compliance dates under Specific Provision 6.c.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 6.b.(2)(a):

**Table 6.2c**

*Final Effluent Limitations Expressed as Bacteria Densities and Allowable Exceedance Frequencies in MS4 Discharges to the Water Body*

Constituent	Concentration-Based Effluent Limitations			
	Single Sample Maximum <sup>a,b</sup> (MPN/100mL)	Single Sample Maximum Allowable Exceedance Frequency <sup>c</sup>	30-Day Geometric Mean <sup>b</sup> (MPN/100mL)	30-Day Geometric Mean Allowable Exceedance Frequency
Total Coliform <sup>d</sup>	10,000	22%	1,000	0%
Fecal Coliform	400	22%	200	0%
<i>Enterococcus</i>	104 <sup>e</sup> / 61 <sup>f</sup>	22%	35 <sup>e</sup> / 33 <sup>f</sup>	0%

## Notes:

- During wet weather days, only the single sample maximum effluent limitations are required to be achieved.
- During dry weather days, the single sample maximum and 30-day geometric mean effluent limitations are required to be achieved.
- The 22% single sample maximum allowable exceedance frequency only applies to wet weather days. For dry weather days, the dry weather bacteria densities must be consistent with the single sample maximum REC-1 water quality objectives in the Ocean Plan for discharges to beaches, and the Basin Plan for discharges to creeks and creek mouths.
- Total coliform effluent limitations only apply to MS4 outfalls that discharge to the Pacific Ocean Shorelines and creek mouths listed in [Table 6.0](#).
- This *Enterococcus* effluent limitation applies to MS4 discharges to segments of areas of Pacific Ocean Shoreline listed in [Table 6.0](#).
- This *Enterococcus* effluent limitation applies to MS4 discharges to segments or areas of creeks or creek mouths listed in [Table 6.0](#).

- (ii) Indicator bacteria percent load reductions from the Responsible Copermittees' MS4s that are greater than or equal to the following effluent limitations by the compliance dates under Specific Provision 6.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 6.b.(2)(a):

**Table 6.3**

*Final Effluent Limitations Expressed as Percent Load Reductions\* in MS4 Discharges to the Water Body*

Watershed Management Areas	Watershed and Water Bodies	Load-Based Effluent Limitations					
		Dry Weather			Wet Weather		
		Total Coliform	Fecal Coliform	Enterococcus	Total Coliform	Fecal Coliform	Enterococcus
South Orange County	San Joaquin Hills HSA (901.11) and Laguna Hills HSA (901.12) -Pacific Ocean Shoreline	91.78%	91.72%	98.28%	46.85%	52.07%	51.26%
	Aliso HSA (901.13) -Pacific Ocean Shoreline -Aliso Creek -Aliso Creek mouth	95.47%	95.58%	99.13%	25.29%	26.62%	27.52% (27.37%)**
	Dana Point HSA (901.14) -Pacific Ocean Shoreline	95.04%	95.03%	98.98%	13.15%	14.86%	15.16%
	Lower San Juan HSA (901.27) -Pacific Ocean Shoreline -San Juan Creek -San Juan Creek mouth	72.96%	74.21%	94.94%	19.21%	12.82%	27.12% (26.90%)**
	San Clemente HA (901.30) -Pacific Ocean Shoreline	94.28%	94.23%	98.83%	23.85%	24.58%	25.26%
San Luis Rey River	San Luis Rey HU (903.00) -Pacific Ocean Shoreline	38.13%	39.09%	87.38%	5.62%	3.12%	11.69%

**Table 6.3 (Cont'd)**

*Final Effluent Limitations Expressed as Percent Load Reductions\* in MS4 Discharges to the Water Body*

Watershed Management Areas	Watershed and Water Bodies	Load-Based Effluent Limitations					
		Dry Weather			Wet Weather		
		Total Coliform	Fecal Coliform	Enterococcus	Total Coliform	Fecal Coliform	Enterococcus
Carlsbad	San Marcos HA (904.50)	82.82%	82.55%	96.03%	18.47%	18.98%	20.19%
	- Pacific Ocean Shoreline						
San Dieguito River	San Dieguito HU (905.00)	14.39%	20.72%	83.48%	4.29%	1.46%	7.72%
	- Pacific Ocean Shoreline						
Penasquitos	Miramar Reservoir HA (906.10)	96.50%	96.59%	99.42%	1.61%	1.99%	1.93%
	- Pacific Ocean Shoreline						
Mission Bay	Scripps HA (906.30)	96.44%	96.42%	99.25%	16.32%	21.14%	18.82%
	- Pacific Ocean Shoreline						
	Tecolote HA (906.50)	94.51%	94.59%	98.94%	16.51%	20.47%	18.15% (18.08%)**
	- Tecolote Creek						
San Diego River	Mission San Diego HSA (907.11) and Santee HSA (907.12)	74.03%	69.44%	93.96%	38.14%	53.22%	42.74% (42.47%)**
	- Pacific Ocean Shoreline						
	- Forrester Creek (lower 1 mile) - San Diego River (lower 6 miles)						
San Diego Bay	Chollas HSA (908.22)	92.06%	92.15%	98.46%	17.82%	24.84%	21.46% (21.36%)**
	- Chollas Creek						

Notes:

\* The percent load reductions are based on reducing loads compared to pollutant loads from 2001 to 2002.

\*\* The alternative *Enterococcus* percent load reduction was calculated based on a numeric target of 104 MPN/100mL instead of 61 MPN/100mL, protective of the REC-1 "moderately to lightly used area" usage frequency that is protective of freshwater creeks and downstream beaches. Acceptable evidence that impaired freshwater creeks can be considered "moderately to lightly used areas" must be provided before these alternative pollutant load reductions can be utilized.

(c) Best Management Practices

- (i) The Water Quality Improvement Plans for the applicable Watershed Management Areas in [Table 6.0](#) must incorporate the Comprehensive Load Reduction Plans (CLRPs) required to be developed pursuant to Resolution No. R9-2010-0001.
- (ii) The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision [6.b.\(2\)\(a\)](#) and/or the effluent limitations under Specific Provision [6.b.\(2\)\(b\)](#) for the segments or areas of the water bodies listed in [Table 6.0](#).
- (iii) The Responsible Copermittees should coordinate any BMPs implemented to address this TMDL with Caltrans, owners/operators of small MS4s, and agricultural dischargers as possible.

(3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance dates, may be demonstrated via one of the following methods:

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision [6.b.\(2\)\(a\)](#) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision [6.b.\(2\)\(b\)\(i\)](#) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the final effluent limitations under Specific Provision [6.b.\(2\)\(b\)\(ii\)](#); OR
- (e) The Responsible Copermittees can demonstrate that exceedances of the final receiving water limitations under Specific Provision [6.b.\(2\)\(a\)](#) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermittees' MS4s are not causing or contributing to the exceedances; OR
- (f) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:
  - (i) Incorporate the BMPs required under Specific Provision [6.b.\(2\)\(c\)](#) as part of the Water Quality Improvement Plan,

- (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision [6.b.\(2\)\(c\)](#) achieves compliance with Specific Provisions [6.b.\(3\)\(a\)](#), [6.b.\(3\)\(b\)](#), [6.b.\(3\)\(c\)](#), [6.b.\(3\)\(d\)](#), and/or [6.b.\(3\)\(e\)](#),
- (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
- (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision [6.b.\(2\)\(c\)](#), AND
- (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision [6.d](#), to demonstrate compliance with Specific Provisions [6.b.\(3\)\(a\)](#), [6.b.\(3\)\(b\)](#), [6.b.\(3\)\(c\)](#), [6.b.\(3\)\(d\)](#), [6.b.\(3\)\(e\)](#) and/or [6.b.\(3\)\(f\)](#).

### **c. INTERIM TMDL COMPLIANCE REQUIREMENTS**

The interim indicator bacteria TMDL compliance requirements for the water bodies listed in [Table 6.0](#) consist of the following:

#### **(1) Interim TMDL Compliance Dates**

The Responsible Copermittees must achieve compliance with the interim TMDL compliance requirements, as determined in accordance with Specific Provision [6.c.\(3\)](#), by the interim compliance dates given in [Table 6.4](#), unless alternative interim compliance dates are accepted by the San Diego Water Board Executive Officer as part of the Water Quality Improvement Plan.

**Table 6.4***Interim Compliance Dates to Achieve Interim TMDL Compliance Requirements*

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Compliance Dates	
			Interim Dry Weather WQBELs	Interim Wet Weather WQBELs
<b>South Orange County</b>  San Joaquin Hills HSA (901.11) and Laguna Beach HSA (901.12)	Pacific Ocean Shoreline	Cameo Cove at Irvine Cove Drive – Riviera Way	April 4, 2016	April 4, 2021
		at Heisler Park - North		
	Pacific Ocean Shoreline	at Main Laguna Beach	April 4, 2016	April 4, 2021
		Laguna Beach at Ocean Avenue		
		Laguna Beach at Cleo Street		
Arch Cove at Bluebird Canyon Road				
Laguna Beach at Dumond Drive				
<b>South Orange County</b>  Aliso HSA (901.13)	Pacific Ocean Shoreline	Laguna Beach at Lagunita Place / Blue Lagoon Place at Aliso Beach	April 4, 2016	April 4, 2021
	Aliso Creek	Entire reach (7.2 miles) and associated tributaries: - Aliso Hills Channel - English Canyon Creek - Dairy Fork Creek - Sulfur Creek - Wood Canyon Creek	April 4, 2018	April 4, 2021
		Aliso Creek Mouth		
<b>South Orange County</b>  Dana Point HSA (901.14)	Pacific Ocean Shoreline	Aliso Beach at West Street	April 4, 2016	April 4, 2021
		Aliso Beach at Table Rock Drive		
		100 Steps Beach at Pacific Coast Hwy at hospital (9 <sup>th</sup> Avenue)		
		at Salt Creek (large outlet)		
		Salt Creek Beach at Salt Creek service road	April 4, 2017	April 4, 2021
		Salt Creek Beach at Strand Road	April 4, 2017	April 4, 2021

**Table 6.4 (Cont'd)***Interim Compliance Dates to Achieve Interim WQBELs*

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Compliance Dates	
			Interim Dry Weather WQBELs	Interim Wet Weather WQBELs
<b>South Orange County</b> Lower San Juan HSA (901.27)	Pacific Ocean Shoreline	at San Juan Creek	April 4, 2016	April 4, 2021
	San Juan Creek	lower 1 mile	April 4, 2018	April 4, 2021
	San Juan Creek Mouth	at mouth	April 4, 2016	April 4, 2021
<b>South Orange County</b> San Clemente HA (901.30)	Pacific Ocean Shoreline	at Poche Beach	April 4, 2016	April 4, 2021
		Ole Hanson Beach Club Beach at Pico Drain	April 4, 2016	April 4, 2021
		San Clemente City Beach at El Portal Street Stairs	April 4, 2017	April 4, 2021
		San Clemente City Beach at Mariposa Street		
		San Clemente City Beach at Linda Lane	April 4, 2016	April 4, 2021
		San Clemente City Beach at South Linda Lane	April 4, 2018	April 4, 2021
		San Clemente City Beach at Lifeguard Headquarters	April 4, 2017	April 4, 2021
		under San Clemente Municipal Pier		
		San Clemente City Beach at Trafalgar Canyon (Trafalgar Lane)	April 4, 2018	April 4, 2021
		San Clemente State Beach at Riviera Beach	April 4, 2016	April 4, 2021
San Clemente State Beach at Cypress Shores	April 4, 2017	April 4, 2021		
<b>San Luis Rey River</b> San Luis Rey HU (903.00)	Pacific Ocean Shoreline	at San Luis Rey River mouth	April 4, 2017	April 4, 2021
<b>Carlsbad</b> San Marcos HA (904.50)	Pacific Ocean Shoreline	at Moonlight State Beach	April 4, 2016	April 4, 2021
<b>San Dieguito River</b> San Dieguito HU (905.00)	Pacific Ocean Shoreline	at San Dieguito Lagoon mouth	April 4, 2016	April 4, 2021



**Table 6.4 (Cont'd)***Interim Compliance Dates to Achieve Interim WQBELs*

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Compliance Dates	
			Interim Dry Weather WQBELs	Interim Wet Weather WQBELs
<b>Penasquitos</b> Miramar Reservoir HA (906.10)	Pacific Ocean Shoreline	Torrey Pines State Beach at Del Mar (Anderson Canyon)	April 4, 2016	April 4, 2021
<b>Mission Bay</b> Scripps HA (906.30)	Pacific Ocean Shoreline	La Jolla Shores Beach at El Paseo Grande	April 4, 2016	April 4, 2021
		La Jolla Shores Beach at Caminito del Oro		
		La Jolla Shores Beach at Vallecitos		
		La Jolla Shores Beach at Avenida de la Playa		
		at Casa Beach, Children's Pool		
		South Casa Beach at Coast Boulevard		
		Whispering Sands Beach at Ravina Street		
		Windansea Beach at Vista de la Playa		
		Windansea Beach at Bonair Street		
		Windansea Beach at Playa del Norte		
		Windansea Beach at Palomar Avenue		
at Tourmaline Surf Park				
Pacific Beach at Grand Avenue				
<b>Mission Bay</b> Tecolote HA (906.50)	Tecolote Creek	Entire reach and tributaries		
<b>San Diego River</b> Mission San Diego HSA (907.11) and Santee HSA (907.12)	Forrester Creek	lower 1 mile	April 4, 2018	April 4, 2021
	San Diego River	lower 6 miles		
	Pacific Ocean Shoreline	at San Diego River mouth at Dog Beach		
<b>San Diego Bay</b> Chollas HSA (908.22)	Chollas Creek	lower 1.2 miles	April 4, 2018	April 4, 2021

## ATTACHMENT E: SPECIFIC PROVISIONS FOR TOTAL MAXIMUM DAILY LOADS

6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I –  
Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)

## (2) Interim Water Quality Based Effluent Limitations

The Responsible Copermittees for discharges to the water bodies in [Table 6.0](#) must comply with the following interim WQBELs by the interim compliance dates given in Specific Provision [6.c.\(1\)](#):

### (a) Interim Receiving Water Limitations

#### (i) *Interim Dry Weather Receiving Water Limitations*

The Responsible Copermittee must calculate the “existing” exceedance frequencies of the 30-day geometric mean water quality objectives for each of the indicator bacteria by analyzing the available monitoring data collected between January 1, 1996 and December 31, 2002. “Existing” exceedance frequencies may be calculated by water body and/or by Watershed Management Area listed in [Table 6.0](#). Separate “existing” exceedance frequencies must be calculated for beaches and creeks/creek mouths.

The Responsible Copermittees must achieve a 50 percent reduction in the “existing” exceedance frequency of the 30-day geometric mean WQBELs for the water bodies listed in [Table 6.0](#) by the interim compliance dates given in [Table 6.4](#). A 50 percent reduction in the “existing” exceedance frequency is equivalent to half of the “existing” exceedance frequency of the 30-day geometric mean WQBELs.

The “existing” exceedance frequencies and the interim dry weather allowable exceedance frequencies (i.e. interim dry weather receiving water limitations) calculated by the Responsible Copermittees must be included in the Water Quality Improvement Plans for the applicable Watershed Management Areas.

(ii) *Interim Wet Weather Receiving Water Limitations*

The Responsible Copermitees must achieve the interim wet weather receiving water limitations in [Table 6.5](#), expressed as interim wet weather allowable exceedance frequencies, by the interim compliance dates given in [Table 6.4](#).

**Table 6.5**

*Interim Wet Weather Receiving Water Limitations Expressed as Interim Wet Weather Allowable Exceedance Frequencies*

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Wet Weather Allowable Exceedance Frequencies		
			Total Coliform	Fecal Coliform	Enterococcus
South Orange County  San Joaquin Hills HSA (901.11) and Laguna Beach HSA (901.12)	Pacific Ocean Shoreline	Cameo Cove at Irvine Cove Drive – Riviera Way	38%	37%	39%
		at Heisler Park - North			
	Pacific Ocean Shoreline	at Main Laguna Beach			
		Laguna Beach at Ocean Avenue			
		Laguna Beach at Cleo Street			
		Arch Cove at Bluebird Canyon Road			
Laguna Beach at Dumond Drive					
South Orange County  Aliso HSA (901.13)	Pacific Ocean Shoreline	Laguna Beach at Lagunita Place / Blue Lagoon Place at Aliso Beach	41%	41%	42%
	Aliso Creek	Entire reach (7.2 miles) and associated tributaries: - Aliso Hills Channel - English Canyon Creek - Dairy Fork Creek - Sulfur Creek - Wood Canyon Creek	41%	41%	42%
		Aliso Creek Mouth	at mouth	41%	41%
South Orange County  Dana Point HSA (901.14)	Pacific Ocean Shoreline	Aliso Beach at West Street	36%	36%	36%
		Aliso Beach at Table Rock Drive			
		100 Steps Beach at Pacific Coast Hwy at hospital (9 <sup>th</sup> Avenue)			
		at Salt Creek (large outlet)			
		Salt Creek Beach at Salt Creek service road			
		Salt Creek Beach at Strand Road			

**Table 6.5 (Cont'd)**

*Interim Wet Weather Receiving Water Limitations Expressed as Interim Wet Weather Allowable Exceedance Frequencies*

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Wet Weather Allowable Exceedance Frequencies		
			Total Coliform	Fecal Coliform	Enterococcus
<b>South Orange County</b> Lower San Juan HSA (901.27)	Pacific Ocean Shoreline	at San Juan Creek	44%	44%	48%
	San Juan Creek	lower 1 mile	44%	44%	47%
	San Juan Creek Mouth	at mouth	44%	44%	47%
<b>South Orange County</b> San Clemente HA (901.30)	Pacific Ocean Shoreline	at Poche Beach	35%	35%	36%
		Ole Hanson Beach Club Beach at Pico Drain			
		San Clemente City Beach at El Portal Street Stairs			
		San Clemente City Beach at Mariposa Street			
		San Clemente City Beach at Linda Lane			
		San Clemente City Beach at South Linda Lane			
		San Clemente City Beach at Lifeguard Headquarters			
		under San Clemente Municipal Pier			
		San Clemente City Beach at Trafalgar Canyon (Trafalgar Lane)			
		San Clemente State Beach at Riviera Beach			
		San Clemente State Beach at Cypress Shores			
<b>San Luis Rey River</b> San Luis Rey HU (903.00)	Pacific Ocean Shoreline	at San Luis Rey River mouth	45%	44%	47%
<b>Carlsbad</b> San Marcos HA (904.50)	Pacific Ocean Shoreline	at Moonlight State Beach	40%	40%	41%
<b>San Dieguito River</b> San Dieguito HU (905.00)	Pacific Ocean Shoreline	at San Dieguito Lagoon mouth	33%	33%	36%

## ATTACHMENT E: SPECIFIC PROVISIONS FOR TOTAL MAXIMUM DAILY LOADS

6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I –  
Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)

**Table 6.5 (Cont'd)**

*Interim Wet Weather Receiving Water Limitations Expressed as Interim Wet Weather Allowable Exceedance Frequencies*

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Wet Weather Allowable Exceedance Frequencies		
			Total Coliform	Fecal Coliform	Enterococcus
<b>Penasquitos</b>  Miramar Reservoir HA (906.10)	Pacific Ocean Shoreline	Torrey Pines State Beach at Del Mar (Anderson Canyon)	26%	26%	26%
<b>Mission Bay</b>  Scripps HA (906.30)	Pacific Ocean Shoreline	La Jolla Shores Beach at El Paseo Grande	37%	37%	37%
		La Jolla Shores Beach at Caminito del Oro			
		La Jolla Shores Beach at Vallecitos			
		La Jolla Shores Beach at Avenida de la Playa			
		at Casa Beach, Children's Pool			
		South Casa Beach at Coast Boulevard			
		Whispering Sands Beach at Ravina Street			
		Windansea Beach at Vista de la Playa			
		Windansea Beach at Bonair Street			
		Windansea Beach at Playa del Norte			
		Windansea Beach at Palomar Avenue			
		at Tourmaline Surf Park			
Pacific Beach at Grand Avenue					
<b>Mission Bay</b>  Tecolote HA (906.50)	Tecolote Creek	Entire reach and tributaries	49%	49%	51%
<b>San Diego River</b>	Forrester Creek	lower 1 mile	46%	43%	49%
	San Diego River	lower 6 miles	46%	43%	49%
Mission San Diego HSA (907.11) and Santee HSA (907.12)	Pacific Ocean Shoreline	at San Diego River mouth at Dog Beach	46%	43%	51%
<b>San Diego Bay</b>  Chollas HSA (908.22)	Chollas Creek	lower 1.2 miles	41%	41%	43%

## ATTACHMENT E: SPECIFIC PROVISIONS FOR TOTAL MAXIMUM DAILY LOADS

6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I –  
Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)

## (b) Interim Effluent Limitations

Indicator bacteria percent load reductions from the Responsible Copermittees' MS4s that are greater than or equal to the following effluent limitations by the interim compliance dates under Specific Provision 6.c.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 6.c.(2)(a):

**Table 6.6**

*Interim Effluent Limitations Expressed as Percent Load Reductions\* in MS4 Discharges to the Water Body*

Watershed Management Areas	Watersheds and Water Bodies	Load-Based Effluent Limitations					
		Dry Weather			Wet Weather		
		Total Coliform	Fecal Coliform	Enterococcus	Total Coliform	Fecal Coliform	Enterococcus
South Orange County	San Joaquin Hills HSA (901.11) and Laguna Hills HSA (901.12) - Pacific Ocean Shoreline	45.89%	45.86%	49.14%	23.43%	26.04%	25.63%
	Aliso HSA (901.13) - Pacific Ocean Shoreline - Aliso Creek - Aliso Creek mouth	47.74%	47.79%	49.57%	12.65%	13.31%	13.76% (13.69%)**
	Dana Point HSA (901.14) - Pacific Ocean Shoreline	47.52%	47.52%	49.49%	6.58%	7.43%	7.58%
	Lower San Juan HSA (901.27) - Pacific Ocean Shoreline - San Juan Creek - San Juan Creek mouth	36.48%	37.11%	47.47%	9.61%	6.41%	13.56% (13.45%)**
	San Clemente HA (901.30) - Pacific Ocean Shoreline	47.14%	47.12%	49.42%	11.93%	12.29%	12.63%
San Luis Rey River	San Luis Rey HU (903.00) - Pacific Ocean Shoreline	19.07%	19.55%	43.69%	2.81%	1.56%	5.85%
Carlsbad	San Marcos HA (904.50) - Pacific Ocean Shoreline	41.41%	41.28%	48.02%	9.24%	9.49%	10.10%

**Table 6.6 (Cont'd)**

*Interim Effluent Limitations Expressed as Percent Load Reductions\* in MS4 Discharges to the Water Body*

Watershed Management Areas	Watersheds and Water Bodies	Load-Based Effluent Limitations					
		Dry Weather			Wet Weather		
		Total Coliform	Fecal Coliform	Enterococcus	Total Coliform	Fecal Coliform	Enterococcus
San Dieguito River	San Dieguito HU (905.00) - Pacific Ocean Shoreline	7.20%	10.36%	41.74%	2.15%	0.73%	3.86%
Penasquitos	Miramar Reservoir HA (906.10) - Pacific Ocean Shoreline	48.25%	48.30%	49.71%	0.81%	1.00%	0.97%
Mission Bay	Scripps HA (906.30) - Pacific Ocean Shoreline	48.22%	48.21%	49.63%	8.16%	10.57%	9.41%
	Tecolote HA (906.50) - Tecolote Creek	47.26%	47.30%	49.47%	8.26%	10.24%	9.08% (9.04%)**
San Diego River	Mission San Diego HSA (907.11) and Santee HSA (907.12) - Pacific Ocean Shoreline - Forrester Creek (lower 1 mile) - San Diego River (lower 6 miles)	37.02%	34.72%	46.98%	19.07%	26.61%	21.37% (21.24%)**
San Diego Bay	Chollas HSA (908.22) - Chollas Creek	46.03%	46.08%	49.23%	8.91%	12.42%	10.73% (10.68%)**

Notes:

\* The percent load reductions are based on reducing loads compared to pollutant loads from 2001 to 2002.

\*\* The alternative *Enterococcus* percent load reduction was calculated based on a numeric target of 104 MPN/100mL instead of 61 MPN/100mL, protective of the REC-1 "moderately to lightly used area" usage frequency that is protective of freshwater creeks and downstream beaches. Acceptable evidence that impaired freshwater creeks can be considered "moderately to lightly used areas" must be provided before these alternative pollutant load reductions can be utilized.

### (3) Interim TMDL Compliance Determination

Compliance with the interim WQBELs, on or after the interim TMDL compliance dates, may be demonstrated via one of the following methods:

- (a) There is no direct or indirect discharge from the Responsible Copermitttee's MS4s to the receiving water; OR

- (b) There are no exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision 6.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the final effluent limitations under Specific Provision 6.b.(2)(b)(ii); OR
- (e) The Responsible Copermittees can demonstrate that exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermittees' MS4s are not causing or contributing to the exceedances; OR
- (f) There are no exceedances of the interim receiving water limitations under Specific Provision 6.c.(2)(a) in the receiving water at, or downstream of the Responsible Copermittees' MS4 outfalls; OR
- (g) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the interim effluent limitations under Specific Provision 6.c.(2)(b); OR
- (h) The Responsible Copermittees have submitted and are fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance dates.

#### **d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS**

##### **(1) Monitoring and Assessment Requirements for Beaches**

###### **(a) Monitoring Stations**

For beaches addressed by the TMDL, monitoring locations should consist of, at a minimum, the same locations used to collect data required pursuant to Order Nos. R9-2007-0001 and R9-2009-0002, and beach monitoring for Health and Safety Code section 115880.<sup>34</sup> If exceedances of the applicable interim or final receiving water limitations are observed in the monitoring data, additional monitoring locations and/or other source identification methods must be implemented to identify the sources

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<sup>34</sup> Commonly referred to as AB 411 monitoring



causing the exceedances. The additional monitoring locations must also be used to demonstrate that the bacteria loads from the identified anthropogenic sources have been addressed and are no longer causing exceedances in the receiving waters.

(b) Monitoring Procedures

- (i) The Responsible Copermittees must collect dry weather monitoring samples from the receiving water monitoring stations at least monthly. Dry weather samples collected from additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified sources have been addressed and are no longer causing exceedances in the receiving waters.
- (ii) The Responsible Copermittees must collect wet weather monitoring samples from the receiving water monitoring stations at least once within the first 24 hours of the end of a storm event<sup>35</sup> during the rainy season (i.e. October 1 through April 30). Wet weather samples collected from receiving water stations and any additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified sources have been addressed and are no longer in exceedance of the allowable exceedance frequencies in the receiving waters.
- (iii) Samples must be analyzed for total coliform, fecal coliform, and *Enterococcus* indicator bacteria.
- (iv) For Pacific Ocean Shoreline segments or areas listed in [Table 6.0](#) that have been de-listed from the Clean Water Act Section 303(d) List, the Responsible Copermittees may propose alternative monitoring procedures to demonstrate that the water bodies continue to remain in compliance with water quality standards under wet weather and dry weather conditions. The alternative monitoring procedures must be submitted as a part of the Water Quality Improvement Plans or any updates required under Provisions [F.1](#) and [F.2.c](#) of the Order.

(c) Assessment and Reporting Requirements

- (i) The Responsible Copermittees must analyze the dry weather and wet weather monitoring data to assess whether the interim and final

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<sup>35</sup> Wet weather days are defined by the TMDL as storm events of 0.2 inches or greater and the following 72 hours. The Responsible Copermittees may choose to limit their wet weather sampling requirements to storm events of 0.2 inches or greater, or also include storm events of 0.1 inches or greater as defined by the federal regulations [40CFR122.26(d)(2)(iii)(A)(2)].

WQBELs for the Pacific Ocean Shoreline segments or areas listed in [Table 6.0](#) have been achieved.

- (ii) Dry weather exceedance frequencies must be calculated as follows:
  - [a] 30-day geometric means must be calculated from the results of any dry weather samples collected from the segments or areas for each water body listed in [Table 6.0](#);
  - [b] The method and number of samples need for calculating the 30-day geometric means must be consistent with the number of samples required by the Ocean Plan;
  - [c] Where there are multiple segments or areas associated with a water body listed in [Table 6.0](#), the Copermittees may calculate geometric means for each segment or area, or combine the dry weather monitoring data from all the segments or areas to calculate geometric means for the water body;
  - [d] The exceedance frequency must be calculated by dividing the number of geometric means that exceed the geometric mean receiving water limitations in [Table 6.2](#) by the total number of geometric means calculated from samples collected during the dry season.
  
- (iii) Wet weather exceedance frequencies must be calculated as follows:
  - [a] If only one sample is collected for a storm event, the bacteria density for every wet weather day associated with that storm event must be assumed to be equal to the results from the one sample collected;
  - [b] If more than one sample is collected for a storm event, but not on a daily basis, the bacteria density for all wet weather days of the storm event not sampled must be assumed to be equal to the highest bacteria density result reported from the samples collected;
  - [c] If there are any storm events not sampled, the bacteria density for every wet weather day of those storm events must be assumed to be equal to the average of the highest bacteria densities reported from each storm event sampled; and
  - [d] The single sample maximum exceedance frequency must be calculated by dividing the number of wet weather days that exceed the single sample maximum receiving water limitations in [Table 6.2](#) by the total number of wet weather days during the rainy season.
  - [e] The data collected for dry weather must be used in addition to the data collected for wet weather to calculate the wet weather 30-day geometric means. The exceedance frequency of the wet weather 30-day geometric means must be calculated by dividing the number of geometric means that exceed the geometric mean receiving water limitations in [Table 6.2](#) by the total number of

geometric means calculated from samples collected during the wet season.

- (iv) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 6.b.(2)(b)(i), dry and wet weather discharge bacteria densities may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.
- (v) The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

## (2) Monitoring and Assessment Requirements for Creeks and Creek Mouths

### (a) Monitoring Stations

For creeks addressed by the TMDL, monitoring locations should consist of, at a minimum, a location at or near the mouth of the creek (e.g. Mass Loading Station or Mass Emission Station) and one or more locations upstream of the mouth (e.g. Watershed Assessment Station). If exceedances of the applicable interim or final receiving water limitations are observed in the monitoring data, additional monitoring locations and/or other source identification methods must be implemented to identify the sources causing the exceedances. The additional monitoring locations must also be used to demonstrate that the bacteria loads from the identified sources have been addressed and are no longer causing exceedances in the receiving waters.

### (b) Monitoring Procedures

- (i) The Responsible Copermittees must collect dry weather monitoring samples from the receiving water monitoring stations in accordance with the requirements of Provision D.
- (ii) The Responsible Copermittees must collect wet weather monitoring samples from the receiving water monitoring stations within the first 24 hours of the end of a storm event<sup>36</sup> during the rainy season (i.e. October 1 through April 30).
- (iii) Samples collected from receiving water monitoring stations must be analyzed for fecal coliform and *Enterococcus* indicator bacteria.

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<sup>36</sup> Wet weather days are defined by the TMDL as storm events of 0.2 inches or greater and the following 72 hours. The Responsible Copermittees may choose to limit their wet weather sampling requirements to storm events of 0.2 inches or greater, or also include storm events of 0.1 inches or greater as defined by the federal regulations [40CFR122.26(d)(2)(iii)(A)(2)].

- (iv) For creeks or creek mouths listed in [Table 6.0](#) that have been delisted from the Clean Water Act Section 303(d) List, the Responsible Copermittees may propose alternative monitoring procedures to demonstrate that the water bodies continue to remain in compliance with water quality standards under wet weather and dry weather conditions. The alternative monitoring procedures must be submitted as a part of the Water Quality Improvement Plans or any updates required under Provisions [F.1](#) and [F.2.c](#) of the Order.

(c) Assessment and Reporting Requirements

- (i) The Responsible Copermittees must analyze the receiving water monitoring data to assess whether the interim and final receiving water WQBELs for the creeks and creek mouths listed in [Table 6.0](#) have been achieved.
- (ii) Dry weather exceedance frequencies must be calculated as follows:
  - [a] 30-day geometric means must be calculated from the results of any dry weather samples collected from the segment or area for each water body listed in [Table 6.0](#);
  - [b] The method and number of samples need for calculating the 30-day geometric means must be consistent with the number of samples required by the Basin Plan;
  - [c] The exceedance frequency must be calculated by dividing the number of 30-day geometric means that exceed the 30-day geometric mean receiving water limitations in [Table 6.2](#) by the total number of 30-day geometric means calculated from samples collected during the dry season.
- (iii) Wet weather exceedance frequencies must be calculated as follows:
  - [a] If only one sample is collected for a storm event, the bacteria density for every wet weather day associated with that storm event must be assumed to be equal to the results from the one sample collected;
  - [b] If more than one sample is collected for a storm event, but not on a daily basis, the bacteria density for all wet weather days of the storm event not sampled must be assumed to be equal to the highest bacteria density result reported from the samples collected;
  - [c] If there are any storm events not sampled, the bacteria density for every wet weather day of those storm events must be assumed to be equal to the average of the highest bacteria densities reported from each of the storm events sampled; and

- [d] The exceedance frequency must be calculated by dividing the number of wet weather days that exceed the single sample maximum receiving water limitations in [Table 6.2](#) by the total number of wet weather days during the rainy season.
  - [e] The data collected for dry weather must be used in addition to the data collected for wet weather to calculate the wet weather 30-day geometric means. The exceedance frequency of the wet weather 30-day geometric means must be calculated by dividing the number of geometric means that exceed the geometric mean receiving water limitations in [Table 6.2](#) by the total number of geometric means calculated from samples collected during the wet season.
- (iv) The Responsible Copermittee must identify and incorporate additional MS4 outfall and receiving water monitoring stations and/or adjust monitoring frequencies to identify sources causing exceedances of the receiving water WQBELs.
  - (v) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision [6.b.\(2\)\(b\)\(i\)](#), dry and wet weather discharge bacteria densities may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.
  - (vi) The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision [F.3.b](#) of this Order.

**ATTACHMENT F**

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

**FACT SHEET / TECHNICAL REPORT**

**FOR**

**ORDER NO. R9-2013-0001  
NPDES NO. CAS0109266**

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT  
AND WASTE DISCHARGE REQUIREMENTS FOR  
DISCHARGES FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s)  
DRAINING THE WATERSHEDS WITHIN THE SAN DIEGO REGION**

**MAY 8, 2013**

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## **I. FACT SHEET FORMAT**

This Fact Sheet briefly sets forth the principal facts and the significant factual, legal, methodological, and policy questions that the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) considered in preparing Order No. R9-2013-0001 (Order). In accordance with the Code of Federal Regulations (CFR) Title 40 Parts 124.8 and 124.56 (40 CFR 124.8 and 40 CFR 124.56), this Fact Sheet includes, but is not limited to, the following information:

1. Contact information
2. Public process and notification procedures
3. Background of municipal storm water permits
4. Regional MS4 Permit approach
5. Economic considerations
6. Applicable statutes, regulations, plans and policies
7. Discussion of the provisions in the Order

Tentative Order No. R9-2013-0001 was distributed for public review on October 31, 2012. The San Diego Water Board accepted written comments on the Tentative Order until January 11, 2013. A public hearing was subsequently held on April 10 and 11, 2013, that was continued to May 8, 2013 to receive oral comments from interested persons.

The San Diego Water Board files applicable to the issuance of Order No. R9-2013-0001 are incorporated into the administrative record in support of the findings and requirements of the Order.

## II. CONTACT INFORMATION

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The Order and other related documents can be downloaded from the San Diego Water Board website at

[http://www.swrcb.ca.gov/rwqcb9/water\\_issues/programs/stormwater/index.shtml](http://www.swrcb.ca.gov/rwqcb9/water_issues/programs/stormwater/index.shtml)

The documents referenced in this Fact Sheet and in Order No. R9-2013-0001 are available for public review at the San Diego Water Board office, located at the address listed above. Public records are available for inspection during regular business hours, from 8:00 am to 5:00 pm Monday through Friday. To schedule an appointment to inspect public records, contact the San Diego Water Board Records Management Officer at 858-467-2952.

**COPERMITTEES****Orange County Copermittees**

- County of Orange
  - City of Aliso Viejo
  - City of Dana Point
  - City of Laguna Beach
  - City of Laguna Hills
  - City of Laguna Niguel
  - City of Laguna Woods
- City of Lake Forest
- City of Mission Viejo
- City of Ranch Santa Margarita
- City of San Clemente
- City of San Juan Capistrano
- Orange County Flood Control District

**Riverside County Copermittees**

- County of Riverside
  - City of Murrieta
  - City of Temecula
  - City of Wildomar
- Riverside County Flood Control and Water Conservation District

**San Diego County Copermittees**

- County of San Diego
  - City of Carlsbad
  - City of Chula Vista
  - City of Coronado
  - City of Del Mar
  - City of El Cajon
  - City of Encinitas
  - City of Escondido
  - City of Imperial Beach
  - City of La Mesa
  - City of Lemon Grove
- City of National City
- City of Oceanside
- City of Poway
- City of San Diego
- City of San Marcos
- City of Santee
- City of Solana Beach
- City of Vista
- San Diego County Regional Airport Authority
- San Diego Unified Port District

### III. PUBLIC PROCESS AND NOTIFICATION PROCEDURES

The San Diego Water Board followed the schedule listed below for the preparation of Order No. R9-2013-0001:

1. On February 8, 2011, the San Diego Water Board met with the San Diego County Copermittees to discuss the Report of Waste Discharge required pursuant to Order No. R9-2007-0001.
2. Between February and May 2011, the San Diego Water Board met with select San Diego County, Orange County, and Riverside County Copermittees, as well as representatives of the environmental community to discuss concepts and receive recommendations for elements to be incorporated in a Regional Municipal Separate Storm Sewer System Permit (Regional MS4 Permit).
3. On June 27, 2011 the San Diego Water Board received the Report of Waste Discharge from the San Diego County Copermittees for the renewal of their NPDES permit, Order No. R9-2007-0001.
4. On April 9, 2012, the San Diego Water Board released an administrative draft of Tentative Order No. R9-2013-0001 for preliminary informal comments and feedback.
5. On April 25, 2012, the San Diego Water Board held an informal public workshop to present the administrative draft of Tentative Order No. R9-2013-0001 and receive verbal comments.
6. Between June and August 2012, the San Diego Water Board held four (4) focused meetings with representatives of the principal stakeholders (the Copermittees, the environmental community, the development/business community, and USEPA) to discuss and receive preliminary comments and feedback about specific elements in the administrative draft of Tentative Order No. R9-2013-0001.
7. On September 5, 2012, the San Diego Water Board held an informal public workshop to present the modifications that were expected to be incorporated into the Tentative Order based on the preliminary comments and feedback received during the focused meetings held between June and August 2012.
8. Informal written comments on the administrative draft of Tentative Order No. R9-2013-0001 were accepted until September 14, 2012.
9. On October 12, 2012, the San Diego Water Board released a revised administrative draft of Tentative Order No. R9-2013-0001.

10. On October 24, 2012, the San Diego Water Board held a focused meeting with representatives of the principal stakeholders (the Copermitees, the environmental community, the development/business community, and USEPA) to discuss modifications incorporated into the administrative draft of Tentative Order No. R9-2013-0001.
11. On October 31, 2012, the San Diego Water Board released Tentative Order No. R9-2013-0001 for formal public review and comment.
12. On November 13, 2012 and December 12, 2012, the San Diego Water Board held a formal public Board workshop to present the public draft of Tentative Order No. R9-2013-0001 and receive verbal comments.
13. Formal written comments on the public draft of Tentative Order No. R9-2013-0001 were accepted until January 11, 2013.
14. A public hearing of Tentative Order No. R9-2013-0001 was conducted on April 10 and 11, 2013, that was continued to May 8, 2013.

#### **IV. BACKGROUND OF THE SAN DIEGO REGION MUNICIPAL STORM WATER PERMITS**

In developed and developing areas, storm water runoff is commonly transported through municipal separate storm sewer systems (MS4s) and discharged into local receiving water bodies. As the storm water runs off and flows over the land or impervious surfaces (e.g., paved streets, parking lots, and building rooftops), it accumulates debris, chemicals, sediment, and other pollutants that can adversely affect receiving water quality if discharged untreated. The United States Environmental Protection Agency (USEPA) recognizes wet weather flows from urban areas as the number one source of estuarine pollution in coastal communities,<sup>1</sup> such as those within the San Diego Region.

The federal Clean Water Act (CWA) was amended in 1987 to address and regulate discharges of storm water associated with industrial activities and from municipal storm sewers. With the amendments, many municipalities throughout the United States were obligated for the first time to obtain National Pollutant Discharge Elimination System (NPDES) permits for discharges of storm water from their MS4s.

In response to the CWA 1987 amendment, as well as the pending federal NPDES regulations which would implement the amendment, the San Diego Water Board issued “early” MS4 permits. The San Diego Water Board adopted and issued Order Nos. 90-38, 90-42, and 90-46 to regulate storm water discharges from the MS4s in Orange County, San Diego County, and Riverside County, respectively, within the San Diego Region on July 16, 1990.

The “early” MS4 permits, or First Term Permits, were issued prior to the November 1990 promulgation of the final federal NPDES storm water regulations. By issuing these First Term Permits before the federal regulations took effect, the San Diego Water Board was able to provide the Copermitees additional flexibility in addressing and managing storm water discharges. The First Term Permits contained the essentials of the 1990 regulations, and required the Copermitees to develop and implement runoff management programs, but provided little specificity about what was required to be included in or actually achieved by those programs.

The flexibility provided in the First Term Permits was generally continued through the Second Term Permits. The combination of the lack of specificity in the First and Second Term Permits, a general lack of meaningful action by the Copermitees and a general lack of corresponding reaction (i.e. enforcement) by the San Diego Water Board during the first ten years of the storm water program, resulted in few substantive steps towards achieving improvements in the quality of receiving waters or storm water discharges from the MS4s.

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<sup>1</sup> US EPA. 1999. 40 CFR Parts 9, 122, 123, and 124. National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule. 64 FR 68727.

From 2001, the regulatory approach incorporated into Third Term Permits was a significant departure from the regulatory approach of the First and Second Term Permits. The Third Term Permits issued by the San Diego Water Board included more detailed requirements that outlined the minimum level of implementation required for the Copermittees' programs to meet the maximum extent practicable (MEP) standard for storm water. The Third Term Permits included more detail to emphasize and enhance the jurisdictional runoff management programs developed by the Copermittees and introduced requirements for developing and implementing watershed-based programs.

The Third Term Permits also incorporated two precedent setting decisions by the State Water Board. In Order WQ 99-05, the State Water Board established receiving water limitation language to be included in all MS4 permits. The State Water Board's precedential language clarified that municipal storm water permits must include provisions requiring discharges to be controlled to attain water quality standards in receiving waters. Unlike previously adopted versions of the receiving water limitation language in the First and Second Term Permits, the language no longer stated that *"violations of water quality standards are not violations of the municipal storm water permit under certain conditions."* In addition, the receiving water limitation language no longer indicated that the *"implementation of best management practices is the 'functional equivalent' of meeting water quality standards."* State Water Board Order WQ 99-05 specifically requires language in MS4 permits for the Copermittees to comply with water quality standards based discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions to reduce pollutants in discharges. (See State Water Board Order WQ 99-05 (*Environmental Health Coalition*)).

In Order WQ 2000-11, also a precedential decision, the State Water Board addressed design standards for structural post-construction best management practices (BMPs) for new development and significant redevelopment. The State Water Board found that the design standards, which require that runoff generated by 85 percent of storm events from specific development categories be infiltrated or treated, reflect the MEP standard. State Water Board Order WQ 2000-11 also found that the post-construction BMP provisions, or Standard Storm Water Mitigation Plan (SSMP) provisions, constitute MEP for addressing storm water pollutant discharges resulting from specific development categories.

The Third Term San Diego County and Orange County Permits (Order Nos. 2001-01 and R9-2002-0001, respectively) were appealed to the State Water Board. Minor modifications were made by the State Water Board, but the requirements were largely upheld. In State Water Board Order WQ 2001-15, the State Water Board upheld the Third Term San Diego County Permit requirements with certain modifications. The State Water Board removed the prohibition of storm water discharges *into* the MS4 that cause or contribute to exceedances of water quality objectives. The revision allows for treatment of pollutants in storm water runoff after the pollutants have entered the MS4. State Water Board Order WQ 2001-15 otherwise upheld all the other requirements of the permit.



In addition to the modification to the discharge prohibition in Order WQ 2001-15, the State Water Board refined Order WQ 99-05 by making clear that the Copermittees may use an iterative approach to achieving compliance with water quality standards that involves ongoing assessments and revisions. Thus, the language for the discharge prohibitions and receiving water limitations was revised to explicitly require the Copermittees to implement an iterative process of assessments and revisions to comply with the discharge prohibitions and receiving water limitations. The San Diego Water Board retained the authority to enforce receiving water limitations and discharge prohibitions even if the Copermittee is engaged in the iterative process.

The Third Term San Diego County Permit was subsequently challenged in the Superior Court of the State of California and the Court of Appeal, Fourth Appellate District. The Court of Appeal, Fourth Appellate District, found that the approach of the Third Term San Diego County Permit to regulating discharges into the MS4 was appropriate (*Building Industry Ass'n. v. State Water Resources Control Bd., et al.*, 124 Cal.App.4<sup>th</sup> 866 (2004)). The State of California Supreme Court denied review sought by the Building Industry Association in March 2005.

The Fourth Term Permits, or current MS4 permits, began with the adoption of Order No. R9-2007-0001 issued to the Copermittees of San Diego County in January 2007. Order Nos. R9-2009-0002 and R9-2010-0016 were subsequently issued to the Copermittees of Orange County and Riverside County. The Fourth Term Permits continued to include more detailed requirements to be implemented by each Copermittee's jurisdictional runoff management program. The Fourth Term Permits also include requirements to further emphasize a watershed management approach and for more coordination among jurisdictional runoff management programs. In addition, the Fourth Term Permits included more requirements for assessing the effectiveness of the runoff management programs being implemented by the Copermittees. The intent of the inclusion of additional requirements was to enhance and better define elements of the permit that were expected to be incorporated into the iterative process for managing runoff from each Copermittee's jurisdiction and within the watersheds of the San Diego Region.

The Fourth Term Permits include several new and emerging approaches for managing storm water runoff and discharges. Low impact development (LID) requirements are included for development and significant redevelopment to reduce pollutants in storm water runoff from sites through more natural processes such as infiltration and biofiltration closer to the source, rather than utilizing conventional mechanical end-of-pipe treatment systems. Hydrograph modification (hydromodification) management requirements also are included to mitigate the potential for increased erosion in receiving waters due to increased runoff rates and durations often caused by development and increased impervious surfaces. The Fourth Term Orange County and Riverside County Permits introduced requirements to identify areas of existing development where retrofitting with LID projects would be feasible and could be implemented to reduce storm water runoff and pollutants in storm water discharges.

The Fourth Term Orange County and Riverside County Permits included a clearer distinction between storm water and non-storm water discharges. The term “urban runoff” was completely removed, and a distinction between storm water (wet weather) runoff and non-storm water (dry weather) runoff was emphasized. This clarification was made to prevent any potential misunderstanding that regulation under the MS4 permits is limited only to urbanized areas, and to prevent non-storm water runoff from being managed in the same manner as storm water runoff. The term “urban runoff” is not defined in the Code of Federal Regulations (CFR) or Federal Register (FR) in the regulation of MS4 discharges. According to the CWA 402(p)(3)(B)(ii), MS4 permits must include a requirement to effectively prohibit non-storm water discharges into the MS4s.

Finally, for the Fourth Term Orange County and Riverside County Permits the San Diego Water Board found that non-storm water discharges to the MS4 from over application of irrigation water are sources of pollutants. The San Diego Water Board found that non-storm water discharges resulting from over-irrigation must be prohibited from entering the MS4 in accordance with the requirements of the CWA and pursuant to 40 CFR 122.26(d)(2)(iv)(B)(1).

The requirements of the Fourth Term Permits issued to the Copermittees in each county within the San Diego Region now have substantively the same core requirements such as discharge prohibitions, receiving water limitations, jurisdictional runoff management program components, and monitoring program requirements. There are, however, several inconsistencies that exist among the three Fourth Term Permits which complicate oversight and implementation of the permits by the San Diego Water Board.

The Fourth Term San Diego County Permit expired in January 2012. The Fourth Term Orange County and Riverside County Permits will expire in December 2014 and November 2015, respectively. Issuing the Fifth Term Permits within five years for three counties under three different permits would require the San Diego Water Board to expend significant time and resources for the issuance of the permits through three separate public proceedings, thereby greatly reducing the time and resources available to oversee implementation and compliance. Multiple permits also create confusion for determining compliance among regulated entities, especially for the land development community.

The San Diego Water Board has acknowledged that issuing a single MS4 permit for all the Copermittees in the San Diego Region can and is expected to result in more consistent implementation, improve communication among agencies within watersheds crossing multiple jurisdictions, and minimize resources spent with each permit renewal process. Within the findings of the Fourth Term Riverside County Permit issued in November 2010, the San Diego Water Board notified the public of its intent to develop and issue a single Regional MS4 Permit.

## **V. REGIONAL MS4 PERMIT APPROACH**

The Fifth Term Permit, or Regional MS4 Permit, shifts the focus of the permit requirements from a minimum level of actions to be implemented by the Copermittees to identifying outcomes to be achieved by those actions. Order No. R9-2013-0001 represents an important paradigm shift in the approach for MS4 permits within the San Diego Region.

### **Historical Permitting Approach**

The First and Second Term Permits were very broad and provided little specificity about what was required to be developed and implemented by the Copermittees. The Third Term Permits began to become more specific about the minimum level of implementation required by the Copermittees. The Fourth Term Permits, or current permits, subsequently increased in specificity. The MS4 permits have progressively become more detailed and focused on specifying the minimum level of actions expected to be implemented by the Copermittees. As detailed and specific as the MS4 permits have become, however, they include very little detail about what the desired outcomes of the required actions are expected to achieve. Compliance with the permit requirements has essentially been tracking numbers of actions and reporting, not tracking progress or actual improvements in the quality of receiving waters or discharges from the MS4s. The result has been an increase in actions being implemented by the Copermittees with little or no ability or expectations to determine whether or not improvements in water quality are being achieved.

The Fourth Term Permits result in significant resource expenditure by the Copermittees to report permit compliance information to the San Diego Water Board in the form of annual jurisdictional runoff management program, watershed program, and monitoring program reports. The San Diego Water Board must then expend much of its limited resources on reviewing more than 50 voluminous reports submitted annually by the Copermittees. The information currently reported by the Copermittees is of limited value when trying to measure progress toward achieving improvements in the quality of receiving waters or discharges from the MS4s. Oversight of the MS4 permits is further complicated by the inconsistencies among the requirements issued to the Orange County, San Diego County, and Riverside County Copermittees under three separate MS4 permits.

Under the Fourth Term Permits, the Copermittees must expend a significant portion of their limited resources collecting data of limited value, and putting together reports to submit that information to the San Diego Water Board. Likewise, the San Diego Water Board must expend most of its limited resources reviewing reports, and developing permits instead of working directly with the Copermittees to identify solutions to problems causing impacts to water quality. This is an unsustainable course that will continue to demand more resources from the Copermittees and the San Diego Water Board, and would continue to result in unknown water quality benefits.

## **New Permitting Approach**

The goal of the Regional MS4 Permit is twofold: 1) bring a consistent set of MS4 permit requirements to all of the Copermitees within the San Diego Region; and, 2) provide an MS4 permit with requirements that will allow the Copermitees to focus their efforts and resources on achieving goals and desired outcomes toward the improvement of water quality rather than completing specific actions.

The overall approach included in the Regional MS4 Permit with respect to the jurisdictional runoff management programs will not differ significantly from the current permits. The general requirements for the jurisdictional runoff management program components and compliance with those requirements will remain and be applied consistently throughout the San Diego Region under the Regional MS4 Permit.

The most significant difference in the new permitting approach is the specific manner of implementation for those jurisdictional runoff management programs. Implementation will be based on decisions made by the Copermitees in accordance with what they have identified as their highest priority water quality conditions. In other words, the Copermitees will have significant control in how to implement the jurisdictional runoff management programs to best utilize their available resources in addressing a specific set of priorities effectively, instead of trying to address all the water quality priorities ineffectively.

The Copermitees are given the responsibility of identifying their highest priority water quality conditions that they intend to address. The Copermitees will develop goals that can be used to measure and demonstrate progress or improvements toward addressing those priorities. In addition to the goals, the Copermitees will provide a schedule for achieving the goals for those highest priorities. The measurement of progress toward achieving the goals for those highest priorities requires a better defined and more focused program of monitoring and assessment than under the Fourth Term Permits.

The monitoring and assessment program must be designed to inform the Copermitees of their progress, and the need for modifications in their jurisdictional runoff management programs and schedules to achieve their goals to improve water quality. The monitoring and assessment program requirements will have a more central role in the Regional MS4 Permit than in earlier permits. The monitoring and assessment requirements must also be designed to enable the Copermitees to focus and direct their efforts in implementing their jurisdictional runoff management programs toward their stated desired outcomes to improve the quality of receiving waters and/or discharges from the MS4s.

By providing an MS4 permit that allows the Copermitees to make more decisions about how to utilize and focus their resources, along with a better defined monitoring and assessment program to inform their water quality management decisions, the Copermitees will have the opportunity to:

- 1) *Plan strategically.* The Copermittees must have the ability to identify their available resources and develop and implement long term plans that can organize, collect, and use those resources in the most strategically advantageous and efficient manner possible. This ability to develop long term plans will allow the Copermittees to focus and utilize their resources in a more concerted way over the short term and long term to address specific water quality priorities through stated desired outcomes.
- 2) *Manage adaptively.* The Copermittees must be given the ability to modify their plans as additional information and data are collected from the monitoring and assessment programs. The Copermittees' plans may require modifications to the programs, priorities, goals, strategies, and/or schedules in order for the Copermittees to achieve a stated desired outcome.
- 3) *Identify synergies.* The Copermittees must be given more flexibility to identify efficiencies within and among their jurisdictional runoff management programs as the strategies are developed and implemented to increase the Copermittees' collective effectiveness. The Copermittees must also be able to identify and utilize resources available from other agencies and entities to further augment and enhance their jurisdictional runoff management programs and/or to collectively work with those other agencies and entities toward achieving a stated desired outcome.

The Regional MS4 Permit requirements will provide the Copermittees the flexibility and responsibility to decide what actions will be necessary to achieve an outcome that is tailored and designed by the Copermittees to improve specific prioritized water quality conditions. The San Diego Water Board expects the approach of the Regional MS4 Permit to give the Copermittees a greater sense of ownership for restoring the quality of receiving waters in the San Diego Region by becoming an integral part of the decision making process in identifying water quality conditions to be addressed, as well as determining the best use of their resources.

## VI. ECONOMIC CONSIDERATIONS

### Statutory Considerations

California Water Code (CWC) section 13241 requires the San Diego Water Board to consider certain factors, including economic considerations, in the adoption of water quality objectives. CWC section 13263 requires the San Diego Water Board to take into consideration the provisions of CWC section 13241 in adopting waste discharge requirements.

In *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4<sup>th</sup> 613, the California Supreme Court considered whether Regional Water Boards must comply with CWC section 13241 when issuing waste discharge requirements under CWC section 13263(a) by taking into account the costs a permittee will incur in complying with the permit requirements. The Court concluded that whether it is necessary to consider such cost information “*depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act.*” (*Id.* at p. 627.) The Court ruled that Regional Water Boards may not consider the factors in CWC section 13241, including economics, to justify imposing pollutant restrictions that are less stringent than applicable federal law requires. (*Id.* At pp. 618, 626-627 [“*Water Code section 13377 specifies that [] 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...Because CWC section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a [] discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards.*”]). However, when pollutant restrictions in an NPDES permit are more stringent than federal law requires, CWC section 13263 requires that the Regional Water Boards consider the factors described in CWC section 13241 as they apply to those specific restrictions.

As discussed in Section VII.F, Unfunded State Mandates, the San Diego Water Board finds that the requirements in this Order are not more stringent than the minimum federal requirements. Among other requirements, federal law requires MS4 permits to include requirements to effectively prohibit non-storm water discharges into the MS4s, in addition to requiring controls to reduce the discharge of pollutants in storm water to the MEP, and other provisions as USEPA or the State determines are appropriate for the control of pollutants in MS4 discharges.

The requirements in this Order may be more specific or detailed than those enumerated in federal regulations under 40 CFR 122.26 or in the USEPA guidance. However, the requirements have been designed to be consistent with and within the federal statutory mandates described in CWA section 402(p)(3)(B)(ii) and (iii) and the related federal regulations and guidance. Consistent with federal law, all of the

conditions in this Order could have been included in a permit adopted by USEPA in the absence of the in lieu authority of California to issue NPDES permits.

Moreover, the inclusion of numeric WQBELs in this Order does not cause this Order to be more stringent than federal law. Federal law authorizes both narrative and numeric effluent limitations to meet state water quality standards. The inclusion of WQBELs as discharge specifications in an NPDES permit in order to achieve compliance with water quality standards is not a more stringent requirement than the inclusion of BMP based permit limitations to achieve water quality standards (State Water Board Order No. WQ 2006-0012 (*Boeing*)). Therefore, consideration of the factors set forth in CWC section 13241 is not required for permit requirements to implement the effective prohibition on the discharge of non-storm water discharges into the MS4 or for controls to reduce the discharge of pollutants in storm water to the MEP, or other provisions that the San Diego Water Board has determine appropriate to control such pollutants, as those requirements are mandated by federal law.

Included in the provisions of the Order are monitoring and reporting requirements that are designed to demonstrate that the Copermittees are implementing programs to comply with the CWA municipal storm water requirements. CWA section 308(a) and 40 CFR 122.41(h), (j)-(l), 122.44(i) and 122.48 require that all NPDES permits specify monitoring and reporting requirements. Federal regulations applicable to large and medium MS4s (40 CFR 122.26(d)(1)(iv)(D), 122.26(d)(1)(v)(B), 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)(D), 122.26(d)(2)(iv)(B)(2) and 122.42(c)) also specify additional monitoring and reporting requirements. In addition to the federal requirements of the CWA, the San Diego Water Board also has the authority in CWC 13383 to establish monitoring, reporting, and recordkeeping requirements that implement federal and state laws and regulations through NPDES permits. .

The monitoring and assessment information that will be reported to the San Diego Water Board is necessary to determine if the Copermittees are making progress toward achieving compliance with the discharge prohibitions, receiving water limitations, and effluent limitations under Provision A of the Order. The monitoring and assessment information that will be reported is also expected to be key to the iterative approach and adaptive management process that is required to be implemented by the Copermittees if they cannot meet the discharge prohibitions and receiving water limitations under the present conditions, which is also part of the requirements under Provision A of the Order.

Notwithstanding the above, the San Diego Water Board has considered cost information in issuing this Order, as discussed below. The San Diego Water Board has also considered all of the evidence that has been presented to the San Diego Water Board regarding the CWC section 13241 factors in adopting this Order. The San Diego Water Board finds that the requirements in this Order are reasonably necessary to protect beneficial uses identified in the Basin Plan and the economic information related to costs of compliance and other CWC section 13241 factors are not sufficient to justify failing to protect those beneficial uses. Where appropriate, the

San Diego Water Board has provided or will consider providing the Copermittees with additional time to implement control measures to achieve final WQBELs and/or water quality standards.

### **Cost Information**

Discussions of the financial and economic ramifications of municipal storm water management programs tend to focus on the significant costs incurred by municipalities in developing and implementing the programs. When considering the cost of implementing the programs, however, it is also important to consider the alternative costs that are incurred when programs are not fully implemented, as well as the economic benefits which result from effective program implementation.

The recent financial and economic conditions have amplified the concerns about the costs incurred by the municipalities in developing and implementing their programs. The reduction in resources resulting from the recent financial and economic conditions has been cited by many of the Copermittees as a justification for reducing the requirements that must be met by their programs. While the recent conditions are a cause for concern in the short term, these programs also have an opportunity to identify and implement improvements and efficiencies before the next period of growth and development, resulting in more effective and sustainable programs over the long term.

In addition, it is very difficult to ascertain the true cost of implementation of the Copermittees' management programs because of inconsistencies in reporting by the Copermittees. Reported costs of compliance for the same program element can vary widely from city to city, often by a very wide margin that is not easily explained.<sup>2</sup> Despite these problems, efforts have been made to identify management program costs, which can be helpful in understanding the costs of program implementation.

The San Diego Water Board recognizes that the Copermittees will incur costs in implementing this Order, potentially above and beyond the costs from the Copermittees' prior permits. The San Diego Water Board also recognizes that, due to California's current economic condition, many Copermittees currently have limited staff and resources to implement actions to address its MS4 discharges. Based on the economic considerations below, the San Diego Water Board has provided the Copermittees a significant amount of flexibility to choose how to implement the requirements of the Order.

The Order also allows the Copermittees to customize their plans, programs, and monitoring requirements. In the end, it is up to the Copermittees to determine the effective BMPs and measures necessary to comply with this Order. The Copermittees can choose to implement the least expensive measures that are effective in meeting the requirements of this Order. This Order also does not require the Copermittees to

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<sup>2</sup> LARWQCB, 2003. Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003. P. 2.



fully implement all requirements within a single permit term. Where appropriate, the Board has provided the Copermitees with additional time outside of the permit term to implement control measures to achieve final WQBELs and/or water quality standards.

The San Diego Water Board has considered available cost information associated with compliance with this Order. It is not possible to predict accurately the cost impact of the requirements that involve an unknown level of implementation or that depend on environmental variables that are as yet undefined. Only general conclusions can be drawn from this information.

### **Estimated Municipal Storm Water Program Implementation Costs**

The USEPA, the State Water Board, and the California Regional Water Quality Control Boards (Regional Water Boards) have attempted to evaluate the costs of implementing municipal storm water programs. The assessments have demonstrated that the true costs are difficult to ascertain and reported costs vary widely. In addition, reported fiscal analyses tend to neglect the costs incurred to municipalities when storm water and non-storm water runoff is not effectively managed, which are incurred as a result of pollution, contamination, nuisance, and damage to ecosystems, property, and human health. Nonetheless, they provide a useful context for considering the costs of requirements within Order No. R9-2013-0001.

In 1999, the USEPA reported on multiple studies it conducted to determine the cost of management programs. A study of Phase II municipalities determined that the annual cost of the Phase II program was expected to be \$9.16 per household. The USEPA also studied 35 Phase I municipalities, finding costs to be \$9.08 per household annually, similar to those anticipated for Phase II municipalities.<sup>3</sup>

The State Water Board commissioned a study by the California State University, Sacramento to assess costs of the Phase I MS4 program. This study includes an assessment of costs incurred by Phase I MS4s throughout the state to implement their programs. Annual cost per household in the study ranged from \$18 to \$46, with the Fresno-Clovis Metropolitan Area representing the lower end of the range, and the City of Encinitas (in San Diego County) representing the upper end of the range.<sup>4</sup>

A study on Phase I MS4 program costs was also conducted by the California Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board), where program costs reported in the municipalities' annual reports were assessed. The Los Angeles Water Board estimated that average per household cost to implement the MS4 program in Los Angeles County was \$12.50.<sup>5</sup>

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<sup>3</sup> Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68791-68792.

<sup>4</sup> State Water Board, 2005. NPDES Stormwater Cost Survey. P. ii.

<sup>5</sup> Los Angeles Water Board, 2003. Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003. P. 2.

It is important to note that reported program costs are not all attributable to solely complying with MS4 permits. Many program components, and their associated costs, existed before any MS4 permits were ever issued. For example, street sweeping and trash collection costs cannot be solely or even principally attributable to MS4 permit compliance, since these practices have long been expected from and implemented by municipalities.

Therefore, true program cost resulting from MS4 permit requirements is some fraction of reported costs. The California State University, Sacramento study found that only 38 percent of program costs are new costs fully attributable to MS4 permits. The remainder of the program costs was either pre-existing or resulted from enhancement of pre-existing programs.<sup>6</sup> In 2000, the County of Orange found that even lower amounts of program costs are solely attributable to MS4 permit compliance, reporting that the amount attributable to implement the County of Orange Drainage Area Management Plan (DAMP), was less than 20 percent of the total budget. The remaining 80 percent was attributable to pre-existing programs.<sup>7</sup> More current data from the County of Orange is not used in this discussion because the County of Orange no longer reports such information.

### **Estimated Value of Healthy Water Quality**

Economic considerations of municipal storm water management programs cannot be limited only to program costs. Evaluation of programs must also consider information on the benefits derived from environmental protection and improvement.<sup>8</sup> Attention is often focused on municipal storm water management program costs, but the programs must also be viewed in terms of their value to the public.

Placing a value on healthy receiving waters is very difficult. Often the value of receiving waters with good water quality manifests in other forms, such as tourism, recreational opportunities, and/or increased property values. When surface water bodies are degraded, thereby degrading the habitat within and adjacent to the water bodies, the public loses the value and benefits associated with being able to use the area in and around the water bodies. Surface waters that are able to support the beneficial uses designated in the Basin Plan can sustain plants and wildlife that can attract visitors and residents, providing aesthetic, recreational, as well as monetary value to the public. At this time, however, there have been no studies for the San Diego Region to quantify the added value that surface waters with healthy water quality can provide.

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<sup>6</sup> State Water Board, 2005. NPDES Stormwater Cost Survey. P. 58.

<sup>7</sup> County of Orange, 2000. A NPDES Annual Progress Report. P. 60.

<sup>8</sup> Ribaud M.O. and D. Heelerstein. 1992, *Estimating Water Quality Benefits: Theoretical and Methodological Issues*. U.S. Department of Agriculture. Technical Bulletin No. 1808.

USEPA has estimated that household willingness to pay for improvements in fresh water quality for fishing and boating is approximately \$158-\$210.<sup>9</sup> This estimate can be considered conservative, since it does not include important considerations such as marine waters benefits, wildlife benefits, or flood control benefits. Another study conducted by California State University, Sacramento reported that the annual household willingness to pay for statewide clean water is approximately \$180.<sup>10</sup>

A study conducted by the University of Southern California and University of California, Los Angeles assessed the costs and benefits of implementing various approaches for achieving compliance with the MS4 permits in the Los Angeles region. The study found that non-structural systems would cost \$2.8 billion but provide \$5.6 billion in benefit. If structural systems were determined to be needed, the study found that total costs would be \$5.7 to \$7.4 billion, while benefits could reach \$18 billion.<sup>11</sup> Costs are anticipated to be borne over many years, probably at least ten years.

As can be seen, the benefits of the municipal storm water management programs are expected to considerably exceed their costs. Such findings are corroborated by USEPA, which found that the benefits of implementation of its Phase II storm water rule would also outweigh the costs.<sup>12</sup>

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<sup>9</sup> Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68793.

<sup>10</sup> State Water Board, 2005. NPDES Stormwater Cost Survey. P. iv.

<sup>11</sup> Los Angeles Water Board, 2004. Alternative Approaches to Stormwater Control.

<sup>12</sup> Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68791.

## VII. APPLICABLE STATUTES, REGULATIONS, PLANS AND POLICIES

### A. Legal Authorities – Federal Clean Water Act and California Water Code

This Order is issued pursuant to section 402 of the CWA and implementing regulations adopted by the USEPA and chapter 5.5, division 7 of the CWC (commencing with section 13370). This Order serves as an NPDES permit for point source discharges to surface waters. This Order also serves as waste discharge requirements pursuant to article 4, chapter 4, division 7 of the CWC (commencing with section 13260).

The objective of the CWA is “*to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.*” To carry out this objective, the CWA requires the implementation of permit programs to regulate the discharge of pollutants and dredged or fill material to the navigable waters of the U.S. and to regulate the use and disposal of sewage sludge. CWA section 402 provides the legal authority to issue a permit for the discharge of pollutants to waters of the U.S. under the NPDES. The CWA provides that NPDES permits may be issued by states which are authorized to implement the provisions of that act. California became authorized to implement the NPDES permit program on May 14, 1973.

The Porter-Cologne Water Quality Control Act (Division 7, commencing with CWC section 13000) established the State Water Resources Control Board (State Water Board) and nine Regional Water Quality Control Boards (Regional Water Boards) as the principal state agencies with primary responsibility for the coordination and control of water quality. CWC section 13200(f) established the San Diego Water Board, which has the primary responsibility for the coordination and control of water quality in the San Diego Region, which includes all the basins draining into the Pacific Ocean between the southern boundary of the Santa Ana Region and the California-Mexico boundary. The San Diego Water Board implements the CWA through Chapter 5.5 of the CWC, commencing with section 13370. CWC section 13377 provides the San Diego Water Board the legal authority to issue waste discharge requirements to ensure compliance with all applicable provisions of the CWA and acts amendatory thereof or supplementary, thereto, to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

CWA section 402(p) requires the USEPA or authorized state to issue NPDES permits for storm water discharges from municipal separate storm sewer systems (MS4s) to waters of the U.S. CWA section 402(p)(3)(B)(ii) requires that NPDES permits for storm water discharges from MS4s “*effectively prohibit non-storm water discharges*” into the MS4s. CWA section 402(p)(3)(B)(iii) requires that NPDES permits for storm water discharges from MS4s to “*require controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable [MEP], 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.*”

The USEPA published implementing regulations (Code of Federal Regulations [CFR] Title 40, Part 122 [40 CFR 122]), which prescribe permit application requirements for storm water discharges from MS4s pursuant to CWA 402(p), on November 16, 1990. The USEPA published an Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems, which provided guidance on permit application requirements for regulated MS4s, on May 17, 1996. The federal regulations in 40 CFR 122 and guidance issued by USEPA serve as the foundation for the provisions of Order No. R9-2013-0001. The legal authorities provided by the above statutes and regulations are included as part of the discussions in Section VIII of this Fact Sheet.

## **B. Legal Authority for the Permit Issued on a Region-wide Basis**

CWA section 402(p)(3)(B) provides the San Diego Water Board the legal authority to issue an NPDES permit for the San Diego Region as compared to separate MS4 permits based upon County- and partial County-wide boundaries as they exist within the San Diego Region. CWA section 402(p)(3)(B) states that "*Permits for discharges from municipal storm sewers- (i) may be issued on a system- or jurisdiction-wide basis ....*" The federal regulations in 40 CFR 122.26(a)(1)(v) also state that the San Diego Water Board "*may designate dischargers from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination, the [San Diego Water Board] may consider the following factors: (A) the location of the discharge with respect to waters of the United States; (B) the size of the discharge; (C) the quantity and nature of the pollutants discharged to waters of the United States; and (D) other relevant factors.*"

More specifically, the federal regulations provide that for large and medium MS4 systems, the San Diego Water Board may issue a regional permit. Specifically, the federal regulation in 40 CFR 122.26(a)(3) provide:

- "(ii) *The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.*
- (iii) *The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either: (A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operator of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system; (B) Submit a distinct permit application*

*which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or (C) A regional authority may be responsible for submitting a permit application under the following guidelines....*

- (iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one systemwide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.*
- (v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system."*

Based on these regulations, the San Diego Water Board may issue a region-wide MS4 permit. The regulations also clarify that the permit may include different conditions for separate discharges covered by the permit. This allows the San Diego Water Board to ensure that suitable water quality conditions and provisions are identified for each watershed.

The USEPA's responses to comments in the Final Rule for the above-mentioned regulations also make it clear that the permitting authority, in this case the San Diego Water Board, has the flexibility to establish system- or region-wide, permits. In the Final Rule published in the Federal Register and containing the responses to comments, USEPA notes that 40 CFR 122.26(a)(3)(iv) would allow an entire system in a geographical region under the purview of a State agency to be designated under a permit.<sup>13</sup> USEPA also states that many commenters wanted to allow the permitting authority broad discretion to establish system-wide permits, and that EPA believes that paragraphs 40 CFR 122.26 (a)(1)(v) and (a)(3)(ii) allow for such broad discretion.<sup>14</sup>

This Order creates watershed requirements that apply to multiple counties. The regional nature of this Order will ensure consistency of regulation within watersheds and is expected to result in overall cost savings for the Copermittees. Managing storm water on a regional and watershed basis is expected to result in improved water quality, as the Order focuses on monitoring and management practices necessary to improve each watershed rather than political boundaries. A single permit also allows the San Diego Water Board staff to expend fewer resources developing successive multiple permits and allows more resources to be devoted to working cooperatively with all three current groups of Copermittees to ensure implementation of this Order results in improved water quality.

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<sup>13</sup> 55 Federal Register 47990-01, 48042

<sup>14</sup> Ibid

### **C. Federal and California Endangered Species Acts**

This Order does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2115.5) or the Federal Endangered Species Act (16 United States Code [USC] sections 1531 to 1544). This Order requires compliance with requirements to protect the beneficial uses of waters of the U.S. The Copermittees are responsible for meeting all requirements of the applicable Endangered Species Act.

### **D. California Environmental Quality Act**

The action to adopt an NPDES Permit is exempt from the provisions of Chapter 3 of the California Environmental Quality Act (CEQA) (Public Resources Code section 21100, et seq.) pursuant to CWC section 13389. (*County of Los Angeles v. Cal. Water Boards* (2006) 143 Cal.App.4th 985.)

### **E. State and Federal Regulations, Plans and Policies**

The legal authority provided by the following regulations, plans, and policies are also included as part of the discussions in Section VIII of this Fact Sheet.

#### Water Quality Control Plan for the San Diego Basin

The CWA requires the San Diego Water Board to establish water quality standards for each water body in its region. Water quality standards include beneficial uses, water quality objectives and criteria that are established at levels sufficient to protect beneficial uses, and an antidegradation policy to prevent degrading of waters. On September 8, 1994, the San Diego Water Board adopted the *Water Quality Control Plan for the San Diego Basin* (Basin Plan). The Basin Plan designates beneficial uses, establishes water quality objectives, and contains implementation programs and policies to achieve those objectives for all waters in the San Diego Region. The San Diego Water Board has amended the Basin Plan on multiple occasions since 1994. In addition, the Basin Plan implements State Water Board Resolution No. 88-63, which established state policy that all waters, with certain exceptions, should be considered suitable or potentially suitable for municipal or domestic supply. Beneficial uses applicable to the surface water bodies that receive discharges from the MS4s within the San Diego Region generally include those listed below:

The Basin Plan identifies the following existing and potential beneficial uses for inland surface waters in the San Diego Region:

- Municipal and Domestic Supply (MUN)
- Agricultural Supply (AGR)

- Industrial Process Supply (PROC)
- Industrial Service Supply (IND)
- Ground Water Recharge (GWR)
- Contact Water Recreation (REC1)
- Non-contact Water Recreation (REC2)
- Warm Freshwater Habitat (WARM)
- Cold Freshwater Habitat (COLD)
- Wildlife Habitat (WILD)
- Rare, Threatened, or Endangered Species (RARE)
- Freshwater Replenishment (FRSH)
- Hydropower Generation (POW)
- Preservation of Biological Habitats of Special Significance (BIOL)

The following additional existing and potential beneficial uses are identified for coastal waters of the San Diego Region:

- Navigation (NAV)
- Commercial and Sport Fishing (COMM)
- Estuarine Habitat (EST)
- Marine Habitat (MAR)
- Aquaculture (AQUA)
- Migration of Aquatic Organisms (MIGR)
- Spawning, Reproduction, and/or Early Development (SPWN)
- Shellfish Harvesting (SHELL)

Pursuant to Water Code sections 13263 and 13377, the requirements of this Order implement the Basin Plan.

#### Water Quality Control Plan for Ocean Waters of California, California Ocean Plan

In 1972, the State Water Board adopted the Water Quality Control Plan for Ocean Waters of California, California Ocean Plan (Ocean Plan). The State Water Board adopted the most recent amended Ocean Plan on September 15, 2009. The Office of Administrative Law approved it on March 10, 2010. On October 8, 2010, USEPA approved the 2009 Ocean Plan. The Ocean Plan is applicable, in its entirety, to ocean waters of the State. In order to protect beneficial uses, the Ocean Plan establishes water quality objectives and a program of implementation. Pursuant to Water Code sections 13263 and 13377, the requirements of this Order implement the Ocean Plan. The Ocean Plan identifies the beneficial uses of ocean waters of the State to be protected as summarized below:

- Industrial water supply
- Water contact and non-contact recreation, including aesthetic enjoyment; navigation
- Commercial and sport fishing



- Mariculture
- Preservation and enhancement of designated Areas of Special Biological Significance
- Rare and endangered species
- Marine habitat
- Fish spawning and shellfish harvesting

On March 20, 2012, the State Water Board approved Resolution No. 2012-0012 approving an exception to the Ocean Plan prohibition against discharges to Areas of Special Biological Significance (ASBS) for certain nonpoint source discharges and NPDES permitted municipal storm water discharges. The State Water Board Resolution No. 2012-0012 requires monitoring and testing of marine aquatic life and water quality in several ASBS to protect California's coastline during storms when rain water overflows into coastal waters. Specific terms, prohibitions, and special conditions were adopted to provide special protections for marine aquatic life and natural water quality in ASBS. The City of San Diego's municipal storm water discharges to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach's municipal storm water discharges to the Heisler Park ASBS are subject terms and conditions of State Water Board Resolution No. 2012-0012. The Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012 applicable to these discharges are hereby incorporated in this Order as if fully set forth herein. Requirements of this Order implement the Ocean Plan.

#### Water Quality Control Plan for Enclosed Bays and Estuaries – Part 1 Sediment Quality

On September 16, 2008, the State Water Board adopted the Water Quality Control Plan for Enclosed Bays and Estuaries – Part 1 Sediment Quality (Sediment Quality Control Plan). The Sediment Quality Control Plan became effective on August 25, 2009. The Sediment Quality Control Plan establishes 1) narrative sediment quality objectives for benthic community protection from exposure to contaminants in sediment and to protect human health, and 2) a program of implementation using a multiple lines of evidence approach to interpret the narrative sediment quality objectives. Requirements of this Order implement the Sediment Quality Control Plan.

#### Antidegradation Policy

Federal regulations (40 CFR 131.12) require that the state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). State Water Board Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law.

The San Diego Water Board's Basin Plan implements and incorporates by reference both the State and federal antidegradation policies. State Water Board Resolution No. 68-16 and 40 CFR 131.12 require the San Diego Water Board to maintain high quality

waters of the State until it is demonstrated that any change in quality will be consistent with maximum benefit to the people of the State, will not unreasonably affect beneficial uses, and will not result in water quality less than that described in the San Diego Water Boards' policies. State Water Board Resolution No. 68-16 requires that discharges of waste be regulated to meet best practicable treatment or control to assure that pollution or nuisance will not occur and the highest water quality consistent with the maximum benefit to the people of the State be maintained.

The discharges permitted in this Order are consistent with the antidegradation provisions of 40 CFR 131.12 and State Water Board Resolution No. 68-16. Many of the water bodies within the area covered by this Order are of high quality. The Order requires the Copermitees to meet best practicable treatment or control to meet water quality standards. As required by 40 CFR 122.44(a), the Copermitees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p) for discharges of pollutants in storm water from the MS4s.

Many of the waters within the area covered by this Order are impaired and listed on the State's CWA Section 303(d) List and the San Diego Water Board has established TMDLs to address the impairments. This Order requires the Copermitees to comply with permit provisions to implement the WLAs set forth in the TMDLs in order to restore the beneficial uses of the impaired water bodies consistent with the assumptions and requirements of the TMDLs. This Order includes requirements to develop and implement storm water management programs, achieve WQBELs, and effectively prohibit non-storm water discharges into the MS4. The issuance of this Order does not authorize an increase in the amount of discharge of waste.

#### Anti-Backsliding Requirements

CWA sections 402(o) and 303(d)(4) and 40 CFR 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations or conditions may be relaxed. All effluent limitations and other conditions in this Order are at least as stringent as the effluent limitations in the previous permits issued to the San Diego County Copermitees, the Orange County Copermitees and the Riverside County Copermitees.

#### Clean Water Act Section 303(d) List

CWA section 303(d)(1) requires each State to identify specific water bodies within its boundaries where water quality standards are not being met or are not expected to be met after implementation of technology-based effluent limitations on point sources. Water bodies that do not meet water quality standards are considered impaired and are placed on the state's "303(d) List." Periodically, USEPA approves the State's 303(d) List.

Most recently, USEPA approved the State's 2010 303(d) List of impaired water bodies on October 11, 2011, which includes certain receiving waters in the San Diego Region. For each listed water body, the state or USEPA is required to establish a TMDL of each pollutant impairing the water quality standards in that water body. A TMDL is a tool for implementing water quality standards and is based on the relationship between pollution sources and in-stream water quality conditions. The TMDL establishes the allowable pollutant loadings for a water body and thereby provides the basis to establish water quality-based controls. These controls should provide the pollution reduction necessary for a water body to meet water quality standards.

A TMDL is the sum of the allowable pollutant loads of a single pollutant from all contributing point sources (the waste load allocations or WLAs) and non-point sources (load allocations of LAs) plus the contribution from background sources and a margin of safety (40 CFR 130.2(i)). MS4 discharges are considered point source discharges. For 303(d)-listed water bodies and pollutants in the San Diego Region, the San Diego Water Board or USEPA develops and adopts TMDLs that specify these requirements.

Since 2002, the San Diego Water Board has established six (6) TMDLs to remedy water quality impairments in various water bodies within the San Diego Region (see Attachment E to the Order). These TMDLs identify MS4 discharges as a source of pollutants to these water bodies, and, as required, establish WLAs for MS4 discharges to reduce the amount of pollutant discharged to receiving waters. CWA section 402(p)(3)(B)(iii) requires the San Diego Water Board to impose permit conditions, 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.*" (Emphasis added.) CWA section 402(a)(1) also requires states to issue permits with conditions necessary to carry out the provisions of the CWA. Federal regulations also require that NPDES permits contain WQBELs consistent with the assumptions and requirements of all available WLAs (40 CFR 122.44(d)(1)(vii)(B)). CWA section 13377 also requires that NPDES permits include limitations necessary to implement water quality control plans. Therefore, this Order includes WQBELs and other provisions to implement the TMDL WLAs assigned to Copermitees regulated by this Order.

#### Other Regulations, Plans and Policies

This Order implements all other applicable federal regulations and State regulations, plans and policies, including the California Toxics Rule at 40 CFR 131.38 (Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California Rule [California Toxics Rule or CTR]), and State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP).

## F. Unfunded State Mandates

Article XIII B, Section 6(a) of the California Constitution provides that whenever “*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.*” The requirements of this Order do not constitute state mandates that are subject to a subvention of funds for several reasons, including, but not limited to, the following.

First, the requirements of this Order do not constitute a new program or a higher level of service as compared to the requirements contained in the previous Fourth Term Permits. The overarching requirement to impose controls to reduce the pollutants in discharges from MS4s is dictated by the CWA and is not new to this permit cycle (33 USC section 1342(p)(3)(B)). The inclusion of new and advanced measures as the MS4 programs evolve and mature over time is anticipated under the CWA (55 FR 47990, 48052 (Nov. 16, 1990)), and to the extent requirements in this Order are interpreted as new advanced measures, they do not constitute a new program or higher level of service.

Second, and more broadly, mandates imposed by federal law, rather than by a state agency, are exempt from the requirement that the local agency’s expenditures be reimbursed (Cal. Const., art. XIII B, section 9, subd. (b)). This Order implements federally mandated requirements under the CWA and its requirements are therefore not subject to subvention of funds. This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants in storm water to the MEP, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants (33 USC section 1342(p)(3)(B)). 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. USEPA* (9<sup>th</sup> Cir. 1992) 966 F.2d 1292, 1308, fn. 17.)

The authority exercised under this Order is not reserved state authority under the CWA’s savings clause (cf. *Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4<sup>th</sup> 613, 627-628 [relying on 33 USC section 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 Board, Santa Ana Region* (2006) 135 Cal.App.4<sup>th</sup> 1377, 1389; *Building Industry Ass’n of San Diego Co. v. State Water Resources Control Bd.* (2004) 124 Cal.App.4<sup>th</sup> 866, 882-883.)

The MEP standard is a flexible standard that balances a number of considerations, including technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. (*Building Ind. Ass’n., supra*, 124 Cal.App.4<sup>th</sup> at pp. 873-874, 889.) Such considerations change over time with advances in technology and with experience

gained in storm water management (55 FR 47990, 48052 (Nov. 16, 1990)). Accordingly, a determination of whether the conditions contained in this Order exceed the requirements of federal law cannot be based on a point by point comparison of the permit conditions and the minimum control measures that are required “at a minimum” to reduce pollutants to the maximum extent practicable and to protect water quality (40 CFR 122.34). Rather, the appropriate focus is whether the permit conditions, as a whole, exceed the MEP standard.

In recent months, the County of Los Angeles and County of Sacramento Superior Courts have granted writs setting aside decisions of the Commission on State Mandates that held certain requirements in Phase I permits constituted unfunded mandates. In both cases, the courts have found that the correct analysis in determining whether an MS4 permit constituted a state mandate was to evaluate whether the permit as a whole exceeds the MEP standard. (*State of Cal. v. Comm. on State Mandates* (Super. Ct. Sacramento County, 2012, No. 34-2010-80000604), *State of California v. County of Los Angeles* (Super. Ct. Los Angeles County, 2011, No. BS130730.) Both cases are currently pending appeal.

The requirements of the Order, taken as a whole rather than individually, are necessary to reduce the discharge of pollutants to the MEP and to protect water quality. The San Diego Water Board finds that the requirements of the Order are practicable, do not exceed federal law, and thus do not constitute an unfunded mandate. These findings are the expert conclusions of the principal state agency charged with implementing the NPDES program in California (CWC sections 13001, 13370).

It should also be noted that the provisions in this Order to effectively prohibit non-storm water discharges are also mandated by the CWA (33 USC section 1342(p)(3)(B)(ii)). Likewise, the provisions of this Order to implement TMDLs are federal mandates. The CWA requires TMDLs to be developed for water bodies that do not meet federal water quality standards (33 USC section 1313(d)). Once the USEPA or a state establishes or adopts a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions and requirements of any applicable waste load allocation in a TMDL (40 CFR 122.44(d)(1)(vii)(B)).

Third, the local agency Copermitees’ 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 CWA regulates the discharge of pollutants from point sources (33 USC section 1342) and the Porter-Cologne Act regulates the discharge of waste (CWC 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 non-governmental 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 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. Generally, the CWA requires point source dischargers, including dischargers of storm water associated with industrial or construction activity, to comply strictly with water quality standards (33 USC section 1311(b)(1)(C); *Defenders of Wildlife v. Browner* (9<sup>th</sup> Cir. 1999) 191 F.3d 1159, 1164-1165 [noting that industrial discharges must strictly comply with water quality standards]). As discussed in prior State Water Board decisions, certain provisions of this Order do not require strict compliance with water quality standards (State Water Board Order No. WQ 2001-0015, p. 7). Those provisions of this Order regulate the discharge of waste in municipal storm water under the CWA's MEP standard, not the BAT/BCT standard that applies to other types of discharges. These provisions, therefore, regulate the discharge of waste in municipal storm water more leniently than the discharge of waste from non-governmental sources.

Fourth, the Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA section 301(a) (33 USC section 1311(a)). To the extent that the local agency Copermittees 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.4<sup>th</sup> 68, 107-108.)

Fifth, the local agency Copermittees' 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.

Finally, even if any of the permit provisions could be considered unfunded mandates, under Government Code section 17556, subdivision (d), a state mandate is not subject to reimbursement if the local agency has the authority to charge a fee. The local agency Copermittees 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 Cal. Const., Art. XIII D, section 6, subd. (c); see also *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4<sup>th</sup> 1351, 1358-1359.) The Fact Sheet demonstrates that numerous activities contribute to the pollutant loading in the MS4. 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.4<sup>th</sup> 830, 842 [upholding inspection fees associated with renting property].) The authority and 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. (*Clovis Unified School Dist. V. Chiang* (2010) 188 Cal.App.4<sup>th</sup> 794, 812, citing *Connell v. Sup. Ct.* (1997) 59 Cal.App.4<sup>th</sup> 382, 401; *County of Fresno v. State of California* (1991) 53 Cal. 3d. 482, 487-488.)

## VIII. PROVISIONS

The provisions (i.e. NPDES permit requirements) of the Order are discussed below.

### A. Prohibitions and Limitations

**Purpose:** Provision A includes the prohibitions and limitations requirements that are the foundation of all the subsequent requirements included in the Order. Compliance with the prohibitions and limitations will restore and protect receiving waters from impacts that may be caused by discharges into and from the Copermittees' MS4s and ultimately achieve the objective of the CWA.

In meeting the requirements set forth in the Order, the Copermittees must be cognizant that the prohibitions and limitations exist and will be the standard by which the San Diego Water Board will be measuring the progress and success of their implementation of the NPDES permit requirements.

**Discussion:** The objective of the CWA is to “*restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.*” The CWA requires the implementation of NPDES permit programs to regulate discharges of pollutants and dredged or fill material to the navigable waters of the U.S. For discharges into and from MS4s, the CWA requires the NPDES permits to “*effectively prohibit non-stormwater discharges into the storm sewers*” and “*require controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable.*”

Provision A includes limitations, consistent with the requirements of the CWA for discharges from MS4s. Provision A expresses these limitations as discharge prohibitions, receiving water limitations, and effluent limitations. Compliance with the discharge prohibitions and receiving water limitations is also explicitly described, in conformance with precedential State Water Board Orders.

More specific and detailed discussions of the requirements of Provision A are provided below.

Provision A.1 (Discharge Prohibitions) prohibits the discharge of specific types of waste into and/or from the Copermittees' MS4s.

Provision A.1.a restates and reiterates Basin Plan Waste Discharge Prohibition 1, by prohibiting discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters of the

state. The terms pollution,<sup>15</sup> contamination,<sup>16</sup> and nuisance<sup>17</sup> are defined under CWC 13050. Provision [A.1.c](#) incorporates all the waste discharge prohibitions of the Basin Plan into the requirements of the Order. The waste discharge prohibitions from the Basin Plan have been reproduced and provided in [Attachment A](#) to the Order.

Provision [A.1.b](#) requires non-storm water discharges into the MS4s to be effectively prohibited, consistent with the requirements of the CWA for MS4 permits to “*effectively prohibit non-stormwater discharges into the storm sewers.*” The effective prohibition is required to be implemented by each Copermittee within its jurisdiction through the illicit discharge detection and elimination requirements under Provision [E.2](#). The prohibition does not apply to NPDES permitted discharges into the Copermittees’ MS4s.

The CWA employs the strategy of prohibiting the discharge of any pollutant from a point source into waters of the United States unless the discharger of the pollutant(s) obtains an NPDES permit pursuant to CWA Section 402. The 1987 amendment to the CWA includes provision 402(p) that specifically addresses NPDES permitting requirements for storm water discharges from MS4s. CWA section 402(p) prohibits the discharge of pollutants from specified MS4s to waters of the U.S. except as authorized by an NPDES permit and identifies two substantive standards for MS4 storm water permits. MS4 permits (1) “*shall include a requirement to effectively prohibit nonstormwater discharges into the storm sewers*” and (2) “*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 State determines appropriate for the control of such pollutants.*” (CWA section 402(p)(3)(B)(ii-iii).)

In November 1990, the USEPA published regulations addressing storm water discharges from MS4s (55 FR 47990 and following (Nov. 16, 1990) (Phase I Final Rule)). The regulations establish minimum requirements for MS4 permits, and generally focus on the requirement that MS4s implement programs to reduce the amount of pollutants found in storm water discharges to the MEP. The CWA’s municipal storm water MEP standard does not require storm water discharges to strictly meet water quality standards, as is required for other NPDES permitted discharges. Compliance is achieved through an iterative approach of continuous

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<sup>15</sup> CWC 13050(l): “(1) ‘Pollution’ means an alteration of the quality of waters of the state by waste to a degree which unreasonably affects either of the following: (A) The water for beneficial uses. (B) Facilities which serve beneficial uses. (2) ‘Pollution’ may include “contamination.

<sup>16</sup> CWC 13050(k): “Contamination’ means an impairment of the quality of waters of the state by waste to a degree which creates a hazard to 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.”

<sup>17</sup> CWC 13050(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.”



implementation of improved BMPs. This distinction reflects Congress's recognition that variability in flow and intensity of storm events render difficult strict compliance with water quality standards by MS4 permittees. In describing the controls that permits must include to reduce pollutants in storm water discharges to the MEP, the statute (CWA section 402(p)(3)(B)(iii)) states that the controls shall include: "*management practices, control techniques and system, design and engineering methods, and such other provisions as the [permit writer] determines appropriate for the control of such pollutants.*"

In contrast, non-storm water discharges from the MS4 that are not authorized by separate NPDES permits are subject to requirements under the NPDES program, including discharge prohibitions, technology based effluent limitations and water quality-based effluent limitations (40 CFR 122.44). The regulations also require the Copermitee's program to include an element to detect and remove illicit discharges and improper disposal into the storm sewer (40 CFR 122.26(d)(2)(iv)(B)).

While "non-storm water" is not defined in the CWA or federal regulations, the federal regulations (at 40 CFR 122.26(b)(2)) define "*illicit discharge*" as "*any discharge to a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer and discharges resulting from fire fighting activities).*" This definition is the most closely applicable definition of "non-storm water" contained in federal law. As stated in the Phase I Final Rule, USEPA added the illicit discharge program requirement to begin implementation of the 'effective prohibition' requirement to detect and control non-storm water discharges to their municipal system.

Thus, federal law mandates that permits issued to MS4s must require management practices that will result in reducing storm water pollutants to the MEP yet at the same time requires that non-storm water discharges be effectively prohibited from entering the MS4. "Effectively" prohibit does not mean that non-storm water discharges are authorized to be discharged into and from the Copermitees' MS4s. The Phase I Final Rule clarifies what "effectively prohibit" means (55 FR 47995):

*"Section 402(p)(3)(B) requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer...Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit (other than the permit for the discharge from the municipal separate storm sewer)" [Emphasis added].*

Consistent with federal law, unless non-storm water discharges to the MS4 are authorized by a separate NPDES permit, non-storm water discharges are appropriately subject to the effective prohibition requirement in the CWA and Regional

Water Boards are not limited by the iterative MEP approach to storm water regulation in crafting appropriate regulations for non-storm water discharges.

The federal regulations (40CFR122.26(d)(2)(i)(B)) require the Copermittees to establish the legal authority which authorizes or enables the Copermittees to prohibit illicit discharges to the MS4s. The federal regulations (40 CFR 122.26(d)(2)(vi)(B)(1)) require the Copermittees to “*implement and enforce an ordinance, order or similar means*” to prevent non-storm water discharges to their MS4s. Thus, the Copermittees are required to “*effectively*” prohibit non-storm water discharges to their MS4s through enforcing their legal authority established under “*ordinance, order or similar means*” and either remove those discharges to their MS4s, or require those discharges to obtain coverage under a separate NPDES permit. More detail about the program that must be implemented to “*effectively*” prohibit non-storm water discharges to the Copermittees’ MS4s is provided under the discussion for Provision [E.2](#).

Provision [A.1.d](#) was included to be consistent Resolution No. 2012-0012, adopted by the State Water Board on March 20, 2012. Provision [A.1.d](#) prohibits discharges from MS4s to Areas of Special Biological Significance (ASBS), except for storm water discharges from the City of San Diego’s MS4 to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach to the Heisler Park ASBS subject to the Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012. The pertinent Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012 are provided in [Attachment A](#) to the Order.

Provision A.2 (Receiving Water Limitations) specifies the condition of the receiving waters that must be achieved when there are discharges from the Copermittees’ MS4s. Receiving water limitations are included in all NPDES permits issued pursuant to the CWA section 402. CWA section 402(p)(3)(B)(iii) authorizes the inclusion of “*such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.*” This requirement gives USEPA or the State permitting authority, in this case the San Diego Water Board, discretion to determine what permit conditions are necessary to control pollutants.

In its Phase I Final Rule (see 55 FR 47990, 47994 (Nov. 16, 1990)), USEPA elaborated on these requirements, stating that, “*permits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls.*” USEPA reiterated in its Phase II Final Rule (64 FR 68722, 68737), that MS4 “*permit conditions must provide for attainment of applicable water quality standards (including designated uses), allocations of pollutant loads established by a TMDL, and timing requirements for implementation of a TMDL.*” CWC section 13377 also requires that NPDES permits include limitations necessary to implement water quality control plans. Both the State Water Board and the San Diego Water Board have previously concluded that discharges from the MS4 contain pollutants that have the reasonable potential to cause or contribute to excursions above water quality

standards. As such, inclusion of receiving water limitations is appropriate to control MS4 discharges.

The inclusion of receiving water limitations is also consistent with the Ninth Circuit Court of Appeals' ruling in *Defenders of Wildlife v. Browner* (191 F.3d 1159, 1166 (1999)) that the permitting authority has discretion regarding the nature and timing of requirements that it includes as MS4 permit conditions to attain water quality standards. The Ninth Circuit Court of Appeals recently explained that, "[w]ater quality standards are used as a supplementary basis for effluent limitations [guidelines] so that numerous dischargers, despite their individual compliance with technology based effluent limitations, can be regulated to prevent water quality from falling below acceptable levels." (*Natural Resources Defense Council v. County of Los Angeles* (9<sup>th</sup> Cir. 2011) 673 F.3d 880, 886 (revd. On other grounds and remanded by *Los Angeles County Flood Control District v. Natural Resources Defense Council* (133 S.Ct. 710 (2013)))

The receiving water limitations included in this Order consist of all applicable numeric or narrative water quality objectives or criteria, or limitations to implement the applicable water quality objectives or criteria, for receiving waters as contained in the Basin Plan or in water quality control plans or policies adopted by the State Water Board, including State Water Board Resolution No. 68-16, or in federal regulations, including but not limited to 40 CFR 131.12 and 131.38. The water quality objectives in the Basin Plan and other State Water Board plans and policies have been approved by USEPA and combined with designated beneficial uses constitute the water quality standards required under federal law.

Provision [A.2.a](#) requires that discharges from the Copermittees' MS4s must not cause or contribute to the violation of water quality standards in receiving waters. The water quality standards of the receiving waters must be protected from the impacts that may be caused by the Copermittees' MS4 discharges. Water quality standards applicable to the surface waters in the San Diego Region must be achieved through meeting the technology based standard of MEP through an iterative process of improved management actions. Provision [A.2.a](#) is also consistent with State Water Board Order WQ 99-05 precedent-setting language requiring discharges from MS4s to attain receiving water quality standards. The water quality control plans and policies with water quality standards applicable to the waters in the San Diego Region are included under Provision [A.2.a](#).

Provisions [A.2.b](#) was included to be consistent with the requirements of State Water Board Resolution No. 2012-0012, adopted on March 20, 2012.

Provision A.3 (Effluent Limitations) specifies the condition of the discharges from the Copermittees' MS4s that must be achieved if and when there are discharges.

Consistent with CWA section 301(b)(1)(A) and 40 CFR 122.44(a), Provision [A.3.a](#) includes the technology-based effluent limitations that must be included in the Order.

The technology-based effluent limits, representing the minimum level of control that must be imposed in a permit under CWA section 402, requires that pollutants in discharges of storm water from the Copermittees' MS4s be reduced to the MEP. This provision applies specifically to storm water discharges. Non-storm water discharges must be effectively prohibited, as required under Provision A.1.b. Non-storm water (dry weather) discharges from the MS4 are not considered storm water (wet weather) discharges and therefore are not subject to the MEP standard.

The technology-based MEP standard is an ever-evolving, flexible, and advancing concept. Neither Congress nor USEPA has specifically defined the term "maximum extent practicable." Congress established this flexible MEP standard so that the administrative bodies would have *"the tools to meet the fundamental goals of the Clean Water Act in the context of storm water pollution."* (*Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4<sup>th</sup> 866, 884.) As knowledge about controlling storm water runoff and discharges continues to evolve, so does the knowledge which constitutes MEP. Reducing the discharge of pollutants in storm water from the MS4 to the MEP requires the Copermittees to assess each program component and revise activities, control measures, BMPs, and measurable goals, as necessary to meet MEP.

The San Diego Water Board or the State Water Board ultimately define MEP, and may include requirements that provide specific guidance on what is expected to demonstrate MEP. It is the responsibility of the Copermittees to propose actions that implement BMPs to reduce storm water pollution to the MEP. In other words, the Copermittees' runoff management programs developed and implemented under the Order are the Copermittees' proposals for achieving MEP. Their total collective and individual activities conducted pursuant to their runoff management programs become their proposal for achieving MEP as it applies both to their overall effort, as well as to specific activities. Provisions B through E of the Order provides a minimum framework to guide the Copermittees in achieving the MEP standard for discharges of pollutants in storm water.

Provision A.3.b incorporates any water quality based effluent limitations (WQBELs) applicable to the MS4s established for TMDLs adopted and approved for the San Diego Region and requires the Copermittees to comply with those WQBELs. This is consistent with 40 CFR 122.44(d)(1)(vii)(B), which requires that NPDES permits to incorporate WQBELs *"developed to protect a narrative water quality criterion, a numeric water quality criterion, or both...consistent with the assumptions and requirements of any available wasteload allocation for the discharge..."*

Pursuant to CWA section 303(d), for surface water bodies identified as impaired by one or more pollutants, the San Diego Water Board is required to establish TMDLs *"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."* The

TMDLs identify sources of the pollutants causing the impairments and assign portions of the TMDL as WLAs to point sources, which include MS4s.

WLAs must be expressed in NPDES permits as WQBELs, which may include one or more numeric components such as numeric effluent limits, and/or receiving water limitations, and/or BMP requirements. Because numeric targets for TMDLs typically include a component that will be protective of water quality standards, a TMDL will likely include one or more numeric receiving water limitations and/or effluent limitations as part of the assumptions or requirements of the TMDL. Any numeric receiving water limitations and/or effluent limitations developed as part of the assumptions or requirements of a TMDL must be incorporated and included as part of WQBELs for the MS4s.

Because the development and approval of new TMDLs, or modification of existing TMDLs, may occur during the term of this Order, the specific provisions of those TMDLs, including effluent limitations applicable to MS4s are provided within [Attachment E](#) to the Order. [Attachment E](#) will be updated with new TMDLs and modifications to existing TMDLs in a timely manner as they occur.

Provision A.4 (Compliance with Discharge Prohibitions and Receiving Water Limitations) describes the process required to be implemented by the Copermittees if compliance with the discharge prohibitions of Provisions [A.1.a](#) and [A.1.c](#) and receiving water limitations of Provision [A.2.a](#) are not being achieved under current conditions.

In its Phase II Stormwater Regulations, Final Rule, USEPA states that MS4 “*permit conditions must provide for attainment of applicable water quality standards (including designated uses), allocations of pollutant loads established by a TMDL, and timing requirements for implementation of a TMDL.*”<sup>18</sup> In a series of comment letters on MS4 permits issued by various Regional Water Boards, USEPA has also reiterated that MS4 discharges must meet water quality standards.<sup>19</sup> In addition, the Ninth Circuit Court of Appeals explained in a recent ruling that, “[w]ater quality standards are used as a supplementary basis for effluent limitations [guidelines] so that numerous dischargers, despite their individual compliance with technology based effluent limitations, can be regulated to prevent water quality from falling below acceptable levels.”<sup>20</sup>

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<sup>18</sup> Phase II Stormwater Regulations, Final Rule, 64 Fed. Reg. 68722, 68737.

<sup>19</sup> Letter from Alexis Strauss, Acting Director, Water Division, USEPA Region IX, to Walt Pettit, Executive Director, State Water Board, re: SWRCB/OCC File A-1041 for Orange County, dated January 21, 1998.

<sup>20</sup> NRDC v. County of Los Angeles (9<sup>th</sup> Cir. 2011), 673 F.3d 880, 886 (revd. on other grounds and remanded by *Los Angeles County Flood Control District v. Natural Resources Defense Council* (133 S.Ct. 710 (2013))). See also, *Building Industry Ass’n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4<sup>th</sup> 866, 884-886, citing *Defenders of Wildlife v. Browning*, (9<sup>th</sup> Cir. 1999) 191 F.3d 1159.)

Water quality standards for the San Diego Region are established in the Basin Plan. The water quality standards of the Basin Plan are incorporated into this Order as the discharge prohibitions under Provisions [A.1.a](#) and [A.1.c](#) and receiving water limitations under Provision [A.2.a](#). The discharge prohibitions and receiving water limitations in this Order consist of all applicable numeric or narrative water quality objectives or criteria, or limitations or prohibitions to implement the applicable water quality objectives or criteria, for receiving waters as contained in the Basin Plan, water quality control plans or policies adopted by the State Water Board, including Resolution No. 68-16, or federal regulations, including but not limited to, 40 CFR 131.12 and 131.38. The waste discharge prohibitions and water quality objectives in the Basin Plan have been approved by USEPA and combined with the designated beneficial uses constitute the water quality standards required under federal law.

Under federal law (CWA section 402(p)(3)(B)(iii)), an MS4 permit must include “*controls to reduce the discharge of pollutants to the maximum extent practicable...and such other provision as...the State determines appropriate for control of such pollutants.*” The State Water Board has previously determined that limitations necessary to meet water quality standards are appropriate for the control of pollutants discharged by MS4s and must be included in MS4 permits. (State Water Board Orders WQ 91-03, 98-01, 99-05, 2001-15; see also *Defenders of Wildlife v. Browner* (9<sup>th</sup> Cir. 1999) 191 F.3d 1159.) This Order prohibits discharges that cause or contribute to violations of water quality standards.

The discharge prohibitions under Provisions [A.1.a](#) and [A.1.c](#) and receiving water limitations under Provision [A.2.a](#) are included in this Order to ensure that discharges from the MS4s do not cause or contribute to exceedances of water quality objectives necessary to protect the beneficial uses of the receiving waters.

Provision [A.4](#) is consistent with the precedent-setting language in State Water Board Order WQ 99-05 required to be included in municipal storm water permits. State Water Board Order WQ 2001-15 refined Order WQ 99-05 by requiring an iterative approach to compliance with water quality standards involving ongoing assessments and revisions, as referred to as the “iterative process.” The “iterative process” is a fundamental NPDES requirement for municipal storm water permits to achieve the objectives of the CWA.

The State Water Board and Regional Water Boards have stated that the provisions under Provisions [A.1.a](#), [A.1.c](#), [A.2.a](#), and [A.4](#) are independently applicable, meaning that compliance with one provision does not provide a “safe harbor” where there is non-compliance with another provision (i.e., compliance with the Provision [A.4](#) does not shield a Copermitee who may have violated Provision [A.1.a](#), [A.1.c](#), or [A.2.a](#) from an enforcement action). The intent of Provision [A.4](#) is to ensure that the Copermitees have the necessary storm water management programs and controls in place, and that they are modified by the Copermitees in a timely fashion when necessary, so that compliance with Provisions [A.1.a](#), [A.1.c](#), and/or [A.2.a](#) is achieved as soon as possible. USEPA expressed the importance of this independent applicability in a series of

comment letters on MS4 permits proposed by various Regional Water Boards. At that time, USEPA expressly objected to certain MS4 permits that included language stating, “*permittees will not be in violation of this [receiving water limitation] provision ... [if certain steps are taken to evaluate and improve the effectiveness of the jurisdictional runoff management programs],*” concluding that this phrase would not comply with the CWA.<sup>21</sup>

The Ninth Circuit held in *Natural Resources Defense Council v. County of Los Angeles* (2011) 673 F3d. 880, 886 (revd. on other grounds and remanded by *Los Angeles County Flood Control District v. Natural Resources Defense Council* (133 S.Ct. 710 (2013))) that engagement in the iterative process does not provide a safe harbor from liability for violations of permit terms prohibiting exceedances of water quality standards. The Ninth Circuit holding is consistent with the position of the State and Regional Water Boards that exceedances of water quality standards in an MS4 permit constitute violations of permit terms subject to enforcement by the Water Boards or through a citizen suit. While the Water Boards have generally directed dischargers to achieve compliance by improving control measures through the iterative process, the San Diego Water Board retains the discretion to take other appropriate enforcement and the iterative process does not shield dischargers from citizen suits under the CWA.

The requirements of Provision A.4, therefore, are required to be implemented until the water quality standards expressed under Provisions A.1.a, A.1.c, and A.2.a are achieved. The CWA requires MS4 permits to “*require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.*” The requirements of this Order have been deemed or determined to be “appropriate” to achieve water quality standards in receiving waters.

Part of the “controls” required by the Order is the process described in Provision A.4. Provision A.4 includes the process that is ultimately expected to achieve compliance with the requirement that discharges from the MS4 do not cause or contribute to violations of water quality standards in the receiving waters. The implementation of Provision A.4 is required when the Copermitees or the San Diego Water Board have determined that discharges from the MS4 are causing or contributing to violations of water quality standards in the receiving waters.

The Copermitees must effectively prohibit non-storm water discharges into the MS4s, reduce the discharge of pollutants in storm water from the MS4s to the MEP, and ensure that their MS4 discharges do not cause or contribute to violations of water quality standards. If the Copermitees have effectively prohibited non-storm water

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<sup>21</sup> Letter from Alexis Strauss, Acting Director, Water Division, USEPA Region IX, to Walt Pettit, Executive Director, State Water Board, re: SWRCB/OCC File A-1041 for Orange County, dated January 21, 1998.

discharges and reduced storm water pollutant discharges to the MEP, but their discharges are still causing or contributing to violations of water quality standards, Provision [A.4](#) provides a clear “iterative process” for the Copermittees to follow.

Provision [A.4](#) essentially requires the Copermittees to implement additional BMPs until MS4 discharges no longer cause or contribute to a violation of water quality standards.

In assessing compliance and potential enforcement actions, the San Diego Water Board looks at the Copermittees’ efforts in total to meet the requirements of Provisions [A.1.a](#), [A.1.c](#), [A.2.a](#) and Provision [A.4](#). The Copermittees need to demonstrate that they are making improvements to their programs and making progress toward achieving the discharge prohibitions and receiving water limitations in Provisions [A.1.a](#), [A.1.c](#), and [A.2.a](#) by implementing the requirements of Provision [A.4](#). The San Diego Water Board would consider these efforts prior to strictly enforcing the requirements of Provisions [A.1.a](#), [A.1.c](#), and [A.2.a](#). Causes of exceedances of the receiving water limitations can often be more difficult to identify and attribute solely to the Copermittees’ MS4s. The intent of the Order is to provide the Copermittees more clarity and flexibility in addressing these exceedances through the iterative approach and adaptive management process until the requirements under Provisions [A.1.a](#), [A.1.c](#), and [A.2.a](#) are fully achieved.

An exception to the iterative approach and adaptive management process would be in receiving waters subject to adopted and approved TMDLs. For TMDLs that are incorporated into the Order, there is a specific date for compliance to be achieved, after which the iterative approach and adaptive management process required under Provision [A.4](#) no longer provides the flexibility to achieve compliance. Where compliance dates for a TMDL have passed, compliance with the WQBELs incorporated into the Order established by a TMDL in [Attachment E](#) to protect water quality standards is required. Thus, after the interim or final compliance dates for a TMDL have passed, if the discharges from the Copermittees’ MS4s are causing or contributing to a violation of WQBELs, exceedances of WQBELs must be strictly enforced by the San Diego Water Board. In the meantime, however, the Copermittees are in compliance with the interim or final TMDL requirements in [Attachment E](#) as long as the interim or final WQBELs are being achieved in accordance with the interim or final compliance dates.



## **B. Water Quality Improvement Plans**

**Purpose:** Since 1990, the Copermitees have been developing and implementing programs and BMPs intended to effectively prohibit non-storm water discharges to the MS4s and control pollutants in storm water discharges from the MS4s to receiving waters. As a result, several water body / pollutant combinations have been de-listed from the CWA Section 303(d) List, beach closures have been significantly reduced, and public awareness of water quality issues has increased. The Copermitees have been able to achieve improvements in water quality in some respects, but significant improvements to the quality of receiving waters and discharges from the MS4s are still necessary to meet the requirements and objectives of the Clean Water Act.

Provision **B** includes requirements for the Copermitees to develop and implement Water Quality Improvement Plans to ultimately comply with the prohibitions and limitations under Provision **A**. The Water Quality Improvement Plans will provide the Copermitees a comprehensive program that can achieve the requirements and further the objectives of the CWA. Implementation of the Water Quality Improvement Plans will also improve the quality of the receiving waters in the San Diego Region.

The Water Quality Improvement Plan is the backbone of the Regional MS4 Permit requirements. Provision **B** provides the guidance, criteria, and minimum expectations and requirements for the elements of the Water Quality Improvement Plan to be developed and implemented by the Copermitees. The Water Quality Improvement Plans will be implemented in the Watershed Management Area by the Copermitees within their jurisdictions through their jurisdictional runoff management programs.

The Water Quality Improvement Plan also incorporates a program to monitor and assess the progress of the Copermitees' jurisdictional runoff management programs toward improving the quality of discharges from the MS4s, as well as tracking improvements to the quality of receiving waters. A process to adapt and improve the effectiveness of the Water Quality Improvement Plans has also been incorporated into the requirements of Provision **B** to be consistent with the "iterative approach" required to achieve compliance with discharge prohibitions of Provisions **A.1.a** and **A.1.c** and receiving water limitations of Provision **A.2.a**, pursuant to the requirements of Provision **A.4**.

The Water Quality Improvement Plans have also been structured to incorporate the requirements of any TMDLs that have been adopted for the San Diego Region. Incorporating the requirements of the TMDLs into the requirements of Provision **B** allows the Copermitees to develop a single plan, instead of separate plans, to coordinate their non-storm water and storm water runoff management programs. The Water Quality Improvement Plans allow the Copermitees to meet the requirements of this Order, as well as fulfill the requirements of the TMDLs.

As an added benefit, if the Copermitees demonstrate that impaired water bodies within the Watershed Management Area listed on the 303(d) List will be addressed with their Water Quality Improvement Plans in a reasonable period of time, the San Diego Water Board may be able to remove the water bodies from the 303(d) List, which would greatly reduce the need for the San Diego Water Board to develop additional TMDLs that would have to be incorporated into the Order and implemented by the Copermitees.

***Discussion:*** The federal NPDES regulations require the Copermitees to develop a proposed management program (40 CFR 122.26(d)(2)(iv)). The proposed management program must include “*a comprehensive planning process*” and “*where necessary intergovernmental coordination*” for the “*duration of the permit.*” The Water Quality Improvement Plan is the Copermitees’ “*comprehensive planning process*” document for the proposed management program that will be implemented within a Watershed Management Area. Implementation of the Water Quality Improvement Plan requires “*intergovernmental coordination*” among the Copermitees for at least the “*duration of the permit,*” and likely into and beyond the next iteration of the permit.

Developing Water Quality Improvement Plans based upon watersheds is consistent with federal regulations that support the development of permit conditions, as well as implementation of storm water management programs, at a watershed scale (40 CFR 122.26(a)(3)(ii), 122.26(a)(3)(v), and 122.26(d)(2)(iv)). In 2003, USEPA issued a Watershed-Based NPDES Permitting Policy Statement (USEPA, 2003) that defines watershed-based permitting as an approach that produces NPDES permits that are issued to point sources on a geographic or watershed basis. In this policy statement, USEPA explains that “[*t*]he utility of this tool relies heavily on a detailed, integrated, and inclusive watershed planning process.” USEPA identifies a number of important benefits of watershed permitting, including more environmentally effective results, the ability to emphasize measuring the effectiveness of targeted actions on improvements in water quality, reduced cost of improving the quality of the nation’s waters and more effective implementation of watershed plans, including TMDLs, among others.

An emphasis on watersheds is appropriate at this stage in the San Diego Region’s MS4 program to shift the focus to more targeted, water quality driven planning and implementation. Addressing discharges on a watershed scale focuses on water quality results by emphasizing the receiving waters in the watershed. The conditions of the receiving waters drive management actions, which in turn focus measures to address pollutant contributions from MS4 discharges.

The Water Quality Improvement Plan gives the Copermitees the responsibility of developing a comprehensive plan to coordinate the efforts of their jurisdictional runoff management programs for addressing the problems related to MS4 discharges causing impacts to water quality in the Watershed Management Area. The development of the plan provides the Copermitees the opportunity to provide significant input on how to implement their jurisdictional runoff management programs, and how to best utilize their available resources in addressing a focused set of

priorities that they believe will result in measureable improvements to water quality within the Watershed Management Area.

The Copermittees are encouraged to separate the Watershed Management Area into subwatersheds, as appropriate. This allows the Copermittees to identify priorities applicable to a subset of the Copermittees or specific water bodies or areas within the Watershed Management Area.

Included in the requirements for the elements to be included in the Water Quality Improvement Plan are monitoring and assessment requirements that are necessary to implement, as well as ensure the Copermittees are in compliance with, the requirements of the Order. In addition to the federal requirements of the CWA section 308(a) and 40 CFR 122.26(d), the San Diego Water Board has the authority to establish monitoring, reporting, and recordkeeping requirements for NPDES permits under CWC 13383.

More specific and detailed discussions of the requirements of Provision B are provided below.

Provision B.1 (Watershed Management Areas) requires the Copermittees to develop a Water Quality Improvement Plan for each of the Watershed Management Areas defined by the San Diego Water Board.

Pursuant to 40 CFR 122.26(d)(2)(iv), proposed management programs “*may impose controls on a...watershed basis...*” The Water Quality Improvement Plan is the Copermittees’ proposed management program. A Water Quality Improvement Plan must be developed for each Watershed Management Area identified in the Order.

The Watershed Management Areas are identified in Table B-1. Table B-1 establishes ten (10) Watershed Management Areas, and identifies the Copermittees that are responsible for developing and implementing the Water Quality Improvement Plan for each Watershed Management Area.

The Copermittees from each of the three counties within the San Diego Region are expected to be phased in as their respective NPDES municipal storm water permits expire. Because Order No. R9-2007-0001 expired in January 2012, the San Diego County Copermittees are covered under the Regional MS4 Permit on the effective date of the Order.

After San Diego Water Board receives and considers the Reports of Waste Discharge required to be submitted by the Orange County Copermittees and Riverside County Copermittees pursuant to the requirements of their current permits, and make any necessary changes to the Order, the Orange County Copermittees and Riverside County Copermittees will be covered under the Regional MS4 Permit after Order No. R9-2009-0002 expires in November 2014, and Order No. R9-2010-0016 expires in December 2015, respectively.

The Orange County Copermittees and Riverside County Copermittees also have the option to obtain coverage under the Regional MS4 Permit earlier than their respective permit expiration dates. The process to apply for early coverage is described Provision [F.6](#).

Because the Santa Margarita River Watershed Management Area includes Copermittees from both San Diego County and Riverside County, a footnote to Table [B-1](#) has been included to specify that the requirements of Provision [B](#) are not required to be implemented by the County of San Diego until the Riverside County Copermittees have received a notice of coverage under the Order. Until the Riverside County Copermittees are notified of coverage under the Order, the County of San Diego is subject to the prohibitions and limitations under Provision [A](#), responsible for continuing to implement its existing jurisdictional runoff management program, and responsible for implementing the transitional monitoring and assessment requirements of Provision [D](#), the transitional annual reporting requirements of Provision [F.3.b](#), and the TMDL requirements of [Attachment E](#) to the Order.

Provision B.2 (Priority Water Quality Conditions) requires the Copermittees in each Watershed Management Area to identify the highest priority water quality conditions which will be the focus of the Water Quality Improvement Plan implementation.

Provisions [B.2.a](#) and [B.2.b](#) provide the criteria that must be assessed when characterizing the receiving water quality and potential impacts from MS4 discharges of the receiving waters within the Watershed Management Area. The criteria are based primarily on the requirements in 40 CFR 122.26(d)(1)(iv)(C) and (C)(1)-(9). Characterizing the receiving water quality and identifying the potential impacts caused by MS4 discharges to receiving waters in the Watershed Management Area is necessary to identify the impacts to receiving waters associated with MS4 discharges that are of the most concern to the Copermittees.

Based on the information required to be considered under Provisions [B.2.a](#) and [B.2.b](#), Provision [B.2.c](#) requires to Copermittees to identify the highest priority water quality conditions related to discharges from the MS4s that will be the primary focus of the Water Quality Improvement Plan in the Watershed Management Area. Addressing and improving these highest priority water quality conditions will become the focus of each Copermittee's jurisdictional runoff management program as the Water Quality Improvement Plan is implemented in the Watershed Management Area. The highest priority water quality conditions are expected to include source of pollutants and/or stressors, and/or receiving water conditions, that the Copermittees consider the highest threats or most likely to have adverse impacts on the physical, chemical, and biological integrity of receiving waters. Addressing these threats and/or adverse impacts should restore the physical, chemical, and biological integrity of receiving waters, and result in the restoration and protection of the beneficial uses of the receiving waters in the Watershed Management Area.

Provision [B.2.d](#) requires the Copermittees to identify known and suspected sources of pollutants and/or stressors contributing to the highest priority water quality conditions. The requirements of Provision [B.2.d](#) are based primarily on the requirements in 40 CFR 122.26(d)(1)(iii)(B)(1)-(6). The Copermittees are required to evaluate several factors in the identification of those sources. The Copermittees must consider and evaluate the following: (1) the land uses that may contribute toward impacts to receiving waters, (2) the locations of the Copermittees' MS4s that can convey and discharge runoff and pollutants to receiving waters, (3) other sources that discharge into the Copermittees' MS4s and receiving waters, and (4) other information and data that can help the Copermittees to evaluate the relative importance of or contribution from those sources toward the highest priority water quality conditions. Identifying the known and suspected sources, and their relative contribution toward the highest priority water quality conditions, will help the Copermittees to focus, direct, and prioritize their resources and implementation efforts within their jurisdictions.

Provision [B.2.e](#) requires the Copermittees to identify potential strategies that can result in improvements to water quality in MS4 discharges and/or receiving waters within the Watershed Management Area. Potential water quality improvement strategies will not necessarily be implemented by the Copermittees, but provide a "menu" of options that the Copermittees will consider for implementation. The public participation process that will be implemented during the development of the Water Quality Improvement Plan is where the potential water quality improvement strategies will be identified.

Provision B.3 (Water Quality Improvement Goals, Strategies and Schedules) requires the Copermittees in each Watershed Management Area to identify the goals that the Copermittees' jurisdictional runoff management programs will work toward achieving to address and improve the highest priority water quality conditions identified under Provision [B.2.c](#); the strategies that will be implemented by the Copermittees within their jurisdictions and the Watershed Management Area to achieve the goals; and, the schedules for implementing the strategies and achieving the goals. The element of the Water Quality Improvement Plan required under Provision [B.3](#) is where the "*comprehensive planning*" and "*intergovernmental coordination*" [40 CFR 122.26(d)(2)(iv)] of the Copermittees' actions for the proposed management programs within the Watershed Management Area is required to be described.

Provision [B.3.a](#) requires the Copermittees to identify interim and final numeric goals, and schedules to achieve those goals as part of the Water Quality Improvement Plans. Provision [B.3.a.\(1\)](#) requires the Copermittees to identify two types of numeric goals to be achieved:

- (1) Final numeric goals in the receiving waters and/or MS4 discharges that will result in the protection of the water quality standards of the receiving waters for the highest priority water quality conditions identified by the Copermittees for Provision [B.2.c](#). These final numeric goals are the ultimate goals for the Water Quality Improvement Plan, and the achievement and maintenance of these final numeric goals will indicate that one or more beneficial uses have been successfully restored and/or protected from MS4 discharges.

(2) Interim numeric goals that can be used by the Copermittees to demonstrate progress toward achieving the final numeric goals in the receiving waters and/or MS4 discharges for the highest priority water quality conditions in the Watershed Management Area. Achievement of the interim numeric goals will demonstrate to the San Diego Water Board that the Copermittees' implementation efforts are progressing toward achieving the final numeric goals.

Provision [B.3.a.\(1\)](#) does not specify what the interim and final numeric goals must be based on, but they essentially must be designed to achieve compliance with water quality standards in the receiving waters. To that end, the interim goals must be based on measureable criteria or indicators capable of demonstrating progress toward achieving the numeric goals.”

The interim and final numeric goals can be based on the water quality objectives in the Basin Plan. The water quality objectives in the Basin Plan, however, consist of numeric and narrative water quality objectives. Numeric water quality objectives can be directly used as numeric goals. Narrative water quality objectives, on the other hand, will require some interpretation to identify numeric goals. The achievement of multiple numeric goals based on the water quality objectives, used in combination, may be necessary to demonstrate that beneficial uses have been restored and/or protected.

The Copermittees could also propose other numeric goals that are not necessarily water quality objectives from the Basin Plan. For example, the Copermittees could propose a numeric goal that consists of achieving some percent improvement of a measureable indicator, such as acreage of a specific habitat or increase in a specific plant or animal species population. Other examples may include pollutant load reductions, number of impaired waterbodies delisted from the List of Water Quality Impaired Segments, Index of Biological Integrity (IBI) scores, etc.

The Copermittees may choose to develop interim numeric goals based on the final numeric goals they develop, such as incremental steps toward ultimately achieving the final numeric goals. The Copermittees may also choose to develop interim numeric goals that are based on other measureable indicators that can indirectly indicate improvements and progress toward the final numeric goals.

There are no limits to the types of interim numeric goals that could be proposed by the Copermittees, other than the goals must be based on measureable criteria or indicators capable of demonstrating progress toward achieving the numeric goals. Likewise, there are no limits to the types of final numeric goals that could be proposed by the Copermittees, other than the goals must “*restore and protect the water quality standards of the receiving waters.*”

Finally, Provision [B.3.a.\(2\)](#) also requires the Copermittees to develop schedules for measuring progress and achieving the interim and final numeric goals. Several criteria

are included for the development of the schedules, but the Copermittees are required to achieve the numeric goals as soon as possible, consistent with federal NPDES regulations (40 CFR 122.47(a)(1)).

The Copermittees are also required to incorporate any compliance schedules for any applicable ASBS or TMDL requirements. Applicable ASBS and TMDL compliance schedules are set forth in [Attachment A](#) and [Attachment E](#) to the Order, respectively. The information provided by the Copermittees under Provision [B.3.a.\(2\)](#) will be used by the Copermittees and the San Diego Water Board to gauge and track the progress of the Copermittees' efforts in addressing the highest priority water quality conditions identified in the Water Quality Improvement Plan.

Provision [B.3.b](#) requires the Copermittees to identify the strategies and schedules to implement those strategies as part of the Water Quality Improvement Plans. Provision [B.3.b](#) requires the Copermittees to identify the water quality improvement strategies that will be and may be implemented within the Watershed Management Area to 1) reduce of pollutants in storm water discharged from the MS4 to the MEP, 2) effectively prohibit non-storm water discharges from entering the MS4, 3) protect water quality standards in receiving waters by controlling MS4 discharges so that they do not cause or contribute to exceedances of receiving water limitations, and 4) achieve applicable WQBELs that implement TMDLs. The Copermittees will select the strategies to be implemented based on the likely effectiveness and efficiency of the potential water quality improvement strategies identified under Provision [B.2.e](#) to effectively prohibit non-storm water discharges to the MS4, reduce pollutants in storm water discharges from the MS4 to the MEP, and/or achieve the interim and final numeric goals identified under Provision [B.3.a](#).

Provision [B.3.b.\(1\)](#) requires each Copermittee to identify the strategies that will be or may be implemented within its jurisdiction. Each Copermittee is required to describe the strategies it is committed to implementing as part of its jurisdictional runoff management requirements under Provisions [E.2](#) through [E.7](#), and the optional jurisdictional strategies that the Copermittee will implement, as necessary, to achieve the numeric goals.

Each Copermittee is expected to implement the optional jurisdictional strategies identified under Provisions [B.3.b.\(1\)\(b\)](#) when the jurisdictional strategies it has committed to implement under Provision [B.3.b.\(1\)\(a\)](#) are not making adequate progress toward the interim and final numeric goals in accordance with the schedules established under Provision [B.3.a](#). Provision [B.3.b.\(1\)\(b\)\(v\)](#) requires each Copermittee to describe the circumstances necessary to trigger implementation of the optional jurisdictional strategies, in addition to the requirements of Provisions [B.3.b.\(1\)\(a\)](#).

The San Diego Water Board recognizes that there may be optional jurisdictional strategies that will likely require funding and/or resources for planning, permitting, procurement of labor and materials, and implementation. Thus, Provision

**B.3.b.(1)(b)(iv)** requires each Copermittee to describe the funding and/or resources that are necessary to implement these optional jurisdictional strategies. This information may provide interested groups and members of the public an understanding of the resources that they could provide or assist in obtaining to implement these optional jurisdictional strategies.

Provision **B.3.b.(2)** requires the Copermittees in the Watershed Management Area to identify the regional or multi-jurisdictional strategies that may be implemented, as necessary, to achieve the numeric goals. Similar to the requirements of Provision **B.3.b.(1)(b)**, these regional or multi-jurisdictional strategies will likely require funding and/or resources for planning, permitting, procurement of labor and materials, and implementation, and San Diego Water Board recognizes that these strategies may be difficult to implement with only Copermittee resources. Thus, Provision **B.3.b.(2)(d)** requires the Copermittees to describe the funding and/or resources necessary to implement these optional regional or multi-jurisdictional strategies. This information may provide interested groups and members of the public an understanding of the resources that they could provide or assist in obtaining to implement these optional regional or multi-jurisdictional strategies.

Provision **B.3.b.(3)** requires the Copermittees to develop and include schedules in the Water Quality Improvement Plan for implementing the water quality improvement strategies identified under Provisions **B.3.b.(1)** and **B.3.b.(2)**. The schedule for implementing the water quality improvement strategies will be used by the Copermittees and San Diego Water Board to measure and demonstrate the progress of the Copermittees' implementation efforts toward reducing pollutants in storm water discharged from the MS4 to the MEP, and eliminating illicit non-storm water discharges from entering the MS4.

Provision **B.3.b.(4)** provides the Copermittees in each Watershed Management Area the option of implementing watershed-specific structural BMP requirements for Priority Development Projects. Historically, storm water permits have included very specific performance standards for permanent, structural BMPs. These standards describe the expectation for the capture or treatment of pollutants and control of excessive flow before storm water is discharged from a site. The Copermittees were also allowed to develop waiver programs for Priority Development Projects to avoid implementing the structural BMPs; however, the waiver programs were not necessarily tied into any sort of holistic watershed strategy. The result is that implementation of BMP requirements is largely done on a site-by-site basis. This requires proper design on the part of the Priority Development Project and strict oversight on the part of the Copermittee.

Provision **B.3.b.(4)** promotes the evaluation of multiple strategies for water quality improvement, in addition to the implementation of permanent structural BMPs, on a watershed-scale versus the site-by-site approach. In a report issued by the Southern California Coastal Water Research Project (SCCWRP) and several other research institutions, the report emphasized that a successful hydromodification management program will involve watershed analysis as a first step, and that integrating multiple



watershed-based strategies is preferable over a site-by-site approach. Indeed, the report states that the watershed analysis “...*should lead to identification of existing opportunities and constraints that can be used to help prioritize areas of greater concern, areas of restoration potential, infrastructure constraints, and pathways for potential cumulative effects.*”<sup>22</sup> Provision B.3.b.(4) promotes the findings and recommendations of the report by providing a pathway for Copermittees to develop an integrated approach to their land development programs.

Under Provision B.3.b.(4), the Copermittees in a Watershed Management Area must first perform an analysis by gathering as much information pertaining to the physical characteristics of the Watershed Management Area as possible. This includes, for example, identifying potential areas of coarse sediment supply, present and anticipated future land uses, and locations of physical structures within receiving streams and upland areas that affect the watershed hydrology (such as bridges, culverts, and flood management basins). Once this information is collected, the Copermittees must produce GIS layers (maps) that include this information.

From there, the Copermittees must use the results of the Watershed Management Area Analysis to identify and compile a list of candidate projects that could potentially be used as alternative compliance options for Priority Development Projects. Such projects include, for example, opportunities for stream or riparian area rehabilitation, opportunities for retrofitting existing infrastructure to incorporate storm water retention or treatment, and opportunities for regional BMPs, among others. Once these candidate projects are identified, Copermittees may allow Priority Development Projects to fund, partially fund, or completely implement these candidate projects. The Copermittees must first find that implementing such a candidate project would provide greater overall benefit to the watershed than requiring implementation of the structural BMPs onsite, and also enter into a voluntary agreement with the Priority Development Project that authorizes this arrangement. The Copermittees may use Provision B.3.b.(4) as both 1) a mechanism to reach their stated goals of the Water Quality Improvement Plan by using Priority Development Projects to either fund or implement projects that will provide water quality benefit, and 2) an alternative to requiring strict adherence to the structural BMP design standards.

Additionally, Provision B.3.b.(4) allows the Copermittees to use the results of the Watershed Management Area Analysis to identify areas within the Watershed Management Area where it is appropriate to allow Priority Development Projects to be exempt from the hydromodification management BMP performance requirements. Provision E.3.c.(2) already allows exemptions for Priority Development Projects that discharge to a conveyance channel whose bed and bank are concrete lined from the point of discharge to an enclosed embayment or the Pacific Ocean. However, there may be cases where further exemptions are warranted. The Copermittees may identify such cases on a watershed basis and include them in the Watershed

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<sup>22</sup> 2012. ED Stein, F Federico, DB Booth, BP Bledsoe, C Bowles, Z Rubin, GM Kondolf, A Sengupta. Technical Report 667. Southern California Coastal Water Research Project. Costa Mesa, CA.

Management Area Analysis; however, they must provide the supporting rationale to support all claims for exemptions.

Provision [B.3.b.\(4\)](#) provides an innovative pathway for Copermittees to regulate their land development programs by allowing alternative compliance in lieu of implementing structural BMPs on each and every Priority Development Project. This approach facilitates the integration of watershed-scale solutions for improving overall water quality and assisting Copermittees to achieve their stated goals of the Water Quality Improvement Plan. The San Diego Water Board understands, however, that undertaking this approach, which involves extensive planning, could be resource intensive for the Copermittees. Therefore, the Watershed Management Area Analysis is optional and not a requirement. The Copermittees can choose not to perform the watershed planning and mapping exercise described in Provision [B.3.b.\(4\)](#), and instead choose to require strict implementation of the structural BMPs onsite, pursuant to Provision [E.3.b](#).

Provision B.4 (Water Quality Improvement Monitoring and Assessment) requires the Copermittees to develop an integrated monitoring and assessment program to track the progress of the Water Quality Improvement Plan toward meeting the implementation goals and schedules, and improving the water quality of the Watershed Management Area. Provision [B.4](#) is the part of the Water Quality Improvement Plan where the Copermittees describe the monitoring data that will be collected, which is not only necessary to implement the “iterative approach” required by Provision [A.4](#), but inform the adaptive management and “*comprehensive planning process*” that allows the Copermittees to make adjustments and modifications to the Water Quality Improvement Plans and the jurisdictional runoff management programs.

Provision [B.4](#) requires the Copermittees, at a minimum, to include the requirements of Provision [D](#) as part of the water quality improvement monitoring and assessment program for the Water Quality Improvement Plan. The Copermittees, however, are not limited to the requirements of Provision [D](#) and may include additional monitoring and assessment methods to track progress toward improving water quality in the Watershed Management Area.

In addition to incorporating the requirements of Provision [D](#), the water quality improvement monitoring and assessment program must incorporate any monitoring and assessment requirements specified for any applicable TMDLs included in [Attachment E](#) to the Order, and the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012 for Watershed Management Areas with ASBS.

The monitoring and assessments required to be incorporated into the Water Quality Improvement Plan are necessary to implement, as well as ensure the Copermittees are in compliance with, the requirements of the Order.

Provision B.5 (Iterative Approach and Adaptive Management Process) requires the Copermittees to implement the iterative approach pursuant to Provision [A.4](#) to adapt

the Water Quality Improvement Plan, monitoring and assessment program, and jurisdictional runoff management programs to become more effective toward achieving compliance with Provisions [A.1.a](#), [A.1.c](#) and [A.2.a](#).

Provision [B.5](#) requires the Copermittees in each Watershed Management Area to re-evaluate the highest priority water quality conditions and potential water quality improvement strategies, the water quality improvement goals, strategies and schedules, and the water quality improvement monitoring and assessment program and provide recommendations for modifying those elements to improve the effectiveness of the Water Quality Improvement Plan. The re-evaluation of the Water Quality Improvement Plan is part of the assessment requirements of Provision [D](#).

Provision B.6 (Water Quality Improvement Plan Submittal, Updates, and Implementation) requires to Copermittees to submit, update, and implement the Water Quality Improvement Plans.

The requirements for the process to develop and submit the Water Quality Improvement Plans is described in more detail under the discussion for Provision [F.1](#). The process will include several opportunities for the public to provide input during the development of the Water Quality Improvement Plans. The process for updating the Water Quality Improvement Plans is described in more detail under the discussion for Provision [F.3.c](#). Upon acceptance of the Water Quality Improvement Plan and updates, the Copermittees are required to immediately begin implementing the Water Quality Improvement Plan and subsequent updates.

The Water Quality Improvement Plan is expected to be a dynamic document that will evolve over time. The Water Quality Improvement Plan is also expected to be a long term plan that focuses the Copermittees' efforts and resources on a limited set of priority water quality conditions, with the ultimate goal of protecting all the beneficial uses of the receiving waters within the Watershed Management Area from impacts that may be caused or contributed to by MS4 discharges. As the Copermittees collect data, implement their jurisdictional runoff management programs, and review the results from their water quality improvement monitoring and assessment program, the Water Quality Improvement Plan is expected to be continually reviewed and updated until compliance with Provisions [A.1.a](#), [A.1.b](#), and [A.2.a](#) is achieved.

However, in specific cases supported by robust analytical documentation the implementation of the Water Quality Improvement Plans may demonstrate that TMDLs are not necessary for identified impaired water bodies within the Watershed Management Area if the analytical record demonstrates that technology-based effluent limitations required by the CWA, more stringent effluent limitations required by state, local, or federal authority, and/or other pollution control requirements (e.g., best management practices) required by local, state or federal authority are stringent enough to implement applicable water quality standards within a reasonable period of time.<sup>23</sup>

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<sup>23</sup> 40 CFR 130.7(b)(1)

The San Diego Water Board submits an Integrated Report to USEPA to comply with the reporting requirements of CWA sections 303(d), 305(b) and 314, which lists the attainment status of water quality standards for water bodies in the San Diego Region. According to USEPA guidance for the Integrated Report,<sup>24</sup> water bodies are placed in one of five categories. Water bodies included in Category 5 in the Integrated Report indicate at least one beneficial use is not being supported or is threatened, and a TMDL is required. Water bodies included in Category 5 are placed on the 303(d) List.

Category 4 in the Integrated Report is for water bodies where available data and/or information indicate that at least one beneficial use is not being supported or is threatened, but a TMDL is not needed.<sup>25</sup> Impaired surface water bodies may be included in Category 4 if a TMDL has been adopted and approved (Category 4a); if other pollution control requirements required by a local, state or federal authority are stringent enough to implement applicable water quality standards within a reasonable period of time (Category 4b); or, if the failure to meet an applicable water quality standard is not caused by a pollutant, but caused by other types of pollution (Category 4c).

Impaired water bodies can be included in Category 4a if a TMDL has been adopted and approved. The TMDLs in Attachment E to the Order implement the requirements of the TMDLs adopted by the San Diego Water Board, and approved by the State Water Board and USEPA. The water bodies in [Attachment E](#) will be included in Category 4a in the Integrated Report and removed from the 303(d) List.

Impaired water bodies can be included in Category 4b if there are *acceptable* “pollution control requirements” required by a local, state or federal authority stringent enough to implement applicable water quality standards within a reasonable period of time (e.g., a compliance date is set). When evaluating whether a particular set of pollution controls are “requirements,” the USEPA considers a number of factors, including: (1) the authority (local, state, federal) under which the controls are required and will be implemented with respect to sources contributing to the water quality impairment (examples may include: self-executing state or local regulations, permits, and contracts and grant/funding agreements that require implementation of necessary controls), (2) existing commitments made by the sources and completion or soon to be completed implementation of the controls (including an analysis of the amount of actual implementation that has already occurred), (3) the certainty of dedicated funding for the implementation of the controls, and (4) other relevant factors as determined by USEPA depending on case-specific circumstances.<sup>26</sup>

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<sup>24</sup> USEPA, 2005. Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act

<sup>25</sup> Ibid

<sup>26</sup> Ibid

Impaired water bodies can be included in Category 4c if the failure to meet an applicable water quality standard is not caused by a pollutant, but caused by other types of pollution. Pollution, as defined by the CWA is “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.”<sup>27</sup> In other cases, pollution does not result from a pollutant and a TMDL is not required. Examples of circumstances where an impaired segment may be placed in Category 4c include segments impaired solely due to lack of adequate flow, stream channelization, or hydromodification. In these situations, there may be water quality management actions that can address the cause(s) of the impairment, but a TMDL may not be required to implement the actions.

The Water Quality Improvement Plans will require the implementation of pollution controls and water quality management actions (i.e. water quality improvement strategies) which can result in the attainment of water quality standards in water bodies impaired by discharges from the Copermitees’ MS4s. The Water Quality Improvement Plans also include requirements that are expected to attain water quality standards in a reasonable period of time. The San Diego Water Board considers the Water Quality Improvement Plans to be a commitment by the Copermitees to develop, plan, budget for, and implement pollution controls that will attain water quality standards in receiving waters in a reasonable period of time, or as soon as possible. The results of the Copermitees’ efforts in implementing the Water Quality Improvement Plans can be used to re-evaluate the condition of the impaired water bodies during the next update to the 303(d) List.

After the Copermitees submit the Water Quality Improvement Plans and demonstrate that water quality standards are being attained or will be attained in a reasonable period of time, the San Diego Water Board may re-evaluate the water bodies on the 303(d) List. These water bodies on the 303(d) List may be re-evaluated and placed into Category 4b or Category 4c in the Integrated Report. The water bodies placed in Category 4b or Category 4c in the Integrated Report must show a record that the water bodies are attaining water quality standards or supporting the identified beneficial uses, or will attain water quality standards or support identified beneficial uses in a reasonable period of time, in order for the water bodies to be appropriately removed from the 303(d) List.

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<sup>27</sup> CWA section 502(19)

## C. Action Levels

**Purpose:** Provision C includes requirements for the Copermittees to identify and include numeric action levels in the Water Quality Improvement Plan to direct and focus the Copermittees' jurisdictional runoff management program implementation efforts for controlling MS4 discharges to receiving waters.

**Discussion:** Under Provision C, the numeric action levels required are for non-storm water discharges and storm water discharges. The non-storm water action levels (NALs) are applicable to non-storm water discharges from the Copermittees' MS4s, which can occur year-round. The storm water action levels (SALs) are applicable to storm water discharges from the Copermittees' MS4s, which occur during the rainy season defined as the period between October 1 and April 30.

The action levels required by Provision C are based on the action level requirements that were developed and incorporated into Order Nos. R9-2009-0002 and R9-2010-0016, the Orange County and Riverside County MS4 Permits, respectively. The Fact Sheets for these Orders provide detailed discussions about the development of the numeric NALs and SALs included in this Order.

Order Nos. R9-2009-0002 and R9-2010-0016 required the Copermittees to perform prescribed actions if the NALs or SALs are exceeded. The actions required under Order Nos. R9-2009-0002 and R9-2010-0016 generally included conducting additional monitoring and source investigations when a discharge from the MS4 is observed to exceed one or more NALs and/or SALs.

For this Order, however, the action levels of Provision C are to be used by the Copermittees to prioritize the actions to be implemented as part of the Water Quality Improvement Plan. Monitoring data collected by the Copermittees from MS4 outfalls will be compared with the NALs and SALs. Exceedances of the NALs and SALs will not require the Copermittees to immediately identify sources causing exceedances, but will provide some numeric indicator levels that can give the Copermittees a way to measure the relative severity of a pollutant contributing to receiving water quality impacts.

NALs and SALs must be included in the Water Quality Improvement Plans to be used by the Copermittees in directing and focusing their water quality improvement strategies. The Copermittees are expected to utilize the NALs and SALs to help focus their implementation efforts on addressing pollutants that have the most significant potential or observed impacts to receiving waters. The NALs and SALs will be used as part of the MS4 discharges assessments required under Provision D.4.b. The NALs and SALs may also be used by the Copermittees as the numeric goals to be achieved in MS4 discharges and/or receiving waters as the Water Quality Improvement Plans are implemented.

More specific and detailed discussions of the requirements of Provision C are provided below.

Provision C.1 (Non-storm Water Action Levels) requires the Copermittees to incorporate NALs into the Water Quality Improvement Plan for pollutants and/or constituents that are causing or contributing, or may be causing or contributing, to the highest priority water quality conditions identified in the Water Quality Improvement Plan related to non-storm water discharges from the MS4s. NALs generally must be consistent with the water quality objectives found within the Basin Plan.

The NALs have been included to ensure that the Copermittees are implementing and complying with several requirements of the MS4 permit. The federal CWA requires permits for municipal storm sewer systems to “*effectively prohibit non-storm water discharges into the storm sewers.*” The federal NPDES regulations, which were promulgated to implement the CWA requirements for discharges from municipal storm sewers, require a program to address illicit discharges, which are non-storm water discharges. Provision A.1.b prohibits “[*n*]on-storm water discharges into MS4s” unless the non-storm water discharge authorized by a separate NPDES permit. The NALs will be used as part of the illicit discharge detection and elimination program required pursuant to Provision E.2, as well as part of the MS4 discharges assessments required pursuant to Provision D.4.b.

Provision A.1.a prohibits non-storm water discharges from the MS4 from “*causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state.*” In addition, pursuant to Provision A.2.a, non-storm water discharges “*must not cause or contribute to the violation of water quality standards in any receiving waters.*”

Ideally, the Copermittees’ jurisdictional runoff management programs will eliminate all non-storm water discharges entering the MS4s within their jurisdictions. The complete elimination of non-storm water discharges to the Copermittees’ MS4s would be in compliance with the CWA requirements for non-storm water discharges, as well as the prohibitions and limitations of Provisions A.1.a and A.2.a.

The federal regulations, however, also refer to several non-storm water discharge categories that must be addressed as illicit discharges if they are found to be a source of pollutants. The federal regulations thus identify some non-storm water discharges that are not required to be addressed as illicit discharges if they are not a source of pollutants (e.g. non-storm water discharges specified in Provisions E.2.a.(1)-(5)). Thus, these regulations imply that some non-storm water discharges into and from the MS4 may occur even if non-storm water discharges are “effectively” prohibited by the Copermittees.

If the source of a non-storm water discharge is identified as a category of non-storm water specified in Provisions E.2.a.(1)-(5), the NALs can be used to determine the category of non-storm water discharges is a source of pollutants. For other non-storm

water discharges not specified in Provisions [E.2.a.\(1\)-\(5\)](#), the CWA requires those discharges to be “*effectively*” prohibited by removing the discharge to the MS4 through enforcement of the Copermittees’ legal authority established under “*ordinance, order or similar means*” to prohibit illicit discharges to the MS4s.

If there are non-storm water discharges that are not required to be addressed as illicit discharges, those discharges must comply, at a minimum, with the discharge prohibitions and receiving water limitations of Provision [A](#). Thus, the non-storm water discharges from the MS4 must be at levels that will not cause or contribute to a condition of pollution, contamination, or nuisance (Provision [A.1.a](#)), and must not cause or contribute to a violation of water quality standards in receiving waters (Provision [A.2.a](#)) to be consistent with the discharge prohibitions and receiving water limitations of Provisions [A.1.a](#) and [A.2.a](#).

Furthermore, the San Diego Region has predominantly intermittent and ephemeral rivers and streams which vary in flow volume and duration at spatial and temporal scales. For most of these river and stream systems, non-storm water discharges from the MS4 are likely to be the most significant or the only source contributing to surface flows present within the receiving water, especially during the dry season.

Therefore, because of the prohibitions and limitations of Provision [A.1.a](#) and [A.2.a](#), and the likelihood that non-storm water discharges from the MS4 are the most significant or only source contributing to surface flows present within the receiving water, NALs generally must be consistent with the water quality objectives found within the Basin Plan. Non-storm water discharges that are meeting the NALs would not be expected to cause or contribute to an exceedance of water quality objectives in receiving waters, which would be consistent with the discharge prohibitions and receiving water limitations of Provisions [A.1.a](#) and [A.2.a](#).

Exceedances of the NALs would then provide an indication of the relative severity of a pollutant in non-storm water discharges from the MS4 contributing to potential or observed receiving water quality impacts. The relative severity or significance of a pollutant in non-storm water discharges from the MS4 will provide the Copermittees a valuable source of information that can be used to identify priority water quality conditions within a Watershed Management Area and within each Copermittee’s jurisdiction.

Tables [C-1](#) through [C-4](#) under Provision [C.1.a](#) specify numeric NALs for several parameters or pollutant constituents for non-storm water discharges from the MS4 to several water body types. The NALs for MS4 discharges given under Provision [C.1.a](#) are based on the water quality objectives for inland surface waters in the Basin Plan, and the water quality objectives for ocean waters in the Ocean Plan. The NALs for most of the metals were calculated based on the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP). The NALs provided in Tables [C-1](#)



through C-4 must be included in the Water Quality Improvement Plans required to be developed pursuant to Provision B.

Provision C.1.b requires the Copermittees to identify NALs for pollutants and/or constituents, not specified in Provision C.1.a, which are causing or contributing, or may be causing or contributing, to the highest priority water quality conditions of the Watershed Management Area related to non-storm water discharges from the MS4s. The NALs must be based on the water quality objectives in the Basin Plan. The NALs identified under Provision C.1.b must be included in the Water Quality Improvement Plan.

The San Diego Water Board recognizes that some of the NALs required pursuant to Provisions C.1.a and C.1.b may be exceeded more frequently than not. Thus, Provision C.1.c has been included in the Order to provide the Copermittees the option to develop secondary NALs that are set at levels greater than the levels required pursuant to Provisions C.1.a and C.1.b to further refine the prioritization and assessment of water quality improvement strategies for addressing non-storm water discharges to and from the MS4s, as well as the detection and elimination of non-storm water and illicit discharges to and from the MS4.

Provision C.2 (Storm Water Action Levels) requires the Copermittees to incorporate SALs into the Water Quality Improvement Plan for pollutants and/or constituents causing or contributing, or may be causing or contributing, to the highest priority water quality conditions identified in the Water Quality Improvement Plan related to storm water discharges from the MS4s.

The SALs have been included to ensure that the Copermittees are implementing and complying with several requirements of the MS4 permit. Provision A.1.a prohibits storm water discharges from the MS4 from *“causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state.”* In addition, pursuant to Provision A.2.a, storm water discharges *“must not cause or contribute to the violation of water quality standards in any receiving waters.”*

Provision A.3.a, however, implicitly acknowledges that compliance with Provisions A.1.a and A.2.a cannot be achieved immediately for discharges of storm water from the MS4 by applying the MEP standard. Thus, Provision A.4 requires the Copermittees to implement an iterative approach to demonstrate that MEP is being achieved. This approach is supported by USEPA.

The federal CWA requires permits for municipal storm sewer systems to *“require controls to reduce the discharge of pollutants [in storm water] 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.”* MEP is an ever-evolving, flexible, and advancing concept. As knowledge about controlling storm water runoff

and discharges evolves, so does the knowledge which constitutes MEP. Reducing the discharge of storm water pollutants from the MS4 to the MEP requires the Copermittees to assess their jurisdictional runoff management programs and revise activities, control measures, BMPs, and measurable goals, as necessary to meet MEP. The SALs provide the Copermittees measurable goals that may be used to demonstrate the achievement of MEP for reducing pollutants in storm water discharges from the MS4. The SALs will be used as part of the MS4 discharges assessments required under Provision [D.4.a](#).

In June of 2006, the State Water Board's Blue Ribbon Storm Water Panel released its report titled "*The Feasibility of Numerical Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities.*" In the recommendations, the Blue Ribbon panel proposed storm water effluent limitations which are computed using statistical based population approaches. The SALs specified in Table [C-5](#) under Provision [C.2.a](#) were developed from a regional subset of nationwide Phase I MS4 data by using USEPA Rain Zone 6 (arid west) data.<sup>28</sup> Additionally, utilization of regional data is appropriate due to the addition of data into the nationwide Phase I MS4 monitoring dataset in February 2008. This additional data increased the number of USEPA Rain Zone 6 samples to more than 400, and included additional monitoring events within Southern California.

Utilizing data from USEPA Rain Zone 6 resulted in SALs which closely reflect the environmental conditions experienced in the San Diego Region. The localized subset of data includes sampling events from multiple Southern California locations including Orange, San Diego, Riverside, Los Angeles, and San Bernardino Counties. The dataset includes samples taken from highly built-out impervious areas and from storm events representative of Southern California conditions.

The SALs for cadmium, copper, lead and zinc require the measurement of hardness and to provide more specificity in the assessment of samples with SALs for total metal concentrations. While USEPA Rain Zone 6 data include a large sample size for concentrations of total metals, the impact the concentration will have on receiving waters will vary with receiving water hardness. Since it is the goal of the SALs, through the iterative process and MEP standard, to have MS4 storm water discharges meet all applicable water quality objectives, the hardness of the receiving water should be used when assessing the total metal concentration of a sample.

Thus, when there is an exceedance of a SAL for a metal, the Copermittee must determine if that exceedance is above the existing applicable water quality objectives based upon the hardness of the receiving water. The water quality objectives Copermittees must use to assess total metal SAL exceedances are the California Toxic Rule (CTR) and USEPA National Recommended Water Quality Criteria for Freshwater Aquatic Life 1 hour maximum concentrations. The 1 hour maximum

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<sup>28</sup> Data used to develop SAL were obtained from <http://rpitt.eng.ua.edu/Research/ms4/mainms4.shtml>

concentration is to be used for comparison since it is expected to most replicate the impacts to waters of the State from the first flush following a precipitation event.

The statistically calculated SALs given in Table C-5 are at levels greater than the water quality objectives in the Basin Plan or Ocean Plan. Because the objective of the CWA is to “*to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters*”, meaning eventually pollutants in storm water discharges must be reduced to a level that cannot cause or contribute to an exceedance of water quality objectives in receiving waters, over time the SALs are expected to be reduced to a level that is based on the water quality objectives rather than statistical calculations. The San Diego Water Board will review the SALs as more data for discharges of storm water from the MS4s are collected, and revise them as conditions improve and the MEP standard advances. For the Water Quality Improvement Plans required under this Order, the SALs identified under Provision C.2.a must be included.

Provision C.2.b requires the Copermittees to identify SALs for pollutants and/or constituents, not specified in Provision C.2.a, which are causing or contributing, or may be causing or contributing, to the highest priority water quality conditions of the Watershed Management Area related to storm water discharges from the MS4s. The SALs identified under Provision C.2.b must be included in the Water Quality Improvement Plan.

The San Diego Water Board recognizes that some of the SALs required pursuant to Provisions C.2.a and C.2.b may be exceeded more frequently than not. Thus, Provision C.2.c has been included in the Order to provide the Copermittees the option to develop secondary SALs that are set at levels greater than the levels required pursuant to Provisions C.2.a and C.2.b to further refine the prioritization and assessment of water quality improvement strategies for reducing pollutants in storm water discharges from the MS4s.

## D. Monitoring and Assessment Program Requirements

**Purpose:** Provision D includes minimum monitoring and assessment requirements that must be developed and implemented by the Copermittees as part of the Water Quality Improvement Plans. Implementation of the monitoring and assessment requirements of Provision D will allow the Copermittees to demonstrate that the requirements of the CWA to effectively prohibit non-storm water discharges to the MS4 and reduce pollutants in storm water discharges from the MS4 to the MEP are being achieved. Implementation of the monitoring and assessment requirements of Provision D will also allow the Copermittees and the San Diego Water Board to track improvements to the water quality in the San Diego Region. The monitoring and assessment program requirements are necessary to implement, as well as ensure the Copermittees are in compliance with, the requirements of the Order.

**Discussion:** The San Diego Water Board recognized that changes to the monitoring and assessment requirements of the Fourth Term Permit were necessary to improve the usefulness and usability of monitoring data collected by the Copermittees to support their jurisdictional storm water programs more efficiently and with increased effectiveness. The data collected are needed to better inform the Copermittees' understanding of the physical, chemical, and biological condition of the receiving waters and the quality of the MS4 discharges. The monitoring program needs to provide opportunities for the Copermittees to integrate regional monitoring efforts into municipal storm water monitoring requirements to provide a cost-effective approach to monitoring and avoid duplication of efforts.

The requirements in Provision D were largely recommended by the Copermittees as an outcome of the San Diego Water Boards Focused Meeting process. The monitoring and assessment program requirements now require collection of more specific information necessary for each Copermittee to adapt its jurisdictional runoff management program in such a way that focuses resources on a watershed's highest priority water quality conditions. The monitoring and assessment program will require the Copermittees to collect data that can be utilized to answer both watershed level management questions (e.g. Are the chemical, physical, and biological conditions of a receiving water protective, or likely protective of beneficial uses?), and specific jurisdictional runoff management program activity questions (e.g. Are the water quality improvement strategies of the jurisdictional program effectively eliminating non-storm water discharges to the MS4?).

The monitoring data collected and assessment information that will be reported to the San Diego Water Board are necessary to determine if the Copermittees are complying with the prohibitions and limitations of Provision A. The required monitoring and assessments that must be reported to the San Diego Water Board will be utilized for three purposes:

- (1) Inform the Copermittees, San Diego Water Board, and the public on the progress of the Copermittees' efforts to effectively prohibit non-storm water discharges to the MS4 and reduce pollutants in storm water discharges from the MS4 to the MEP;
- (2) Inform the Copermittees, San Diego Water Board, and the public on the condition of water bodies receiving discharges from the Copermittees' MS4, and the progress of the Copermittees' water quality improvement implementation efforts toward improving the receiving water quality; and
- (3) Inform the Copermittees, the San Diego Water Board, and the public on the effectiveness of the Water Quality Improvement Plan toward achieving (1) and (2).

The monitoring and assessment information reported pursuant to Provision F is also expected to be key to the iterative approach and adaptive management process required under Provision A.4 and implemented through the Water Quality Improvement Plan required under Provision B. As required by Provision A.4, the iterative approach and adaptive management process is required if the Copermittees cannot meet the discharge prohibitions and receiving water limitations of Provisions A.1.a, A.1.c, and/or A.2.a under the present conditions.

Provision D provides the minimum monitoring and assessment requirements that must be included in each Water Quality Improvement Plan to be developed and implemented by the Copermittees. The Copermittees, however, are not limited to the requirements of Provision D and may include additional methods to track progress toward improving water quality in a Watershed Management Area.

More specific and detailed discussions of the requirements of Provision D are provided below.

Provision D.1 (Receiving Water Monitoring Requirements) specifies the minimum receiving water monitoring that the Copermittees must conduct within the Watershed Management Area and include as part of the Water Quality Improvement Plan.

Provision D.1 establishes minimum monitoring requirements that must be conducted by the Copermittees within each Watershed Management Area. Provision D.1 requires the Copermittees to collect and develop the data and information necessary to determine potential impacts to the beneficial uses in the receiving waters due to discharges from the MS4s. The monitoring required under Provision D.1 will also provide the data that will allow the Copermittees to gauge the effectiveness and progress of its Water Quality Improvement Plan implementation efforts toward improving the quality of receiving waters.

The receiving water monitoring requirements of Provision D.1 are focused primarily on monitoring the conditions and response of the receiving waters to the Copermittees'

collective implementation efforts to reduce receiving water impacts that may be caused by the discharges from the MS4s. The preference of the San Diego Water Board is for the Copermitees to spend their resources achieving tangible and observable improvements in receiving water conditions instead of collecting samples and analyzing data that has consistently indicated that receiving water conditions are degraded and require improvement. In general, the ability to measure potential improvements in receiving water conditions due to any actions implemented by the Copermitees as part of the Water Quality Improvement Plan may require several years before a response can be observed. Thus, the frequency of collecting receiving water monitoring data has been kept to a minimum.

During the transitional period between adoption of this Order and San Diego Water Board acceptance of a Water Quality Improvement Plan, the Copermitees must conduct receiving water monitoring in accordance with Provision [D.1.a](#). This approach to collecting receiving water data is different from what was required in the Fourth Term Permits, but one that truly embraces the concept of an integrated, cost-effective, streamlined receiving water monitoring approach.

Provision [D.1.a](#) requires Copermitees to continue performing the receiving water monitoring programs required in Order Nos. R-2007-0001, R9-2009-002, and R9-2010-0016; plus participation in: hydromodification management plan monitoring approved by the San Diego Water Board, monitoring plans as part of load reduction plans (either Bacteria Load Reduction Plans or Comprehensive Load Reduction Plans) for TMDLs in [Attachment E](#) of the Order, Storm Water Monitoring Coalition Regional Monitoring, Southern California Bight Regional Monitoring, Sediment Quality Monitoring, and ASBS Monitoring as applicable to a Watershed Management Area.

Provision [D.1.a](#) also provides an opportunity for the Copermitees to use third party data to meet receiving water monitoring requirements where feasible. Allowing the Copermitees to use the data currently collected through its participation in existing regional receiving water programs and that of third parties provides an efficiency of resources in obtaining the data necessary to inform the Copermitees and the San Diego Water Board about the physical, chemical, and biological conditions of the receiving waters, which can also help to focus the receiving water monitoring during the implementation of the Water Quality Improvement Plan. Once a Water Quality Improvement Plan is developed for a Watershed Management Area in compliance with Provision [B](#) of this Order, the transitional period is over and Copermitees are required to conduct receiving water monitoring according to the requirements of Provisions [D.1.b-e](#).

Provision [D.1.b](#) requires each Copermitee to identify at least one long term receiving water monitoring station to be representative of receiving water quality within each Watershed Management Area. Long term receiving water monitoring stations can be located at any existing mass loading stations, temporary watershed assessment stations, bioassessment stations, and stream assessment stations previously established by the Copermitees. The requirements under Provision [D.1.b](#) are

consistent with 40 CFR 122.26(d)(2)(iii)(D), which specifies that a “*monitoring program for representative data collection for the term of the permit*” may include “*instream locations*.” For each Watershed Management Area, at least one long term watershed monitoring station is required to be established and monitored. The Copermittees may choose to establish additional long term monitoring stations where necessary to support the implementation and adaptation of the Water Quality Improvement Plan.

Provision [D.1.b](#) requires the Copermittees to locate the long term receiving water monitoring station at one of these existing receiving water monitoring stations to provide the Copermittees an opportunity to experience monitoring cost savings while continuing to collect the necessary data to assess the status and trends of receiving water quality conditions in 1) coastal water, 2) enclosed bays, harbors, estuaries, and lagoons, and 3) streams under both dry weather and wet weather conditions. Ideally these stations will continue to be monitored as part of the receiving water monitoring for each Watershed Management Area to maintain a consistent set of locations and a period of data that can be built upon with the monitoring required under this Order.

The receiving water monitoring requirements are separated into monitoring required during dry weather conditions pursuant to Provision [D.1.c](#), and wet weather conditions pursuant to Provision [D.1.d](#).

At each long term monitoring station the Copermittees must conduct at least three dry weather monitoring events as required pursuant to Provision [D.1.c](#) and at least three wet weather monitoring events as required pursuant to Provision [D.1.d](#) per permit term. Provisions [D.1.c](#) and [D.1.d](#) require the Copermittees to monitor priority water quality conditions identified in the Water Quality Improvement Plan, constituents listed as causing impairment of receiving waters in the Watershed Management Area, applicable NALs, toxicity, constituents listed in [Tables D-2](#) and [D-3](#), and constituents for implementation plans (e.g. Bacteria Load Reduction Plans and Comprehensive Load Reduction Plans). Required toxicity monitoring was changed to reflect an updated understanding of the unique challenges associated with sampling storm water for toxicity. Copermittees are required to sample storm water for toxicity during each dry weather and each wet weather event pursuant to Provision [D.1.c\(4\)](#) and [D.1.d\(4\)](#). Required toxicity monitoring is now consistent with the State Water Resources Control Board Policy for Toxicity Assessment and Control (Draft June 2012) and recently adopted MS4 permits for Caltrans and Los Angeles Water Board. Receiving water monitoring efforts in this Order have been streamlined to redirect resources to monitoring efforts that better support pollutant reduction solutions with an increasing emphasis on MS4 outfall monitoring, source identification and source abatement activities.

In addition to the receiving water monitoring requirements under Provisions [D.1.b-d](#), Provision [D.1.e](#) requires the Copermittees participate in and/or conduct other types of receiving water monitoring. As recommended and requested by the Copermittees, Provision [D.1.e\(1\)](#) requires the Copermittees to participate in existing regional monitoring, as applicable to each Watershed Management Area. Existing regional

monitoring includes monitoring conducted by the Storm Water Monitoring Coalition and for the Southern California Bight. Participation in and use of monitoring data collected from these existing regional water quality monitoring programs provide the Copermittees a greater opportunity for efficiency in the use of their resources to manage their storm water programs and those controllable discharges under their authority.

The State Water Resources Control Board adopted the Water Quality Control Plan for Enclosed Bays and Estuaries of California – Part 1 Sediment Quality which became effective August 25, 2009 (Sediment Quality Monitoring Policy). Provision [D.1.e.\(2\)](#) requires any Copermittees with MS4 discharges to an enclosed bay or estuary to monitoring the sediments in the enclosed bay or estuary receiving water in accordance with the sediment quality monitoring procedures as prescribed in the Sediment Quality Monitoring Policy.

The State Water Board adopted Resolution No. 2012-0012 which approved exceptions to the California Ocean Plan for selected discharges into Areas of Special Biological Significance (ASBS), including special protections for beneficial uses. State Board Resolution No. 2012-0012 became effective on March 20, 2012, and Attachment B to the Resolution established limitations on point source storm water discharges to ASBS. Copermittees with MS4s that discharge to an ASBS must monitor its discharge to assure compliance with State Board Resolution No. 2012-0012 as required pursuant to Provision [D.1.e.\(3\)](#).

The San Diego Water Board is currently developing a regional monitoring strategy to assess the conditions of receiving waters in the San Diego Region. The monitoring requirements of Provision [D.1](#) are expected to be incorporated or serve as a foundation of this regional monitoring strategy, but may require some modifications. When the San Diego Water Board develops an alternative regional monitoring strategy, the Copermittees will be required to participate in the development and implementation of the alternative regional monitoring program pursuant to Provision [D.1.f](#).

Provision D.2 (MS4 Outfall Discharge Monitoring Requirements) specifies the minimum MS4 outfall discharge monitoring requirements that the Copermittees must incorporate and implement as part of the Water Quality Improvement Plan.

The dry weather MS4 outfall discharge monitoring requirements are included under Provisions [D.2.a.\(2\)](#) and [D.2.b](#). The dry weather MS4 outfall discharge monitoring requirements are part of the “*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*” required by 40 CFR 122.26(d)(2)(iv)(B), which is expected to achieve compliance with the CWA section 402(p)(3)(B)(ii) statutory requirement for municipal storm water permits to require the Copermittees to “*effectively prohibit non-storm water discharges into the storm sewers.*” The dry weather MS4 outfall discharge monitoring data



collection requirements are based on requirements under 40 CFR 122.26(d)(1)(iv)(D) and 122.26(d)(2)(iv)(B)(3).

The dry weather MS4 outfall discharge monitoring requirements are designed to provide wide spatial and temporal coverage of each jurisdiction to better understand the extent and magnitude of non-storm water discharges to receiving waters, and make a distinction between persistent and transient non-storm water flows. This information is expected to allow each Copermittee to focus its resources on eliminating and controlling the highest priority threats to receiving water quality, as well as integrating other elements of the storm water programs (e.g. complaint call response) and third party data to efficiently and effectively assist in efforts to eliminate non-storm water discharges.

The dry weather MS4 outfall discharge monitoring requirements of Provision [D.2.a.\(2\)](#) and [D.2.b](#) are separated into monitoring required before and after the San Diego Water Board accepts the Copermittees' Water Quality Improvement Plan. Outfall monitoring conducted prior to acceptance of the Water Quality Improvement Plan is referred to in the Order as Transitional MS4 Outfall Discharge Monitoring. Provision [D.2.a.\(2\)](#) includes the transitional dry weather MS4 outfall discharge monitoring requirements.

The requirements under Provision [D.2.a.\(2\)](#) are based on the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B), which include the requirements for a monitoring program to identify, detect, and eliminate illicit connections and illegal discharges to the MS4s. The federal regulations (40 CFR 122.26(d)(1)(iv)(D)) require the monitoring program to include “*a field screening analysis for illicit connections and illegal dumping [that]...[a]t a minimum, include[s] a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods.*” The federal regulations (40 CFR 122.26(d)(1)(v)(B)) require the monitoring program to include “*inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.*” Furthermore, the monitoring program is required by federal regulations (40 CFR 122.26(d)(2)(iv)(B)) to include “*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.*”

Dry weather transitional MS4 outfall discharge monitoring requires each Copermittee to field screen (inspect) its major MS4 outfalls to classify the MS4 outfall locations as having persistent dry weather flows, transient dry weather flows, or no dry weather flows. To account for the variance in size of the 39 jurisdictions covered under this Order, the Copermittees recommended a tiered approach to the number of major MS4 outfalls that must be inspected. Provision [D.2.a.\(2\)\(a\)](#) provides a tiered approach to the number of major MS4 outfalls that must be visually inspected per jurisdiction as well as a minimum frequency each Copermittee must inspect each major MS4 outfall per year. This tiered approach is based on the total number of major MS4 outfalls within a Copermittees jurisdiction within each Watershed Management Area.

Based on the field screening, each Copermittee is required to make a determination whether any observed flowing, pooled, or ponded waters are transient or persistent flows. Based on this field screening information, other jurisdictional program information, and third party information, each Copermittee is required to prioritize the MS4 outfalls within its jurisdiction for follow up investigation and elimination of the non-storm water discharge, as part of its illicit discharge detection and elimination program required pursuant to Provision E.2. In accordance with the requirements of Provision E.2, each Copermittee is required to immediately investigate obvious illicit discharges (e.g. outfall discharges with unusual color, unusual odor, or high flows).

This approach allows a Copermittee to use all of its resources, as well as leverage resources and information provided by third parties, to effectively eliminate non-storm water discharges from its MS4 outfalls. If the source of the non-storm water discharge cannot be immediately eliminated, the Copermittee uses the persistent flow or transient flow classification along with other programmatic implementation data to prioritize the MS4 outfalls for future investigation. In accordance with the adaptive management approach deployed throughout this Order, Provision D.2.a.(2)(c) requires each Copermittee to update its MS4 outfall discharge monitoring station inventory, compiled pursuant to Provision D.2.a.(1), with any new information on the classification of whether the MS4 outfall produces persistent flow, transient flow, or no dry weather flow. The requirement of Provision D.2.a.(2)(c) assures that each Copermittee is collecting data that can be used to demonstrate compliance with the CWA requirement that each Copermittee must implement a program to “*effectively prohibit non-storm water discharges into the [MS4]*” and with the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B).

Provision D.2.b describes the dry weather MS4 outfall discharge monitoring required to be incorporated and implemented as part of the Water Quality Improvement Plan. Dry weather MS4 outfall discharge monitoring must be performed by each Copermittee to identify non-storm water and illicit discharges within its jurisdiction pursuant to Provision E.2.c, and to prioritize the dry weather MS4 discharges that will be investigated and eliminated pursuant to Provision E.2.d. The emphasis of the dry weather MS4 outfall discharge monitoring required pursuant to Provision D.2.b is consistent with the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B).

Provision D.2.b.(1) requires each Copermittee to continue field screening its major MS4 outfalls and identifying those with persistent flows and transient flows, as conducted during the transitional period (i.e. before the Water Quality Improvement Plan was developed). However, each Copermittee now has the flexibility to adjust the field screening monitoring frequencies and locations for the MS4 outfalls in its inventory, as needed, to identify and eliminate sources of non-storm water persistent flow discharges in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan. In order to ensure a minimum number of outfalls are inspected, Provision D.2.b.(1) requires the number of visual

inspections be equal to the number of visual inspections required in the tiered inspection program pursuant to Provision [D.2.a.\(2\)\(a\)](#).

Provision [D.2.b.\(2\)\(b\)](#) requires each Copermittee to monitor a minimum of 5 major MS4 outfalls with persistent flows identified as the highest priorities within a Copermittee's jurisdiction, within each Watershed Management Area. In other words, Copermittees located in more than one Watershed Management Area must identify at least 5 major MS4 outfalls with persistent flows in its jurisdiction in each Watershed Management Area. If a Copermittee is located in more than one Watershed Management Area, and they have less than 5 major MS4 outfalls with persistent flows per jurisdictional area per Watershed Management Area, all of the major MS4 outfalls must be identified as high priority dry weather persistent flow MS4 outfalls. The Copermittees identified as Responsible Copermittees by a TMDL in Attachment E of the Order may need to monitor more than 5 dry weather major MS4 outfall locations to determine compliance with the requirements of the TMDL(s).

Monitoring must occur at the highest priority outfall locations at least semi-annually until the non-storm water discharges have been eliminated for three consecutive dry weather monitoring events; identified to be authorized by a separate NPDES Permit; or reprioritized to a lower priority. Persistent flow MS4 outfall monitoring stations that have been removed must be replaced with the next highest prioritized MS4 major outfall in the Copermittee's jurisdiction within the Watershed Management Area, unless there are no remaining qualifying major MS4 outfalls within the Copermittees jurisdiction. The Copermittees must continually update their dry weather persistent flow MS4 outfall discharge monitoring locations with the next highest priority non-storm water flow that have yet to be eliminated until all persistent and transient flows are eliminated or its threat reduced.

Non-storm water persistent flow MS4 outfall discharge monitoring data collected during each semi-annual monitoring event, must be collected and analyzed according to the requirements of Provision [D.2.b.\(2\)\(b\)–\(e\)](#). These monitoring requirements are consistent with the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B).

The wet weather MS4 outfall discharge monitoring requirements are included under Provisions [D.2.a.\(3\)](#) and [D.2.c](#). The wet weather MS4 outfall discharge monitoring requirements are necessary for the Copermittees to implement a “*management program...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*” required by 40CFR 122.26(d)(2)(iv), which is expected to achieve compliance with the CWA section 402(p)(3)(B)(iii) statutory requirement for municipal storm water permits to require “*controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable.*” The wet weather MS4 outfall discharge monitoring data collection requirements are based on requirements under 40 CFR 122.26(d)(2)(iii), 122.26(d)(2)(iii)(A) and 122.26(d)(2)(iii)(A)(1)–(4), and 40 CFR 122.21(g)(7)(i)–(ii).

The wet weather MS4 outfall discharge monitoring requirements of Provision [D.2.a.\(3\)](#) and [D.2.c](#) are separated into monitoring required before and after the San Diego Water Board accepts the Copermittees' Water Quality Improvement Plan. Outfall monitoring conducted prior to acceptance of the Water Quality Improvement Plan is referred to in the Order as Transitional MS4 Outfall Discharge Monitoring. Provision [D.2.a.\(3\)](#) includes the transitional wet weather MS4 outfall discharge monitoring requirements.

Until the wet weather MS4 outfall discharge monitoring requirements of Provision [D.2.c](#) are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board, the Copermittees must comply with the requirements of transitional wet weather MS4 outfall monitoring requirements pursuant to Provision [D.2.a.\(3\)](#). Provision [D.2.a.\(3\)](#) requires the Copermittees in each Watershed Management Area to sample, at least five of the major MS4 outfalls inventoried pursuant to Provision [D.2.a.\(1\)](#) once per wet season for the monitoring data required to be collected pursuant to Provision [D.2.a.\(3\)\(c\)-\(e\)](#). Provision [D.2.a.\(3\)](#) further requires at least one major MS4 outfall monitoring station be located in each Copermittee's jurisdiction within the Watershed Management Area.

At a minimum, the five sampling locations chosen must be representative of storm water discharges from residential, commercial, industrial, and typical mixed-use land uses present within a Watershed Management Area. The San Diego Water Board expects the Copermittees to extrapolate from these data to similar land uses throughout the Watershed Management Area to better inform the Water Quality Improvement Plan development process by prioritizing drainages for implementation of storm water control efforts required pursuant to Provision [E](#).

Provision [D.2.c](#) describes the wet weather MS4 outfall discharge monitoring required to be included and implemented as part of the Water Quality Improvement Plan. Provision [D.2.c](#) provides the Copermittees the flexibility to adjust the wet weather MS4 outfall discharge monitoring locations and frequencies in the Watershed Management Area, as needed, to identify sources of pollutants in storm water discharges from MS4s in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan.

Although Provision [D.2.c.\(1\)](#) allows the Copermittees to adaptively manage the wet weather MS4 outfall discharge monitoring locations and frequencies, the provision requires a minimum of at least five wet weather outfall stations to be monitored. Provision [D.2.c.\(2\)](#) further allows the Copermittees to modify the monitoring frequency at each wet weather MS4 outfall station to meet the goals of the Water Quality Improvement Plan as long as the monitoring frequency occurs at least once per year and is at an appropriate frequency to identify sources of pollutants in storm water discharges, guide pollutant source identification efforts, or determine compliance with the requirements of the applicable TMDLs in Attachment E to the Order.

The wet weather MS4 outfall discharge monitoring requirements of Provisions [D.2.c.\(3\)](#) and [D.2.c.\(4\)](#) are the same as the transitional wet weather MS4 outfall discharge monitoring. In contrast, the requirements of Provision [D.2.c.\(5\)](#) are focused on collecting analytical data specific to the highest priority water quality conditions in the Watershed Management Area identified in the Water Quality Improvement Plan. The wet weather MS4 outfall discharge monitoring data collection requirements are consistent with the requirements under 40 CFR 122.26(d)(2)(iii), 122.26(d)(2)(iii)(A) and 122.26(d)(2)(iii)(A)(1)-(4), and 40 CFR 122.21(g)(7)(i)-(ii).

Provision D.3 (Special Studies) requires the Copermittees to develop special studies that will be conducted for each Watershed Management Area and the entire San Diego Region. Data collected pursuant to Provision [D.3](#) is to be used by the Copermittees to improve the effectiveness of the strategies implemented by the jurisdictional runoff management programs toward achieving the numeric goals identified in the Water Quality Improvement Plans and ultimately achieve compliance with the discharge prohibitions and receiving water limitations of Provisions [A.1.a](#), [A.1.c](#), and [A.2.a](#), which is consistent with the requirements of Provision [A.4](#).

Special studies are often necessary to fill data gaps or provide more refined information that allow the Copermittees to better manage the generation or elimination of pollutants and discharges to and from the MS4. In the Fourth Term Permits, the Copermittees have been required to implement special studies as directed by the San Diego Water Board. The special studies required by this Order provide the Copermittees more flexibility to identify and implement special studies that will be most useful to improving the effectiveness of their jurisdictional runoff management programs.

Provision [D.3.a.\(1\)](#) requires the Copermittees to develop and conduct at least two special studies per Watershed Management Area, to be determined by the Copermittees. One of the two special studies may be accomplished through participation in a Regional Special Study required under Provision [D.3.a.\(2\)](#). The requirements provide the Copermittees great latitude in identifying and developing the special studies. Watershed Management Area special studies are required, at a minimum, to: (a) relate in some way to the highest water quality priorities identified by the Copermittees in the Water Quality Improvement Plan, (b) be conducted within the Watershed Management Area, and (c) include some form of participation (e.g. contribution of funds, personnel services, project management) by all the responsible Copermittees within the Watershed Management Area.

Examples of Watershed Management Area special studies might include, but are not limited to: (1) focused pollutant source identification studies, (2) BMP effectiveness and/or comparison studies, (3) pilot tests for new or emerging pollutant control methods, (4) receiving water pollutant or stressor source identification and/or mitigation studies, or (5) pollutant fate and transport studies. The Watershed Management Area special studies are expected to provide data that can be utilized by the Copermittees to improve the Water Quality Improvement Plan or implementation of

the Copermittees' jurisdictional runoff management programs to address the highest priority water quality conditions.

Provision [D.3.a.\(2\)](#) requires the Copermittees to develop at least one special study that will be conducted for the entire San Diego region. The regional special study is expected to provide data that can be utilized by the Copermittees to improve the Water Quality Improvement Plan or implementation of the Copermittees' jurisdictional runoff management programs to identify or address regional water quality concerns and priorities.

An example of a regional special study would be to develop and establish allowable exceedance frequencies of the bacteria water quality objectives for several types of water bodies, during different wet and dry weather conditions the San Diego region. The special study would be related to bacteria, which is a priority for the San Diego region due to the adoption of "*Bacteria TMDL Project I – Beaches and Creeks in the San Diego Region*." The study results could be used to inform the Copermittees and the San Diego Water Board about the indicator bacteria water quality objective exceedance frequencies that occur in natural or reference watersheds.

Provision D.4 (Assessment Requirements) specifies the assessments that the Copermittees are required to perform, based on the monitoring data collected, and will be reported as part of the Annual Report for the Water Quality Improvement Plan implementation. Provision [D.4](#) requires the Copermittees assess the progress of the water quality improvement strategies in the Water Quality Improvement Plan toward achieving compliance with Provisions [A.1.a](#), [A.1.c](#), and [A.2.a](#).

Provision [D.4](#) specifies the assessments that Copermittees must perform for each Watershed Management Area to assess the effectiveness of each Copermittee's jurisdictional runoff management program and the Water Quality Improvement Plan. The effectiveness of each Copermittee's jurisdictional runoff management program and Water Quality Improvement Plan is measured through these types of assessments: (a) Receiving Waters Assessments (b) MS4 Outfall Discharges Assessments, (c) Special Studies Assessments, and (d) Integrated Assessment of Water Quality Improvement Plan.

Provision [D.4.a](#) requires the Copermittees to assess the status of receiving water conditions annually during the transitional monitoring period (during development of the Water Quality Improvement Plan) and after acceptance of the Water Quality Improvement Plan. The monitoring data collected pursuant to Provision [D.1](#) will be evaluated, among other information, to assess the condition of a Watershed Management Area's streams, coastal waters, enclosed bays, harbors, estuaries, and lagoons. The focus of the receiving waters assessments is to measure progress toward the objective of the CWA to "*restore and maintain the chemical, physical, and biological integrity of the Nation's waters*" as the Water Quality Improvement Plan and each Copermittee's jurisdictional runoff management program are implemented within a Watershed Management Area. Provision [D.4.a](#) is consistent with 40 CFR

122.42(c)(7) which requires the Copermittees to annually report the “[i]dentification of water quality improvements or degradation.”

Provision D.4.b includes the MS4 outfall discharges assessment requirements. The focus of MS4 outfall discharges assessments is to determine if the Copermittees’ are implementing programs that comply with the requirements of the CWA for MS4 permits to “effectively prohibit non-stormwater discharges into the storm sewers” and “require controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable.” The monitoring data collected pursuant to Provisions D.2 will be evaluated, among other information, to assess the effectiveness of the transitional MS4 outfall field screening monitoring, the implementation of the Water Quality Improvement Plan and each Copermittee’s jurisdictional runoff management program. The MS4 outfall discharge assessments consist of Non-Storm Water Discharges Reduction Assessments and Storm Water Pollutant Discharges Reduction Assessments.

The Non-Storm Water Discharges Reduction Assessments are how each Copermittee will demonstrate that its jurisdictional runoff management program implementation efforts are achieving the CWA requirement to “effectively prohibit non-stormwater discharges into the storm sewers.” Provision D.4.b.(1) requires each Copermittee to assess and report on its illicit discharge detection and elimination program required pursuant to Provision E.2 to reduce and effectively prohibit non-storm water and illicit discharges into the MS4 within its jurisdiction. The Non-Storm Water Discharges Reduction Assessments include specific assessment requirements applicable to each Copermittee.

As each Copermittee collects and analyzes the data collected pursuant to dry weather MS4 outfall discharges monitoring requirements of Provisions D.2.a.(2) and D.2.b, Provision D.4.b.(1) requires each Copermittee to assess the progress, assess the effectiveness of its current actions, and identify modifications necessary to increase the effectiveness of its actions toward reducing and eliminating non-storm water and illicit discharges to its MS4. The findings from these assessments are expected to be utilized by the Copermittee as part of its procedures to prioritize the non-storm water discharges that will be addressed by its Illicit Discharge Detection and Elimination program required pursuant to Provision E.2.

The assessment requirements of Provision D.4.a.(1) are consistent with 40 CFR 122.26(d)(2)(iv)(B) and 122.26(d)(2)(iv)(B)(3) which require “procedures...to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information [emphasis added], indicate a reasonable potential of contain illicit discharges or other sources of non-storm water” as part of a “program...to detect and remove...illicit discharges and improper disposal into the storm sewer.” The assessment requirements of Provision D.4.a.(1) are also consistent with 40 CFR 122.42(c)(1) requires the Copermittees to annually report the “status of implementing the components of the storm water management program that are established as permit conditions.”

The Storm Water Pollutant Discharges Reduction Assessment is how the Copermittees in each Watershed Management Area will demonstrate that their jurisdictional runoff management program implementation efforts are achieving the CWA requirement to “*reduce the discharge of pollutants [in storm water] to the maximum extent practicable.*” Provision [D.4.b.\(2\)](#) requires the Copermittees in each Watershed Management Area to assess and report the progress of the Copermittees’ efforts to reduce pollutants in storm water discharges from the MS4s to the MEP. The Storm Water Pollutant Discharges Reduction Assessments include specific assessment requirements during both the transitional monitoring period and after acceptance of the Water Quality Improvement Plan applicable to the Watershed Management Area and each Copermittee.

As the Copermittees collect and analyze the data collected pursuant to wet weather MS4 outfall discharges monitoring requirements of Provisions [D.2.a.\(3\)](#) and [D.2.c](#), Provision [D.4.b.\(2\)](#) requires the Copermittees to assess runoff conditions during the transitional period, and the progress of the Water Quality Improvement Plan strategies toward reducing pollutants in storm water from the MS4 to the MEP. The findings from these assessments are expected to be utilized by the Copermittees to identify any modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies necessary to identify sources of pollutants in storm water discharges from the MS4s, as well as focus, modify, and improve the water quality improvement strategies implemented by each Copermittee within its jurisdiction to reduce pollutants in storm water discharges to the MEP.

The assessment requirements of Provision [D.4.b.\(2\)](#) are consistent with 40 CFR 122.26(d)(2)(iii)(B) which requires “*[e]stimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls...during a storm event...accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modeling, data analysis, and calculation methods.*” The assessment requirements of Provision [D.4.a.\(2\)](#) are consistent with 40 CFR 122.26(d)(2)(v) which requires that each Copermittee assesses the “*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 requirements of Provision [D.4.b.\(2\)](#) are also consistent with 40 CFR 122.42(c)(1) which requires the Copermittees to annually report the “*status of implementing the components of the storm water management program that are established as permit conditions.*”

Provision [D.4.c](#) includes the special studies assessment requirements. Performing special studies are how the Copermittees will address data gaps identified during the development of and updates to the Water Quality Improvement Plan. The relevant findings from the special studies assessments are expected to be incorporated as part of the applicable receiving water assessments, MS4 outfall discharge assessments,



and integrated water quality improvement assessments required in Provision [D.4.a](#), [D.4.b](#), and [D.4.d](#), respectively.

The assessment requirements in Provision [D.4.d](#) are part of the iterative approach and adaptive management process required by Provision [A.4](#). The Copermittees are required to integrate the data collected pursuant to Provisions [D.4.a-c](#), and information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision [E](#) to re-evaluate the Water Quality Improvement Plan.

The monitoring data collected pursuant to Provisions [D.1](#) and [D.2](#), and the results of the assessment required pursuant to Provisions [D.4.a-c](#), will be used to determine whether the Water Quality Improvement Plan and each Copermittee's jurisdictional runoff management program are effective, or require modifications or improvements to become more effective to achieve the requirements of the CWA. The assessments required by Provision [D.4.d](#) are consistent with 40 CFR 122.42(c)(1) which requires that the Copermittees to report the “[t]he status of implementing the components of the storm water management program that are established as permit conditions.”

## E. Jurisdictional Runoff Management Programs

**Purpose:** Provision E includes the requirements for the jurisdictional runoff management programs to be implemented by each of the Copermittees. Compliance with the requirements for the jurisdictional runoff management programs will allow the Copermittees to demonstrate that they are implementing programs to effectively prohibit non-storm water discharges to the MS4 and reduce pollutants in storm water discharges from the MS4 to the MEP. The jurisdictional runoff management program document prepared by each Copermittee will also provide the details for implementing the water quality improvement strategies identified in the Water Quality Improvement Plan specifically within its jurisdiction.

**Discussion:** Implementation of the jurisdictional runoff management program requirements under Provision E is how the Copermittees “*effectively prohibit non-stormwater discharges into the storm sewer,*” and outlines the “*controls to reduce the discharge of pollutants to the maximum extent practicable*” consistent with the federal regulations under 40 CFR 122.26. The jurisdictional runoff management program is part of the “*comprehensive planning process*” that is required pursuant to 40 CFR 122.26(d)(2)(iv). Where the Water Quality Improvement Plan is the “*comprehensive planning process*” on a Watershed Management Area scale, requiring “*intergovernmental coordination,*” the jurisdictional runoff management program document is the “*comprehensive planning process*” on a jurisdictional scale that should be coordinated with the other Copermittees in the Watershed Management Area to achieve the goals of the Water Quality Improvement Plan.

The jurisdictional runoff management program requirements are included to provide each Copermittee criteria that can be used to demonstrate that its storm water management program is implementing the “*comprehensive planning process*” within its jurisdiction to “*effectively prohibit non-stormwater discharges into the storm sewers,*” and to identify and implement the most effective “*controls to reduce the discharge of pollutants to the maximum extent practicable*” in accordance with the performance standards given in the CWA.

Provision E includes the requirements for each of the components that must be included in the Copermittee’s jurisdictional runoff management program document that will be implemented by the Copermittee within its jurisdiction. Implementation of the components of each Copermittee’s jurisdictional runoff management program must incorporate the water quality improvement strategies identified by each Copermittee in the Water Quality Improvement Plans, described pursuant to Provision B.3.b.(1)(a).

More specific and detailed discussions of the requirements of Provision E are provided below.

Provision E.1 (Legal Authority Establishment and Enforcement) requires each Copermitttee to establish and enforce sufficient legal authority to control discharges to the MS4 within its jurisdiction.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermitttee must have sufficient *“legal authority to control discharges to the municipal separate storm sewer system”* and be able to demonstrate that it can *“operate pursuant to legal authority established by statute, ordinance or series of contracts.”* Provision [E.1.a](#) describes the minimum legal authorities each Copermitttee must establish for itself within its jurisdiction to control discharges to its MS4. The requirements of Provision [E.1.a](#) are consistent with the requirements set forth in 40 CFR 122.26(d)(2)(i)(A)-(F).

The certification statement required from each Copermitttee by Provision [E.1.b](#) is included to provide the San Diego Water Board additional documentation that each Copermitttee has established the legal authorities consistent with Provision [E.1.a](#) and 40 CFR 122.26(d)(2)(i)(A)-(F), and the Copermitttee can *“operate pursuant to legal authority established by statute, ordinance or series of contracts.”*

Provision E.2 (Illicit Discharge Detection and Elimination) requires each Copermitttee to implement an illicit discharge detection and elimination program to effectively prohibit non-storm water discharges to the MS4 by actively detecting and eliminating illicit discharges and disposal into its MS4.

Provision [E.2](#) establishes the minimum requirements that each Copermitttee must implement within its jurisdiction to effectively prohibit non-storm water discharges from entering its MS4. The federal CWA requires permits for municipal storm sewer systems to *“effectively prohibit non-storm water discharges into the storm sewers.”* The federal regulations (40CFR122.26(d)(2)(i)(B)) require each Copermitttee to establish the legal authority to prohibit illicit discharges to its MS4s. Under 40 CFR 122.26(d)(2)(iv)(B), each Copermitttee must implement a *“program...to detect and remove...illicit discharges and improper disposal into the storm sewer.”* The federal NPDES regulations, under 40 CFR 122.26(b)(2), define illicit discharges as *“any discharge to a municipal separate storm sewer that is not composed entirely of storm water.”* Thus, non-storm water discharges are not authorized to enter the MS4 and are considered to be illicit discharges, unless authorized by a separate NPDES permit.

The Phase I Final Rule clarifies that non-storm water discharges through an MS4 are not authorized under the CWA (55 FR 47995):

*“Today’s rule defines the term “illicit discharge” to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the Clean Water Act. Section 402(p)(3)(B) requires that permits for discharges from municipal separate storm sewers require the municipality to “effectively prohibit” non-storm water discharges from the municipal separate storm sewer...Ultimately, such non-storm water discharges through a municipal separate*

*storm sewer must either be removed from the system or become subject to an NPDES permit.”*

The federal NPDES requirements for the program to address illicit discharges must include “*inspections, to implement and enforce an ordinance, orders, or other similar means to prevent illicit discharges to the MS4.*” The federal NPDES regulations also reference several categories of “*non-storm water discharges or flows [which] shall be addressed where such discharges are identified...as sources of pollutants to waters of the United States.*” The Phase I Final Rule (55 FR 48037) further clarified the requirements of 40 CFR 122.26(d)(2)(iv)(B)(1) as follows:

*“EPA is clarifying that section 402(p)(3)(B) of the CWA (which requires permits for municipal separate storm sewers to 'effectively' prohibit non-storm water discharges) does not require permits for municipalities to prohibit certain discharges or flows of nonstorm water to waters of the United States through municipal separate storm sewers in all cases.”*

In previous iterations of the municipal storm water permits for the San Diego Region, these categories were simply listed and referred to as categories of non-storm water discharges “not prohibited” unless identified as a source of pollutants. The Copermittees have often referred to these categories as “exempt” discharges. In both cases, however, the language is inconsistent with the federal CWA and NPDES regulations. And, the clarification provided in the Phase I Final Rule does not specifically state that such discharges are “not prohibited” or “exempt” or in any way authorized. The federal NPDES regulations do, however, state that specific categories of non-storm water discharges must be “*addressed*” if identified as “*sources of pollutants to waters of the United States.*”

The language of Provision [E.2.a](#) has been revised to be fully consistent with the language of the CWA and the requirements of the federal regulations under 40 CFR 122.26(d)(2)(iv)(B)(1). Provision [E.2.a](#) requires each Copermittee to address all types of non-storm water discharges into its MS4 as illicit discharges, unless the discharge is authorized by a separate NPDES permit, or identified as a category of non-storm water discharges or flows that must be addressed pursuant to Provisions [E.2.a.\(1\)](#) through [E.2.a.\(5\)](#). Only non-NPDES-permitted non-storm water discharges identified as a category of non-storm water discharges under Provisions [E.2.a.\(1\)](#) through [E.2.a.\(5\)](#) and not identified as a source of pollutants do not have to be addressed as illicit discharges. Categories of non-storm water discharges that meet the requirements of Provisions [E.2.a.\(1\)](#) through [E.2.a.\(5\)](#) do not have to be addressed by the Copermittee as illicit discharges.

Several of the non-storm water categories listed in 40 CFR 122.26(d)(2)(iv)(B)(1) have not been included in Provisions [E.2.a.\(1\)](#) through [E.2.a.\(5\)](#), including: street wash water, landscape irrigation, irrigation water, and lawn watering. Because these are no longer included within the categories listed under Provisions [E.2.a.\(1\)](#) through [E.2.a.\(5\)](#), the Copermittees must prohibit these types of non-storm water discharges

from entering the MS4. This is consistent with the clarification of 40 CFR 122.26(d)(2)(iv)(B)(1) in the Phase I Final Rule (55 FR 48037), which states:

*“[T]he Director may include permit conditions that either require municipalities to prohibit or otherwise control any of these types of discharges where appropriate.”*

Street wash water is a category of non-storm water discharges that was removed when the Third Term Permits were issued. Street wash water is a source of several pollutants (e.g., metals, oil and grease, petroleum hydrocarbons, chlorinated solvents, sediment) which are generated during the street washing process. The removal of this category requires the Copermittees to prohibit this type of non-storm water discharge from entering the MS4.

The landscape irrigation, irrigation water, and lawn watering categories, collectively referred to hereafter as “over-irrigation” discharges, were removed from the list of non-storm water discharge categories in the Fourth Term Orange County and Riverside County Permits. Non-storm water discharges resulting from over-irrigation have been found to be a source of several types of pollutants (e.g., nutrients, bacteria, pesticides, sediment) in receiving waters. The San Diego Water Board and the Copermittees have identified categories of non-storm water discharges associated with over-irrigation as a source of pollutants and conveyance of pollutants to the MS4 and waters of the United States in the following documents:

- **SmartTimer/EdgescapE Evaluation Program (SEEP) Grant Application**

The State Water Board allocated grant funding to the SEEP project grant application submitted in 2006, which targeted irrigation runoff by retrofitting areas of existing development and documenting the conservation and runoff improvements. The basis of this grant project is that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 is a source and conveyance of pollutants. In addition, the grant application indicated that this alteration of natural flows is impacting the beneficial uses of waters of the state and U.S. Results from the study indicate that that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 is a source and conveyance of pollutants. The results of this study can be applied broadly to any area where over-irrigation takes place. The grant application included the following statements:

*“Irrigation runoff contributes flow & pollutant loads to creeks and beaches that are 303(d) listed for bacteria indicators.”*

*“Regional program managers agree that the reduction and/or elimination of irrigation-related urban flows and associated pollutant loads may be key to successful attainment of water quality and beneficial use goals as outlined in the San Diego Basin Plan and Bacteria TMDL over the long term.”*

*“Elevated dry-weather storm drain flows, composed primarily ... of landscape irrigation water wasted as runoff, carry pollutants that impair recreational use and aquatic habitats all along Southern California’s urbanized coastline. Storm drain systems carry the wasted water, along with landscape derived pollutants such as bacteria, nutrients and pesticides, to local creeks and the ocean. Given the local Mediterranean climate, excessive perennial dry season stream flows are an unnatural hydrologic pattern, causing species shifts in local riparian communities and warm, unseasonal contaminated freshwater plumes in the near-shore marine environment.”*

- **2006-2007 Orange County Watershed Action Plan Annual Reports**

The Watershed Action Plan Annual Reports for the 2006-2007 reporting period were submitted by the County of Orange, Orange County Flood Control District and Copermittees within the San Juan Creek, Laguna Coastal Streams, Aliso Creek, and Dana Point Coastal Streams Watersheds. San Juan Creek, Laguna Coastal Streams, Aliso Creek and Dana Point Coastal Streams are all currently 303(d) listed as impaired for indicator bacteria within their watersheds and/or in the Pacific Ocean at the discharge points of their watersheds. The Orange County Copermittees, within their Watershed Action Strategy Table for fecal indicator bacteria included the following:

*“Support programs to reduce or eliminate the discharge of anthropogenic dry weather nuisance flow throughout the...watershed. Dry weather flow is the transport medium for bacteria and other 303(d) constituents of concern.”*

*Additionally, they state that “conditions in the MS4 contribute to high seasonal bacteria propagation in-pipe during warm weather. Landscape irrigation is a major contributor to dry weather flow, both as surface runoff due to over-irrigation and overspray onto pavements; and as subsurface seepage that finds its way into the MS4.”*

- **Fiscal Year 2008 Carlsbad Watershed Urban Runoff Management Program Annual Report**

The Carlsbad Watershed Urban Runoff Management Program Annual Report for Fiscal Year 2008 was submitted by the Carlsbad Watershed Copermittees (Cities of Carlsbad, Encinitas, Escondido, Oceanside, San Marcos, Solana Beach, and Vista, and the County of San Diego). In the Annual Report, the Carlsbad Watershed Copermittees stated the following:

*“The Carlsbad Watershed Management Area (WMA) collective watershed strategy identifies bacteria, sediment, and nutrients as high priority water quality pollutants in the Agua Hedionda (904.3 – bacteria and sediment), Buena Vista (904.2 – bacteria), and San Marcos Creek (904.5 – nutrients) Hydrologic Areas.*

*Bacteria, sediment, and nutrients have been identified as potential discharges from over-irrigation.”*

- **2007-2008 San Diego Bay Watershed Urban Runoff Management Program Annual Report**

The San Diego Bay Watershed Urban Runoff Management Program 2007-2008 Annual Report was submitted by the San Diego Bay Watershed Copermittees (Cities of Chula Vista, Coronado, Imperial Beach, La Mesa, Lemon Grove, National City, and San Diego, the County of San Diego, the Port of San Diego, and the San Diego County Airport Authority). In Appendix D of the Annual Report, titled “Likely Sources of Pollutants,” the San Diego Bay Watershed Copermittees identified over-irrigation of lawns as a pollutant generating activity from business and/or residential land uses for bacteria, pesticides, and sediment.

- **Copermittee Public Education Materials**

The Orange County Public Works *Tips for Landscape & Gardening* public education brochure states: “*Fertilizers, pesticides and other chemicals that are left on yards or driveways can be blown or washed into storm drains that flow to the ocean. Overwatering lawns can also send materials into storm drains.*”

The Riverside County Flood Control and Water Conservation District *Landscape and Garden* public education brochure states: “*Soil, yard wastes, over-watering and garden chemicals become part of the urban runoff mix that winds its way through streets, gutters and storm drains before entering lakes, rivers, streams, etc. Urban runoff pollution contaminates water and harms aquatic life!*”

- **Los Penasquitos Lagoon Sedimentation/Siltation TMDL Technical Report**

The Los Penasquitos Lagoon Sedimentation/Siltation TMDL technical report was prepared for the City of San Diego and USEPA in October 2010. The technical report was included as a technical supporting document attached to the Sediment TMDL for Los Penasquitos Lagoon staff report prepared by the San Diego Water Board, dated June 13, 2012. Under the Source Assessment section, the technical report states the following:

*“Dry weather loading is dominated by nuisance flows from urban land use activities such as car washing, sidewalk washing, and lawn over-irrigation, which pick up and transport sediment into receiving waters.”*

These documents confirm that non-storm water discharges associated with over-irrigation are a source of pollutants and should be addressed as illicit discharges to the MS4. Prohibiting non-storm water discharges associated with over-irrigation, however,

is not a new requirement for the Copermittees because it is also consistent with and required by the Water Conservation in Landscaping Act (AB 1881, Laird).

The Water Conservation in Landscaping Act required the Department of Water Resources (DWR) to prepare a Model Water Efficient Landscape Ordinance for use by local agencies (e.g. the Copermittees). All local agencies were required to adopt a water efficient landscape ordinance by January 1, 2010. Local agencies could adopt the Water Efficient Landscape Ordinance developed by DWR, or an ordinance considered at least as effective as the Model Ordinance. The Water Efficient Landscape Ordinance includes a requirement that local agencies prohibit runoff from irrigation (§ 493.2):

*“Local agencies shall prevent water waste resulting from inefficient landscape irrigation by prohibiting runoff from leaving the target landscape [emphasis added] due to low head drainage, overspray, or other similar conditions where water flows onto adjacent property, non-irrigated areas, walks, roadways, parking lots, or structures. Penalties for violation of these prohibitions shall be established locally.”*

Furthermore, non-storm water discharges from over-irrigation not only transport and discharge pollutants to receiving waters, but are also a likely source of the dry weather flows causing changes to habitat within and along the receiving water bodies. Examples of habitat changes from the dry weather flows include perennialization of ephemeral streams, and conversion of saltwater and brackish water marsh habitats to freshwater marsh habitats (e.g. Los Penasquitos Lagoon). Both of these examples have resulted in the promotion of invasive species in several areas of the San Diego Region.

The removal of the over-irrigation discharges categories does not require the Copermittees to strictly prohibit lawn and landscape irrigation, but does require the prohibition of excessive irrigation water that results in non-storm water discharges to the MS4. Non-storm water discharges to the MS4 from over-irrigation must be addressed as illicit discharges by the Copermittees pursuant to the requirements of Provision [E.2](#).

The remaining non-storm water categories listed in 40 CFR 122.26(d)(2)(iv)(B)(1) are listed under Provisions [E.2.a.\(1\)](#) through [E.2.a.\(5\)](#) and generally fall into four categories: (1) non-storm water discharges subject to existing San Diego Water Board waste discharge requirements and NPDES permits; (2) non-storm water discharges generally not expected to be a source of pollutants to receiving waters; (3) non-storm water discharges likely to contain pollutants requiring some form of control to address the pollutants prior to discharging to the MS4; and (4) non-storm water discharges or flows associated with firefighting.

Provisions [E.2.a.\(1\)](#) and [E.2.a.\(2\)](#) include several categories of non-storm water discharges listed in 40 CFR 122.26(d)(2)(iv)(B)(1) for which the San Diego Water Board already has developed general waste discharge requirements and NPDES



permits to address the discharges. The Copermittees are only required to address these types of non-storm water discharges as illicit discharges if the Copermittees or the San Diego Water Board identifies these non-storm water discharges not having coverage under the applicable NPDES permit.

Provision [E.2.a.\(3\)](#) includes several categories of non-storm water discharges listed in 40 CFR 122.26(d)(2)(iv)(B)(1) which are generally not expected to be a source of pollutants to receiving waters, many of which originate from what are typically natural, uncontrollable sources. The Copermittees are only required to address these types of non-storm water discharges as illicit discharges if the Copermittees or the San Diego Water Board identifies these non-storm water discharges as a source of pollutants to receiving waters. Because many of these sources are generally uncontrollable, enforcing a prohibition may not be a possibility for the Copermittees. The Copermittees would be able to address these non-storm water discharges by preventing these non-storm water discharges from entering the MS4. This could potentially be achieved by sealing their MS4 structures so the discharges cannot enter the MS4.

Provision [E.2.a.\(4\)](#) includes several categories of non-storm water discharges listed in 40 CFR 122.26(d)(2)(iv)(B)(1) that are likely to contain pollutants requiring some form of control to address the pollutants prior to discharging to the MS4. At this time, an outright prohibition of these types of non-storm water discharges does not yet appear to be warranted. Thus, Provision [E.2.a.\(4\)](#) includes several requirements for the Copermittees to control the pollutants from these types of non-storm water discharges. This is consistent with the clarification of the federal regulations in the Phase I Final Rule (55 FR 48037), which states the San Diego Water Board has the authority to require the Copermittees to “*control any of these types of discharges where appropriate.*”

Unlike non-storm water discharges from over-irrigation, these types of non-storm water discharges are not expected to occur in close proximity to each other or very frequently. Provided these types of non-storm water discharges are controlled as required in Provision [E.2.a.\(4\)](#), the Copermittees would only be required to address these types of non-storm water discharges as illicit discharges if the Copermittee or the San Diego Water Board identifies these non-storm water discharges as a source of pollutants to receiving waters.

Provision [E.2.a.\(5\)](#) includes specific requirements for fire fighting discharges and flows. The requirements for non-storm water discharges and flows associated with fire fighting have been separated into requirements for: a) non-emergency fire fighting discharges and flows, and b) emergency fire fighting discharges and flows.

The San Diego Water Board has found that discharges from building fire suppression system maintenance (e.g. fire sprinklers) contain waste and potentially a significant source of pollutants to receiving waters. As such, the San Diego Water Board is requiring these discharges be addressed as illicit discharges by the Copermittees.

Thus, the discharges to the MS4 are to be prohibited via ordinance, order or similar means. For other non-emergency firefighting discharges and flows (i.e. flows from controlled or practice blazes, firefighting training, and maintenance activities not associated with building fire suppression systems), the Copermittees are required to develop and implement a program to address pollutants in these non-storm water discharges and flows. This is consistent with the clarification of the federal regulations in the Phase I Final Rule (55 FR 48037), which states the San Diego Water Board has the authority to require the Copermittees to “*control any of these types of discharges where appropriate.*”

For emergency firefighting discharges and flows, the Phase I Final Rule (55 FR 48037) has clarified the requirements of 40 CFR 122.26(d)(2)(iv)(B)(1) pertaining to emergency firefighting flows and discharges, which states:

*“In the case of firefighting it is not the intention of these rules to prohibit in any circumstances the protection of life and public or private property through the use of water or other fire retardants that flow into separate storm sewers.”*

Thus, the requirements have been made to be consistent with the guidance provided by the Phase I Final Rule. The Order recommends that the Copermittees develop and encourage implementation of BMPs to reduce or eliminate the discharge of pollutants from emergency firefighting flows to the MS4s and receiving waters. The Order does not include any requirements that should be interpreted as requiring the implementation of BMPs for emergency firefighting flows to the MS4s and receiving waters.

The Copermittees are expected to review the dry weather MS4 outfall discharge monitoring data they collect to determine if and when there are non-storm water discharges to or from their MS4s that are a source of pollutants to receiving waters. If the Copermittees identify one of the types of non-storm water discharges listed in Provisions [E.2.a.\(1\)](#) through [E.2.a.\(4\)](#) as a source of pollutants to receiving waters based on the review and evaluation of monitoring data, Provision [E.2.a.\(6\)](#) requires the Copermittees to prohibit those categories of discharges from entering the MS4 through ordinance, order or similar means. In addition, Provision [E.2.a.\(6\)](#) clarifies that the San Diego Water Board may identify categories of non-storm water discharges or flows listed under Provisions [E.2.a.\(1\)](#) through [E.2.a.\(4\)](#) that must be prohibited.

Provision [E.2.a.\(6\)](#) also provides the Copermittees an option to propose controls to be implemented for the category of non-storm water discharges as part of the Water Quality Improvement Plan instead of prohibiting the category of non-storm water discharges. If the Water Quality Improvement Plan is accepted by the San Diego Water Board with the proposed controls, the Copermittees will not be required to prohibit the category of non-storm water discharges to their MS4s as long as the controls are implemented. This is consistent with the clarification of 40 CFR 122.26(d)(2)(iv)(B)(1) in the Phase I Final Rule (55 FR 48037), which states the San

Diego Water Board may “*require municipalities to prohibit or otherwise control any of these types of discharges where appropriate.*”

Finally, Provision [E.2.a.\(7\)](#) has been included in the requirements for non-storm water discharges to clarify that any non-storm water discharges to the Copermittee’s MS4, even those identified pursuant to Provisions [E.2.a.\(1\)](#) through [E.2.a.\(4\)](#), must be reduced or eliminated, unless a non-storm water discharge is identified as a discharge authorized by a separate NPDES permit. Provision [E.2.a.\(7\)](#) is consistent with the requirements of CWA section 402(p)(3)(B)(ii) and 40 CFR 122.26(d)(1)(v)(B), as clarified in the Phase I Final Rule (55 FR 47995) that “[u]ltimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit.” However, the reduction or elimination of those non-storm water discharges are expected to be achieved as feasible, in accordance with the priorities in the Water Quality Improvement Plan and when the resources are available to the Copermittee.

Consistent with 40 CFR 122.26(d)(2)(iv)(B) and 122.26(d)(2)(iv)(B)(1), each Copermittee must implement a “*program...to prevent illicit discharges to the municipal storm sewer system*” and “*detect...illicit discharges and improper disposal into the storm sewer.*” Provision [E.2.b](#) requires each Copermittee to implement measures to prevent and detect illicit discharges and connections to its MS4 as part of its illicit discharge detection and elimination program.

As part of the program to prevent and detect illicit discharges to the MS4, 40 CFR 122.26(d)(2)(iv)(B)(2) requires “*procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens.*” As part of the procedures, each Copermittee is required to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction. Having knowledge about where inlets, access points, connections with other MS4s, and outfalls are located is necessary for each Copermittee to track, identify, and eliminate illicit discharges and connections. Thus, Provision [E.2.b.\(1\)](#) of the Order specifies that the map must include the segments of the storm sewer system owned, operated, and maintained by the Copermittee, and include locations of all known inlets, connections with other MS4s, and outfalls to the Copermittee’s MS4. The remaining requirements of Provision [E.2.b](#) are consistent with the requirements of 40 CFR 122.26(d)(2)(iv)(B)(3)-(7) related to implementing measures to prevent and detect illicit discharges and connections to the MS4.

Provision [E.2.c](#) requires each Copermittee to conduct field screening and monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect non-storm water and illicit discharges and connections to the MS4. Field screening is a required element of the program to detect and eliminate illicit discharges and connections to the MS4, pursuant to 40 CFR 122.26(d)(2)(iv)(B)(2). The field screening requirement will be implemented through the dry weather MS4 outfall discharge monitoring required under Provisions [D.2.a.\(2\)](#) and [D.2.b.\(1\)](#).

Provision E.2.d specifies the measures each Copermittee must implement to eliminate illicit discharges and connections to its MS4. Elimination of illicit discharges and connections to the MS4 is consistent with the requirement of 40 CFR 122.26(d)(2)(iv)(B) *“to detect and remove [emphasis added]...illicit discharges and improper disposal into the storm sewer”* and will achieve the CWA requirement for MS4 permits to *“effectively prohibit non-storm water discharges into the storm sewers.”*

Generally, each Copermittee is responsible for prioritizing its efforts to eliminate non-storm water and illicit discharges or connections to its MS4 based on field screening and monitoring data, NALs, illicit discharge investigation records, and the known or suspected sources. Sources of non-storm water and illicit discharges or connections must be eliminated by enforcing the legal authority established by each Copermittee pursuant to Provision E.1.

Provision E.3 (Development Planning) requires each Copermittee to use its land use and planning authority to implement a development planning program to control and reduce the discharge of pollutants in storm water from new development and significant redevelopment to the MEP. Proper implementation of the development planning program will also contribute toward effectively prohibiting non-storm water discharges from development projects to the MS4.

Pursuant to 40 CFR 122.26(d)(2)(iv), each Copermittee is required to implement a *“management program...to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and other such provisions where applicable.”* As part of the management program, 40 CFR 122.26(d)(2)(iv)(A)(2) requires *“planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal storm sewers which receive discharges from areas of new development and significant redevelopment.”*

Land development generally alters the natural conditions of the land by removing vegetative cover, compacting soil, and/or placement of concrete, asphalt, or other impervious surfaces. These impervious surfaces concentrate urban pollutants (such as pesticides, petroleum hydrocarbons, heavy metals, and pathogens) that are otherwise not found in high concentrations in the natural environment. Pollutants that accumulate on impervious surfaces are not easily biodegraded nor subject to natural treatment processes.

Impervious surfaces greatly affect the natural hydrology of the land because they do not allow natural infiltration and treatment of storm water runoff to take place. Instead, storm water runoff from impervious surfaces is typically directed through pipes, curbs, gutters, and other hardscape into receiving waters, with little treatment, at significantly increased volumes and accelerated flow rates over what would occur naturally. The increased pollutant loads, storm water volume, discharge rates and velocities, and discharge durations from the MS4 adversely impact stream habitat by causing accelerated, unnatural erosion and scouring within creek bed and banks. Placement

of impervious surfaces also encapsulates “good” sediment (such as sand, gravel, rocks and cobbles) that would normally replenish creek beds and banks to help stabilize them. Collectively, these changes to natural hydrologic processes are termed hydrograph modification, or hydromodification.

Hydromodification, which is caused by both altered storm water flow and altered sediment flow regimes, is largely responsible for degradation of creeks, streams, and associated habitats in the San Diego Region. In an ongoing study by the Stormwater Monitoring Coalition to assess the health of streams throughout Southern California, researchers found that three of the four highest risk stressors to creeks (percent sands and fines present, channel alteration, and riparian disturbance) were related to physical habitat.<sup>29</sup> Researchers studying flood frequencies in Riverside County have found that increases in watershed imperviousness of only 9-22 percent can result in increases in peak flow rates for the two-year storm event of up to 100 percent.<sup>30</sup> Such changes in runoff have significant impacts on channel morphology.

In addition, a technical report issued by the Southern California Coastal Water Research Project (SCCWRP) stated that “[r]ecent studies indicate that California’s intermittent and ephemeral streams are more susceptible to the effects of hydromodification than streams from other parts of the United States. Physical degradation of stream channels in the central and eastern United States can initially be detected when watershed impervious cover approaches 10 percent, although biological effects (which may be more difficult to detect) may occur at lower levels. In contrast, initial response of streams in the semi-arid portions of California appears to occur between 3 and 5 percent impervious cover.”<sup>31</sup> These studies highlight the extent to which impacts originating from impervious surfaces created by land development are responsible for the degradation of creek and stream habitat.

This is consistent with what USEPA has noted, that “[m]ost stormwater runoff is the result of the man-made hydrologic modifications that normally accompany development. The addition of impervious surfaces, soil compaction, and tree and vegetation removal result in alterations to the movement of water through the environment. As interception, evapotranspiration, and infiltration are reduced and precipitation is converted to overland flow, these modifications affect not only the characteristics of the developed site but also the watershed in which the development is located. Stormwater has been identified as one of the leading sources of pollution for all waterbody types in the United States. Furthermore, the impacts of stormwater

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<sup>29</sup> Assessing the Health of Southern California Streams, Stormwater Monitoring Coalition, Fact Sheet

<sup>30</sup> Schueler and Holland, 2000. Storm Water Strategies for Arid and Semi-Arid Watersheds (Article 66). The Practice of Watershed Protection.

<sup>31</sup> Stein, E. and Zaleski, S., 2005. Technical Report 475, Managing Runoff to Protect Natural Streams: The Latest Development on Investigation and Management of Hydromodification in California. December 30, 2005.

*pollution are not static; they usually increase with more development and urbanization.”<sup>32</sup>*

Reducing the impact from the increased pollutant loads and flows generated by impervious surfaces within a watershed is essential to protecting and restoring the integrity of the receiving waters. Provision E.3 includes the minimum “*management practices, control techniques and system, design and engineering methods, and other such provisions where applicable*” to be included in the “*planning procedures...to reduce the discharge of pollutants...from areas of new development and significant redevelopment.*” The requirements of Provision E.3 will 1) minimize the generation and discharge of pollutants in storm water from the MS4, and 2) minimize the potential of storm water discharges from the MS4 from causing altered flow regimes and excessive downstream erosion in receiving waters.

The requirements of Provision E.3.a include the minimum “*management practices, control techniques and system, design and engineering methods, and other such provisions where applicable*” to be included in the “*planning procedures...to reduce the discharge of pollutants...from areas of new development and significant redevelopment*” applicable to all development projects, regardless of size or purpose of development. In general, all development projects must implement onsite BMPs to remove pollutants from runoff prior to its discharge to any receiving waters, as close to the pollutant generating source as possible, and structural BMPs must not be constructed within waters of the U.S.

Furthermore, the onsite BMPs must be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors (e.g. mosquitos, rodents, and flies). If not properly designed or maintained, certain BMPs implemented or required by municipalities may create a habitat for vectors. Monitoring studies conducted by the California Department of Public Health (CDPH) have documented that mosquitoes opportunistically breed in structural storm water BMPs, particularly those that hold standing water for over 96 hours. Certain site design features that hold standing water may similarly produce mosquitoes.

Structural BMPs and site design features should incorporate design, construction, and maintenance principles to promote drainage within 96 hours to minimize standing water available to mosquitoes. Nuisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities and local vector control agencies and the CDPH during the development and implementation of storm water runoff management programs. The CDPH also has issued guidance for BMP implementation that will minimize potential nuisances and public health impacts resulting from vector breeding.<sup>33</sup>

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<sup>32</sup> USEPA, 2007. Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices, December 2007.

<sup>33</sup> California Department of Public Health, 2012. Best Management Practices for Mosquito Control in California. (<http://www.cdph.ca.gov/HealthInfo/discond/Documents/BMPforMosquitoControl07-12.pdf>)

All development projects are required to implement source control BMPs that will minimize the generation of pollutants. Additionally, each development project must implement, where applicable and feasible, low impact development (LID) BMPs to mimic the natural hydrology of the site and retain and/or treat pollutants in storm water runoff prior to discharging to and from the MS4.

The LID Center defines LID as “*a comprehensive land planning and engineering design approach with a goal of maintaining and enhancing the pre-development hydrologic regime of urban and developing watersheds.*”<sup>34</sup> LID designs seek to control storm water at the source, using small-scale integrated site design and management practices to mimic the natural hydrology of a site, retain storm water runoff by minimizing soil compaction and impervious surfaces, and disconnect storm water runoff from conveyances to the storm drain system.

LID BMPs may utilize interception, storage, evaporation, evapotranspiration, infiltration, and filtration processes to retain and/or treat pollutants in storm water before it is discharged from a site. Because of these numerous options, the San Diego Water Board expects that every development project will be able to implement some form of LID BMPs. Examples of LID BMPs include using permeable pavements, rain gardens, rain barrels, grassy swales, soil amendments, and native plants.

Provision [E.3.a](#) also includes requirements for all development projects to, where feasible, landscape with native and/or low water use plants to minimize the discharge of non-storm water discharges associated with excessive irrigation, as well as harvest (i.e., storage) and use precipitation to promote the concept of utilizing storm water as a resource.

While all development projects are subject to the requirements of Provision [E.3.a](#), Provision [E.3.b](#) identifies Priority Development Projects that exceed given size thresholds and/or fit under specific use categories. Priority Development Projects are required to incorporate specific performance criteria for structural BMPs into the project plan to reduce the generation of pollutants, and address potential impacts from hydromodification.

The Priority Development Project categories are based on the requirements of the Fourth Term Permits for Orange County and Riverside County (Order Nos. R9-2009-0002 and R9-2010-0016, respectively), and do not differ significantly from the Fourth Term Permit for San Diego County. Furthermore, the Priority Development Project categories are consistent with Santa Ana Water Board Order Nos. R8-2009-0030 and R8-2010-0033 (Orange County and Riverside County MS4 Permits, respectively), and Los Angeles Water Board Order No. R4-2010-0108 (Ventura County MS4 Permit).

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<sup>34</sup> [www.lowimpactdevelopment.org](http://www.lowimpactdevelopment.org)

Because of the impact of relatively small increases in watershed impervious surfaces to receiving waters, Provision [E.3.b.\(1\)\(c\)\(iv\)](#) has been updated to include large driveways that are 5,000 square feet or more. The San Diego Water Board finds that large driveways can exacerbate altered flow regimes if not properly controlled.

Provision [E.3.b.\(3\)](#) describes projects that are exempt from Priority Development Project status. These include new or retrofit paved sidewalks, bicycle lanes, or trails that are designed and constructed to direct runoff to vegetated areas or be hydraulically disconnected from paved areas. The exemptions have been provided to encourage these types of projects because they provide multiple environmental benefits, such as promoting walking rather than driving, which will in turn improve air quality. Additionally, retrofitting of existing alleys, streets, or roads are exempt from Priority Development Project status if they are constructed using USEPA Green Streets guidance.<sup>35</sup> By doing so, retrofitting of these types of projects is encouraged. The San Diego Water Board recognizes that there are spatial constraints associated with these projects, and implementation of structural BMPs are not always feasible.

For development projects identified as Priority Development Projects, the requirements of Provision [E.3.c](#) are the minimum “*management practices, control techniques and system, design and engineering methods, and other such provisions where applicable*” to be included in the “*planning procedures...to reduce the discharge of pollutants...from areas of new development and significant redevelopment.*” Provisions [E.3.c.\(1\)-\(3\)](#) describe the performance criteria for the structural BMPs that must be implemented for each Priority Development Project defined by Provision [E.3.b](#).

Provision [E.3.c.\(1\)](#) describes the storm water pollutant control BMP requirements that must be implemented by all Priority Development Projects. The purpose of Provision [E.3.c.\(1\)](#) is to reduce pollutants in storm water runoff to the MEP from Priority Development Projects before it is discharged to the MS4. Of all the available treatment processes available, retention of storm water, and therefore capture of the pollutants in the storm water, will achieve 100 percent pollutant removal efficiency for the volume of storm water retained. No other method of treatment can achieve 100 percent pollutant removal efficiency. Thus, retention of as much storm water onsite is the most effective way to reduce pollutants in storm water discharges to, and consequently from the MS4, and controls pollutants in storm water discharges from a site to the MEP.

Under Provision [E.3.c.\(1\)\(a\)](#), retention of the pollutants in the runoff produced from the 85<sup>th</sup> percentile storm event (“design capture volume”) is the design standard to which Priority Development Projects must comply. Since the 85<sup>th</sup> percentile storm event has previously been used as the numeric design standard for treatment control BMPs, this same size storm event is used as the numeric design standard for storm water

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<sup>35</sup> “Managing Wet Weather with Green Infrastructure – Municipal Handbook: Green Streets” (USEPA, 2008).



retention. This is the MEP standard recognized by the San Diego Water Board and is consistent with the Fourth Term Permits for Orange County and Riverside County (Order Nos. R9-2009-0002 and R9-2010-0016, respectively), as well as Santa Ana Water Board Order Nos. R8-2009-0030 and R8-2010-0033 (Orange County and Riverside County MS4 Permits, respectively), Los Angeles Water Board Order No. R4-2010-0108 (Ventura County MS4 Permit), and Los Angeles Water Board Order No. R4-2012-0175 (Los Angeles County MS4 Permit).

The 85<sup>th</sup> percentile storm event is the event that has a precipitation total greater than or equal to 85 percent of all storm events over a given period of record in a specific area or location. For example, to determine what the 85<sup>th</sup> percentile storm event is in a specific location, all 24 hour storms that have recorded values over a 30 year period would be tabulated and a 85<sup>th</sup> percentile storm would be determined from this record (i.e. 15 percent of the storms would be greater than the number determined to be the 85<sup>th</sup> percentile storm). Most jurisdictions in the San Diego Region have already developed isopluvial maps that can provide this type of information. The 85<sup>th</sup> percentile storm might be determined to be a number such as 1.0 inch, and this would be multiplied by the total area of the project footprint producing runoff to calculate the design capture volume. The Priority Development Project designer would then select a system of BMPs that would retain (i.e. intercept, store, infiltrate, evaporate, or evapotranspire) the pollutants contained in the design capture volume onsite.

Retention BMPs are necessary to capture and retain pollutants generated from a Priority Development Project. In a recent study performed by SCCWRP in the Los Angeles Region, they found *“that the magnitude of constituent load associated with storm water runoff depends, at least in part, on the amount of time available for pollutant build-up on land surfaces. The extended dry period that typically occurs in arid climates such as southern California maximizes the time for constituents to build-up on land surfaces, resulting in proportionally higher concentrations and loads during initial storms of the season.”*<sup>36</sup> This implies that the “first flush” of a rainy season and the first storm events after long antecedent dry periods tend to have the highest pollutant loads. Capturing and retaining the pollutant loads of the “first flush” of a rainy season and the first storm events after long antecedent dry periods will reduce a significant portion of the pollutants in storm water discharged to and from the MS4.

The San Diego Water Board, however, acknowledges that in some situations retention of the full design capture volume onsite may not be technically feasible. In this event, the Copermittee may allow the Priority Development Project to use biofiltration BMPs to treat 1.5 times the design capture volume not reliably retained onsite, or biofiltration BMPs with a flow-thru design that has a total volume, including pore spaces and pre-filter detention volume, sized to hold at least 0.75 times the portion of the design capture volume not reliably retained onsite.

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<sup>36</sup> Stein, E.D., Tiefenthaler, L.L., and Schiff, K.C., 2007. Technical Report 510, Sources, Patterns and Mechanisms of Storm Water Pollutant Loading from Watershed and Land Uses of the Greater Los Angeles Area, California, USA. March 20, 2007.

The 1.5 multiplier is based on the finding in the Ventura County Technical Guidance Manual that biofiltration of 1.5 times the design capture volume not retained onsite will provide approximately the same pollutant removal as retention of the design capture volume on an annual basis.<sup>37</sup> This standard is consistent with the Los Angeles Water Board's Los Angeles County and Ventura County municipal storm water permits (Order Nos. R4-2012-0175 and R4-2010-0108, respectively). The flow-thru design of 0.75 times the portion of the design capture volume not reliably retained onsite is consistent with the San Diego Water Board's Orange County and Riverside County municipal storm water permits (Order Nos. R9-2009-0002 and R9-2010-0016, respectively). In either case, the biofiltration BMPs must be designed with an appropriate hydraulic loading rate to maximize storm water retention and pollutant removal, as well as to prevent erosion, scour, and channeling within the BMP. Each Copermittee is required to update its BMP Design Manual to provide guidance for hydraulic loading rates and other biofiltration design criteria necessary to maximize storm water retention and pollutant removal.

The San Diego Water Board further recognizes that, in addition to not being technically feasible, retention of the full design capture storm onsite may be cost prohibitive, or may not provide as much water quality benefit to the Watershed Management Area as would implementing BMPs elsewhere in the watershed. Thus, Provision [E.3.c.\(1\)\(b\)](#) allows for the use of a combination of onsite retention BMPs, and the implementation of an Alternative Compliance Program described in Provision [E.3.c.\(3\)](#). Provision [E.3.c.\(3\)](#) is discussed in more detail below.

If the full design capture volume is not retained onsite either because biofiltration is not technically feasible, or a Copermittee grants a Priority Development Project permission to utilize the Alternative Compliance Program, then the pollutants in the portion of the design capture volume that are not reliably retained onsite must still be reduced to the MEP. Thus, flow-thru treatment control BMPs are required to be implemented on Priority Development Projects in addition to the retention BMPs. The requirements of Provisions [E.3.c.\(1\)\(a\)\(ii\)\[a\]-\[c\]](#) include the performance standards for flow-thru treatment control BMPs, consistent with the Fourth Term Permits in the San Diego Region.

Whereas the purpose of the requirements under Provision [E.3.c.\(1\)](#) is to reduce pollutants in storm water runoff to the MEP, the purpose of the requirements under Provision [E.3.c.\(2\)](#) is to maintain or restore more natural hydrologic flow regimes to prevent accelerated, unnatural erosion in downstream receiving waters, also to the MEP standard. Provision [E.3.c.\(2\)](#) describes hydromodification management BMP requirements that must be implemented by all Priority Development Projects.

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<sup>37</sup> Ventura Countywide Stormwater Management Program. 2011. Ventura Technical Guidance Manual, Manual Update, 2011.

The performance criteria for the implementation of hydromodification management BMPs on Priority Development Projects are consistent with the requirements in the Fourth Term Permits for Orange and Riverside Counties (Order Nos. R9-2009-0002 and R9-2010-0016, respectively). Modifications to the Orange County and Riverside County Hydromodification Management Plans (HMPs) will likely be minor, or may not be necessary. The HMP for San Diego County will likely require some minor modifications to incorporate the requirements of Provision [E.3.c.\(2\)](#) and become consistent with the Orange County and Riverside County HMPs. The San Diego Water Board does not, however, expect that it will be necessary for the San Diego County Copermittees to develop a new approach or significantly re-write the San Diego County HMP. This is because the premise of the hydromodification management BMP requirements, which are to control storm water runoff conditions (flow rates and durations) for Copermittee-defined range of flows, is unchanged from all Fourth Term Permits in the San Diego Region.

Provision [E.3.c.\(2\)\(a\)](#) requires that post-project runoff conditions mimic the *pre-development* runoff conditions, and not the *pre-project* runoff conditions. Fundamentally, the San Diego Water Board believes that using a hydrology baseline that approximates that of an undeveloped, natural watershed is the only way to facilitate the return of more natural hydrological conditions to already built-out watersheds, and ultimately improved stream health. On the other hand, using the *pre-project* hydrology as a baseline for redevelopment projects results in propagating the unnatural hydrology of urbanized areas. Propagating the urbanized flow regime does not support conditions for restoring degraded or channelized stream segments, and would forever sentence such streams to the degraded state. Furthermore, reducing the volume of storm water runoff associated with the urbanized flow regime will also result in reducing the discharge of pollutants into receiving waters, since storm water runoff from impervious surfaces contains untreated pollutants.

The San Diego Water Board understands that approximating the pre-development runoff condition associated with a redevelopment site is not necessarily straightforward because factors such as natural grade and native vegetation for the site cannot be precisely known. Therefore, the San Diego Water Board does not expect project designers to estimate historical conditions associated with redevelopment sites. Rather, the San Diego Water Board expects project designers and the Copermittees to approximate pre-development runoff conditions using the parameters of a *pervious* area rather than an *impervious* area. This means that for redevelopment sites, approximating pre-development runoff conditions equates to using existing onsite grade and assuming the infiltration characteristics of the underlying soil. A redevelopment Priority Development Project must not use runoff coefficients of concrete or asphalt to estimate pre-development runoff conditions. Rather, redevelopment projects must use available information pertaining to existing underlying soil type (such as soil maps published by the National Resource Conservation Service), onsite existing grade, and any other readily available pertinent information to estimate pre-development runoff conditions.

The San Diego Water Board understands, indeed asserts, that the pre-development hydrology of an area in question can only be roughly estimated and cannot be precisely known. However, using the hydrology of a natural condition, even if not precisely known, will provide significant benefit to receiving waters over using the hydrology associated with pervious (developed) surfaces. Therefore in order to achieve the goals of the Clean Water Act, which are to “*restore and maintain the chemical, physical, and biological integrity of the nation’s waters* [emphasis added],” the most appropriate standard to use for hydromodification management is the standard associated with the pre-development condition.

Provision [E.3.c.\(2\)\(b\)](#) requires Priority Development Projects to avoid known critical sediment yield areas or implement measures that would allow coarse sediment to be discharged to receiving waters, such that the natural sediment supply is unaffected by the project. This is necessary because coarse sediment supply is as much an issue for causing erosive conditions to receiving streams as are accelerated flows.

The San Diego Water Board recognizes that in some situations implementing the hydromodification management BMP requirements fully onsite may not be technically feasible, may be cost prohibitive, or may not provide any overall water quality benefits to the Watershed Management Area. Thus, Provision [E.3.c.\(2\)\(c\)](#) allows for the use of a combination of onsite hydromodification management BMPs and alternative compliance options described in Provision [E.3.c.\(3\)](#).

Provision [E.3.c.\(3\)](#) allows for alternative compliance in instances where the Copermittee determines that offsite measures will have a greater overall water quality benefit for the Watershed Management Area than if the Priority Development Project were to implement structural BMPs onsite. Consequently, watershed-specific structural BMP requirements are present in this Order in the form of allowable compliance offsite. The Alternative Compliance Program to Onsite Structural BMP Implementation Provision is intended to integrate with the Copermittees’ planning efforts in the Water Quality Improvement Plans.

The Alternative Compliance Program is an option for Priority Development Projects where the governing Copermittee has participated in the development of a Watershed Management Area Analysis as part of the Water Quality Improvement Plan (described in Provision [B.3.b.\(4\)](#)). Such an approach is consistent with the latest findings in hydromodification management by the scientific community. In a Technical Report entitled *Hydromodification Assessment and Management in California*,<sup>38</sup> the report states:

*“An effective [hydromodification] management program will likely include combinations of on-site measures (e.g., low-impact development techniques, flow-control basins), in-stream measures (e.g., stream habitat restoration), floodplain*

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<sup>38</sup> 2012. ED Stein, F Federico, DB Booth, BP Bledsoe, C Bowles, Z Rubin, GM Kondolf, A Sengupta. Technical Report 667. Southern California Coastal Water Research Project. Costa Mesa, CA.

*and riparian zone actions, and off-site measures. Off-site measures may include compensatory mitigation measures at upstream locations that are designed to help restore and manage flow and sediment yield in the watershed.”*

Consistent with the ideas brought forth in the report, in the Watershed Management Area Analysis of Provision [B.3.b.\(4\)](#), which is optional, the Copermittees will develop watershed maps that include as much detail about factors that affect the hydrology of the watershed as is available. Such factors included identification of areas suitable for infiltration, coarse sediment supply areas, and locating stream channel structures and constrictions. Once these factors are mapped and studied, the Copermittees can identify areas in the watershed where candidate projects may be implemented that are expected to improve water quality in the watershed by providing more opportunity for infiltration, slowing down storm water flows, or attenuation of pollutants naturally via healthy stream habitat. These candidate projects may be in the form of retrofitting existing development, rehabilitating degraded stream segments, identifying regional BMPs, purchasing land to preserve valuable floodplain functions, and any other project(s) that the Copermittees identify.

Under the Alternative Compliance Program, Priority Development Projects may be allowed to fund, partially fund, or implement a candidate project, in lieu of implementing structural BMPs onsite, if they enter into a voluntary agreement with the governing Copermittee permitting this arrangement. Project proponents may also propose an alternative project not previously identified by the Copermittees. In either case, whether a project proponent implements a candidate project identified by the Copermittees or a separate alternative compliance project, the governing Copermittee must determine that implementation of the project will have a greater overall water quality benefit for the Watershed Management Area than fully implementing structural BMPs onsite. If alternative compliance involves funding or implementing a project that is outside the jurisdiction of the governing Copermittee, then that Copermittee may enter into an inter-agency agreement with the appropriate jurisdiction.

Finally, Provision [E.3.c.\(2\)\(d\)](#) allows Priority Development Projects to be exempt from the hydromodification management BMP requirements if there is no threat of erosion to downstream receiving waters (i.e. the receiving stream is concrete lined from the point of discharge all the way to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean). If the Copermittees believe that more exemptions are warranted, then they must perform the optional Watershed Management Area Analysis of Provision [B.3.b.\(4\)](#). Additional exemptions other than those specified in this Order may be established on a watershed basis, provided the Copermittees perform the analysis, provide supporting rationale for the exemptions, and complete the Water Quality Improvement Plan approval process pursuant to Provision [F.1](#).

Provisions [E.3.c.\(4\)](#) and [E.3.c.\(5\)](#) were included under the BMP requirements applicable to all development projects in the Fourth Term Permits for San Diego, Orange, and Riverside Counties (Order Nos. R9-2007-0001, R9-2009-0002, and R9-2010-0016, respectively). In this Order, the long-term BMP maintenance and

infiltration and groundwater protection requirements apply to structural BMPs implemented by Priority Development Projects only.

Provision [E.3.d](#) requires the Copermitees to update their BMP Design Manual as needed to incorporate the requirements of Provision [E.3](#). The BMP Design Manual is formerly known as the Standard Storm Water Mitigation Plan, or SSMP, and was renamed so that the title has a more accurate description of the document content. The contents of the BMP Design Manual are largely unchanged from the previous Standard Storm Water Mitigation Plans required under the Fourth Term Permits. The BMP Design Manual fulfills the 40 CFR 122.26(d)(2)(iv)(A)(2) requirement that the Copermitee's development planning program includes "*a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal storm sewers which receive discharges from areas of new development and significant redevelopment.*"

As part of the "*planning procedures,*" 40 CFR 122.26(d)(2)(iv)(A)(2) requires the procedures to "*address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.*" The requirements applicable to the implementation and oversight of structural BMPs at Priority Development Projects are provided under Provision [E.3.e](#).

Proper installation of the structural BMPs approved for a Priority Development Project is necessary to ensure that pollutants in storm water discharges will be reduced to the MEP after the project is completed. In addition to the proper installation of structural BMPs, the maintenance of structural BMPs on Priority Development Projects is necessary to ensure that pollutants in storm water discharges will continue to be reduced to the MEP. Provision [E.3.e.\(1\)](#) includes the minimum requirements that each Copermitee must implement to ensure structural BMPs are properly installed and will be properly maintained.

The requirements under Provision [E.3.e.\(2\)-\(3\)](#) are necessary to demonstrate each Copermitee is implementing a program that complies with Provisions [E.3.b-c](#) and [E.3.e.\(1\)](#), and ensure structural BMPs at Priority Development Project will continue to be able to reduce pollutants in storm water discharges to the MEP.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermitee must have sufficient "*legal authority to control discharges to the municipal separate storm sewer system.*" Where enforcement is necessary for any development projects to compel compliance with the requirements of Provision [E.3](#) and ensure the pollutants in storm water discharges from the MS4 are reduced and continue to be reduced to the MEP, Provision [E.3.f](#) requires each Copermitee to enforce its legal authority established pursuant to Provision [E.1](#), and in accordance with its Enforcement Response Plan required to be developed pursuant to Provision [E.6](#).

Provision E.4 (Construction Management) requires each Copermitee to implement a construction management program to control and reduce the discharge of pollutants in

storm water from construction sites to the MEP. Proper implementation of the construction management program will also contribute toward effectively prohibiting non-storm water discharges from construction sites to the MS4.

Pursuant to 40 CFR 122.26(d)(2)(iv), each Copermittee is required to implement a *“management program...to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and other such provisions where applicable.”* As part of the management program, 40 CFR 122.26(d)(2)(iv)(D) requires *“a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system.”*

Construction sites can be significant sources of sediment, trash, and other pollutants to receiving waters. Although sediment is naturally occurring in the natural environment, the discharge of sediment under unnatural conditions is problematic to receiving waters. Fine sediment in creeks causes high turbidity that interferes with the functionality of native flora and fauna in local creeks. For example, turbidity interferes with both photosynthesis of water-philic plants, as well as successful foraging and reproduction of benthic macroinvertebrates. Sediment can also make it difficult for fish to breathe because it clogs fish gills. Other pollutants such as heavy metals or pesticides can adhere to sediment and are transported to receiving waters during storm events, where they dissolve in the water column and become bioavailable to aquatic organisms. Sediment is recognized as a major stressor to surface waters and is responsible for the impairment of several lagoons and creeks in the San Diego Region.

Provision [E.4](#) includes requirements that each Copermittee must implement to minimize the discharge of sediment and other pollutants from construction sites to the MS4 within its jurisdiction. The requirements under Provision [E.4](#) are consistent with the Fourth Term Permits for San Diego, Orange, and Riverside Counties. Therefore, Copermittees are expected to implement the requirements seamlessly, with minimal changes to their existing construction management programs. The Copermittees, however, are given more flexibility to run their programs as needed to maximize efficiency, and also to be consistent with the Water Quality Improvement Plan for the Watershed Management Area.

As part of the construction management program, 40 CFR 122.26(d)(2)(iv)(D)(1) requires *“procedures for site planning which incorporate consideration of potential water quality impacts.”* Provision [E.4.a](#) describes the minimum elements each Copermittee is required to include as part of the construction site planning and project approval process. The construction site planning and approval process is based primarily on ensuring each project had an adequate site-specific pollution control, construction BMP, and/or erosion and sediment control plan that will be implemented to minimize the discharge of pollutants in storm water to the MEP, and minimize impacts to receiving waters.

The requirements under Provision [E.4.b](#) provide the data and information necessary to identify “*priorities for inspecting sites and enforcing control measures*” required pursuant to 40 CFR 122.26(d)(2)(iv)(D)(3). Under Provision [E.4.b](#), each Copermittee must identify construction sites that are considered a high threat to downstream surface waters. Designation of “high threat to water quality” construction sites will necessitate the Copermittees to develop criteria to identify such sites. Provision [E.4.b.\(2\)](#) describes a list of factors that must be considered when the Copermittee considers threat to water quality. For example, a Copermittee must identify sites as “high threat to water quality” if it is located within a hydrologic subarea where sediment is known or suspected to contribute to the highest priority water quality conditions, according to the Water Quality Improvement Plan. This ensures that construction management program implementation is compatible with the Copermittee’s identified highest priority water quality conditions.

Pursuant to 40 CFR 122.26(d)(2)(iv)(D)(2) each Copermittee is required describe “*requirements for nonstructural and structural best management practices*” at construction sites. Provision [E.4.c](#) includes the types of construction site BMPs that the Copermittees must implement, or require the implementation of, at each construction site to reduce pollutants in storm water discharges to the MEP.

Each Copermittee is expected to require the implementation of appropriate BMPs given specific site conditions, the season and likelihood of rain events, and construction phase (i.e. grading vs. vertical construction). This means that throughout the life of the project construction, the appropriate BMPs will vary, especially if the construction of the project spans multiple wet seasons. As opposed to describing specific minimum BMPs that must be implemented, the Order describes major BMP categories that should be considered for each site.

Each Copermittee is expected to use its 20 years of storm water experience and knowledge to require implementation of appropriate BMPs from the various categories at each construction site within its jurisdiction. For example, the San Diego Water Board expects that each site will be required to implement erosion control and sediment control. The San Diego Water Board also expects each Copermittee to require implementation of active/passive sediment treatment systems at sites where other BMPs have been tried and are known to be inadequate, and discharges of sediment are causing or contributing to water quality impairment downstream. Each Copermittee is granted flexibility in specifying the minimum level of BMP requirements at each site, but the San Diego Water Board expects each site to be capable of controlling pollutants in storm water discharges to the MEP and preventing illicit discharges.

The requirements under Provision [E.4.d](#) are necessary to demonstrate that each Copermittee is implementing a program that complies with Provisions [E.4.a](#) and [E.4.c](#) and ensure BMPs at construction sites will reduce pollutants in storm water discharges to the MEP.



Provision E.4.d does not include minimum required inspection frequencies for construction sites. Each Copermittee must use its experience and knowledge to specify an appropriate inspection frequency for both high priority and lower priority sites in their jurisdictional runoff management program documents, and in accordance with the Water Quality Improvement Plan. Appropriate inspection frequencies may vary by Copermittee, but the San Diego Water Board expects that the stated frequency will be adequate for each Copermittee to properly oversee the construction sites within its jurisdiction, confirm BMPs are implemented to reduce pollutants in storm water discharges from construction sites to the MEP, and make needed changes to its program on an ongoing basis as necessary.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient “*legal authority to control discharges to the municipal separate storm sewer system.*” Where enforcement is necessary for any development projects to compel compliance with the requirements of Provision E.4 and ensure the pollutants in storm water discharges from the MS4 are reduced and continue to be reduced to the MEP, Provision E.4.e requires each Copermittee to enforce its legal authority established pursuant to Provision E.1, and in accordance with its Enforcement Response Plan required to be developed pursuant to Provision E.6.

Provision E.5 (Existing Development Management) requires each Copermittee to implement an existing development management program to control and reduce the discharge of pollutants in storm water from areas of existing development to the MEP. Proper implementation of the existing development management program will also contribute toward effectively prohibiting non-storm water discharges from areas of existing development to the MS4.

Pursuant to 40 CFR 122.26(d)(2)(iv), each Copermittee is required to implement a “*management program...to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and other such provisions where applicable.*” Within 40 CFR 122.26(d)(2)(iv)(A) and (C), the management program is required to reduce impacts on receiving waters and reduce pollutants in storm water discharges to the MEP from commercial and residential areas, industrial facilities, and municipal facilities.

Commercial and residential areas, industrial facilities, and municipal facilities must be addressed by each Copermittee with the existing development management program required under Provision E.5. All other areas within each Copermittee’s jurisdiction should be either undeveloped open space, or areas that are being developed or under construction. Areas being developed or under construction will be addressed by the Copermittee under the requirements of Provision E.3 (Development Planning) or Provision E.4 (Construction Management).

Areas of existing development typically include impervious surfaces such as sidewalks, driveways, roads, and rooftops, which generate and concentrate pollutants

(such as pesticides, petroleum hydrocarbons, heavy metals, and pathogens) that are otherwise not found in high concentrations in the natural environment. Pollutants that accumulate on impervious surfaces are not easily biodegraded or not subject to natural treatment processes. When it rains, these pollutants are transported in storm water runoff from these impervious surfaces into receiving waters, resulting in poor water quality and degradation of beneficial uses.

In addition to the generation of pollutants, areas of existing development have generally altered the natural conditions of the land and removed vegetative cover, reduced the perviousness of the surface, and reduced the capacity of storm water that can be intercepted, captured, stored, infiltrated, evaporated, and/or evapotranspired. The alteration of the natural conditions and the impervious surfaces associated with areas of existing development causes water quality problems due to the alteration of natural flow regimes within the watersheds; resulting in hydromodification of channels, streams, and habitats that exist within or adjacent to the areas of existing development.

Thus, storm water discharges from areas of existing development are responsible for poor water quality, degraded habitats, and hydromodified channels throughout the developed portions of the watersheds in the San Diego Region. To improve the health and functionality of the receiving waters in a Watershed Management Area, land use practices and the amount of impervious surfaces in areas of existing development must change to reduce the various impacts caused by hydromodification and pollutants from storm water runoff generated in developed areas. Each Copermittee must be aggressive to address pollutant sources and runoff from areas of existing development to be able to reduce pollutants in storm water discharges from the MS4 to the MEP.

There is some overlap in the requirements under Provision E.5 with the requirements under Provisions E.2 (Illicit Discharge Detection and Elimination), E.3 (Development Planning), and E.4 (Construction Management). Illicit discharges frequently originate from areas of existing development. New development projects, when completed will become some type of residential, commercial, industrial or municipal existing development. Redevelopment projects are, by definition, redeveloping areas of existing development. And, redevelopment projects become construction sites located in areas of existing development. Much of the data and information collected, inspections performed, and enforcement actions taken for the requirements under Provisions E.2 to E.4 may also be utilized by the existing development management program. The requirements under Provision E.5, however, are focused primarily on reducing pollutants generated in areas of existing development that can be transported in storm water runoff and discharged to and from the MS4.

The requirements under Provision E.5 build upon existing program elements being implemented by the Copermittees. Provision E.5 is generally consistent with the existing development requirements of the Fourth Term Permits for Orange and Riverside Counties (Order Nos. R9-2009-0002 and R9-2010-0016, respectively), but

modified to provide more flexibility to implement the programs so resources can be better focused toward addressing the highest priority water quality conditions identified in the Water Quality Improvement Plans.

For a Copermittee to properly manage areas of existing development, having knowledge of what development exists within its jurisdiction is essential. Provision [E.5.a](#) requires each Copermittee to maintain a watershed-based inventory of all the existing development within its jurisdiction. This requirement is necessary for each Copermittee to implement the requirements of Provision [E.5.b-e](#).

As opposed to just maintaining separate inventories based on the type of site, each Copermittee must maintain a watershed-based inventory that includes all types of existing development within its jurisdiction. By utilizing a watershed-based inventory, the Copermittees within a Watershed Management Area can combine their inventories and review the inventories by watershed in addition to by jurisdiction. Pollutant sources and strategies for abatement can then be evaluated on a watershed level, as opposed to evaluating sources and strategies strictly by type of site.

Provision [E.5.a](#) includes the information that must be included in the inventory. Provision [E.5.a.\(1\)](#) specifies what facilities or areas must be included in the inventory. A commercial type of existing development may be identified in the inventory as a facility (e.g. individual building, individual business) or an area (e.g. shopping center, commercial zone). An industrial type of existing development must be identified in the inventory by facility (e.g. individual industrial entity). A municipal type of existing development must be identified in the inventory by facility, with a list of specific municipal facilities that must be included in the inventory. A residential type of existing development must be identified by areas to be designated by the Copermittee. For each of the facilities and areas identified in the Copermittee's inventory developed pursuant to Provision [E.5.a.\(1\)](#), Provision [E.5.a.\(2\)](#) specifies the information that must be included in the description for the facility or area.

Provision [E.5.a.\(3\)](#) requires each Copermittee to maintain an updated map showing the location of inventoried existing development, watershed boundaries, and water bodies. This requirement was included because this information is expected to help the Copermittees in a Watershed Management Area identify and prioritize sources of pollutants and/or stressors in areas of existing development that contribute toward the highest priority water quality conditions identified in the Water Quality Improvement Plans.

Knowledge of the existing development that are likely to be sources of pollutants contributing to the highest priority water quality conditions is expected to be a key element in the Copermittees' development of the water quality improvement strategies that will be included in the Water Quality Improvement Plans. The strategies described in the Water Quality Improvement Plans will direct efforts within the existing development management programs implemented by each Copermittee.

Pursuant to 40 CFR 122.26(d)(2)(iv)(A) each Copermittee is required describe "*structural and source control measures to reduce pollutants*" in storm water runoff discharged from areas of existing development. Provision E.5.b includes the BMP implementation and maintenance requirements that the each Copermittee must require at areas of existing development to reduce pollutants in storm water discharges to the MEP. The San Diego Water Board, however, recognizes that BMP implementation and maintenance for residential areas will require much more education and encouragement through less authoritative measures than for commercial, industrial and municipal facilities and areas. Thus, the BMP implementation and maintenance requirements have been separated between requirements under Provision E.5.b.(1) for commercial, industrial and municipal facilities and areas, and Provision E.5.b.(2) for residential areas.

Most of the requirements in Provision E.5.b are consistent with the related requirements in the Fourth Term Permits. The level of specificity, however, has been changed to allow each Copermittee the flexibility to implement its program to achieve maximum efficiency, and to perform functions that will address the highest priority water quality conditions identified in the Water Quality Improvement Plans.

Each Copermittee is expected to require the implementation of appropriate BMPs to address the expected pollutants from each facility or area. The Third and Fourth Term Permits described specific minimum BMPs that must be implemented at various sites. This Order, however, requires each Copermittee to designate minimum BMPs themselves and require implementation. Consistent with the Fourth Term Permits, each Copermittee is required to maintain, or require the maintenance of, all BMPs as needed.

The BMP implementation and maintenance requirements include a schedule of operation and maintenance activities for the MS4 and related structures (such as catch basins, storm drain inlets, and detention basins), as well as public streets and roads. Public streets and roads specifically include public unpaved roads. The San Diego Water Board identified, through investigations and complaints, sediment discharges from unpaved roads as a significant source of water quality problems in the San Diego Region. Inspection activities conducted by the San Diego Water Board since the Third Term Permits have found a lack of source control for many unpaved roads within the jurisdiction of the Copermittees.

Unpaved roads are a source of sediment that can be discharged in runoff to receiving waters, especially during storm events. Erosion of unpaved roadways occurs when soil particles are loosened and carried away from the roadway base, ditch, or road bank by water, wind, traffic, or other transport means. Exposed soils, high runoff velocities and volumes, sandy or silty soil types, and poor compaction increase the potential for erosion.

Road construction, culvert installation, and other maintenance activities can disturb the soil and drainage patterns to streams in undeveloped areas, causing excess runoff

and thereby erosion and the release of sediment. Poorly designed unpaved roads can act as preferential drainage pathways that carry runoff and sediment into natural streams, impacting water quality. In addition, other public works activities along unpaved roads have the potential to significantly affect sediment discharge and transport within streams and other waterways, which can degrade the beneficial uses of those waterways.

USEPA also recognizes that discharges from unpaved roads pose a significant potential threat to water quality. USEPA guidance<sup>39</sup> emphasizes the threat of unpaved roads to water quality:

*“Dirt and gravel roads are a major potential source of these pollutants [sediment] and pollutants that bind to sediment such as oils, nutrients, pesticides, herbicides, and other toxic substances. Many roads have unstable surfaces and bases. Roads act like dams, concentrating flows that accelerate erosion of road materials and roadsides. Both unstable surfaces and accelerated erosion then lead to sediment and dust.”*

There are several guidance documents, developed by the USEPA,<sup>40</sup> the US Forest Service,<sup>41</sup> the University of California,<sup>42</sup> and others, that include design and construction specifications and BMPs that are readily available for implementation by public entities. Implementing design and other source control BMPs for unpaved roads in the region is necessary to reduce and minimize the impacts of sediment discharged during storm events from unpaved roads to the MS4s and receiving waters.

Provision E.5.c describes existing development site inspection frequency, content, and tracking that each Copermittee must incorporate into their existing development management programs. The requirements under Provision E.5.c are necessary to demonstrate each Copermittee is implementing a program that complies with Provision E.5.b and ensure BMPs implemented in areas of existing development will reduce pollutants in storm water discharges to the MEP. Provision E.5.c has been modified to include a minimum of once every 5 years for all inventoried facilities and areas of existing development, utilizing one or more methods of inspection.

In addition to onsite inspections, the methods of inspection have been expanded to include drive-by inspections. Inspections may be performed by the Copermittee’s municipal and contract staff, or by volunteer monitoring or patrol programs. Volunteer monitoring or patrol programs are not expected to enforce the Copermittee’s

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<sup>39</sup> USEPA, 2006. Environmentally Sensitive Maintenance for Dirt and Gravel Roads. Gesford and Anderson, USEPA-PA-2005.

<sup>40</sup> Ibid

<sup>41</sup> US Forest Service, 1996. Forest Service Specifications for Construction of Roads & Bridges. EM-7720-100. Revised August 1996.

<sup>42</sup> University of California Division of Agriculture and Natural Resources, 2007. Rural Roads: A Construction and Maintenance Guide of California Landowners. Publication 8262.

ordinances, or to inspect areas or facilities where members of the public are not allowed access. Volunteer monitoring or patrol programs must be trained by the Copermittee, and are only expected to collect visual observations. By utilizing drive-by inspections and volunteer monitoring or patrol programs, the Copermittees will be able to maximize and efficiently use their resources to identify and address sources of pollutants in areas of existing development.

The municipal and contract staff of each Copermittee must annually perform onsite inspections of an equivalent of at least 20 percent of the commercial, industrial, and municipal facilities and areas in its inventoried existing development pursuant to Provision [E.5.c.\(1\)\(a\)\(iv\)](#). An “equivalent” of at least 20 percent means if any commercial, industrial, or municipal facilities or areas require multiple onsite inspections during any given year, those additional inspections may count toward the total annual inspection requirement. Linear municipal facilities (i.e. MS4 linear channels, sanitary sewer collection systems, streets, roads and highways) in the Copermittee’s existing development inventory are not subject to the inspection frequency requirement of Provision [E.5.c.\(1\)\(a\)\(iv\)](#).

The inspection content specified in Provision [E.5.c.\(2\)\(a\)](#) includes the information required to be collected during an inspection by any method. The inspection content specified in Provision [E.5.c.\(2\)\(b\)](#) includes additional information that must be collected when a Copermittee’s municipal or contract staff perform an onsite inspection. Provision [E.5.c.\(3\)](#) specifies the information that each Copermittee must maintain in its existing development inspection records.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient “*legal authority to control discharges to the municipal separate storm sewer system.*” Where enforcement is necessary to compel compliance with the requirements of Provision [E.5](#) and ensure the pollutants in storm water discharges from the MS4 are reduced and continue to be reduced to the MEP, Provision [E.5.d](#) requires each Copermittee to enforce its legal authority established pursuant to Provision [E.1](#), and in accordance with its Enforcement Response Plan required to be developed pursuant to Provision [E.6](#).

Provisions [E.5.e.\(1\)-\(2\)](#) specifically require the Copermittee to identify areas of existing development as candidates for retrofitting, and streams, channels, and/or habitats as candidates for rehabilitation. Provisions [E.5.e.\(1\)-\(2\)](#) are based on the retrofitting requirements of the Fourth Term Permits for Orange and Riverside Counties, but modified to also include identifying projects to rehabilitate channels within areas of existing development. The requirements have also been modified to be more focused on utilizing these types of projects for addressing the highest priority water quality conditions identified in the Water Quality Improvement Plans.

Interest and opportunity to retrofit areas of existing development and rehabilitate channels located in areas of existing development has been observed in several programs the San Diego Water Board oversees (e.g., CWA Section 401 Water Quality

Certification program, supplemental environmental projects, and grant programs). Each jurisdiction has miles and miles of streets that could be retrofitted to become green streets. Reshaping landscaped areas from convex to concave configurations can detain storm water instead of directing runoff as quickly as possible to the MS4. Retrofit projects could also include simply replacing impervious surfaces with permeable surfaces.

Retrofitting projects do not necessarily have to be expensive. Retrofitting projects could be as simple as redirecting downspouts from roofs to pervious or landscaped areas instead of to hardscaped areas discharging directly to the MS4, providing rain barrels to harvest storm water from downspouts for use at a later time, or planting more trees in areas with little vegetation to provide canopy that can intercept storm water. The San Diego Water Board encourages the Copermittees to identify simple, low-cost retrofitting opportunities that can be easily implemented, in addition to other more expensive retrofitting and channel rehabilitation projects.

Rehabilitation of channels, streams, and/or habitat will require more significant planning and resources to implement. There are, however, also abundant opportunities to rehabilitate channels, streams and/or habitats in or adjacent to areas of existing development. Each Watershed Management Area likely has several creeks and stream reaches that have been undergrounded, artificially hardened, or hydromodified that could be rehabilitated to be more sustainably configured, which would slow down storm water flows and potentially have more assimilative capacity for pollutants while still being supportive of designated beneficial uses.

The San Diego Water Board recognizes that it may be infeasible to implement retrofitting or channel rehabilitation projects within certain areas of a Copermittee's jurisdictions. For such areas, the Copermittee must instead identify, develop, and implement regional retrofitting and channel rehabilitation projects (i.e. projects that can retain and/or treat storm water from one or more areas of existing development) adjacent to and/or downstream of the areas of existing development.

Provisions [E.5.e.\(1\)-\(2\)](#) do not require the implementation of retrofitting and rehabilitation projects, but do require the Copermittee to develop a program with strategies to facilitate the implementation of these types of projects in areas of existing development. The strategies are expected to include allowing and encouraging Priority Development Projects to implement retrofitting types of projects as a means of compliance with the structural BMP performance criteria requirements of Provisions [E.3.c.\(1\)](#) and [E.3.c.\(2\)](#).

Provision E.6 (Enforcement Response Plans) requires each Copermittee to develop an Enforcement Response Plan as part of its jurisdictional runoff management program document. Proper implementation of the Enforcement Response Plans is necessary to effectively prohibit non-storm water discharges to the MS4, and reduce the discharge of pollutants in storm water from the MS4 to the MEP.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient “*legal authority to control discharges to the municipal separate storm sewer system*” and be able to demonstrate that it can “*operate pursuant to legal authority established by statute, ordinance or series of contracts*” to control the discharge of non-storm water and pollutants in storm water to and from its MS4. Pursuant to 40 CFR 122.26(d)(2)(i)(E) each Copermittee is specifically required to have the legal authority to “*[r]equire compliance with conditions in ordinances, permits, contracts or orders.*”

The requirements under Provision E.6 are necessary to demonstrate that each Copermittee can enforce its legal authority to “*effectively prohibit non-stormwater discharges*” and “*reduce the discharge of pollutants to the maximum extent practicable*” as well as “*[r]equire compliance with conditions in ordinances, permits, contracts or order.*”

The Enforcement Response Plan required under Provision E.6 will serve as a reference for the Copermittee and the San Diego Water Board to determine if consistent enforcement actions are being implemented to achieve timely and effective compliance from all public and private entities that are not in compliance with the Copermittee’s ordinances, permits, or other requirements. The Enforcement Response Plan must contain clear direction for the Copermittee to take immediate enforcement action, when appropriate and necessary, in their illicit discharge detection and elimination, development planning, construction management, and existing development management programs.

If the entities subject to the Copermittee’s legal authority do not implement appropriate corrective actions in a timely manner, or if violations repeat, the Copermittee must take progressively stricter responses to enforce its legal authority and achieve compliance with its ordinances, permits, or other requirements to “*effectively prohibit non-stormwater discharges*” and “*reduce the discharge of pollutants to the maximum extent practicable.*”

Provision E.7 (Public Education and Participation) requires each Copermittee to implement a public education and participation program. Proper implementation of the public education and participation program as part of its jurisdictional runoff management program will contribute toward effectively prohibiting non-storm water discharges to the MS4, and toward the reduction of pollutants in storm water from the MS4 to the MEP.

Provision E.7 establishes the minimum requirements that each Copermittee must implement to engage members of the public as part of its jurisdictional runoff management program. In the Fourth Term Permits, the public education program requirements and the public participation requirements were included as separate jurisdictional runoff management program components. In this Order, the public education requirements have been consolidated with the public participation requirements, as both sets of requirements are related to the engagement of the public



by each Copermittee. Engagement of the public is critical for the success of each Copermittee's jurisdictional runoff management program.

The Copermittees have been implementing public education programs for the last 20 years, which are now well established. The specificity of expected public education program elements of the Fourth Term Permits has been removed. For the most part, the public education program requirements in Provision E.7.a have been reduced to a set of requirements that are specifically included in the federal regulations under 40 CFR 122.26(d)(2)(iv)(A)(6), 122.26(d)(2)(B)(6) and 122.26(d)(2)(D)(4), which should already be incorporated into each Copermittee's existing public education program. Each Copermittee is expected to utilize the information and data collected from the monitoring and assessments conducted within the Watershed Management Area, and from its inventories and inspections to best direct its public education program resources toward addressing the highest priority water quality conditions identified within the Water Quality Improvement Plan.

According to 40 CFR 122.26(d)(2)(iv), public participation is required to be included as part of the "*comprehensive planning process*", which includes the development and implementation of the Water Quality Improvement Plan and jurisdictional runoff management programs. The requirements under Provision E.7.b specify the opportunities that the public must be provided to be involved in the "*comprehensive planning process*", as required by to 40 CFR 122.26(d)(2)(iv).

Provision E.8 (Fiscal Analysis) requires each Copermittee to secure the resources and provide an analysis of the resources that will be necessary to implement the requirements of the Order. Adequate fiscal resources are necessary for a jurisdictional runoff management program to effectively prohibit non-storm water discharges to the MS4, and reduce pollutants in storm water from the MS4 to the MEP.

According to 40 CFR 122.26(d)(2)(vi), each Copermittee is responsible for providing "*a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities*" required by this Order, including "*a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.*" The fiscal analysis requirements of Provision E.8 are consistent with 40 CFR 122.26(d)(2)(vi).

The San Diego Water Board has chosen not to require a description of fiscal benefits realized from implementation of the jurisdictional runoff management programs. This is a recommendation from the National Association of Flood and Stormwater Management Agencies.<sup>43</sup> For instance, the fiscal analysis requirements do not address city-wide fiscal benefits of protection (e.g., public health, tourism, property values, economic activity, beneficial uses, etc.), even though many costs currently

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<sup>43</sup> National Association of Flood and Stormwater Management Agencies. 2006. *Guidance for Municipal Stormwater Funding*. Prepared under a grant provided by the USEPA.

reported to the San Diego Water Board are for related activities. This type of assessment may help Copermittees improve the allocation of resources and it may help the Copermittees secure adequate funding for the program. Qualitative assessments, however, could be overly subjective and most Copermittees likely lack the ability to provide accurate quantitative assessments. The San Diego Water Board encourages the Copermittees to consider means for conducting assessments of fiscal benefits derived from the programs. Such assessments could be conducted on a regional scale similar to studies of program costs conducted by the State Water Board.<sup>44</sup>

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<sup>44</sup> State Water Board, 2005. NPDES Stormwater Cost Survey.

## F. Reporting

**Purpose:** Provision F includes the requirements for the documents and reports that the Copermittees must prepare and provide to the San Diego Water Board. The documents prepared by the Copermittees and provided to the San Diego Water Board and made available to the public will provide the documentation that the Copermittees are complying with the requirements of the Order.

**Discussion:** Provision F requires the Copermittees to prepare several documents and reports that must be provided to the San Diego Water Board and made available to the public. The reporting requirements have been significantly reduced compared to the Fourth Term Permit reporting requirements. The reduction in reporting requirements was recommended by the San Diego County Copermittees in the Report of Water Discharge submitted in June 2011.

More specific and detailed discussions of the requirements of Provision F are provided below.

Provision F.1 (Water Quality Improvement Plans) requires the Copermittees in each Watershed Management Area to develop and submit a Water Quality Improvement Plan in accordance with the requirements of Provision B.

Of all the requirements of Provision F, the Water Quality Improvement Plans will likely be the documents requiring the most significant effort to develop. The content of the Water Quality Improvement Plans, however, is expected to include content that should already have been developed for the Watershed Plans and several elements that are included in the Monitoring and Reporting Programs required under the Fourth Term Permits.

Because the Water Quality Improvement Plan is part of the “*comprehensive planning process which involves public participation*,” Provision F.1 includes requirements to give multiple opportunities to the public to provide input on the content of the plans.

Provision F.1.a.(1) specifies the elements that the Copermittees must include in the public participation process for the development of the Water Quality Improvement Plans. In order for the public to be aware of the opportunities to provide input, Provision F.1.a.(1)(a) requires the Copermittees to develop a publicly available and noticed schedule of the opportunities for the public to participate and provide comments during the development of the Water Quality Improvement Plan. These opportunities are when the public can provide the data, information, and recommendations that the Copermittees can consider during the development of the Water Quality Improvement Plans.

The San Diego Water Board recognizes, however, that the Copermittees cannot be expected to incorporate all the data, information, and recommendations that the public

may provide into the Water Quality Improvement Plans. The Copermittees will have to review the data, information, and recommendations received and make some decisions on what to incorporate into the Water Quality Improvement Plans. Before the Copermittees finalize their decisions, members of the public should be allowed to review the Copermittees' decisions. Thus, Provision [F.1.a.\(1\)\(b\)](#) requires the Copermittees to form a Water Quality Improvement Consultation Panel (Panel).

The Panel will consist of a member from the environmental community and a member from the development community familiar with the Watershed Management Area. A representative from the San Diego Water Board staff will also be part of the Panel. The Copermittees may choose to include additional members, but the Panel is only required to include three panel members.

The Panel will serve as an additional public participation and input mechanism during the development of the Water Quality Improvement Plans. The knowledge and expertise from these Panel members are expected to provide the Copermittees valuable direction during their decision-making process. The Copermittees will review the content of their planned submittals with the Panel members to receive recommendations. If the Panel provides recommendations, the Copermittees must consider revisions to the Water Quality Improvement Plan submittals.

The San Diego Water Board recognizes that the development of multiple Water Quality Improvement Plans concurrently may limit the ability of the public to review and provide comments to the Copermittees. Thus, Provision [F.1.a.\(1\)\(c\)](#) requires the Copermittees to coordinate the schedules for the public participation process among the Watershed Management Areas to provide the public time and opportunity to participate during the development of the Water Quality Improvement Plans.

Provision [F.1.a.\(2\)](#) requires the Copermittees to develop and submit the first Water Quality Improvement Plan component, in accordance with the requirements of Provision [B.2](#), which includes the identification of the priority water quality conditions and potential water quality improvement strategies. The public must be provided an opportunity to provide data, information and recommendations to be utilized in the development and identification of the priority water quality conditions and potential water quality improvement strategies for the Watershed Management Area. The Copermittees must consult with the Panel and consider making revisions. The Copermittees may submit the requirements of Provision [B.2](#) as early as 6 months and no later than 12 months after the commencement of coverage under this Order. After the requirements of Provision [B.2](#) are submitted to the San Diego Water Board, the public will be provided another opportunity to provide comments.

Provision [F.1.a.\(3\)](#) requires the Copermittees to develop and submit the second Water Quality Improvement Plan component, in accordance with the requirements of Provision [B.3](#), which includes the identification of the numeric goals for the highest priority water quality conditions identified for the Watershed Management Area, and the strategies that will be implemented to achieve the potential numeric goals. The

Copermittees may also develop the Optional Watershed Management Area Analysis, in accordance with the requirements of Provision [B.3.b.\(4\)](#), as part of this submittal. The public must be provided an opportunity to provide data, information and recommendations to be utilized in the development and identification of the numeric goals and water quality improvement strategies for the Watershed Management Area. The Copermittees must consult with the Panel and consider making revisions. The Copermittees may submit the requirements of Provision [B.3](#) as early as 9 months and no later than 18 months after the commencement of coverage under this Order. After the requirements of Provision [B.3](#) are submitted to the San Diego Water Board, the public will be provided another opportunity to provide comments.

Finally, Provision [F.1.b](#) describes the process for the submittal and implementation of the Water Quality Improvement Plans. The complete Water Quality Improvement Plans are required to be submitted by the Copermittees within 24 months after the commencement of coverage under this Order. The San Diego Water Board will provide the public an opportunity to provide comments on each complete Water Quality Improvement Plan.

The San Diego Water Board will review each Water Quality Improvement Plan and the public comments received to determine if the Copermittees have submitted a Water Quality Improvement Plan that meets the requirements of Provision [B](#). If a Water Quality Improvement Plan does not meet the requirements of Provision [B](#), the Copermittees will be considered out of compliance and directed in writing by the San Diego Water Board Executive Officer to correct the deficiencies.

When a Water Quality Improvement Plan meets the requirements of Provision [B](#), the San Diego Water Board will determine whether to hold a public hearing or to limit public input to submittal of written comments before accepting the Water Quality Improvement Plan. Implementation of the Water Quality Improvement Plan must begin within 30 days of acceptance.

The San Diego Water Board expects that any deficiencies in the Water Quality Improvement Plan will be identified either in the public comments or during the review by the San Diego Water Board before implementation begins. In the event any deficiencies are identified after the implementation of the Water Quality Improvement Plan, Provision [F.1.b.\(7\)](#) clarifies that the San Diego Water Board maintains the right to require the Copermittees to correct any deficiencies that may be identified.

Provision [F.2 \(Updates\)](#) requires the Copermittees to update specific documents that the Copermittees will utilize to implement the requirements of this Order.

Each Copermittee is required to continue implementing a jurisdictional runoff management program, as required under Provision [E](#). Implementation of each Copermittee's jurisdictional runoff management program is directed by its jurisdictional runoff management program document. Provision [F.2.a](#) requires each Copermittee to update its jurisdictional runoff management program document to be consistent with

the requirements of Provision E concurrent with the submittal of the Water Quality Improvement Plan.

Likewise, each Copermittee must continue to require new development and redevelopment projects to implement BMPs to control pollutants in storm water runoff. The control of pollutants in storm water runoff from development and redevelopment projects within each Copermittee's jurisdiction is guided and directed by its BMP Design Manual, formerly known as a Standard Storm Water Mitigation Plan (SSMP). Provision F.2.b requires each Copermittee to update its BMP Design Manual to be consistent with the requirements of Provision E.3 concurrent with the submittal of the Water Quality Improvement Plan.

In general, the requirements of the Order should not necessitate a complete rewrite of each Copermittee's jurisdictional runoff management program document or BMP Design Manual, as was required by the Third Term Permits. The jurisdictional runoff management program and BMP Design Manual requirements of this Order are not significantly different than the requirements of the Fourth Term Permits. Thus, only sections of the Order which are new or have been significantly changed should warrant revisions to specific sections of the Copermittee's jurisdictional runoff management program document and BMP Design Manual.

Finally, the Water Quality Improvement Plans are expected to require updates as the iterative approach and adaptive management process included in the Water Quality Improvement Plan, as required under Provision B.5, is implemented by the Copermittees. Provision F.2.c.(1) requires the Copermittees to implement a public participation process for the proposed updates, review the proposed updates with the Panel, and submit the updates to the Water Quality Improvement Plan as part of the Annual Reports required under Provision F.3.b.

Also, because TMDLs are likely to be developed, adopted and approved during the term of the Order, Provision F.2.c.(2) has been included to expedite the incorporation of TMDLs into the Copermittees' Water Quality Improvement Plans as part of the update process, potentially before the Order is re-opened to incorporated the requirements of the new TMDLs.

Provision F.3 (Progress Reporting) requires the Copermittees to report on the progress of implementing the Water Quality Improvement Plans.

The requirements of Provision F.3 are to report the progress toward improving water quality that the Copermittees are achieving with the implementation of the Water Quality Improvement Plans and each Copermittee's jurisdictional runoff management program. The Progress Report Presentations required under Provision F.3.a are included to provide the Copermittees an opportunity to communicate directly with the San Diego Water Board and the public. The Progress Report Presentations will also provide the members of the San Diego Water Board and members of the public an opportunity to become more acquainted with the Copermittees and their projects and

programs to address non-storm water and storm water discharges into and from their MS4s.

The Annual Report requirements of Provision [F.3.b](#) are a consolidation of several reporting requirements from the Fourth Term Permits, including the Jurisdictional Runoff Management Program Annual Reports, the Watershed Annual Reports, and the Monitoring and Reporting Program Annual Reports. Furthermore, the Annual Report requirements are consistent with the requirements under 40 CFR 122.42(c).

Pursuant to 40 CFR 122.42(c), “[t]he operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director...must submit an annual report”, which must include the following:

- (1) *The status of implementing the components of the storm water management program that are established as permit conditions [40 CFR 122.42(c)(1)];*
- (2) *Proposed changes to the storm water management programs that are established as permit conditions [40 CFR 122.42(c)(2)];*
- (3) *Revisions, if necessary, to the assessment of controls and fiscal analysis [40 CFR 122.42(c)(3)];*
- (4) *A summary of data, including monitoring data, that is accumulated throughout the reporting year [40 CFR 122.42(c)(4)];*
- (5) *Annual expenditures and budget for year following each annual report [40 CFR 122.42(c)(5)];*
- (6) *A summary describing the number and nature of enforcement actions, inspections, and public education programs [40 CFR 122.42(c)(6)];*
- (7) *Identification of water quality improvements or degradation [40 CFR 122.42(c)(7)].*

Under the Fourth Term Permits, each Copermittee is responsible for submitting a Jurisdictional Runoff Management Program Annual Report; the Copermittees in each designated watershed are responsible for submitting a Watershed Annual Report; and the Copermittees from each county are responsible for submitting a Monitoring and Reporting Program Annual Report.

There are 39 Copermittees in the San Diego Region, each required to prepare and submit a Jurisdictional Runoff Management Program Annual Report. There are 9 designated watersheds in San Diego County, 6 designated watersheds in Orange County, and 1 designated watershed in Riverside County for a total of 16 designated watersheds, each requiring a Watershed Annual Report. There are 3 sets of Copermittees in 3 counties in the San Diego Region, requiring Copermittees from each county to prepare and submit a Monitoring and Reporting Program Annual Report.

Thus each Copermittee is currently required to prepare, or participate in the preparation of at least 3 annual reports. In addition, the San Diego County Copermittees are required to prepare and submit a Regional Urban Runoff Management Plan Annual Report.

In total, there are 59 annual reports that are prepared by the Copermittees and submitted to the San Diego Water Board for the Fourth Term Permits. The preparation of these annual reports requires significant time and resources from each Copermittee, which could otherwise be expended on actions that could improve water quality within its jurisdiction. In turn, significant time and resources are required from the San Diego Water Board staff to review these reports, which could otherwise be expended on working directly with the Copermittees to improve their implementation efforts toward restoring and protecting water quality.

Until the Water Quality Improvement Plans are developed, there will be a transitional period during which the Copermittees will continue to implement their existing jurisdictional runoff management programs. There will also be a transitional period during which the Copermittees will implement the transitional monitoring and assessment requirements of Provision D. During the transitional period, the Copermittees will submit annual reports pursuant to the requirements of Provisions [F.3.b.\(1\)](#) and [F.3.b.\(2\)](#).

Provision [F.3.b.\(1\)](#) includes the transitional annual reporting requirements for each Copermittee's jurisdictional runoff management program. The reporting of the jurisdictional runoff management program implementation efforts have been reduced to a single 2-page form. Each Copermittee is required to complete and submit a Jurisdictional Runoff Management Program Annual Report Form (contained in [Attachment D](#) or a revised form accepted by the San Diego Water Board) no later than October 31 of each year for each jurisdictional runoff management program reporting period (i.e. July 1 to June 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted. The Jurisdictional Runoff Management Program Annual Report Form will certify that each Copermittee has implemented its jurisdictional runoff management program in accordance with the requirements of Provision E. Each Copermittee may choose to continue to utilize and submit the jurisdictional runoff management program annual reporting format of its current Order until the first Water Quality Improvement Plan Annual Report is required to be submitted.

Provision [F.3.b.\(2\)](#) includes the transitional annual reporting requirements for the transitional monitoring and assessment program for each Watershed Management Area. The Copermittees in the Watershed Management Area are required to submit a Transitional Monitoring and Assessment Program Annual Report no later than January 31 for each complete transitional monitoring and assessment program reporting period (i.e. October 1 to September 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted. The Transitional Monitoring and Assessment Program Annual Report is required to include



the transitional period monitoring data collected pursuant to Provisions [D.1.a](#) and [D.2.a](#), and the findings from the transitional period findings from the assessments required pursuant to Provisions [D.4.a.\(1\)\(a\)](#), [D.4.b.\(1\)\(a\)\(i\)](#), [D.4.b.\(2\)\(a\)\(i\)](#).

Provision [F.3.b.\(3\)](#) includes the Water Quality Improvement Plan Annual Report requirements. Only one Water Quality Improvement Plan Annual Report is required for each of the ten (10) Watershed Management Areas designated under Provision [B.1](#), which is a significant reduction in the number of annual reports required to be prepared and submitted by the Copermittees. The Water Quality Improvement Plan Annual Report will document the Copermittees' efforts to implement the Water Quality Improvement Plan. Each Water Quality Improvement Plan Annual Report will be focused primarily on reporting the analysis of the monitoring data collected pursuant to Provisions [D.1-D.3](#) during the reporting period, and the assessments that are required pursuant to Provision [D.4](#) based on the data. The monitoring data analyses and the assessments that are provided in the Water Quality Improvement Plan Annual Report will be the core of the report. The reporting of the jurisdictional runoff management program implementation efforts have been reduced to a single 2-page form, and will no longer be the primary focus of the reporting requirements as in the Third and Fourth Term Permits.

Each Copermittee will continue to prepare and submit a Jurisdictional Runoff Management Program Annual Report Form as part of the Water Quality Improvement Plan Annual Report to certify that each Copermittee has implemented its jurisdictional runoff management program in accordance with the requirements of Provision [E](#). Instead of reviewing a voluminous report from each Copermittee, as was required under the Third and Fourth Term Permits, the San Diego Water Board will conduct audits of each Copermittee's jurisdictional runoff management program to investigate and confirm the information provided by each Copermittee on its Jurisdictional Runoff Management Program Annual Report Form. The audits will allow the San Diego Water Board to become more familiar with the each Copermittee's jurisdictional runoff management program, and each Copermittee will become more informed about the expectations of the San Diego Water Board.

The reduction in the number and content of the Water Quality Improvement Plan Annual Reports should result in significant time, cost and resource savings for the Copermittees, as well as the San Diego Water Board. Those savings should offset a significant portion of any additional costs that may be incurred to develop the Water Quality Improvement Plans and to implement the monitoring and assessment program requirements of Provision [D](#).

The reporting period for the Water Quality Improvement Plan Annual Reports consists of two periods. Because the jurisdictional runoff management programs are typically budgeted and implemented during a fiscal year, the information provided on the Jurisdictional Runoff Management Program Annual Report Forms will cover the period from July 1 to June 30 of the following year.

The Water Quality Improvement Plan Annual Reports, however, are focused primarily on the monitoring data and the assessments based on the monitoring data. The monitoring data is collected during the monitoring year, which begins October 1 and ends September 30 of the following year. The monitoring year begins after the beginning of the fiscal year and ends after the end of the fiscal year. Therefore, to accommodate and capture the information collected during the fiscal year and the monitoring year, the Annual Report reporting period incorporates both periods.

Finally, Provision [F.3.c](#) requires the Copermittees to develop and submit a Regional Monitoring and Assessment Report. The Regional Monitoring and Assessment Report is similar to the Long Term Effectiveness Assessment required under the Fourth Term San Diego County Permit. The Regional Monitoring and Assessment Report is expected to utilize the entire body of data and information collected by the Copermittees during the term of this Order to assess improvements to water quality on a regional scale.

Provision F.4 (Regional Clearinghouse) requires the Copermittees to develop, update, and maintain an internet-based Regional Clearinghouse that can be used to store, disseminate, and share the Copermittees' documents, monitoring data, special studies, and any other data or information.

Most of the documents and data that are generated by the Copermittees can be provided in electronic format, and made available to the San Diego Water Board and the public on the internet. The San Diego Water Board has been gradually transitioning its document submittal requirements to electronic submittals. Provision [F.4](#) has been included to further these efforts.

Provision [F.4](#) has also been included to improve the exchange and availability of information among the Copermittees, as well as between the Copermittees and the San Diego Water Board. Provision [F.4](#) will also make the information generated during the implementation of the Order more accessible to the public.

Provision F.5 (Report of Waste Discharge) requires the Copermittees to submit a Report of Waste Discharge to reapply for renewal of the Order prior to its expiration, in accordance with 40 CFR 122.21(d)(2) and CWC section 13376.

Because the Orange County and Riverside County Copermittees will not be subject to the requirements of this Order until they are notified of coverage, Provision [F.5.a](#) describes the process of submitting their Reports of Waste Discharge pursuant to the requirements of their current permits to obtain coverage under this Order.

For the Copermittees subject to the requirements of this Order, Provision [F.5.b](#) requires the Copermittees to submit a Report of Waste Discharge 180 days in advance of the expiration of this Order. Provision [F.5.b](#) also describes the minimum information to be included in the Report of Waste Discharge, based on USEPA

guidance “Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems,” dated May 17, 1996.

Provision F.6 (Application for Early Coverage) describes the process that would allow the Orange County and/or Riverside County Copermittees to obtain coverage under this Order earlier than the expiration of their current Orders.

If the Orange County and/or Riverside County Copermittees choose to obtain coverage under this Order earlier than the expiration of their current Orders, the preparation and submittal of a Report of Waste Discharge, as required by the Fourth Term Permits, will not be necessary. The existing Order for the respective county will be rescinded upon the effective coverage date under this Order, except for enforcement purposes.

## **G. Principal Watershed Copermittee Responsibilities**

**Purpose:** Provision [G](#) includes the requirements for the Principal Watershed Copermittee designated by the Copermittees in each Watershed Management Area.

**Discussion:** Unlike previous NPDES requirements, there will no longer be a single Principal Copermittee. Provision [G.1](#) requires the Copermittees to designate a Principal Watershed Copermittee for each Watershed Management Area. There are ten (10) Watershed Management Areas in the San Diego Region, as defined in [Table B-1](#) under Provision [B.1](#) of the Order. An individual Copermittee should not be the Principal Watershed Copermittee for more than two (2) Watershed Management Areas. There could be up to ten (10) Principal Water Copermittees designated for the Watershed Management Areas in the San Diego Region.

Provision [G.2](#) describes the minimum responsibilities of each Principal Watershed Copermittee. The primary responsibility of the Principal Watershed Copermittees is to serve as the liaison between the Copermittees in the Watershed Management Area and the San Diego Water Board on general permit issues. Ideally, the Principal Watershed Copermittee can represent the interests of all the Copermittees within a Watershed Management Area during discussions or meetings to facilitate communication with the San Diego Water Board. The Principal Watershed Copermittees are also responsible for facilitating and coordinating the implementation efforts of the Copermittees and submittals of required documents and reports.

The Principal Watershed Copermittee is responsible for facilitating the efforts of the Copermittees within the Watershed Management Area to develop the Water Quality Improvement Plan required under Provision [B](#), and submit it for approval in accordance with Provision [F.1](#). The Principal Watershed Copermittee is also responsible for coordinating the submittal of the document updates, Progress Report Presentations, and Annual Reports required from the Copermittees within each Watershed Management Area under Provisions [F.2](#), [F.3.a](#), and [F.3.b](#). The Principal Watershed Copermittees are responsible for coordinating with each other to develop and submit the Regional Clearinghouse, Regional Monitoring and Assessment Report, and the Report of Waste Discharge required under Provisions [F.3.c](#), [F.4](#), and [F.5](#).

The designated Principal Watershed Copermittee for each Watershed Management Area does not necessarily have to serve as the Principal Watershed Copermittee for the entire term of the Order. If the Copermittees in a Watershed Management Area choose to designate a new Principal Watershed Copermittee, the change may be submitted as part of the Annual Report required under Provision [F.3.b](#), with an update to the Water Quality Improvement Plan in accordance with Provision [F.2.c](#).

Provision [G.3](#) specifies that the Principal Watershed Copermittee is not responsible for ensuring that the other Copermittees within the Watershed Management Area are in compliance with the requirements of this Order

## H. Modification of Order

**Purpose:** Provision H provides the conditions under which modifications to Order No. R9-2013-0001 may occur.

**Discussion:** Provision H allows for modifications to Order No. R9-2013-0001. Minor modifications may be made by the San Diego Water Board Executive Officer without a public notice or public hearing. Minor modifications are defined under 40 CFR 122.63. Minor modifications under 40 CFR 122.63 potentially applicable to this Order are the following:

- Correcting typographical errors;
- Requiring more frequent monitoring or reporting by the Copermittees;
- Changing an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement.

Modifications that are not one of the above minor modifications will require re-opening the Order, subject to the requirements of 40 CFR 122.44, 122.62 to 122.64, and 124.5, but only for the specific provisions subject to the modification. Modifications of the Order that are not minor require a draft Order with the proposed modifications made available for public review, a public notice and comment period, and a public hearing. Comments on the provisions not subject to the proposed modifications are not required to be considered in the San Diego Water Board's responses to comments or during the public hearing.

Provision H.4 was included to specify that the Order will be re-opened for modifications if the State Water Board determines revisions to Provision A are warranted, an application for early coverage under the Order is received pursuant to Provision F.6, the Basin Plan is amended to modify an existing TMDL or incorporate a new TMDL, or the monitoring and assessment program requirements need to be updated or revised.

Provision H.5 was included to specify that the San Diego Water Board will re-open and consider modifications to this Order when the Orange County Copermittees or the Riverside County Copermittees submit a complete Report of Waste Discharge pursuant to the requirements of their current Orders

## I. Standard Permit Provisions and General Provisions

**Purpose:** Provision I incorporates the standard permit provisions required to be included in all NPDES permits, as well as several other general provisions.

**Discussion:** Provision I refers to Attachment B to the Order. Attachment B expressly incorporates the conditions applicable to all NPDES permits as provided under 40 CFR 122.41(a)-(n), as well as the applicable conditions for MS4s and storm water discharges provided under 40 CFR 122.42(c) and 40 CFR 122.42(d), respectively. Attachment B also includes several general provisions that are typically included in or applicable to waste discharge requirements issued by the San Diego Water Board.

## IX. ATTACHMENTS

The attachments to the Order are discussed below. The discussions describe the content of the attachments.

### **Attachment A – Discharge Prohibitions and Special Protections**

Section 1 of [Attachment A](#) includes the Waste Discharge Prohibitions from the Basin Plan. They have been provided verbatim in their entirety.

Section 2 of [Attachment A](#) includes the “*Special Protections for Areas of Special Biological Significance, Governing Point Source Discharges of Storm Water and Nonpoint Source Waste Discharges*” applicable to permitted point source discharges of storm water, adopted under State Water Board Resolution No. 2012-0012. The terms, prohibitions, and special conditions (collectively referred to as special conditions) are established as limitations on point source storm water discharges. These special conditions provide Special Protections for marine aquatic life and natural water quality in ASBS, as required for State Water Quality Protection Areas pursuant to California Public Resources Code sections 36700(f) and 36710(f). These Special Protections were adopted by the State Water Board as part of the Ocean Plan General Exception.

## **Attachment B – Standard Permit Provisions and General Provisions**

Conditions applicable to all NPDES permits, as required under 40 CFR 122.41, and conditions applicable to MS4s and storm water discharges, as required under 40 CFR 122.42(c) and 122.42(d), respectively are provided in [Attachment B](#) to the Order. They have been provided expressly in their entirety.

In addition to the standard provisions required to be incorporated into the Order and NPDES permit pursuant to 40 CFR 122.41 and 40 CFR 122.42, several other general provisions apply to this Order. These general provisions are typically included in or applicable to waste discharge requirements issued by the San Diego Water Board. Many of the general provisions were developed by the State Water Board. Where a general provision is derived from statute or regulation, a citation of the statute or regulation section is provided. General provisions that do not provide a citation are included under the authority provided CWC 13377.



## **Attachment C – Acronyms, Abbreviations and Definitions**

The acronyms and abbreviations that are used in the Order are provided in [Attachment C](#). [Attachment C](#) also includes definitions that may provide an explanation or description of the meaning or intent of specific terms or phrases included in the Order.

## Attachment D – Jurisdictional Runoff Management Program Annual Report Form

An example of the Jurisdictional Runoff Management Program Annual Report Form required to be submitted by each Copermittee as part of the Annual Reports required under Provision [F.3.b.\(1\)\(e\)](#) is provided as [Attachment D](#) to the Order. An electronic version of the form will be available from the San Diego Water Board after the adoption of the Order.

The Jurisdictional Runoff Management Program Annual Report Form includes the minimum information necessary to demonstrate that the Copermittee is implementing and in compliance with the requirements of Provision [E](#), and includes much of the information required to be reported pursuant to 40 CFR 122.42(c).

The information that must be provided on the Jurisdictional Runoff Management Program Annual Report Form is limited to the fiscal year, which begins July 1 and ends June 30 of the following year. The information expected to be provided by the Copermittees in each section of the Jurisdictional Runoff Management Program Annual Report Form is discussed below.

### I. COPERMITTEE INFORMATION

The name of the Copermittee (e.g. name of city, county, or special district) and the contact information for the storm water program manager are provided under this section.

### II. LEGAL AUTHORITY

The Copermittee must confirm whether or not the legal authorities under Provision [E.1.a](#) have been established for itself within its jurisdiction.

The Copermittee must also confirm whether or not a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative has certified that the Copermittee obtained and maintains adequate legal authority, as required under Provision [E.1.b](#). The certification statement required by Provision [E.1.b](#) is only required to be submitted with the first Annual Report required under Provision [F.3.b](#).

### III. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM DOCUMENT UPDATE

The Copermittee must inform the San Diego Water Board whether or not an update to its jurisdictional runoff management program document was required or recommended by the San Diego Water Board during the reporting period. An update to the jurisdictional runoff management program is required under Provision [F.2.a](#). The San Diego Water Board may recommend modifications to the jurisdictional runoff management program as part of the iterative approach and adaptive management process required under Provision [B.5](#), which may result in an update that is necessary for the Copermittee's jurisdictional runoff management document.

If an update was required or recommended, the Copermittee must confirm whether or not the update was completed and made available on the Regional Clearinghouse within the reporting period. If no update was required or recommended, an answer is not required. If the answer is NO, meaning the required or recommended update was not completed and/or made available on the Regional Clearinghouse, the Copermittee must attach a schedule for the completion of the update and/or posting of the updated document on the Regional Clearinghouse.

#### IV. ILLICIT DISCHARGE DETECTION AND ELIMINATION PROGRAM

The Copermittee must confirm whether or not a program was implemented during the fiscal year to actively detect and eliminate illicit discharges and connections in accordance with the requirements under Provision [E.2](#).

In addition to confirming that a program to detect and eliminate illicit discharges was implemented during the reporting period, the Copermittee is also required to report on several items related to the program. The information that must be reported is limited to the fiscal year for the Annual Report.

All non-storm water discharges are considered illicit discharges unless the source is identified as one of the categories on non-storm water discharges under Provisions [E.2.a.\(1\)-\(5\)](#). If a non-storm water discharge is identified as one of the categories on non-storm water discharges under Provisions [E.2.a.\(1\)-\(5\)](#), the discharge is a non-storm water discharge, but not an illicit discharge. If a non-storm water discharge is identified but not in one of the categories on non-storm water discharges under Provisions [E.2.a.\(1\)-\(5\)](#), the discharge is both a non-storm water discharge and an illicit discharge.

#### V. DEVELOPMENT PLANNING PROGRAM

The Copermittee must confirm whether or not a development planning program was implemented during the fiscal year in accordance with the requirements under Provision [E.3](#).

The Copermittee must also inform the San Diego Water Board whether or not an update to its BMP Design Manual was required or recommended by the San Diego Water Board during the fiscal year. An update to the BMP Design Manual is required under Provision [F.2.b](#). The San Diego Water Board may recommend modifications to the BMP Design Manual, which may result in an update that is necessary for Copermittee's the BMP Design Manual.

If an update was required or recommended, the Copermittee must confirm whether or not the update was completed and made available on the Regional Clearinghouse within the reporting period. If no update was required or recommended, an answer is not required. If the answer is NO, meaning the required or recommended update was not completed and/or made available on the Regional Clearinghouse, the Copermittee must attach a schedule for the completion of the update and/or posting of the updated document on the Regional Clearinghouse.

The Copermittee is also required to report on several items related to the program. For the development and redevelopment projects that are reviewed under the program, the Copermittee must report the total number projects submitted for review during the fiscal year. Of those projects, the Copermittee must report the number that are Priority Development Projects, as defined under Provision [E.3.b.\(1\)](#). The Copermittee must also report the number of Priority Development Projects that were approved and/or granted occupancy during the fiscal year, regardless of when the project was originally submitted for review. Any projects that were approved during the fiscal year and granted any exemptions from the BMP Design Manual requirements and/or allowed to implement alternative compliance options in accordance with Provision [E.3.c.\(3\)](#) must be reported.

Finally, the Copermittee must also report on several items related to its oversight of permanent BMPs on Priority Development Projects within its jurisdiction, as required under Provision [E.3.e](#). The information that must be reported is limited to the fiscal year for the Annual Report.

#### VI. CONSTRUCTION MANAGEMENT PROGRAM

The Copermittee must confirm whether or not a construction management program was implemented during the fiscal year in accordance with the requirements under Provision [E.4](#).

The Copermittee is also required to report on several items related to its oversight construction projects within its jurisdiction. The information that must be reported is limited to the fiscal year for the Annual Report.

#### VII. EXISTING DEVELOPMENT MANAGEMENT PROGRAM

The Copermittee must confirm whether or not an existing development management program was implemented during the fiscal year in accordance with the requirements under Provision [E.5](#).

The Copermittee is also required to report on several items related to its oversight in areas of existing development within its jurisdiction. The information that must be reported is limited to the fiscal year for the Annual Report. The information must also be separated into four categories of existing development: municipal, commercial, industrial, and residential.

#### VIII. PUBLIC EDUCATION AND PARTICIPATION

The Copermittee must confirm whether or not a public education program component was implemented during the fiscal year in accordance with the requirements under Provision [E.7.a](#).

The Copermittee must also confirm whether or not a public participation program component was implemented during the fiscal year in accordance with the requirements under Provision [E.7.b](#).

#### IX. FISCAL ANALYSIS

The Copermittee must confirm a summary of its fiscal analysis, conducted in accordance with the requirements under Provision [E.8](#), has been attached to the form.

#### X. CERTIFICATION

A Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative must sign and certify the Jurisdictional Runoff Management Program Annual Report Form. The appropriate box must be checked to indicate the whether a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative is signing the form.

## Attachment E – Specific Provisions for Total Maximum Daily Loads Applicable to Order No. R9-2013-0001

[Attachment E](#) provides specific provisions for implementing the load allocations (LAs) and wasteload allocations (WLAs) of Total Maximum Daily Loads (TMDLs) adopted by the San Diego Water Board and approved by USEPA in which the Copermitttees are identified as responsible for discharges subject to the requirements of the TMDLs. Federal regulations require that NPDES requirements incorporate water quality based effluent limitations (WQBELs) that must be consistent with the requirements and assumptions of any available WLAs,<sup>45</sup> which may be expressed as numeric effluent limitations, when feasible, and/or as a best management practice (BMP) program of expanded or better-tailored BMPs.<sup>46</sup> Where the TMDL includes WLAs that provide numeric pollutant load or pollutant parameter objectives, the WLA has been, where feasible, translated into numeric WQBELs.<sup>47</sup>

For each TMDL in [Attachment E](#), four sections are included:

- a. **Applicability**: This section provides the resolution under which the TMDL Basin Plan amendment was adopted and approved, with the applicable adoption and approval dates. This section also gives the effective date of the TMDL and where the TMDL is applicable (i.e. Watershed Management Area and water body). The Copermitttees that are responsible for implementing the specific provisions are also given in this section.
- b. **Final TMDL Compliance Requirements**: For each TMDL, the final TMDL compliance requirements consist of the final TMDL compliance date(s), the final WQBELs, and the final TMDL compliance determination requirements. The final WQBELs are expressed in terms of receiving water limitations, effluent limitations, and/or best management practices (BMPs). The final WQBELs for the TMDLs are incorporated by reference into Provision [A](#) of the Order. The final WQBELs become enforceable when the final TMDL compliance dates have passed. Applicable BMPs within the final WQBELs must be incorporated into the Water Quality Improvement Plans. Compliance with the final WQBELs will be determined in accordance with the options provided under the final TMDL compliance determination requirements.
- c. **Interim TMDL Compliance Requirements**: If the final TMDL compliance date has not passed and there are interim TMDL compliance requirements, they are included in this section. If there are interim WQBELs with interim compliance dates, the interim WQBELs become enforceable when the corresponding interim compliance dates have passed. Compliance with the interim WQBELs will be determined in accordance with the options provided under the interim TMDL compliance determination requirements.
- d. **Specific Monitoring and Assessment Requirements**: If there are specific monitoring and assessment requirements that cannot be met with the monitoring and assessment program

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<sup>45</sup> 40 CFR 122.44(d)(1)(vii)(B)

<sup>46</sup> 40 CFR 122.44(k)(2) and 40 CFR 122.44(k)(3)

<sup>47</sup> November 12, 2010 Memorandum from the USEPA, Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLA"

requirements under Provision [D](#) of the Order, the additional requirements are included in this section.

The requirements of the TMDLs are based on and consistent with the assumptions and requirements of any available adopted and approved TMDLs that have been incorporated into the Basin Plan. Modifications to the requirements for the TMDLs in [Attachment E](#) cannot be made unless the TMDLs are modified in the Basin Plan.

A modification to any aspect of a TMDL in the Basin Plan requires a Basin Plan amendment. A Basin Plan amendment to modify a TMDL will require the San Diego Water Board to adopt a resolution to amend the Basin Plan, which includes a separate public process. When the San Diego Water Board adopts a Basin Plan amendment, it subsequently requires approval from the State Water Board, the Office of Administrative Law, and the USEPA before it becomes effective.

If and when the TMDLs are modified in the Basin Plan, the San Diego Water Board will revise the requirements of the TMDL in accordance with the Basin Plan amendment. When a Basin Plan amendment to modify a TMDL becomes effective, the San Diego Water Board will modify the requirements of the TMDL pursuant to the requirements of Provision [H.4](#) of the Order as soon as possible.

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION  
ORDER NO. R9-2007-0001  
NPDES NO. CAS0108758  
WASTE DISCHARGE REQUIREMENTS  
FOR DISCHARGES OF URBAN RUNOFF FROM  
THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s)  
DRAINING THE WATERSHEDS OF THE COUNTY OF SAN DIEGO,  
THE INCORPORATED CITIES OF SAN DIEGO COUNTY,  
THE SAN DIEGO UNIFIED PORT DISTRICT,  
AND THE SAN DIEGO COUNTY REGIONAL AIRPORT AUTHORITY**

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Attachment A – Basin Plan Prohibitions

Attachment B – Standard Provisions, Reporting Requirements, and Notifications

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Attachment D – Scheduled Submittal Summary

RECEIVING WATERS AND URBAN RUNOFF MONITORING AND REPORTING  
PROGRAM NO. R9-2007-0001

The California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board), finds that:

#### A. BASIS FOR THE ORDER

1. This Order is based on the federal Clean Water Act (CWA), the Porter-Cologne Water Quality Control Act (Division 7 of the Water Code, commencing with Section 13000), applicable state and federal regulations, all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Resources Control Board (SWRCB), the Water Quality Control Plan for the San Diego Basin adopted by the Regional Board, the California Toxics Rule, and the California Toxics Rule Implementation Plan.
2. 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.

#### B. REGULATED PARTIES

1. Each of the persons in Table 1 below, hereinafter called Copermittees or dischargers, owns or operates a municipal separate storm sewer system (MS4), through which it discharges urban runoff into waters of the United States within the San Diego Region. These MS4s fall into one or more of the following categories: (1) a medium or large MS4 that services a population of greater than 100,000 or 250,000 respectively; or (2) a small MS4 that is “interrelated” to a medium or large MS4; or (3) an MS4 which contributes to a violation of a water quality standard; or (4) an MS4 which is a significant contributor of pollutants to waters of the United States.

Table 1. Municipal Copermittees

1. City of Carlsbad	12. City of Oceanside
2. City of Chula Vista	13. City of Poway
3. City of Coronado	14. City of San Diego
4. City of Del Mar	15. City of San Marcos
5. City of El Cajon	16. City of Santee
6. City of Encinitas	17. City of Solana Beach
7. City of Escondido	18. City of Vista
8. City of Imperial Beach	19. County of San Diego
9. City of La Mesa	20. San Diego Unified Port District
10. City of Lemon Grove	21. San Diego County Regional
11. City of National City	Airport Authority

#### C. DISCHARGE CHARACTERISTICS

1. Urban runoff contains waste, as defined in the California Water Code (CWC), and pollutants that adversely affect the quality of the waters of the State. The discharge of urban runoff from an MS4 is a “discharge of pollutants from a point source” into waters of the U.S. as defined in the CWA.
2. The most common categories of pollutants in urban runoff include total suspended solids, sediment (due to anthropogenic activities); pathogens (e.g., bacteria, viruses, protozoa);



heavy metals (e.g., copper, lead, zinc and cadmium); petroleum products and polynuclear aromatic hydrocarbons; synthetic organics (e.g., pesticides, herbicides, and PCBs); nutrients (e.g., nitrogen and phosphorus fertilizers), oxygen-demanding substances (decaying vegetation, animal waste), and trash.

3. The discharge of pollutants and/or increased flows from MS4s may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives and impair or threaten to impair designated beneficial uses resulting in a condition of pollution (i.e., unreasonable impairment of water quality for designated beneficial uses), contamination, or nuisance.
4. Pollutants in urban runoff can threaten human health. Human illnesses have been clearly linked to recreating near storm drains flowing to coastal waters. Also, urban runoff pollutants in receiving waters can bioaccumulate in the tissues of invertebrates and fish, which may be eventually consumed by humans.
5. Urban runoff discharges from MS4s often contain pollutants that cause toxicity to aquatic organisms (i.e., adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). Toxic pollutants impact the overall quality of aquatic systems and beneficial uses of receiving waters.
6. The Copermittees discharge urban runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within ten of the eleven hydrologic units (watersheds) comprising the San Diego Region as shown in Table 2 below. Some of the receiving water bodies have been designated as impaired by the Regional Board and the United States Environmental Protection Agency (USEPA) in 2002 pursuant to CWA section 303(d). Also shown below are the watershed management areas (WMAs) as defined in the Regional Board report, Watershed Management Approach, January 2002.

Table 2. Common Watersheds and CWA Section 303(d) Impaired Waters

REGIONAL BOARD WATERSHED MANAGEMENT AREA (WMA)	HYDROLOGIC UNIT(S)	MAJOR SURFACE WATER BODIES	303(d) POLLUTANT(S) OF CONCERN OR WATER QUALITY EFFECT <sup>1</sup>	COPERMITTEES
Santa Margarita River	Santa Margarita (902.00)	Santa Margarita River and Estuary, Pacific Ocean	1. Eutrophic 2. Nitrogen 3. Phosphorus 4. Total Dissolved Solids	1. County of San Diego
San Luis Rey River	San Luis Rey (903.00)	San Luis Rey River and Estuary, Pacific Ocean	1. Bacterial Indicators 2. Eutrophic 3. Chloride 4. Total Dissolved Solids	1. City of Escondido 2. City of Oceanside 3. City of Vista 4. County of San Diego
Carlsbad	Carlsbad (904.00)	Batiquitos Lagoon San Elijo Lagoon Agua Hedionda Lagoon Buena Vista Lagoon And Tributary Streams Pacific Ocean	1. Bacterial Indicators 2. Eutrophic 3. Sedimentation/Siltation 4. Nutrients 5. Total Dissolved Solids	1. City of Carlsbad 2. City of Encinitas 3. City of Escondido 4. City of Oceanside 5. City of San Marcos 6. City of Solana Beach 7. City of Vista 8. County of San Diego

<sup>1</sup> The listed 303(d) pollutant(s) of concern do not necessarily reflect impairment of the entire corresponding WMA or all corresponding major surface water bodies. The specific impaired portions of each WMA are listed in the State Water Resources Control Board's 2002 Section 303(d) List of Water Quality Limited Segments.

REGIONAL BOARD WATERSHED MANAGEMENT AREA (WMA)	HYDROLOGIC UNIT(S)	MAJOR SURFACE WATER BODIES	303(d) POLLUTANT(S) OF CONCERN OR WATER QUALITY EFFECT <sup>1</sup>	COPERMITTEES
San Dieguito River	San Dieguito (905.00)	San Dieguito River and Estuary, Pacific Ocean	1. Bacterial Indicators 2. Sulfate 3. Color 4. Nitrogen 5. Phosphorus 6. Total Dissolved Solids	1. City of Del Mar 2. City of Escondido 3. City of Poway 4. City of San Diego 5. City of Solana Beach 6. County of San Diego
Mission Bay	Peñasquitos (906.00)	Los Peñasquitos Lagoon Mission Bay, Pacific Ocean	1. Bacterial Indicators 2. Metals 3. Eutrophic 4. Sedimentation/Siltation 5. Toxicity	1. City of Del Mar 2. City of Poway 3. City of San Diego 4. County of San Diego
San Diego River	San Diego (907.00)	San Diego River, Pacific Ocean	1. Bacterial Indicators 2. Eutrophic 3. pH 4. Total Dissolved Solids 5. Oxygen (Dissolved)	1. City of El Cajon 2. City of La Mesa 3. City of Poway 4. City of San Diego 5. City of Santee 6. County of San Diego
San Diego Bay	Pueblo San Diego (908.00) Sweetwater (909.00) Otay (910.00)	San Diego Bay Sweetwater River Otay River Pacific Ocean	1. Bacterial Indicators 2. Metals 3. Sediment Toxicity 4. Benthic Community Degradation 5. Diazinon 6. Chlordane 7. Lindane 8. PAHs 9. PCBs	1. City of Chula Vista 2. City of Coronado 3. City of Imperial Beach 4. City of La Mesa 5. City of Lemon Grove 6. City of National City 7. City of San Diego 8. County of San Diego 9. San Diego Unified Port District 10. San Diego County Regional Airport Authority
Tijuana River	Tijuana (911.00)	Tijuana River and Estuary Pacific Ocean	1. Bacterial Indicators 2. Low Dissolved Oxygen 3. Metals 4. Eutrophic 5. Pesticides 6. Synthetic Organics 7. Trace Elements 8. Trash 9. Solids	1. City of Imperial Beach 2. City of San Diego 3. County of San Diego

7. The Copermittees' water quality monitoring data submitted to date documents persistent exceedances of Basin Plan water quality objectives for various urban runoff-related pollutants (diazinon, fecal coliform bacteria, total suspended solids, turbidity, metals, etc.) at various watershed monitoring stations. At some monitoring stations, such as Agua Hedionda, statistically significant upward trends in pollutant concentrations have been observed. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicates that the majority of watersheds have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that urban runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in San Diego County.
  
8. When natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost. Therefore, runoff leaving a developed urban area is significantly greater in runoff volume, velocity, and peak flow rate than pre-development runoff from the same area. Runoff durations can also increase as a result of flood control and other efforts to control peak flow rates. Increased volume, velocity, rate, and duration of runoff greatly accelerate the erosion of downstream natural channels. Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur

with as little as a 10% conversion from natural to impervious surfaces. The increased runoff characteristics from new development must be controlled to protect against increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

9. Urban development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. which can either be washed or directly dumped into the MS4. As a result, the runoff leaving the developed urban area is significantly greater in pollutant load than the pre-development runoff from the same area. These increased pollutant loads must be controlled to protect downstream receiving water quality.
10. Development and urbanization especially threaten environmentally sensitive areas (ESAs), such as water bodies designated as supporting a RARE beneficial use (supporting rare, threatened or endangered species) and CWA 303(d) impaired water bodies. Such areas have a much lower capacity to withstand pollutant shocks than might be acceptable in the general circumstance. In essence, development that is ordinarily insignificant in its impact on the environment may become significant in a particular sensitive environment. Therefore, additional control to reduce pollutants from new and existing development may be necessary for areas adjacent to or discharging directly to an ESA.
11. Although dependent on several factors, the risks typically associated with properly managed infiltration of runoff (especially from residential land use areas) are not significant. The risks associated with infiltration can be managed by many techniques, including (1) designing landscape drainage features that promote infiltration of runoff, but do not “inject” runoff (injection bypasses the natural processes of filtering and transformation that occur in the soil); (2) taking reasonable steps to prevent the illegal disposal of wastes; (3) protecting footings and foundations; and (4) ensuring that each drainage feature is adequately maintained in perpetuity.

## **D. URBAN RUNOFF MANAGEMENT PROGRAMS**

### **1. General**

- a. This Order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP). However, since MEP is a dynamic performance standard which evolves over time as urban runoff management knowledge increases, the Copermittees’ urban runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc. in order to achieve the evolving MEP standard. Absent evidence to the contrary, this continual assessment, revision, and improvement of urban runoff management program implementation is expected to ultimately achieve compliance with water quality standards.
- b. Although the Copermittees have generally been implementing the jurisdictional urban runoff management programs required pursuant to Order No. 2001-01 since February 21, 2002, urban runoff discharges continue to cause or contribute to violations of water quality standards. 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. Some of the new or modified requirements, such as the expanded Watershed Urban Runoff Management Program section, are designed to specifically address these high priority water quality problems. Other new or modified requirements address program deficiencies that have been noted during audits, report reviews, and other Regional Board compliance assessment activities.

- c. Updated Jurisdictional Urban Runoff Management Plans (JURMPs) and Watershed Urban Runoff Management Plans (WURMPs), and a new Regional Urban Runoff Management Plan (RURMP), which describe the Copermittees' urban runoff management programs in their entirety, are needed to guide the Copermittees' urban runoff management efforts and aid the Copermittees in tracking urban runoff management program implementation. It is practicable for the Copermittees to update the JURMPs and WURMPs, and create the RURMP, within one year, since significant efforts to develop these programs have already occurred.
- d. Pollutants can be effectively reduced in urban runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Pollution prevention is the reduction or elimination of pollutant generation at its source and is the best "first line of defense". Source control BMPs (both structural and non-structural) minimize the contact between pollutants and flows (e.g., rerouting run-on around pollutant sources or keeping pollutants on-site and out of receiving waters). Treatment control BMPs remove pollutants from urban runoff.
- e. Urban runoff needs to be addressed during the three major phases of development (planning, construction, and use) in order to reduce the discharge of pollutants to the MEP and protect receiving waters. Development which is not guided by water quality planning policies and principles can unnecessarily result in increased pollutant load discharges, flow rates, and flow durations which can impact receiving water beneficial uses. Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. Existing development generates substantial pollutant loads which are discharged in urban runoff to receiving waters.
- f. Annual reporting requirements included in this Order are necessary to meet federal requirements and to evaluate the effectiveness and compliance of the Copermittees' programs.

## **2. Development Planning**

- a. The Standard Urban Storm Water Mitigation Plan (SUSMP) requirements contained in this Order are consistent with Order WQ-2000-11 adopted by the SWRCB on October 5, 2000. In the precedential order, the SWRCB found that the design standards, which essentially require that urban runoff generated by 85 percent of storm events from specific development categories be infiltrated or treated, reflect the MEP standard. The order also found that the SUSMP requirements are appropriately applied to the majority of the Priority Development Project categories contained in Section D.1 of this Order. The SWRCB also gave Regional Water Quality Control Boards the discretion to include additional categories and locations, such as retail gasoline outlets (RGOs), in future SUSMPs.

- b. Controlling urban runoff pollution by using a combination of onsite source control and Low Impact Development (LID) BMPs augmented with treatment control BMPs before the runoff enters the MS4 is important for the following reasons: (1) Many end-of-pipe BMPs (such as diversion to the sanitary sewer) are typically ineffective during significant storm events. Whereas, onsite source control BMPs can be applied during all runoff conditions; (2) End-of-pipe BMPs are often incapable of capturing and treating the wide range of pollutants which can be generated on a sub-watershed scale; (3) End-of-pipe BMPs are more effective when used as polishing BMPs, rather than the sole BMP to be implemented; (4) End-of-pipe BMPs do not protect the quality or beneficial uses of receiving waters between the source and the BMP; and (5) Offsite end-of-pipe BMPs do not aid in the effort to educate the public regarding sources of pollution and their prevention.
- c. Use of LID BMPs at new development projects can be an effective means for minimizing the impact of urban runoff discharges from the development projects on receiving waters. LID BMPs help preserve and restore the natural hydrologic cycle of the site, allowing for filtration and infiltration which can greatly reduce the volume, peak flow rate, velocity, and pollutant loads of urban runoff.
- d. Retail Gasoline Outlets (RGOs) are significant sources of pollutants in urban runoff. RGOs are points of convergence for motor vehicles for automotive related services such as repair, refueling, tire inflation, and radiator fill-up and consequently produce significantly higher loadings of hydrocarbons and trace metals (including copper and zinc) than other urban areas. To meet MEP, LID, source control, and treatment control BMPs are needed at 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. These are appropriate thresholds since vehicular development size and volume of traffic are good indicators of potential impacts of urban runoff from RGOs on receiving waters.
- e. Sites of heavy industry are significant sources of pollutants in urban runoff. Pollutant concentrations and loads in runoff from industrial sites are similar or exceed pollutant concentrations and loads in runoff from other land uses, such as commercial or residential land uses. As with other land uses, LID, source control, and treatment control BMPs are needed at sites of heavy industry in order to meet the MEP standard. These BMPs are necessary where the site of heavy industry is larger than one acre. The one acre threshold is appropriate, since it is consistent with requirements in the Phase II NPDES storm water regulations.
- f. If not properly designed or maintained, certain BMPs implemented or required by municipalities for urban runoff management may create a habitat for vectors (e.g. mosquitoes and rodents). However, proper BMP design and maintenance can prevent the creation of vector habitat. Nuisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities and local vector control agencies and the State Department of Health Services during the development and implementation of urban runoff management programs.

### **3. Construction and Existing Development**

- a. In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from

industrial and construction sites are subject to dual (state and local) storm water regulation. Under this dual system, 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.

- b. Identification of sources of pollutants in urban runoff (such as municipal areas and activities, industrial and commercial sites/sources, construction sites, and residential areas), development and implementation of BMPs to address those sources, and updating ordinances and approval processes are necessary for the Copermittees to ensure that discharges of pollutants into and from its MS4 are reduced to the MEP. Inspections and other compliance verification methods are needed to ensure minimum BMPs are implemented. Inspections are especially important at high risk areas for pollutant discharges.
- c. Historic and current development makes use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, man-made, or partially modified features. In these cases, the urban stream is both an MS4 and a receiving water.
- d. As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These discharges may cause or contribute to a condition of contamination or a violation of water quality standards.
- e. Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the U.S. unless they are removed or treated. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. For this reason, pollutant discharges into MS4s must be reduced to the MEP unless treatment within the MS4 occurs.
- f. Enforcement of local urban runoff related ordinances, permits, and plans is an essential component of every urban runoff management program and is specifically required in the federal storm water regulations and this Order. Each Copermittee is individually responsible for adoption and enforcement of ordinances and/or policies, implementation of identified control measures/BMPs needed to prevent or reduce pollutants in storm water runoff, and for the allocation of funds for the capital, operation and maintenance, administrative, and enforcement expenditures necessary to implement and enforce such control measures/BMPs under its jurisdiction.
- g. Education is an important aspect of every effective urban runoff management program and the basis for changes in behavior at a societal level. Education of municipal planning, inspection, and maintenance department staffs is especially critical to ensure that in-house staffs understand how their activities impact water

quality, how to accomplish their jobs while protecting water quality, and their specific roles and responsibilities for compliance with this Order. Public education, designed to target various urban land users and other audiences, is also essential to inform the public of how individual actions impact receiving water quality and how these impacts can be minimized.

- h. Public participation during the development of urban runoff management programs is necessary to ensure that all stakeholder interests and a variety of creative solutions are considered.

#### **4. Watershed and Regional Urban Runoff Management**

- a. Since urban runoff does not recognize political boundaries, watershed-based urban runoff management can greatly enhance the protection of receiving waters within a watershed. Such management provides a means to focus on the most important water quality problems in each watershed. By focusing on the most important water quality problems, watershed efforts can maximize protection of beneficial use in an efficient manner. Effective watershed-based urban runoff management actively reduces pollutant discharges and abates pollutant sources causing or contributing to watershed water quality problems; watershed-based urban runoff management that does not actively reduce pollutant discharges and abate pollutant sources causing or contributing to watershed water quality problems can necessitate implementation of the iterative process outlined in section A.3 of the Order. Watershed management of urban runoff does not require Copermittees to expend resources outside of their jurisdictions. Watershed management requires the Copermittees within a watershed to develop a watershed-based management strategy, which can then be implemented on a jurisdictional basis.
- b. Some urban runoff issues, such as residential education, can be effectively addressed on a regional basis. Regional approaches to urban runoff management can improve program consistency and promote sharing of resources, which can result in implementation of more efficient programs.
- c. Both regionally and on a watershed basis, it is important for the Copermittees to coordinate their water quality protection and land use planning activities to achieve the greatest protection of receiving water bodies. Copermittee coordination with other watershed stakeholders, especially Caltrans, the Department of Defense, and Native American Tribes, is also important. Establishment of a management structure, within which the Copermittees subject to this Order will fund and coordinate those aspects of their joint obligations, will help promote implementation of urban runoff management programs on a watershed and regional basis in a most cost effective manner.

#### **E. STATUTE AND REGULATORY CONSIDERATIONS**

1. The Receiving Water Limitations (RWL) language specified in this Order is consistent with language recommended by the USEPA and established in SWRCB Water Quality Order 99-05, adopted by the SWRCB on June 17, 1999. The RWL in this Order require compliance with water quality standards, which is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time. Compliance with receiving water limits based on applicable water quality standards is necessary to ensure that MS4 discharges will not cause or contribute to violations of water quality standards and the

creation of conditions of pollution.

2. The Water Quality Control Plan for the San Diego Basin (Basin Plan), identifies the following beneficial uses for surface waters in San Diego County: Municipal and Domestic Supply (MUN), Agricultural Supply (AGR), Industrial Process Supply (PROC), Industrial Service Supply (IND), Ground Water Recharge (GWR), Contact Water Recreation (REC1) Non-contact Water Recreation (REC2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Rare, Threatened, or Endangered Species (RARE), Freshwater Replenishment (FRSH), Hydropower Generation (POW), and Preservation of Biological Habitats of Special Significance (BIOL). The following additional beneficial uses are identified for coastal waters of San Diego County: Navigation (NAV), Commercial and Sport Fishing (COMM), Estuarine Habitat (EST), Marine Habitat (MAR), Aquaculture (AQUA), Migration of Aquatic Organisms (MIGR), Spawning, Reproduction, and/or Early Development (SPWN), and Shellfish Harvesting (SHELL).
3. This Order is in conformance with SWRCB Resolution No. 68-16 and the federal Antidegradation Policy described in 40 CFR 131.12.
4. Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This NPDES permit addresses the management measures required for the urban category, with the exception of septic systems. The adoption and implementation of this NPDES permit relieves the Permittee 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 shall identify those waters within its boundaries for which the effluent limitations...are not stringent enough to implement any water quality standard (WQS) applicable to such waters.” The CWA also requires states to establish a priority ranking of impaired waterbodies known as Water Quality Limited Segments and to establish Total Maximum Daily Loads (TMDLs) for such waters. This priority list of impaired waterbodies is called the Section 303(d) List. The current Section 303(d) List was approved by the SWRCB on February 4, 2003 and on July 25, 2003 by USEPA.
6. This Order fulfills a component of the TMDL Implementation Plan adopted by this Regional Board on August 14, 2002 for diazinon in Chollas Creek by establishing Water Quality Based Effluent Limits (WQBELs) for the Cities of San Diego, Lemon Grove, and La Mesa, the County of San Diego, and the San Diego Unified Port District; and by requiring: 1) legal authority, 2) implementation of a diazinon toxicity control plan and a diazinon public outreach/ education program, 3) achievement of the Compliance Schedule, and 4) a monitoring program. The establishment of WQBELs expressed as iterative BMPs to achieve the Waste Load Allocation (WLA) compliance schedule is appropriate and is expected to be sufficient to achieve the WLAs specified in the TMDL.
7. This Order fulfills a component of the TMDL Implementation Plan adopted by this Regional Board on February 9, 2005 for dissolved copper in Shelter Island Yacht Basin (SIYB) by establishing WQBELs expressed as BMPs to achieve the WLA of 30 kg copper / year for the City of San Diego and the San Diego Unified Port District. The establishment of WQBELs expressed as BMPs is appropriate and is expected to be sufficient to achieve the WLA



specified in the TMDL.

8. This Order establishes WQBELs and conditions consistent with the requirements and assumptions of the WLAs in the TMDLs as required by 40 CFR 122.44(d)(1)(vii)(B).
9. Requirements in this Order that are more explicit than the federal storm water regulations in 40 CFR 122.26 are prescribed in accordance with the CWA section 402(p)(3)(B)(iii) and are necessary to meet the MEP standard.
10. Urban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water. Federal regulations at 40 CFR 131.10(a) state that in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. Authorizing the construction of an urban runoff treatment facility within a water of the U.S., or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Furthermore, the construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. This is consistent with USEPA guidance to avoid locating structural controls in natural wetlands.
11. The issuance of waste discharge requirements and an NPDES permit for the discharge of urban runoff from MS4s to waters of the U.S. is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, section 21000 et seq.) in accordance with the CWC section 13389.

#### **F. PUBLIC PROCESS**

1. The Regional Board has notified the Copermittees, all known interested parties, and the public of its intent to consider adoption of an Order prescribing waste discharge requirements that would serve to renew an NPDES permit for the existing discharge of urban runoff.
2. The Regional Board has, at public meetings on (date), held public hearings and heard and considered all comments pertaining to the terms and conditions of this Order.

**IT IS HEREBY ORDERED** that the Copermittees, in order to meet the provisions contained in Division 7 of the California Water Code (CWC) and regulations adopted thereunder, and the provisions of the Clean Water Act (CWA) and regulations adopted thereunder, shall each comply with the following:

#### **A. PROHIBITIONS AND RECEIVING WATER LIMITATIONS**

1. Discharges into and from municipal separate storm sewer systems (MS4s) in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state are prohibited.
2. Discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP) are prohibited.<sup>2</sup>

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<sup>2</sup> This prohibition does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer).

3. Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited.
  - a. Each Copermittee shall comply with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order through timely implementation of control measures and other actions to reduce pollutants in urban runoff discharges in accordance with the Jurisdictional Urban Runoff Management Program and other requirements of this Order including any modifications. The Jurisdictional Urban Runoff Management Program shall be designed to achieve compliance with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order. If exceedance(s) of water quality standards persist notwithstanding implementation of the Jurisdictional Urban Runoff Management Program and other requirements of this Order, the Copermittee shall assure compliance with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order by complying with the following procedure:
    - (1) Upon a determination by either the Copermittee or the Regional Board that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the Copermittee shall promptly notify and thereafter submit a report to the Regional Board that describes best management practices (BMPs) that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report may be incorporated in the annual update to the Jurisdictional Urban Runoff Management Program unless the Regional Board directs an earlier submittal. The report shall include an implementation schedule. The Regional Board may require modifications to the report;
    - (2) Submit any modifications to the report required by the Regional Board within 30 days of notification;
    - (3) Within 30 days following approval of the report described above by the Regional Board, the Copermittee shall revise its Jurisdictional Urban Runoff Management Program and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required;
    - (4) Implement the revised Jurisdictional Urban Runoff Management Program and monitoring program in accordance with the approved schedule.
  - b. So long as the Copermittee has complied with the procedures set forth above and is implementing the revised Jurisdictional Urban Runoff Management Program, the Copermittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to do so.
  - c. Nothing in section A.3 shall prevent the Regional Board from enforcing any provision of this Order while the Copermittee prepares and implements the above report.

4. In addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in Attachment A to this Order.

## **B. NON-STORM WATER DISCHARGES**

1. Each Copermittee shall effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate National Pollutant Discharge Elimination System (NPDES) permit; or not prohibited in accordance with sections B.2 and B.3 below.
2. The following categories of non-storm water discharges are not prohibited unless a Copermittee or the Regional Board identifies the discharge category as a significant source of pollutants to waters of the U.S. For such a discharge category, the Copermittee shall either prohibit the discharge category or develop and implement appropriate control measures to reduce the discharge of pollutants to the MEP and report to the Regional Board pursuant to section J.
  - a. Diverted stream flows;
  - b. Rising ground waters;
  - c. Uncontaminated ground water infiltration [as defined at 40 CFR 35.2005(20)] to MS4s;
  - d. Uncontaminated pumped ground water;
  - e. Foundation drains;
  - f. Springs;
  - g. Water from crawl space pumps;
  - h. Footing drains;
  - i. Air conditioning condensation;
  - j. Flows from riparian habitats and wetlands;
  - k. Water line flushing;
  - l. Landscape irrigation;
  - m. Discharges from potable water sources not subject to NPDES Permit No. CAG679001, other than water main breaks;
  - n. Irrigation water;
  - o. Lawn watering;
  - p. Individual residential car washing; and
  - q. Dechlorinated swimming pool discharges.
3. Emergency fire fighting flows (i.e., flows necessary for the protection of life or property) do not require BMPs and need not be prohibited. As part of the Jurisdictional Urban Runoff Management Plan (JURMP), each Copermittee shall develop and implement a program to reduce pollutants from non-emergency fire fighting flows (i.e., flows from controlled or practice blazes and maintenance activities) identified by the Copermittee to be significant sources of pollutants to waters of the United States.
4. Each Copermittee shall examine all dry weather field screening and analytical monitoring results collected in accordance with section D.4 of this Order and Receiving Waters Monitoring and Reporting Program No. R9-2007-0001 to identify water quality problems which may be the result of any non-prohibited discharge category(ies) identified above in section B.2. Follow-up investigations shall be conducted as necessary to identify and control any non-prohibited discharge category(ies) listed above.

**C. LEGAL AUTHORITY**

1. Each Copermittee shall establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. This legal authority must, at a minimum, authorize the Copermittee to:
  - a. Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites. This requirement applies both to industrial and construction sites which have coverage under the statewide general industrial or construction storm water permits, as well as to those sites which do not. Grading ordinances shall be upgraded and enforced as necessary to comply with this Order.
  - b. Prohibit all identified illicit discharges not otherwise allowed pursuant to section B.2 including but not limited to:
    - (1) Sewage;
    - (2) Discharges of wash water resulting from the hosing or cleaning of gas stations, auto repair garages, or other types of automotive services facilities;
    - (3) 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.;
    - (4) Discharges of wash water from mobile operations such as mobile automobile washing, steam cleaning, power washing, and carpet cleaning, etc.;
    - (5) 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.;
    - (6) Discharges of runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials;
    - (7) Discharges of pool or fountain water containing chlorine, biocides, or other chemicals; discharges of pool or fountain filter backwash water;
    - (8) Discharges of sediment, pet waste, vegetation clippings, or other landscape or construction-related wastes; and
    - (9) Discharges of food-related wastes (e.g., grease, fish processing, and restaurant kitchen mat and trash bin wash water, etc.).
  - c. Prohibit and eliminate illicit connections to the MS4;
  - d. Control the discharge of spills, dumping, or disposal of materials other than storm water to its MS4;
  - e. Require compliance with conditions in Copermittee ordinances, permits, contracts or orders (i.e., hold dischargers to its MS4 accountable for their contributions of pollutants and flows);
  - f. Utilize enforcement mechanisms to require compliance with Copermittee storm water ordinances, permits, contracts, or orders;
  - g. Control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements among Copermittees. Control of

the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements with other owners of the MS4 such as Caltrans, the Department of Defense, or Native American Tribes is encouraged;

- h. Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits and with this Order, including the prohibition on illicit discharges to the MS4. This means the Copermittee must have authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from industrial facilities discharging into its MS4, including construction sites;
  - i. Require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s to the MEP; and
  - j. Require documentation on the effectiveness of BMPs implemented to reduce the discharge of pollutants to the MS4 to the MEP.
2. Each Permittee shall include as part of its JURMP a statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority to implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order. This statement shall include:
- a. Identification of all departments within the jurisdiction that conduct urban runoff related activities, and their roles and responsibilities under this Order. Include an up to date organizational chart specifying these departments and key personnel.
  - b. Citation of urban runoff related ordinances and the reasons they are enforceable;
  - c. Identification of the local administrative and legal procedures available to mandate compliance with urban runoff related ordinances and therefore with the conditions of this Order;
  - d. A description of how urban runoff related ordinances are implemented and appealed; and
  - e. Description of whether the municipality can issue administrative orders and injunctions or if it must go through the court system for enforcement actions.

#### **D. JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM**

Each Copermittee shall implement all requirements of section D of this Order no later than 365 days after adoption of the Order, unless otherwise specified in this Order. Prior to 365 days after adoption of the Order, each Copermittee shall at a minimum implement its Jurisdictional URMP document, as the document was developed and amended to comply with the requirements of Order No. 2001-01.

Each Copermittee shall develop and implement an updated Jurisdictional Urban Runoff Management Program for its jurisdiction. Each updated Jurisdictional Urban Runoff Management Program shall meet the requirements of section D 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.

## 1. Development Planning Component

Each Copermittee shall implement a program which meets the requirements of this section and (1) reduces Development Project discharges of pollutants from the MS4 to the MEP, (2) prevents Development Project discharges from the MS4 from causing or contributing to a violation of water quality standards, and (3) manages increases in runoff discharge rates and durations from Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

### a. GENERAL PLAN

Each Copermittee shall revise as needed its General Plan or equivalent plan (e.g., Comprehensive, Master, or Community Plan) for the purpose of providing effective water quality and watershed protection principles and policies that direct land-use decisions and require implementation of consistent water quality protection measures for Development Projects.

### b. ENVIRONMENTAL REVIEW PROCESS

Each Copermittee shall revise as needed their current environmental review processes to accurately evaluate water quality impacts and cumulative impacts and identify appropriate measures to avoid, minimize and mitigate those impacts for all Development Projects.

### c. APPROVAL PROCESS CRITERIA AND REQUIREMENTS FOR ALL DEVELOPMENT PROJECTS

For all proposed Development Projects, each Copermittee during the planning process and prior to project approval and issuance of local permits shall prescribe the necessary requirements so that Development Project discharges of pollutants from the MS4 will be reduced to the MEP, will not cause or contribute to a violation of water quality standards, and will comply with Copermittee's ordinances, permits, plans, and requirements, and with this Order. The requirements shall include, but not be limited to, implementation by the project proponent of the following:

- (1) Source control BMPs that reduce storm water pollutants of concern in urban runoff, including storm drain system stenciling and signage, properly designed outdoor material storage areas, properly designed trash storage areas, and implementation of efficient irrigation systems;
- (2) LID BMPs where feasible which maximize infiltration, provide retention, slow runoff, minimize impervious footprint, direct runoff from impervious areas into landscaping, and construct impervious surfaces to minimum widths necessary;
- (3) Buffer zones for natural water bodies, where feasible. Where buffer zones are infeasible, require project proponent to implement other buffers such as trees, access restrictions, etc., where feasible;
- (4) Measures necessary so that grading or other construction activities meet the provisions specified in section D.2 of this Order; and
- (5) Submittal of proof of a mechanism under which ongoing long-term maintenance of all structural post-construction BMPs will be conducted.

d. STANDARD URBAN STORM WATER MITIGATION PLANS (SUSMPs) – APPROVAL PROCESS CRITERIA AND REQUIREMENTS FOR PRIORITY DEVELOPMENT PROJECTS

Each Copermittee shall implement an updated local SUSMP which meets the requirements of section D.1.d of this Order and (1) reduces Priority Development Project discharges of pollutants from the MS4 to the MEP, (2) prevents Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, and (3) manages increases in runoff discharge rates and durations from Priority Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.<sup>3</sup>

(1) Definition of Priority Development Project

- (a) 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). Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to SUSMP requirements, the numeric sizing criteria discussed in section D.1.d.(6)(c) applies only to the addition, and not to the entire development. Where redevelopment results in an increase of more than fifty percent of the impervious surfaces of a previously existing development, the numeric sizing criteria applies to the entire development. Where a new Development Project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements.
- (b) In addition to the Priority Development Project Categories identified in section D.1.d.(2), within three years of adoption of this Order Priority Development Projects shall also include all other pollutant generating Development Projects that result in the disturbance of one acre or more of land.<sup>4</sup> As an alternative to this one acre threshold, the Copermittees may collectively identify a different threshold, provided the Copermittees' threshold is at least as inclusive of Development Projects as the one acre threshold.

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<sup>3</sup> Updated SUSMP and hydromodification requirements shall apply to all priority projects or phases of priority projects which have not yet begun grading or construction activities at the time any updated SUSMP or hydromodification requirement commences. If a Copermittee determines that lawful prior approval of a project exists, whereby application of an updated SUSMP or hydromodification requirement to the project is infeasible, the updated SUSMP or hydromodification requirement need not apply to the project. Where feasible, the Copermittees shall utilize the SUSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SUSMP and hydromodification requirements in their plans.

<sup>4</sup> Pollutant generating Development Projects are those projects that generate pollutants at levels greater than background levels.

(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 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.

(3) Pollutants of Concern

As part of its local SUSMP, each Copermittee shall develop and implement a procedure for pollutants of concern to be identified for each Priority Development Project. The procedure shall address, at a minimum: (1) Receiving water quality (including pollutants for which receiving waters are listed as impaired under CWA section 303(d)); (2) Land use type of the Development Project and pollutants associated with that land use type; and (3) Pollutants expected to be present on site.

(4) Low Impact Development (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:

- (a) The following LID site design BMPs shall be implemented at all Priority Development Projects as required below:
- i. For Priority Development Projects with landscaped or other pervious areas, drain a portion of impervious areas (rooftops, parking lots, sidewalks, walkways, patios, etc) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall correspond with the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' soil conditions, slope, and other pertinent factors.
  - ii. For Priority Development Projects with landscaped or other pervious areas, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas, taking into consideration the pervious areas' soil conditions, slope, and other pertinent factors.
  - iii. For Priority Development Projects with low traffic areas and appropriate soil conditions, 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.
- (b) The following LID BMPs listed below shall be implemented at all Priority Development Projects where applicable and feasible.
- i. Conserve natural areas, including existing trees, other vegetation, and soils.
  - ii. Construct streets, sidewalks, or parking lot aisles to the minimum widths necessary, provided that public safety and a walkable environment for pedestrians are not compromised.
  - iii. Minimize the impervious footprint of the project.
  - iv. Minimize soil compaction.
  - v. Minimize disturbances to natural drainages (e.g., natural swales, topographic depressions, etc.)

(5) Source Control BMP Requirements

Each Copermittee shall require each Priority Development Project to implement source control BMPs. The source control BMPs to be required shall:

- (a) Minimize storm water pollutants of concern in urban runoff.
- (b) Include storm drain system stenciling or signage.
- (c) Include properly designed outdoor material storage areas.
- (d) Include properly designed trash storage areas.
- (e) Include efficient irrigation systems.
- (f) Include water quality requirements applicable to individual priority project categories.

(6) Treatment Control BMP Requirements<sup>5</sup>

Each Copermittee shall require each Priority Development Project to implement treatment control BMPs which meet the following treatment control BMP requirements:

- (a) Treatment control BMPs for all Priority Development Projects shall mitigate (infiltrate, filter, or treat) the required volume or flow of runoff (identified in section D.1.d.(6)(c)) from all developed portions of the project, including landscaped areas.
- (b) All treatment control BMPs shall be located so as to infiltrate, filter, or treat the required runoff volume or flow prior to its discharge to any waters of the U.S. Multiple Priority Development Projects may use shared treatment control BMPs as long as construction of any shared treatment control BMP is completed prior to the use or occupation of any Priority Development Project from which the treatment control BMP will receive runoff.
- (c) All treatment control BMPs for a single Priority Development Project shall collectively be sized to comply with the following numeric sizing criteria:
  - i. Volume-based treatment control BMPs shall be designed to mitigate (infiltrate, filter, or treat) the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of San Diego's 85th Percentile Precipitation Isopluvial Map; or
  - ii. Flow-based treatment control BMPs shall be designed to mitigate (infiltrate, filter, or treat) either: a) the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour of a storm event; or b) the maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity (for each hour of a storm event), as determined from the local historical rainfall record, multiplied by a factor of two.

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<sup>5</sup> LID BMPs that are correctly designed to effectively infiltrate, filter, or treat runoff can be considered treatment control BMPs.

- (d) All treatment control BMPs for Priority Development Projects shall, at a minimum:
- i. Be ranked with a high or medium pollutant removal efficiency for the project's most significant pollutants of concern, as the pollutant removal efficiencies are identified in the Copermittees' Model SUSMP and the most current updates thereto. Treatment control BMPs with a low removal efficiency ranking shall only be approved by a Copermittee when a feasibility analysis has been conducted which exhibits that implementation of treatment control BMPs with high or medium removal efficiency rankings are infeasible for a Priority Development Project or portion of a Priority Development Project.
  - ii. Be correctly sized and designed so as to remove pollutants to the MEP.
  - iii. Target removal of pollutants of concern from urban runoff.
  - iv. Be implemented close to pollutant sources (where shared BMPs are not proposed), and prior to discharging into waters of the U.S.
  - v. Not be constructed within a receiving water.
  - vi. Include proof of a mechanism, to be provided by the project proponent or Copermittee, under which ongoing long-term maintenance will be conducted.

(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.

(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.
- (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.

(9) Implementation Process

As part of its local SUSMP, each Copermittee shall implement a process to verify compliance with SUSMP requirements. The process shall identify at what point in the planning process Priority Development Projects will be required to meet SUSMP requirements. The process shall also include identification of the roles and responsibilities of various municipal departments in implementing the SUSMP requirements, as well as any other measures necessary for the implementation of SUSMP requirements.

(10) Downstream Erosion

As part of its local SUSMP, each Copermittee shall develop and apply criteria to Priority Development Projects so that runoff discharge rates, durations, and velocities from Priority Development Projects are controlled to maintain or reduce downstream erosion conditions and protect stream habitat. Upon adoption of the Hydromodification Management Plan (HMP) by the Regional Board (section D.1.g), individual Copermittee criteria for control of downstream erosion shall be superseded by criteria identified in the HMP.

(11) Waiver Provision

(a) A Copermittee may provide for a project to be waived from the requirement of meeting numeric sizing criteria (sections D.1.d.(6)(c) or D.1.d.(8)(a)iii) if infeasibility can be established. A waiver of infeasibility shall only be granted by a Copermittee when all available BMPs have been considered and rejected as infeasible. Copermittees shall notify the Regional Board within 5 days of each waiver issued and shall include the following information in the notification:

- i. Name of the person granting each waiver;
- ii. Name of developer receiving the waiver;
- iii. Site location;
- iv. Reason for waiver; and
- v. Description of BMPs required.

(b) The Copermittees may collectively or individually develop a program to require project proponents who have received waivers to transfer the savings in cost, as determined by the Copermittee(s), to a storm water mitigation fund. This program may be implemented by all Copermittees that issue waivers. Funds may be used on projects to improve urban runoff quality within the watershed of the waived project. The waiver mitigation program should, at a minimum, identify:

- i. The entity or entities that will manage the storm water mitigation fund (i.e., assume full responsibility for);
- ii. The range and types of acceptable projects for which mitigation funds may be expended;
- iii. The entity or entities that will assume full responsibility for each mitigation project including its successful completion; and
- iv. How the dollar amount of fund contributions will be determined.

(12) Infiltration and Groundwater Protection

To protect groundwater quality, each Copermittee shall apply restrictions to the use of treatment control BMPs that are designed to primarily function as centralized infiltration devices (such as large infiltration trenches and infiltration basins). Such restrictions shall be designed so that the use of such infiltration treatment control BMPs shall not cause or contribute to an exceedance of groundwater quality objectives. At a minimum, each treatment control BMP designed to primarily function as a centralized infiltration device shall meet the restrictions below, unless it is demonstrated that a restriction is not necessary to

protect groundwater quality. The Copermittees may collectively or individually develop alternative restrictions on the use of treatment control BMPs which are designed to primarily function as centralized infiltration devices. Alternative restrictions developed by the Copermittees can partially or wholly replace the restrictions listed below. The restrictions are not intended to be applied to small infiltration systems dispersed throughout a development project.

- (a) Urban runoff shall undergo pretreatment such as sedimentation or filtration prior to infiltration;
- (b) All dry weather flows containing significant pollutant loads shall be diverted from infiltration devices;
- (c) Pollution prevention and source control BMPs shall be implemented at a level appropriate to protect groundwater quality at sites where infiltration treatment control BMPs are to be used;
- (d) Infiltration treatment control BMPs shall be adequately maintained so that they remove pollutants to the MEP;
- (e) The vertical distance from the base of any infiltration treatment control BMP to the seasonal high groundwater mark shall be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained;
- (f) The soil through which infiltration is to occur shall have physical and chemical characteristics (such as appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of urban runoff for the protection of groundwater beneficial uses;
- (g) Infiltration treatment control BMPs shall not be used for areas of industrial or light industrial activity; areas subject to high vehicular traffic (25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway); automotive repair shops; car washes; fleet storage areas (bus, truck, etc.); nurseries<sup>6</sup>; and other high threat to water quality land uses and activities as designated by each Permittee; and
- (h) Infiltration treatment control BMPs shall be located a minimum of 100 feet horizontally from any water supply wells.

e. TREATMENT CONTROL BMP MAINTENANCE TRACKING

- (1) Each Copermittee shall develop and utilize a watershed-based database to track and inventory approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction. At a minimum, the database shall include information on treatment control BMP type, location, watershed, date of construction, party responsible for maintenance, maintenance certifications or verifications, inspections, inspection findings, and corrective actions.
- (2) Each Copermittee shall develop and implement a program to verify that approved treatment control BMPs are operating effectively and have been adequately maintained. At a minimum, the program shall include the following:
  - (a) An annual inventory of all approved treatment control BMPs within the Copermittee's jurisdiction. The inventory shall also include all treatment control BMPs approved during the previous permit cycle.

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<sup>6</sup> Except with regard to treated nursery runoff or clean storm water runoff.

- (b) The prioritization of all projects with approved treatment control BMPs into high, medium, and low priority categories. At a minimum, projects with drainage insert treatment control BMPs shall be designated as at least a medium priority. Prioritization of other projects with treatment control BMPs shall include consideration of treatment control BMP size, recommended maintenance frequency, likelihood of operational and maintenance issues, location, receiving water quality, and other pertinent factors.
  - (c) 100% of projects with treatment control BMPs that are high priority shall be inspected by the Copermittee annually. 50% of projects with drainage insert treatment control BMPs shall be inspected by the Copermittee annually. Treatment control BMPs that are low priority shall be inspected as needed. All inspections shall verify effective operation and maintenance of the treatment control BMPs, as well as compliance with all ordinances, permits, and this Order. A minimum of 20% of the total number of projects with approved treatment control BMPs, and a maximum of 200% of the average number of projects with treatment control BMPs approved per year, shall be inspected annually.
  - (d) Requirement of annual verification of effective operation and maintenance of each approved treatment control BMP by the party responsible for the treatment control BMP maintenance.
- (3) Operation and maintenance verifications shall be required prior to each rainy season.
- (4) Inspections of high priority treatment control BMPs shall be conducted prior to each rainy season.

f. BMP VERIFICATION

Prior to occupancy of each Priority Development Project subject to SUSMP requirements, each Copermittee shall inspect the constructed LID, source control, and treatment control BMPs to verify that they have been constructed in compliance with all specifications, plans, permits, ordinances, and this Order. This initial BMP verification inspection does not constitute an operation and maintenance inspection, as required above in section D.1.e.(2)(c).

g. HYDROMODIFICATION - LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS<sup>7</sup>

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

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<sup>7</sup> Updated SUSMP and hydromodification requirements shall apply to all priority projects or phases of priority projects which have not yet begun grading or construction activities at the time any updated SUSMP or hydromodification requirement commences. If a Copermittee determines that lawful prior approval of a project exists, whereby application of an updated SUSMP or hydromodification requirement to the project is infeasible, the updated SUSMP or hydromodification requirement need not apply to the project. Where feasible, the Copermittees shall utilize the SUSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SUSMP and hydromodification requirements in their plans.

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 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<sup>8</sup> 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.

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<sup>8</sup> The identified range of runoff flows to be controlled should be expressed in terms of peak flow rates of rainfall events, such as "10% of the pre-project 2-year peak flow up to the pre-project 10-year peak flow."



- (h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.
  - (i) Include technical information supporting any standards and criteria proposed.
  - (j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.
  - (k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.
  - (l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.
  - (m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.
- (2) The HMP may include implementation of planning measures (e.g., buffers and restoration activities, including revegetation, use of less-impacting facilities at the point(s) of discharge, etc.) to allow expected changes in stream channel cross sections, vegetation, and discharge rates, velocities, and/or durations without adverse impacts to channel beneficial uses. Such measures shall not include utilization of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc.
- (3) Section D.1.g.(1)(c) does not apply to Development Projects where the project discharges stormwater runoff into channels or storm drains where the pre-existing 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 re-introduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermitees shall collaborate to report on HMP development as required in section J.2.a of this Order.

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermitee 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 Copermitees.

(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%).

h. ENFORCEMENT OF DEVELOPMENT SITES

Each Copermittee shall enforce its storm water ordinance for all Development Projects and at all development sites as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms shall include appropriate sanctions to achieve compliance. Sanctions shall include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit or occupancy denials for non-compliance.

**2. Construction Component**

Each Copermittee shall implement a construction program which meets the requirements of this section, reduces construction site discharges of pollutants from the MS4 to the MEP, and prevents construction site discharges from the MS4 from causing or contributing to a violation of water quality standards.

a. ORDINANCE UPDATE AND APPROVAL PROCESS

- (1) Within 365 days of adoption of this Order, each Copermittee shall review and update its grading ordinances and other ordinances as necessary to achieve full compliance with this Order, including requirements for the implementation of all designated BMPs and other measures.
- (2) Prior to approval and issuance of local construction and grading permits, each Copermittee shall:

- (a) Require all individual proposed construction sites to implement designated BMPs and other measures so that pollutants discharged from the site will be reduced to the maximum extent practicable and will not cause or contribute to a violation of water quality standards.
- (b) Prior to permit issuance, require and review the project proponent's storm water management plan to verify compliance with their grading ordinance, other ordinances, and this Order.
- (c) Verify that project proponents subject to California's statewide General NPDES Permit for Storm Water Discharges Associated With Construction Activities, (hereinafter General Construction Permit), have existing coverage under the General Construction Permit.

b. SOURCE IDENTIFICATION

Each Copermittee shall maintain and update monthly a watershed based inventory of all construction sites within its jurisdiction. The use of an automated database system, such as Geographical Information System (GIS) is highly recommended.

c. BMP IMPLEMENTATION

- (1) Each Copermittee shall designate a minimum set of BMPs and other measures to be implemented at construction sites. The designated minimum set of BMPs shall include, at a minimum:

(a) General Site Management

- i. Pollution prevention, where appropriate.
- ii. Development and implementation of a storm water management plan.
- iii. Minimization of areas that are cleared and graded to only the portion of the site that is necessary for construction;
- iv. Minimization of exposure time of disturbed soil areas;
- v. Minimization of grading during the wet season and correlation of grading with seasonal dry weather periods to the extent feasible.
- vi. Limitation of grading to a maximum disturbed area as determined by each Copermittee before either temporary or permanent erosion controls are implemented to prevent storm water pollution. The Copermittee has the option of temporarily increasing the size of disturbed soil areas by a set amount beyond the maximum, if the individual site is in compliance with applicable storm water regulations and the site has adequate control practices implemented to prevent storm water pollution.
- vii. Temporary stabilization and reseeded of disturbed soil areas as rapidly as feasible;
- viii. Preservation of natural hydrologic features where feasible;
- ix. Preservation of riparian buffers and corridors where feasible;
- x. Maintenance of all BMPs, until removed; and
- xi. Retention, reduction, and proper management of all pollutant discharges on site to the MEP standard.

(b) Erosion and Sediment Controls

- i. Erosion prevention, to be used as the most important measure for keeping sediment on site during construction, but never as the single method;
- ii. Sediment controls, to be used as a supplement to erosion prevention for keeping sediment on-site during construction;
- iii. Slope stabilization on all inactive slopes during the rainy season and during rain events in the dry season;
- iv. Slope stabilization on all active slopes during rain events regardless of the season; and
- v. Permanent revegetation or landscaping as early as feasible.

(2) Each Copermittee shall require implementation of advanced treatment for sediment at construction sites that are determined by the Copermittee to be an exceptional threat to water quality. In evaluating the threat to water quality, the following factors shall be considered by the Copermittee:

- (a) Soil erosion potential or soil type;
- (b) The site's slopes;
- (c) Project size and type;
- (d) Sensitivity of receiving water bodies;
- (e) Proximity to receiving water bodies;
- (f) Non-storm water discharges;
- (g) Ineffectiveness of other BMPs; and
- (h) Any other relevant factors.

(3) Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each construction site within its jurisdiction year round. However, BMP implementation requirements can vary based on wet and dry seasons. Dry season BMP implementation must plan for and address rain events that may occur during the dry season.

(4) Each Copermittee shall implement, or require implementation of, additional controls for construction sites tributary to CWA section 303(d) water body segments impaired for sediment as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for construction sites within or adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas (as defined in section Attachment C of this Order) as necessary to comply with this Order.

d. INSPECTION OF CONSTRUCTION SITES

Each Copermittee shall conduct construction site inspections for compliance with its local ordinances (grading, storm water, etc.), permits (construction, grading, etc.), and this Order.

(1) During the wet season, each Copermittee shall inspect at least biweekly (every two weeks), all construction sites within its jurisdiction meeting the following

criteria:

- (a) All sites 50 acres or more in size and grading will occur during the wet season;
  - (b) All sites 1 acre or more, and tributary to a CWA section 303(d) water body segment impaired for sediment or within or directly adjacent to or discharging directly to a receiving water within an ESA; and
  - (c) Other sites determined by the Copermittees or the Regional Board as a significant threat to water quality. In evaluating threat to water quality, the following factors shall be considered:
    - i. soil erosion potential;
    - ii. site slope;
    - iii. project size and type;
    - iv. sensitivity of receiving water bodies;
    - v. proximity to receiving water bodies;
    - vi. non-storm water discharges;
    - vii. past record of non-compliance by the operators of the construction site; and
    - viii. any other relevant factors.
- (2) During the wet season, each Copermittee shall inspect at least monthly, all construction sites with one acre or more of soil disturbance not meeting the criteria specified above in section D.2.c.(1).
  - (3) During the wet season, each Copermittee shall inspect as needed, construction sites less than 1 acre in size.
  - (4) Each Copermittee shall inspect all construction sites as needed during the dry season.
  - (5) Based upon site inspection findings, each Copermittee shall implement all follow-up actions (i.e., reinspection, enforcement) necessary to comply with this Order.
  - (6) Inspections of construction sites shall include, but not be limited to:
    - (a) Check for coverage under the General Construction Permit (Notice of Intent (NOI) and/or Waste Discharge Identification No.) during initial inspections;
    - (b) Assessment of compliance with Permittee ordinances and permits related to urban runoff, including the implementation and maintenance of designated minimum BMPs;
    - (c) Assessment of BMP effectiveness;
    - (d) Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff;
    - (e) Education and outreach on storm water pollution prevention, as needed; and
    - (f) Creation of a written or electronic inspection report.
  - (7) The Copermittees shall track the number of inspections for the inventoried construction sites throughout the reporting period to verify that the sites are inspected at the minimum frequencies required.

e. ENFORCEMENT OF CONSTRUCTION SITES

Each Copermittee shall develop and implement an escalating enforcement process that achieves prompt corrective actions at construction sites for violations of the Copermittee's water quality protection permit requirements and ordinances. This enforcement process shall include authorizing the Copermittee's construction site inspectors to take immediate enforcement actions when appropriate and necessary. The enforcement process shall include appropriate sanctions such as stop work orders, non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

f. REPORTING OF NON-COMPLIANT SITES

In addition to the notification requirements in section 5(e) of Attachment B, each Copermittee shall notify the Regional Board when the Copermittee issues a stop work order or other high level enforcement to a construction site in their jurisdiction as a result of storm water violations.

### 3. Existing Development Component

a. MUNICIPAL

Each Copermittee shall implement a municipal program which meets the requirements of this section, reduces municipal discharges of pollutants from the MS4 to the MEP, and prevents municipal discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification

Each Copermittee shall annually update a watershed based inventory of municipal areas and activities. The inventory shall include the name, address (if applicable), and a description of the area/activity, which pollutants are potentially generated by the area/activity, and identification of whether the area/activity is tributary to a CWA section 303(d) water body segment and generates pollutants for which the water body segment is impaired. The use of an automated database system, such as Geographical Information System (GIS) is highly recommended when applicable, but not required.

(2) BMP Implementation

- (a) Each Copermittee shall implement pollution prevention methods in its municipal program and shall require their use by appropriate municipal departments and personnel, where appropriate.
- (b) Each Copermittee shall designate a minimum set of BMPs for all municipal areas and activities. The designated minimum BMPs for municipal areas and activities shall be area or activity specific as appropriate.
- (c) Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order for each municipal area or activity within its

jurisdiction.

- (d) Each Copermittee shall evaluate existing flood control devices to determine if retrofitting the device to provide additional pollutant removal from urban runoff is feasible. When conducting flood control device retrofit projects, each Copermittee shall incorporate permanent pollutant removal measures into the projects, where feasible.
- (e) Each Copermittee shall implement, or require implementation of, any additional controls for municipal areas and activities tributary to CWA section 303(d) impaired water body segments (where an area or activity generates pollutants for which the water body segment is impaired) as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for municipal areas and activities within or directly adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order) as necessary to comply with this Order.
- (f) Each Copermittee shall implement, or require implementation of, additional controls for special events within their jurisdiction that are expected to generate significant trash and litter. Controls to consider shall include:
  - i. Temporary screens on catch basins and storm drain inlets;
  - ii. Temporary fencing to prevent windblown trash from entering adjacent water bodies and MS4 channels;
  - iii. Proper management of trash and litter;
  - iv. Catch basin cleaning following the special event and prior to an anticipated rain event;
  - v. Street sweeping of roads, streets, highways and parking facilities following the special event; and
  - vi. Other equivalent controls.

(3) Operation and Maintenance of Municipal Separate Storm Sewer System and Structural Controls

- (a) Each Copermittee shall implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
- (b) Each Copermittee shall implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
  - i. Inspection at least once a year between May 1 and September 30 of each year 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.

(4) Management of Pesticides, Herbicides, and Fertilizers

The Copermittees shall implement BMPs to reduce the contribution of pollutants associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from municipal areas and activities to MS4s. Important municipal areas and activities include municipal facilities, public rights-of-way, parks, recreational facilities, golf courses, cemeteries, botanical or zoological gardens and exhibits, landscaped areas, etc.

Such BMPs shall include, at a minimum: (1) educational activities, permits, certifications and other measures for municipal applicators and distributors; (2) integrated pest management measures that rely on non-chemical solutions; (3) the use of native vegetation; (4) schedules for irrigation and chemical application; and (5) the collection and proper disposal of unused pesticides, herbicides, and fertilizers.

(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.

(6) Infiltration From Sanitary Sewer to MS4/Provide Preventive Maintenance of Both

Each Copermittee shall implement controls and measures to prevent and eliminate infiltration of seepage from municipal sanitary sewers to MS4s through thorough, routine preventive maintenance of the MS4. Each Copermittee that



operates both a municipal sanitary sewer system and a MS4 shall implement controls and measures to prevent and eliminate infiltration of seepage from the municipal sanitary sewers to the MS4s that shall include overall sanitary sewer and MS4 surveys and thorough, routine preventive maintenance of both.

(7) Inspection of Municipal Areas and Activities

- (a) At a minimum, each Copermittee shall inspect the following high priority municipal areas and activities annually:
- i. Roads, Streets, Highways, and Parking Facilities.
  - ii. Flood Management Projects and Flood Control Devices.
  - iii. Areas and activities tributary to a C WA section 303(d) impaired water body segment, where an area or activity generates pollutants for which the water body segment is impaired. Areas and activities within or adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).
  - iv. Municipal Facilities.
    - [1] Active or closed municipal landfills;
    - [2] Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewage collection systems;
    - [3] Solid waste transfer facilities;
    - [4] Land application sites;
    - [5] Corporate yards including maintenance and storage yards for materials, waste, equipment and vehicles; and
    - [6] Household hazardous waste collection facilities.
  - v. Municipal airfields.
  - vi. Parks and recreation facilities.
  - vii. Special event venues following special events (festivals, sporting events, etc.)
  - viii. Power washing.
  - ix. Other municipal areas and activities that the Copermittee determines may contribute a significant pollutant load to the MS4.
- (b) Other municipal areas and activities shall be inspected as needed.
- (c) Based upon site inspection findings, each Copermittee shall implement all follow-up actions necessary to comply with this Order.

(8) Enforcement of Municipal Areas and Activities

Each Copermittee shall enforce its storm water ordinance for all municipal areas and activities as necessary to maintain compliance with this Order.

b. INDUSTRIAL AND COMMERCIAL

Each Copermittee shall implement an industrial and commercial program which meets the requirements of this section, reduces industrial and commercial discharges of pollutants from the MS4 to the MEP, and prevents industrial and commercial discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification

Each Copermittee shall annually update a watershed-based inventory of all industrial and commercial sites/sources within its jurisdiction (regardless of ownership) that could contribute a significant pollutant load to the MS4. The inventory shall include the following minimum information for each industrial and commercial site/source: name; address; pollutants potentially generated by the site/source (and identification of whether the site/source is tributary to a Clean Water Act section 303(d) water body segment and generates pollutants for which the water body segment is impaired); and a narrative description including SIC codes which best reflects the principal products or services provided by each facility. The use of an automated database system, such as Geographical Information System (GIS) is highly recommended.

At a minimum, the following sites/sources shall be included in the inventory:

(a) Commercial Sites/Sources:

- i. Automobile repair, maintenance, fueling, or cleaning;
- ii. Airplane repair, maintenance, fueling, or cleaning;
- iii. Boat repair, maintenance, fueling, or cleaning;
- iv. Equipment repair, maintenance, fueling, or cleaning;
- v. Automobile and other vehicle body repair or painting;
- vi. Mobile automobile or other vehicle washing;
- vii. Automobile (or other vehicle) parking lots and storage facilities;
- viii. Retail or wholesale fueling;
- ix. Pest control services;
- x. Eating or drinking establishments, including food markets;
- xi. Mobile carpet, drape or furniture cleaning;
- xii. Cement mixing or cutting;
- xiii. Masonry;
- xiv. Painting and coating;
- xv. Botanical or zoological gardens and exhibits;
- xvi. Landscaping;
- xvii. Nurseries and greenhouses;
- xviii. Golf courses, parks and other recreational areas/facilities;
- xix. Cemeteries;
- xx. Pool and fountain cleaning;
- xxi. Marinas;
- xxii. Portable sanitary services;
- xxiii. Building material retailers and storage;
- xxiv. Animal facilities; and
- xxv. Power washing services.

(b) Industrial Sites/Sources:

- i. Industrial Facilities, as defined at 40 CFR § 122.26(b)(14), including those subject to the General Industrial Permit or other individual NPDES permit;
- ii. Operating and closed landfills;
- iii. Facilities subject to SARA Title III; and

iv. Hazardous waste treatment, disposal, storage and recovery facilities.

- (c) All other commercial or industrial sites/sources tributary to a CWA Section 303(d) impaired water body segment, where the site/source generates pollutants for which the water body segment is impaired. All other commercial or industrial sites/sources within or directly adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).
- (d) All other commercial or industrial sites/sources that the Copermittee determines may contribute a significant pollutant load to the MS4.

(2) BMP Implementation

- (a) Each Copermittee shall require the use of pollution prevention methods by industrial and commercial sites/sources, where appropriate.
- (b) Each Copermittee shall designate a minimum set of BMPs for all industrial and commercial sites/sources. The designated minimum BMPs shall be specific to facility types and pollutant generating activities, as appropriate.
- (c) Within the first three years of implementation of the updated Jurisdictional Urban Runoff Management Program, each Copermittee shall notify the owner/operator of each inventoried industrial and commercial site/source of the BMP requirements applicable to the site/source.
- (d) Each Copermittee shall implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each industrial and commercial site/source within its jurisdiction.
- (e) Each Copermittee shall implement, or require implementation of, additional controls for industrial and commercial sites/sources tributary to CWA section 303(d) impaired water body segments (where a site/source generates pollutants for which the water body segment is impaired) as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for industrial and commercial sites/sources within or directly adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order) as necessary to comply with this Order.

(3) Inspection of Industrial and Commercial Sites/Sources

- (a) Each Copermittee shall conduct industrial and commercial site inspections for compliance with its ordinances, permits, and this Order. Inspections shall include but not be limited to:
- i. Review of BMP implementation plans, if the site uses or is required to use such a plan;
  - ii. Review of facility monitoring data, if the site monitors its runoff;

- iii. Check for coverage under the General Industrial Permit (Notice of Intent (NOI) and/or Waste Discharge Identification No.), if applicable;
  - iv. Assessment of compliance with Copermittee ordinances and permits related to urban runoff;
  - v. Assessment of BMP implementation, maintenance and effectiveness;
  - vi. Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff; and
  - vii. Education and training on storm water pollution prevention, as conditions warrant.
- (b) At a minimum, 50% of all sites (excluding mobile sources) determined to pose a high threat to water quality shall be inspected in the first year of implementation of the updated Jurisdictional Urban Runoff Management Program, regardless of whether this exceeds the number of inspections required in section D.3.b.(3)(c). This requirement shall increase to 100% of the sites in the second year, and 100% annually thereafter. In any year that the total number of required inspection per section D.3.b.(3)(c) exceeds the number of high threat to water quality sites, all high threat to water quality sites shall be inspected. In evaluating threat to water quality, each Copermittee shall address, at a minimum, the following:
- i. Type of activity (SIC code);
  - ii. Materials used at the facility;
  - iii. Wastes generated;
  - iv. Pollutant discharge potential;
  - v. Non-storm water discharges;
  - vi. Size of facility;
  - vii. Proximity to receiving water bodies;
  - viii. Sensitivity of receiving water bodies;
  - ix. Whether the facility is subject to the General Industrial Permit or an individual NPDES permit;
  - x. Whether the facility has filed a No Exposure Certification/Notice of Non-Applicability;
  - xi. Facility design;
  - xii. Total area of the site, area of the site where industrial or commercial activities occur, and area of the site exposed to rainfall and runoff;
  - xiii. The facility's compliance history; and
  - xiv. Any other relevant factors.
- (c) At a minimum, 20% of the sites inventoried as required in section D.3.b.(1) above (excluding mobile sources) shall be inspected in the first year of implementation of the updated Jurisdictional Urban Runoff Management Program. This requirement shall increase to 25% of the sites in the second year, and 25% annually thereafter.
- (d) Each Copermittee may develop and implement a third party inspection program for verifying industrial and commercial site/source compliance with its ordinances, permits, and this Order. The third party inspections can satisfy up to 30% of the inspection requirements in section D.3.b(3)(c), with the Copermittee having to fulfill the remaining required inspections. To the extent that third party inspections are conducted to fulfill the requirements of

section D.3.b(3)(c), the Copermittee will be responsible for the inspection of an additional site for every three sites inspected by a third party. The additional inspections may be conducted by the Copermittee or a third party inspector. The Copermittees third party inspection program must include the following:

- i. A description of facility types proposed to be inspected by third parties, including SIC codes;
- ii. A third party inspector certification program;
- iii. The inspection requirements described in section D.3.b.(3)(a);
- iv. Inspection form templates for third party inspector use;
- v. Photo documentation of potential storm water violations identified during the third party inspection;
- vi. An annual Copermittee audit of random, representative sites that were inspected by a third party;
- vii. An annual Copermittee audit of random, representative third party inspectors;
- viii. Reporting to the Copermittee of identified significant potential violations within 24 hours of the third party inspection;
- ix. Reporting to the Copermittee of all inspection findings within one week of the inspection being conducted; and
- x. Copermittee follow-up and/or enforcement actions for identified potential storm water violations within 2 business days of the inspection or potential violation report receipt.

- (e) Based upon site inspection findings, each Copermittee shall implement all follow-up actions and enforcement necessary to comply with this Order.
- (f) To the extent that the Regional Board has conducted an inspection of an industrial site during a particular year, the requirement for the responsible Copermittee to inspect this facility during the same year will be satisfied.
- (g) The Copermittees shall track the number of inspections for the inventoried industrial and commercial sites/sources throughout the reporting period to verify that the sites/sources are inspected at the minimum frequencies listed in sections D.3.b.(3)(b) and D.3.b.(3)(c).

(4) Regulation of Mobile Businesses

- (a) Each Copermittee shall develop and implement a program to reduce the discharge of pollutants from mobile businesses to the MEP. Each Copermittee shall keep as part of their inventory (section D.3.b.(1) above), a listing of mobile businesses known to operate within its jurisdiction. The program shall include:
  - i. Development and implementation of minimum standards and BMPs to be required for each of the various types of mobile businesses.
  - ii. Development and implementation of an enforcement strategy which specifically addresses the unique characteristics of mobile businesses.
  - iii. Notification of those mobile businesses known to operate within the Copermittee's jurisdiction of the minimum standards and BMP requirements and local ordinances.

- iv. Development and implementation of an outreach and education strategy.
- v. Inspection of mobile businesses as needed.

- (b) If they choose to, the Copermittees may cooperate in developing and implementing their programs for mobile businesses, including sharing of mobile business inventories, BMP requirements, enforcement action information, and education.

(5) Enforcement of Industrial and Commercial Sites/Sources

Each Copermittee shall enforce its storm water ordinance for all industrial and commercial sites/sources as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms shall include appropriate sanctions to achieve compliance. Sanctions shall include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

(6) Reporting of Industrial Non-Filers

As part of each Annual Report, each Copermittee shall report a list of industrial sites, including the name, address, and SIC code, that may require coverage under the General Industrial Permit for which a NOI has not been filed.

c. RESIDENTIAL

Each Copermittee shall implement a residential program which meets the requirements of this section, reduces residential discharges of pollutants from the MS4 to the MEP, and prevents residential discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Threat to Water Quality Prioritization

Each Copermittee shall identify high threat to water quality residential areas and activities. At a minimum, these shall include:

- (a) Automobile repair, maintenance, washing, and parking;
- (b) Home and garden care activities and product use (pesticides, herbicides, and fertilizers);
- (c) Disposal of trash, pet waste, green waste, and household hazardous waste (e.g., paints, cleaning products);
- (d) Any other residential source that the Copermittee determines may contribute a significant pollutant load to the MS4;
- (e) Any residential areas tributary to a CWA section 303(d) impaired water body, where the residence generates pollutants for which the water body is impaired; and
- (f) Any residential areas within or directly adjacent to or discharging directly to a coastal lagoon or other receiving waters within an environmentally sensitive area (as defined in Attachment C of this Order).

(2) BMP Implementation

- (a) Each Copermittee shall designate minimum BMPs for high threat to water quality residential areas and activities. The designated minimum BMPs for high threat to water quality municipal areas and activities shall be area or activity specific.
- (b) Each Copermittee shall encourage the use of pollution prevention methods by residents, where appropriate.
- (c) Each Copermittee shall facilitate the proper management and disposal of used oil, toxic materials, and other household hazardous wastes. Such facilitation shall include educational activities, public information activities, and establishment of collection sites operated by the Copermittee or a private entity. Curbside collection of household hazardous wastes is encouraged.
- (d) Each Copermittee shall implement, or require implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order for high threat to water quality residential areas and activities.
- (e) Each Copermittee shall implement, or require implementation of, BMPs for residential areas and activities that have not been designated a high threat to water quality, as necessary.
- (f) Each Copermittee shall implement, or require implementation of, any additional controls for residential areas and activities tributary to CWA section 303(d) impaired water body segments (where a residential area or activity generates pollutants for which the water body segment is impaired) as necessary to comply with this Order. Each Copermittee shall implement, or require implementation of, additional controls for residential areas within or directly adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas (as defined in section Attachment C of this Order) as necessary to comply with this Order.

(3) Enforcement of Residential Areas and Activities

Each Copermittee shall enforce its storm water ordinance for all residential areas and activities as necessary to maintain compliance with this Order.

(4) Evaluation of Oversight of Residential Areas and Activities

The Copermittees are encouraged to individually or collectively evaluate their methods used for oversight of residential areas and activities, including assessment of inspections of residential areas and activities. The evaluation should consider various oversight and inspection approaches to identify an effective and appropriate oversight and inspection approach for residential areas and activities.

(5) Regional Residential Education Program

Each Copermittee shall collaborate with the other Copermittees to develop and implement the Regional Residential Education Program required in section F.1 of this Order.

#### 4. Illicit Discharge Detection and Elimination Component

Each Copermittee shall implement an Illicit Discharge Detection and Elimination program which meets the requirements of this section and actively seeks and eliminates illicit discharges and connections.

a. ILLICIT DISCHARGES AND CONNECTIONS

Each Copermittee shall implement a program to actively seek and eliminate illicit discharges and connections into its MS4. The program shall include utilization of appropriate municipal personnel to assist in identifying illicit discharges and connections during their daily activities. The program shall address all types of illicit discharges and connections excluding those non-storm water discharges not prohibited by the Copermittee in accordance with section B of this Order.

b. DEVELOP/MAINTAIN MS4 MAP

Each Copermittee shall develop and/or update its labeled map of its entire MS4 and the corresponding drainage areas within its jurisdiction. The use of a GIS is highly recommended. The accuracy of the MS4 map shall be confirmed during dry weather field screening and analytical monitoring and shall be updated at least annually.

c. DRY WEATHER FIELD SCREENING AND ANALYTICAL MONITORING

Each Copermittee shall conduct dry weather field screening and analytical monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect illicit discharges and connections in accordance with Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R9-2007-0001.

d. INVESTIGATION/INSPECTION AND FOLLOW-UP

(1) Each Copermittee shall investigate and inspect any portion of the MS4 that, based on visual observations, dry weather field screening and analytical monitoring results, or other appropriate information, indicates a reasonable potential for illicit discharges, illicit connections, or other sources of non-storm water (including non-prohibited discharge(s) identified in section B of this Order). Each Copermittee shall develop/update and utilize numeric criteria action levels (or other actions level criteria where appropriate) to determine when follow-up investigations will be performed.

(2) Within two business days of receiving dry weather field screening results that exceed action levels, the Copermittees shall either conduct an investigation to identify the source of the discharge or provide the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. Within two business days, where applicable, of receiving analytical laboratory results that exceed action levels, the Copermittees shall either conduct an investigation to identify the source of the discharge or provide the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) shall be investigated immediately.



e. ELIMINATION OF ILLICIT DISCHARGES AND CONNECTIONS

Each Copermittee shall take immediate action to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections as soon as possible after detection. Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment. Illicit discharges that pose a serious threat to the public's health or the environment must be eliminated immediately.

f. ENFORCE ORDINANCES

Each Copermittee shall implement and enforce its ordinances, orders, or other legal authority to prevent illicit discharges and connections to its MS4. Each Copermittee shall also implement and enforce its ordinance, orders, or other legal authority to eliminate detected illicit discharges and connections to it MS4.

g. PREVENT AND RESPOND TO SEWAGE SPILLS (INCLUDING FROM PRIVATE LATERALS AND FAILING SEPTIC SYSTEMS) AND OTHER SPILLS

Each Copermittee shall prevent, respond to, contain and clean up all sewage and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems). Spill response teams shall prevent entry of spills into the MS4 and contamination of surface water, ground water and soil to the maximum extent practicable. Each Copermittee shall coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies so that maximum water quality protection is available at all times.

Each Copermittee shall develop and implement a mechanism whereby it is notified of all sewage spills from private laterals and failing septic systems into its MS4. Each Copermittee shall prevent, respond to, contain and clean up sewage from any such notification.

h. FACILITATE PUBLIC REPORTING OF ILLICIT DISCHARGES AND CONNECTIONS - PUBLIC HOTLINE

Each Copermittee shall promote, publicize and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from MS4s. Each Copermittee shall facilitate public reporting through development and operation of a public hotline. Public hotlines can be Copermittee-specific or shared by Copermittees. All storm water hotlines shall be capable of receiving reports in both English and Spanish 24 hours per day / seven days per week. Copermittees shall respond to and resolve each reported incident in a timely manner. All reported incidents, and how each was resolved, shall be summarized in each Copermittee's individual JURMP Annual Report.

## 5. Education Component

Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education

program shall meet the requirements of this section and address the following target communities:

- Municipal Departments and Personnel
- Construction Site Owners and Developers
- Industrial Owners and Operators
- Commercial Owners and Operators
- Residential Community, General Public, and School Children

a. GENERAL REQUIREMENTS

(1) Each Copermittee shall educate each target community on the following topics where appropriate:

Table 3. Education

<b>Laws, Regulations, Permits, &amp; Requirements</b>	<b>Best Management Practices</b>
<ul style="list-style-type: none"> <li>• Federal, state, and local water quality laws and regulations</li> <li>• Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction).</li> <li>• Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities</li> <li>• Regional Board’s General NPDES Permit for Ground Water Dewatering</li> <li>• Regional Board’s 401 Water Quality Certification Program</li> <li>• Statewide General NPDES Utility Vault Permit</li> <li>• Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)</li> </ul>	<ul style="list-style-type: none"> <li>• Pollution prevention and safe alternatives</li> <li>• Good housekeeping (e.g., sweeping impervious surfaces instead of hosing)</li> <li>• 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)</li> <li>• Non-storm water disposal alternatives (e.g., all wash waters)</li> <li>• Methods to minimized the impact of land development and construction</li> <li>• Erosion prevention</li> <li>• Methods to reduce the impact of residential and charity car-washing</li> <li>• Preventive Maintenance</li> <li>• Equipment/vehicle maintenance and repair</li> <li>• Spill response, containment, and recovery</li> <li>• Recycling</li> <li>• BMP maintenance</li> </ul>
<b>General Urban Runoff Concepts</b>	<b>Other Topics</b>
<ul style="list-style-type: none"> <li>• Impacts of urban runoff on receiving waters</li> <li>• Distinction between MS4s and sanitary sewers</li> <li>• BMP types: facility or activity specific, LID, source control, and treatment control</li> <li>• Short- and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction)</li> <li>• Non-storm water discharge prohibitions</li> <li>• How to conduct a storm water inspections</li> </ul>	<ul style="list-style-type: none"> <li>• Public reporting mechanisms</li> <li>• Water quality awareness for Emergency/ First Responders</li> <li>• Illicit Discharge Detection and Elimination observations and follow-up during daily work activities</li> <li>• Potable water discharges to the MS4</li> <li>• Dechlorination techniques</li> <li>• Hydrostatic testing</li> <li>• Integrated pest management</li> <li>• Benefits of native vegetation</li> <li>• Water conservation</li> </ul>

	<ul style="list-style-type: none"> <li>• Alternative materials and designs to maintain peak runoff values</li> <li>• Traffic reduction, alternative fuel use</li> </ul>
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- (2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

- (a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:
- i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
  - ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
  - iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
  - iv. Methods of minimizing impacts to receiving water quality resulting from development, including:
    - [1] Storm water management plan development and review;
    - [2] Methods to control downstream erosion impacts;
    - [3] Identification of pollutants of concern;
    - [4] LID BMP techniques;
    - [5] Source control BMPs; and
    - [6] Selection of the most effective treatment control BMPs for the pollutants of concern.
- (b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:
- i. Federal, state, and local water quality laws and regulations applicable to construction and grading activities.
  - ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
  - iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
  - iv. The Copermittee’s inspection, plan review, and enforcement policies and procedures to verify consistent application.
  - v. Current advancements in BMP technologies.

vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

## **6. Public Participation Component**

Each Copermittee shall incorporate a mechanism for public participation in the updating, development, and implementation of the Jurisdictional Urban Runoff Management Program.

## **E. WATERSHED URBAN RUNOFF MANAGEMENT PROGRAM**

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

a. Lead Watershed Permittee Identification

Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA. In the event that a Lead Watershed Permittee is not selected and identified by the Watershed Copermittees, by default the Copermittee identified in Table 4 as the Lead Watershed Permittee for that WMA shall be responsible for implementing the requirements of the Lead Watershed Permittee in that WMA. The Lead Watershed Copermittees shall serve as liaisons between the Copermittees and Regional Board, where appropriate.

b. Watershed Map

Watershed Copermittees shall develop and periodically update a map of the WMA to facilitate planning, assessment, and collaborative decision-making. As determined appropriate, the map shall include features such as receiving waters (including the Pacific Ocean); Clean Water Act section 303(d) impaired receiving waters; land uses, MS4s; major highways; jurisdictional boundaries; and inventoried commercial, industrial, and municipal sites.

c. Watershed Water Quality Assessment

Watershed Copermittees shall annually assess the water quality of receiving waters in their WMA. This assessment shall use applicable water quality data, reports, and analysis generated in accordance with the requirements of the Receiving Waters Monitoring and Reporting Program, as well as applicable information available from other public and private organizations.

The assessment and analysis shall annually identify the WMA's water quality problems that are partially or fully attributable to MS4 discharges. Identified water quality problems shall include CWA section 303(d) listings, persistent violations of water quality standards, toxicity, impacts to beneficial uses, and other pertinent conditions. From the list of water quality problems, the high priority water quality problems of the WMA shall be identified, which shall include those water quality problems which most significantly exceed or impact water quality standards (water quality objectives and beneficial uses).

The assessment shall include annual identification of the likely sources of the WMA's high priority water quality problems.

d. Watershed-based Land Use Planning

The Watershed Copermittees shall develop, implement, and modify, as necessary, a program for encouraging collaborative, watershed-based, land use planning in their jurisdictional planning departments.

## e. Watershed Strategy

Watershed Copermittees shall develop and implement a collective watershed strategy to abate the sources and reduce the discharge of pollutants causing the high priority water quality problems of the WMA. The strategy shall guide Watershed Copermittee selection and implementation of Watershed Activities, so that the Watershed Activities selected and implemented are appropriate for each Watershed Copermittee's contribution to the WMA's high priority water quality problems.

## 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 WURMP and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.
- (3) Each activity on the Watershed Activities List shall include the following information:
  - (a) A description of the activity;
  - (b) A time schedule for implementation of the activity, including key milestones;
  - (c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
  - (d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
  - (e) A description of how the activity is consistent with the collective watershed strategy;
  - (f) A description of the expected benefits of implementing the activity; and
  - (g) A description of how implementation effectiveness will be measured.
- (4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity

is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed’s high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

h. Public Participation

Watershed Copermittees shall implement a watershed-specific public participation mechanism within each watershed. The mechanism shall encourage participation from other organizations within the watershed (such as the Department of Defense, Caltrans, lagoon foundations, etc.)

i. WURMP Review and Updates

Each WURMP shall be reviewed annually to identify needed modifications and improvements. Pursuant to the requirements of Section I.2.b of this Order the Watershed Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. All updates to the WURMP shall be documented in the Watershed Urban Runoff Management Program Annual Reports. Individual Watershed Copermittees shall also review and modify their jurisdictional activities and JURMPs as necessary so that they are consistent with the requirements of the WURMP.

Table 4. Watershed Management Areas and Watershed Copermittees

RESPONSIBLE WATERSHED COPERMITTEE(S)	WATERSHED MANAGEMENT AREA	HYDROLOGIC UNIT OR AREA	MAJOR RECEIVING WATER BODIES
1. County of San Diego	Santa Margarita River	Santa Margarita HU (902.00)	Santa Margarita River and Estuary, Pacific Ocean
2. City of Oceanside 3. City of Vista 4. County of San Diego	San Luis Rey River	San Luis Rey HU (903.00)	San Luis Rey River and Estuary, Pacific Ocean
1. City of Carlsbad 2. City of Encinitas 3. City of Escondido 4. City of Oceanside 5. City of San Marcos 6. City of Solana Beach 7. City of Vista 8. County of San Diego	Carlsbad	Carlsbad HU (904.00)	Batiqitos Lagoon San Elijo Lagoon Agua Hedionda Lagoon Buena Vista Lagoon and Tributary Streams Pacific Ocean
1. City of Del Mar 2. City of Escondido 3. City of Poway 4. City of San Diego 5. City of Solana Beach 6. County of San Diego	San Dieguito River	San Dieguito HU (905.00)	San Dieguito River and Estuary Pacific Ocean

RESPONSIBLE WATERSHED COPERMITTEE(S)	WATERSHED MANAGEMENT AREA	HYDROLOGIC UNIT OR AREA	MAJOR RECEIVING WATER BODIES
1. City of Del Mar 2. <b>City of Poway</b> 3. City of San Diego 4. County of San Diego	Peñasquitos	Miramar Reservoir HA (906.10) Poway HA (906.20)	Los Peñasquitos Creek Los Peñasquitos Lagoon Pacific Ocean
1. <b>City of San Diego</b>	Mission Bay	Scripps HA (906.30) Miramar HA(906.40) Tecolote HA (906.50)	Mission Bay Pacific Ocean
1. <b>City of El Cajon</b> 2. City of La Mesa 3. City of San Diego 4. City of Santee 5. County of San Diego	San Diego River	San Diego HU (907.00)	San Diego River Pacific Ocean
1. City of Chula Vista 2. City of Coronado 3. City of Imperial Beach 4. City of La Mesa 5. City of Lemon Grove 6. City of National City 7. City of San Diego 8. County of San Diego 9. <b>San Diego Unified Port District</b> 10. San Diego County Regional Airport Authority	San Diego Bay	Pueblo San Diego HU (908.00) Sweetwater HU (909.00) Otay HU (910.00)	San Diego Bay Sweetwater River Otay River Pacific Ocean
1. City of Imperial Beach 2. City of San Diego 3. <b>County of San Diego</b>	Tijuana River	Tijuana (911.00)	Tijuana River and Estuary Pacific Ocean

- The Lead Watershed Permittee for each watershed is highlighted

**F. REGIONAL URBAN RUNOFF MANAGEMENT PROGRAM**

The Copermittees shall implement all requirements of section F of this Order no later than 365 days after adoption of this Order, unless otherwise specified in this Order.

Each Copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program. The Regional Urban Runoff Management Program shall meet the requirements of section F of this Order, reduce the discharge of pollutants 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. 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 this Order.
3. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

As options, the Regional Urban Runoff Management Program may:

1. Develop and implement urban runoff management activities on a regional level, as determined to be necessary by the Copermittees.



2. Develop and implement a strategy to integrate management, implementation, and reporting of jurisdictional, watershed, and regional activities, as determined to be necessary by the Copermittees. Any such integration shall assure compliance with the jurisdictional requirements of section D and the watershed requirements of section E.
3. Facilitate TMDL management and implementation, as determined to be necessary by the Copermittees.
4. Facilitate development of strategies for implementation of activities on a watershed level, as determined to be necessary by the Copermittees.

## **G. FISCAL ANALYSIS**

1. Each Copermittee shall secure the resources necessary to meet all requirements of this Order.
2. As part of the Regional Urban Runoff Management Program, the Copermittees shall collectively develop a standardized method and format for annually conducting and reporting fiscal analyses of their urban runoff management programs in their entirety (including jurisdictional, watershed, and regional activities). This standardized method shall:
  - a. Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.
  - b. Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program.
  - c. Identify a metric or metrics to be used to report program component and total program expenditures.
3. Each Copermittee shall conduct an annual fiscal analysis. Starting January 31, 2010, the annual fiscal analysis shall be conducted consistent with the standardized fiscal analysis method included in the January 31, 2009 Regional Urban Runoff Management Program Annual Report. The annual fiscal analysis shall be conducted and reported on as part of each Copermittee's Jurisdictional Urban Runoff Management Program Annual Reports. For convenience, the fiscal analysis included in the Jurisdictional Urban Runoff Management Program Annual Reports shall address the Copermittee's urban runoff management programs in their entirety, including jurisdictional, watershed, and regional activities. The fiscal analysis shall provide the Copermittee's urban runoff management program budget for the current reporting period. The fiscal analysis shall include a description of the source(s) of the funds that are proposed to be used to meet the necessary expenditures, including legal restrictions on the use of such funds.

## **H. TOTAL MAXIMUM DAILY LOADS**

1. **Chollas Creek Diazinon TMDL Water Quality Based Effluent Limits (WQBELs)**
  - a. The Copermittees in the Chollas Creek watershed shall implement BMPs capable of achieving the interim and final diazinon Waste Load Allocation (WLA) concentration in the storm water discharge in Chollas Creek listed in Table 5.

Table 5. Chollas Creek Diazinon Schedule

<b>Calendar Year</b>	<b>Year</b>	<b>Waste Load Allocation</b>	<b>Interim TMDL Numeric Target</b>	<b>% Reduction</b>
2004	1	0.460 µg/L	0.5 µg/L	0
2005	2	0.460 µg/L	0.5 µg/L	0
2006	3	0.460 µg/L	0.5 µg/L	0
2007	4	0.414 µg/L	0.45 µg/L	10
2008	5	0.322 µg/L	0.35 µg/L	20
2009	6	0.184 µg/L	0.20 µg/L	30
2010	7	0.045 µg/L	0.05 µg/L	30

- b. The Copermittees in the Chollas Creek watershed shall not cause or contribute to the violation of the Interim TMDL Numeric Targets in Chollas Creek as listed in Table 5. If the Interim TMDL Numeric Target is violated in Chollas Creek in more than one sample in any three consecutive years, the Copermittees shall submit a report that either 1) documents compliance with the WLA through additional sampling of the urban runoff discharge or 2) demonstrates, using modeling or other technical or scientific basis, the effectiveness of additional BMPs that will be implemented to achieve the WLA. The report may be incorporated into the Watershed Urban Runoff Management Program Annual Report unless the Regional Board directs an earlier submittal. The report shall include an implementation schedule.
- c. The Copermittees in the Chollas Creek watershed shall implement the Diazinon Toxicity Control Plan and Diazinon Public Outreach/Education Program as described in the report titled, "Technical Report for Total Maximum Daily Load for Diazinon in Chollas Creek Watershed, San Diego County, August 14, 2002," including subsequent modifications, in order to achieve the WLA listed in Table 5.

## **2. Shelter Island Yacht Basin WQBELs**

- a. The Copermittees in the Shelter Island Yacht Basin watershed shall implement BMPs to maintain a total annual copper discharge load of less than or equal to 30 kg copper / year.
- b. The Copermittees in the Shelter Island Yacht Basin watershed shall implement, at a minimum, the BMPs included in the Copermittees' Jurisdictional Urban Runoff Management Plan, including subsequent modifications, which address the discharge of copper to achieve the annual copper load in Section H.2.a above.

## **I. PROGRAM EFFECTIVENESS ASSESSMENT**

### **1. Jurisdictional**

- a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

- (1) Specifically assess the effectiveness of each of the following:

- (a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
  - (b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge Detection and Elimination, and Education); and
  - (c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.
- (2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.
  - (3) Utilize outcome levels 1-6<sup>9</sup> 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, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.<sup>10</sup>
- 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) 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:

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<sup>9</sup> Effectiveness assessment outcome levels are defined in Attachment C of this Order.

<sup>10</sup> Implementation Assessment, Water Quality Assessment, and Integrated Assessment are defined in Attachment C of this Order.

- (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. 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.

### 3. Regional

- a. As part of the Regional Urban Runoff Management Program, the Copermittees shall annually assess the effectiveness of Regional 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 regional activity/BMP or type of regional activity/BMP implemented, including regional residential education activities; and
    - (b) The Regional 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.3.a.(1) above.
  - (3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.3.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.3.a.(1) above, where applicable and feasible.
  - (5) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.
  - (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.
- b. Based on the results of the effectiveness assessment, the Copermittees shall annually review their regional activities and other aspects of the Regional Urban Runoff Management Program to identify modifications and improvements needed maximize Regional 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. Regional activities that are ineffective or less effective than other

comparable regional activities shall be replaced or improved upon by implementation of more effective regional activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, regional activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

- c. Based on the results of the Copermittees' evaluation of their effectiveness assessments, the Copermittees shall modify their effectiveness assessment methods to improve their ability to accurately assess the effectiveness of their urban runoff management programs.
- d. As part of its Regional Urban Runoff Management Program Annual Reports, the Copermittees shall report on its Regional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.3.a, I.3.b, and I.3.c above.

#### **4. TMDL BMP Implementation Plan**

- a. For each TMDL in a watershed, the Copermittees subject to the TMDL within the watershed shall annually assess the effectiveness of its TMDL BMP Implementation Plan or equivalent plan.<sup>11</sup> At a minimum, the annual effectiveness assessment shall:
  - (1) Specifically assess the effectiveness of each of the following:
    - (a) Each activity/BMP or type of activity/BMP implemented; and
    - (b) Implementation of the TMDL BMP Implementation Plan or equivalent plan as a whole.
  - (2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in sections I.4.a.(1) above.
  - (3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in section I.4.a.(1)(a) above, where applicable and feasible.
  - (4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the TMDL BMP Implementation Plan or equivalent plan as a whole, where applicable and feasible.
  - (5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of the TMDL BMP Implementation Plan or equivalent plan as a whole. These assessments shall attempt to exhibit the effects of the TMDL BMP Implementation Plan or equivalent plan on the impairment that is targeted.
- b. Based on the results of the effectiveness assessment, the Copermittees subject to the TMDL shall modify their BMPs and other aspects of the TMDL BMP Implementation Plan or equivalent plan in order to maximize TMDL BMP Implementation Plan or equivalent plan effectiveness. BMPs that are ineffective or less effective than other comparable BMPs shall be replaced or improved upon by implementation of more effective BMPs. Where monitoring data exhibits persistent

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<sup>11</sup> This requirement applies to those TMDLs where a TMDL BMP Implementation Plan or equivalent plan has been developed and submitted to the Regional Board.

water quality problems that are caused or contributed to by MS4 discharges, BMPs 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 group of Copermittees subject to a TMDL shall report on any TMDL BMP Implementation Plan or equivalent plan effectiveness assessments as implemented under each of the requirements of sections I.4.a and I.4.b above.

## **5. Long-term Effectiveness Assessment**

- a. Each Copermittee shall collaborate with the other Copermittees to develop a Long-term Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.
- b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6) of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.
- c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).
- 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.

## **J. REPORTING**

### **1. Urban Runoff Management Plans**

- a. JURISDICTIONAL URBAN RUNOFF MANAGEMENT PLANS
  - (1) Copermittees - The written account of the overall program to be conducted by each Copermittee to meet the jurisdictional requirements of section D of this Order is referred to as the Jurisdictional Urban Runoff Management Plan (JURMP). Each Copermittee shall revise and update its JURMP so that it describes all activities the Copermittee will undertake to implement the requirements of each component of Jurisdictional Urban Runoff Management Program section D of this Order. Each Copermittee shall submit its updated and revised JURMP to the Principal Permittee by the date specified by the Principal

Permittee.

- (2) Principal Permittee –The Principal Permittee shall be responsible for collecting and assembling the individual JURMPs which cover the activities conducted by each individual Copermittee. The Principal Permittee shall submit the JURMPs to the Regional Board 365 days after adoption of this Order.
- (3) At a minimum, each Copermittee’s JURMP shall be updated and revised to contain the following information:
  - (a) Non-Storm Water Discharges
    - i. Identification of non-storm water discharge categories identified as a source of pollutants to waters of the U.S.
    - ii. A description of whether non-storm water discharge categories identified under section (a)i above will be prohibited or required to implement appropriate control measures to reduce the discharge of pollutants to the MEP.
    - iii. Identification of any control measures to be required and implemented for non-storm water discharge categories identified under section (a)i above.
    - iv. A description of a program to reduce pollutants from non-emergency fire fighting flows identified by the Copermittee to be significant sources of pollutants.
  - (b) Administrative and Legal Procedures
    - i. Certified statement by the chief legal counsel that the Copermittee has adequate legal authority to implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order.
    - ii. Identification of all departments within the jurisdiction that conduct urban runoff related activities, and their roles and responsibilities under the Order. Include an up-to-date organizational chart specifying these departments and key personnel.
    - iii. Updated urban runoff related ordinances, with explanations of how they are enforceable.
    - iv. Identification of the local administrative and legal procedures available to mandate compliance with urban runoff related ordinances and therefore with the conditions of the Order.
    - v. Description of how urban runoff related ordinances are implemented and appealed.
    - vi. Description of whether the municipality can issue administrative orders and injunctions or if it must go through the court system for enforcement actions.
  - (c) Development Planning
    - i. A description of the water quality and watershed protection principles that have been or will be included in the Copermittee’s General Plan, and a time schedule for when modifications are planned, if applicable.
    - ii. A description of the Copermittee’s current environmental review process and how it addresses impacts to water quality and appropriate mitigation measures. If the Copermittee plans to modify the process during the permit term, a time schedule for modifications shall be included.



- iii. A description of the development project approval process and requirements.
  - iv. An updated SUSMP document that meets the applicable requirements specified in sections D.1.d and D.1.g(6), including a description of LID BMP requirements to be used prior to the Model SUSMP update. The updated SUSMP may be submitted under separate cover as an attachment to the JURMP.
  - v. A description of the database to be used to track and inventory approved treatment control BMPs and treatment control BMP maintenance.
  - vi. A completed watershed-based inventory of approved treatment control BMPs.
  - vii. A description of the program to be implemented to verify approved treatment control BMPs are operating effectively and have been adequately maintained, including information on treatment control BMP inventory, prioritization, inspection, and annual verification.
  - viii. A description of inspections that will be conducted to verify BMPs have been constructed according to requirements.
  - ix. A description of collaboration efforts to be conducted to develop the HMP.
  - x. A description of enforcement mechanisms and how they will be used.
- (d) Construction
- i. Updated grading and other applicable ordinances.
  - ii. A description of the construction and grading approval processes.
  - iii. Updated construction and grading project requirements.
  - iv. A completed watershed-based inventory of all construction sites.
  - v. A description of steps that will be taken to maintain and update monthly a watershed-based inventory of all construction sites.
  - vi. A list and description of the minimum BMPs that will be implemented, or required to be implemented, including pollution prevention.
  - vii. A description of the maximum disturbed area allowed for grading before either temporary or permanent erosion controls are implemented.
  - viii. A description of construction site conditions where advanced treatment will be required.
  - ix. A description of the steps that will be taken to require and verify the implementation of the designated BMPs at all construction sites.
  - x. A description of planned inspection frequencies.
  - xi. A description of inspection procedures.
  - xii. A description of steps that will be taken to track construction site inspections to verify that all construction sites are inspected at the minimum frequencies required.
  - xiii. A description of available enforcement mechanisms, under what conditions each will be used, and how they will escalate.
  - xiv. A description of notification procedures for non-compliant sites.
- (e) Municipal
- i. A completed inventory of all municipal facilities and activities.
  - ii. A description of which BMPs will be implemented, or required to be implemented, for municipal facilities and activities, including pollution prevention.
  - iii. A description of which BMPs will be implemented, or required to be implemented, for special events.

- iv. A description of steps that will be taken to require and verify the implementation of designated BMPs at municipal facilities and activities.
  - v. A description of MS4 and MS4 facility inspection and maintenance activities and schedules.
  - vi. A description of the management strategy and BMPs to be implemented for pesticides, herbicides, and fertilizer use.
  - vii. A description of street and parking facility sweeping activities and schedules.
  - viii. A description of controls and measures to be implemented to prevent and eliminate infiltration of seepage from sanitary sewers to MS4s.
  - ix. A description of inspection frequencies and procedures.
  - x. A description of enforcement mechanisms and how they will be used.
- (f) Industrial and Commercial
- i. A completed and prioritized inventory of all industrial and commercial sites/sources that could contribute a significant pollutant load to the MS4.
  - ii. A list of minimum BMPs that will be implemented, or required to be implemented, for each facility type or pollutant-generating activity, including pollution prevention.
  - iii. A description of the steps that will be taken to require and verify the implementation of designated BMPs, including notification efforts.
  - iv. Identification of high priority sites/sources and sites/sources to be inspected during the first year of implementation.
  - v. A description of the steps taken to identify sites/sources to be inspected during the first year of implementation, including rationale for their selection.
  - vi. A description of steps that will be taken to identify sites/sources to be inspected in subsequent years.
  - vii. A description of inspection procedures.
  - viii. A description of any third party inspection program to be implemented.
  - ix. A description of the program to be implemented to regulate mobile businesses, including notification of BMP requirements and local ordinances.
  - x. A description of enforcement mechanisms and how they will be used.
  - xi. A description of steps that will be taken to identify non-filers and notify the Regional Board of non-filers.
- (g) Residential
- i. A list of residential areas and activities that have been identified as high priority.
  - ii. A list of minimum BMPs that will be implemented, or required to be implemented, for high priority residential activities.
  - iii. A description of which pollution prevention methods will be encouraged for implementation, and the steps that will be taken to encourage implementation.
  - iv. A description of the steps that will be taken to require and verify the implementation of prescribed BMPs for high priority residential activities.
  - v. A description of efforts to facilitate proper disposal of used oil and other toxic materials.

- vi. A description of efforts to evaluate methods used for oversight of residential areas and activities.
  - vii. A description of enforcement mechanisms and how they will be used.
- (h) Illicit Discharge Detection and Elimination
- i. A description of the program to actively seek and eliminate illicit discharges and illicit connections.
  - ii. An updated MS4 map, including locations of the MS4, dry weather field screening and analytical monitoring sites, and watersheds.
  - iii. A description of dry weather field screening and analytical monitoring to be conducted (including procedures) which addresses all requirements included in sections B.1-4 of Receiving Waters Monitoring and Reporting Program No. R9-2006-0011.
  - iv. A description of investigation and inspection procedures to follow up on dry weather monitoring results or other information which indicate potential for illicit discharges and illicit connections.
  - v. A description of procedures to eliminate detected illicit discharges and illicit connections.
  - vi. A description of enforcement mechanisms and how they will be used.
  - vii. A description of the mechanism to receive notification of spills.
  - viii. A description of measures to prevent, respond to, contain, and clean up all sewage and other spills.
  - ix. A description of efforts to facilitate public reporting of illicit discharges and connections, including a public hotline.
- (i) Education
- i. A description of the content, form, and frequency of education efforts for each target community.
  - ii. A description of steps to be taken to educate underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.
  - iii. A description of the content, form, and frequency of education efforts targeting municipal staff working on development planning, construction, municipal, industrial/commercial, and other aspects of the Jurisdictional Urban Runoff Management Program.
  - iv. A description of the content, form, and frequency of education efforts targeting new development and construction target communities.
  - v. A description of the content, form, and frequency of jurisdictional education efforts for the residential, general public, and school children target communities.
- (j) Public Participation
- i. A description of the steps that will be taken to include public participation in the development and implementation of each Copermittee’s Jurisdictional Urban Runoff Management Program.
- (k) Fiscal Analysis
- i. A description of the fiscal analysis to be conducted annually, as required by section G of this Order.

- (l) Program Effectiveness Assessment
  - i. A description of steps that will be taken to annually conduct program effectiveness assessments in compliance with section I.1 of the Order.
  - ii. Identify measurable targeted outcomes, assessment measures, and assessment methods to be used to assess the effectiveness of: (1) Each significant jurisdictional activity or BMP to be implemented; (2) Implementation of each major component of the Jurisdictional Urban Runoff Management Program; and (3) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.
  - iii. Identify which of the outcome levels 1-6 will be utilized to assess the effectiveness of each of the items listed in sections J.1.a.(3)(l)ii(1-3). Where an outcome level is determined to not be applicable or feasible for an item listed in sections J.1.a.(3)(l)ii(1-3), the Copermittee shall provide a discussion exhibiting inapplicability or infeasibility.
  - iv. A description of the steps that will be taken to utilize monitoring data to assess the effectiveness of each of the items listed in sections J.1.a.(3)(l)ii(1-3).
  - v. A description of the steps that will be taken to improve the Copermittee's ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6. Include a time schedule for when improvement will occur.
  - vi. A description of the steps that will be taken to identify aspects of the Copermittee's Jurisdictional Urban Runoff Management Program that will be changed, based on the results of the effectiveness assessment.

(m) JURMP Modification

- i. Identification of the location in the JURMP of any changes made to the JURMP in order to meet the requirements of Order No. R9-2007-0001.

b. WATERSHED URBAN RUNOFF MANAGEMENT PLANS

- (1) Copermittees - The written account of the program conducted by each watershed group of Copermittees is referred to as the Watershed Urban Runoff Management Plan (WURMP). The Copermittees within each watershed shall be responsible for updating and revising each WURMP, as specified in Table 4 above. Each WURMP shall be updated and revised to describe all activities the watershed Copermittees will undertake to implement the Watershed Urban Runoff Management Program requirements of section E of this Order.
- (2) Lead Watershed Permittee - Each Lead Watershed Permittee shall be responsible for producing its respective WURMP, as well as for coordination and meetings amongst all member watershed Copermittees. Each Lead Watershed Permittee is further responsible for the submittal of the WURMP to the Principal Permittee by the date specified by the Principal Permittee.
- (3) Principal Permittee – The Principal Permittee shall assemble and submit the WURMPs to the Regional Board 365 days after adoption of this Order.
- (4) Each WURMP shall include:
  - (a) Identification of the Lead Watershed Permittee for the watershed.
  - (b) An updated watershed map.

- (c) Identification and description of all applicable water quality data, reports, analyses, and other information to be used to assess receiving water quality.
- (d) Assessment and analysis of the watershed's water quality data, reports, analyses, and other information, including identification and prioritization of the watershed's water quality problems. Water quality problems and high priority water quality problems shall be identified.
- (e) Identification of the likely sources, pollutant discharges, and/or other factors causing the high priority water quality problems within the watershed.
- (f) A description of the program to be implemented to encourage collaborative, watershed-based, land-use planning.
- (g) A description of the strategy to be used to guide Copermittee implementation of Watershed Water Quality Activities and Watershed Education Activities, including criteria for evaluating and identifying effective activities.
- (h) A list of potential Watershed Water Quality Activities, including a description of each activity and its location(s).
- (i) Identification and description of the Watershed Water Quality Activities to be implemented by each Copermittee for the first year of implementation, including justification for why the activities were chosen and a description of how the activities are expected to reduce discharged pollutant loads, abate pollutant sources, or result in other quantifiable benefits to discharge or receiving water quality, in relation to the watershed's high priority water quality problem(s). Plans for activity implementation beyond the first year of implementation should also be provided.
- (j) A list of potential Watershed Education Activities.
- (k) Identification and description of the Watershed Education Activities to be implemented by each Copermittee for the first year of implementation, including justification for why the activities were chosen and a description of how the activities are expected to directly target the sources and discharges of pollutants causing the watershed's high priority water quality problems. Plans for activity implementation beyond the first year of implementation should also be provided.
- (l) A description of the public participation mechanisms to be used and the parties anticipated to be involved.
- (m) A description of Copermittee collaboration to occur, including a schedule for WURMP meetings.
- (n) A description of any TMDL BMP Implementation Plan or equivalent plan to be implemented under section H of this Order.<sup>12</sup>
- (o) A detailed description of the effectiveness assessment to be conducted for the WURMP, including a description how each of the requirements in section I.2 of this Order will be met.

c. REGIONAL URBAN RUNOFF MANAGEMENT PLAN

- (1) Copermittees - The written account of the regional program to be conducted is referred to as the Regional Urban Runoff Management Plan (RURMP). Each Copermittee shall collaborate with the other Copermittees to develop the RURMP. The RURMP shall describe all activities the Copermittees will undertake to implement the requirements of each component of Regional Urban

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<sup>12</sup> For TMDLs not yet approved by the Office of Administrative Law at the time of adoption of this Order, TMDL BMP Implementation Plans shall be submitted separately 365 days following approval of the TMDL.

Runoff Management Program section F of this Order. At a minimum, the RURMP shall contain the following information:

- (a) A common activities section that describes the urban runoff management activities to be implemented on a regional level. For regional activities which are to be implemented in compliance with any jurisdictional requirements of section D or watershed requirements of section E, it shall be described how the regional activities achieve compliance with the subject jurisdictional and/or watershed requirements.
  - (b) A description of steps that will be taken to facilitate assessment of the effectiveness of jurisdictional, watershed, and regional programs.
  - (c) A description of the regional residential education program to be implemented.
  - (d) A description of the strategy for development of the standardized fiscal analysis method required by section G of this Order.
  - (e) A detailed description of the effectiveness assessment to be conducted for the Regional Urban Runoff Management Program, including a description how each of the requirements in section I.3 of this Order will be met.
- (2) The Principal Permittee shall be responsible for creating and submitting the RURMP. The Principal Permittee shall submit the RURMP to the Regional Board 365 days after adoption of this Order.

## **2. Other Required Reports and Plans**

### **a. HYDROMODIFICATION MANAGEMENT PLAN**

- (1) Copermittees - Each Copermittee shall collaborate with the other Copermittees to develop the HMP. The HMP shall be submitted for approval by the Regional Board.
- (2) Principal Permittee - The Principal Permittee shall be responsible for producing and submitting each document according to the schedule below.
  - (a) Within 180 days of adoption of the Order: Submit a detailed workplan and schedule for completion of the literature review, development of a protocol to identify an appropriate channel standard and limiting range of flow rates, development of guidance materials, and other required information;
  - (b) Within 18 months of adoption of the Order: Submit progress report on completion of requirements of the HMP;
  - (c) Within 2 years of adoption of the Order: Submit a draft HMP, including the analysis that identifies the appropriate limiting range of flow rates;
  - (d) Within 180 days of receiving comments from the Regional Board: Submit the HMP for Regional Board approval.

### **b. SUSMP UPDATES**

Each Copermittee shall collaborate with the other Copermittees to update the Model SUSMP. The Principal Permittee shall be responsible for producing and submitting the updated Model SUSMP in accordance with the requirements of section D.1.d.(8)(b). Each Copermittee shall submit its updated local SUSMP, consistent

with the updated Model SUSMP, in accordance with the requirements of section D.1.d.(8)(c).

c. LONG-TERM EFFECTIVENESS ASSESSMENT

In accordance with section I.5 of this Order, the Principal Permittee shall submit the LTEA to the Regional Board no later than 210 days in advance of the expiration of this Order.

d. REPORT OF WASTE DISCHARGE

The Principal Permittee shall submit to the Regional Board, no later than 210 days in advance of the expiration date of this Order, a Report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements. At a minimum, the ROWD shall include the following: (1) Proposed changes to the Copermittees' urban runoff management programs; (2) Proposed changes to monitoring programs; (3) Justification for proposed changes; (4) Name and mailing addresses of the Copermittees; (5) Names and titles of primary contacts of the Copermittees; and (6) Any other information necessary for the reissuance of this Order.

**3. Annual Reports**

a. JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM ANNUAL REPORTS

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

(1) Copermittees – Each Copermittee shall generate individual Jurisdictional Urban Runoff Management Program Annual Reports which cover implementation of its jurisdictional activities during the past annual reporting period. Each Copermittee shall submit to the Principal Permittee its individual Jurisdictional Urban Runoff Management Program Annual Report by the date specified by the Principal Permittee. Each individual Jurisdictional Urban Runoff Management Program Annual Report shall be a comprehensive description of all activities conducted by the Copermittees to meet all requirements of each component of section D of this Order.

(2) Principal Permittee – The Principal Permittee shall submit Unified Jurisdictional Urban Runoff Management Program Annual Reports to the Regional Board by September 30 of each year, beginning on September 30, 2008. The Unified Jurisdictional Urban Runoff Management Program Annual Report shall contain the twenty-one individual Jurisdictional Urban Runoff Management Program Annual Reports.

The Principal Permittee shall also be responsible for collecting and assembling each Copermittees' individual Jurisdictional Urban Runoff Management Program Annual Report.

- (3) At a minimum, each Jurisdictional Urban Runoff Management Program Annual Report shall contain the following information:
- (a) Development Planning
- i. A description of any amendments to the General Plan, the environmental review process, development project approval processes, or development project requirements.
  - ii. Confirmation that all development projects were required to undergo the Copermittee's urban runoff approval process and meet the applicable project requirements, including a description of how this information was tracked.
  - iii. A listing of the development projects to which SUSMP requirements were applied.
  - iv. Confirmation that all applicable SUSMP BMP requirements were applied to all priority development projects, including a description of how this information was tracked.
  - v. At least one example of a priority development project that was conditioned to meet SUSMP requirements and a description of the required BMPs.
  - vi. A listing of the priority development projects which were allowed to implement treatment control BMPs with low removal efficiency rankings, including the feasibility analyses which were conducted to exhibit that more effective BMPs were infeasible.
  - vii. An updated treatment control BMP inventory.
  - viii. The number of treatment control BMPs inspected, including a summary of inspection results and findings.
  - ix. A description of the annual verification of operation and maintenance of treatment control BMPs, including a summary of verification results and findings.
  - x. Confirmation that BMP verification was conducted for all priority development projects prior to occupancy, including a description of how this information was tracked.
  - xi. A listing of any projects which received a SUSMP waiver.
  - xii. A description of implementation of any SUSMP waiver mitigation program.
  - xiii. A description of Hydromodification Management Plan (HMP) development collaboration and participation.
  - xiv. A listing of development projects required to meet HMP requirements, including a description of hydrologic control measures implemented.
  - xv. A listing of priority development projects not required to meet HMP requirements, including a description of why the projects were found to be exempt from the requirements.
  - xvi. A listing of development projects disturbing 50 acres or more, including information on whether Interim Hydromodification Criteria were met by each of the projects, together with a description of hydrologic control measures implemented for each applicable project.
  - xvii. The number of violations and enforcement actions (including types) taken for development projects, including information on any necessary follow-up actions taken. The discussion should exhibit that compliance has been achieved, or describe actions that are being taken to achieve compliance.



- xviii. A description of notable activities conducted to manage urban runoff from development projects.
- (b) Construction
- i. Confirmation that all construction sites were required to undergo the Copermittee's construction urban runoff approval process and meet the applicable construction requirements, including a description of how this information was tracked.
  - ii. Confirmation that a regularly updated construction site inventory was maintained, including a description of how the inventory was managed.
  - iii. A description of modifications made to the construction and grading ordinances and approval processes.
  - iv. Confirmation that the designated BMPs were implemented, or required to be implemented, for all construction sites.
  - v. Confirmation that a maximum disturbed area for grading was applied to all applicable construction sites.
  - vi. A listing of all construction sites with conditions requiring advanced treatment, together with confirmation that advanced treatment was required at such construction sites.
  - vii. For each construction site within each priority category (high, medium, and low), identification of the period of time (weeks) the site was active within the rainy season, the number of inspections conducted during the rainy season, and the number of inspections conducted during the dry season, and the total number of inspections conducted for all sites.
  - viii. A description of the general results of the inspections.
  - ix. Confirmation that the inspections conducted addressed all the required inspection steps to determine full compliance.
  - x. The number of violations and enforcement actions (including types) taken for construction sites, including information on any necessary follow-up actions taken. The discussion should exhibit that compliance has been achieved, or describe actions that are being taken to achieve compliance.
  - xi. A description of notable activities conducted to manage urban runoff from construction sites.
- (c) Municipal
- i. Any updates to the municipal inventory and prioritization.
  - ii. Confirmation that the designated BMPs were implemented, or required to be implemented, for municipal areas and activities, as well as special events.
  - iii. A description of inspections and maintenance conducted for municipal treatment controls.
  - 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 open channels inspected, the distance of 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.
  - ix. Confirmation that the designated BMPs for pesticides, herbicides, and fertilizers were implemented, or required to be implemented, for municipal areas and activities.
  - 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.
  - xvi. A description of efforts implemented to prevent and eliminate infiltration from the sanitary sewer to the MS4
  - xvii. Identification of the number of sites requiring inspections, the number of sites inspected, and the frequency of the inspections.
  - xviii. A description of the general results of the inspections.
  - xix. Confirmation that the inspections conducted addressed all the required inspection steps to determine full compliance.
  - xx. The number of violations and enforcement actions (including types) taken for municipal areas and activities, including information on any necessary follow-up actions taken. The discussion should exhibit that compliance has been achieved, or describe actions that are being taken to achieve compliance.
  - xxi. A description of notable activities conducted to manage urban runoff from municipal areas and activities.
- (d) Industrial and Commercial
- i. Any updates to the industrial and commercial inventory.
  - ii. Confirmation that the designated BMPs were implemented, or required to be implemented, for industrial and commercial sites/sources.
  - iii. A description of efforts taken to notify owners/operators of industrial and commercial sites/sources of BMP requirements, including mobile businesses.
  - iv. Identification of the total number of industrial and commercial sites/sources inventoried and the total number inspected.
  - v. Justification and rationale for why the industrial and commercial sites/sources inspected were chosen for inspection.

- vi. Confirmation that all inspections conducted addressed all the required inspection steps to determine full compliance.
- vii. Identification of the number of third party inspections conducted.
- viii. Identification of efforts conducted to verify third party inspection effectiveness.
- ix. A description of efforts implemented to address mobile businesses.
- x. The number of violations and enforcement actions (including types) taken for industrial and commercial sites/sources, including information on any necessary follow-up actions taken. The discussion should exhibit that compliance has been achieved, or describe actions that are being taken to achieve compliance.
- xi. A description of steps taken to identify non-filers and a list of non-filers (under the General Industrial Permit) identified by the Copermittees.
- xii. A description of notable activities conducted to manage urban runoff from industrial and commercial sites/sources.

(e) Residential

- i. Identification of the high threat to water quality residential areas and activities that were focused on.
- ii. Confirmation that the designated BMPs were implemented, or required to be implemented, for residential areas and activities.
- iii. A description of efforts implemented to facilitate proper management and disposal of used oil and other household hazardous materials.
- iv. Types and amounts of household hazardous wastes collected, if applicable.
- v. A description of any evaluation of methods used for oversight of residential areas and activities, as well as any findings of the evaluation.
- vi. The number of violations and enforcement actions (including types) taken for residential areas and activities, including information on any necessary follow-up actions taken. The discussion should exhibit that compliance has been achieved, or describe actions that are being taken to achieve compliance.
- vii. A description of collaboration efforts taken to develop and implement the Regional Residential Education Program.
- viii. A description of notable activities conducted to manage urban runoff from residential areas and activities.

(f) Illicit Discharge Detection and Elimination

- i. Correction of any inaccuracies in either the MS4 map or the Dry Weather Field Screening and Analytical Stations Map.
- ii. Reporting of all dry weather field screening and analytical monitoring results. The data should be presented in tabular and graphical form. The reporting shall include station locations, all dry weather field screening and analytical monitoring results, identification of sites where results exceeded action levels, follow-up and elimination activities for potential illicit discharges and connections, the rationale for why follow-up investigations were not conducted at sites where action levels were exceeded, any Copermittee or consultant program recommendations/changes resulting from the monitoring, and documentation that these recommendations/changes have been implemented. Dry weather field screening and analytical monitoring reporting shall comply with all monitoring and standard reporting

- requirements in Attachment B of Order No. R9-2007-0001 and Receiving Waters Monitoring and Reporting Program No. R9-2007-0001.
- iii. Any dry weather field screening and analytical monitoring consultant reports generated, to be provided as an attachment to the annual report.
  - iv. A brief description of any other investigations and follow-up activities for illicit discharges and connections.
  - v. The number and brief description of illicit discharges and connections identified.
  - vi. The number of illicit discharges and connections eliminated.
  - vii. Identification and description of all spills to the MS4 and response to the spills.
  - viii. A description of activities implemented to prevent sewage and other spills from entering the MS4.
  - ix. A description of the mechanism whereby notification of sewage spills from private laterals and septic systems is received.
  - x. Number of times the hotline was called, as compared to previous reporting periods, and a summary of the calls.
  - xi. A description of efforts to publicize and facilitate public reporting of illicit discharges.
  - xii. The number of violations and enforcement actions (including types) taken for illicit discharges and connections, including information on any necessary follow-up actions taken. The discussion should exhibit that compliance has been achieved, or describe actions that are being taken to achieve compliance.
  - xiii. A description of notable activities conducted to manage illicit discharges and connections.
- (g) Education
- i. A description of education efforts conducted for each target community.
  - ii. A description of how education efforts targeted underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges.
  - iii. A description of education efforts conducted for municipal departments and personnel.
  - iv. A description of education efforts conducted for the new development and construction communities.
  - v. A description of jurisdictional education efforts conducted for residents, the general public, and school children.
- (h) Public Participation
- i. A description of public participation efforts conducted.
- (i) Program Effectiveness Assessment
- i. An assessment of the effectiveness of the Jurisdictional Urban Runoff Management Program which meets all requirements of section I.1 of this Order.
- (j) Fiscal Analysis
- i. A fiscal analysis of the Copermittee’s urban runoff management programs which meets all requirements of section G of this Order.

- (k) Special Investigations
    - i. A description of any special investigations conducted.
  - (l) Non-Emergency Fire Fighting
    - i. A description of any efforts conducted to reduce pollutant discharges from non-emergency fire fighting flows.
  - (m) JURMP Revisions
    - i. A description of any proposed revisions to the JURMP.
- b. WATERSHED URBAN RUNOFF MANAGEMENT PROGRAM ANNUAL REPORTS
- (1) Lead Watershed Permittee - Each Lead Watershed Permittee shall generate watershed specific Watershed Urban Runoff Management Program Annual Reports for their respective watershed(s), as they are outlined in Table 4 of Order No. R9-2007-0001. Copermittees within each watershed shall collaborate with the Lead Watershed Permittee to generate the Watershed Urban Runoff Management Program Annual Reports.
  - (2) Each Watershed Urban Runoff Management Program Annual Report shall be a comprehensive documentation of all activities conducted by the watershed Copermittees during the previous annual reporting period to meet all requirements of section E of Order No. R9-2007-0001. Each Watershed Urban Runoff Management Program Annual Report shall also serve as an update to the WURMP.<sup>13</sup> Each Watershed Urban Runoff Management Program Annual Report shall, at a minimum, contain the following for its reporting period:
    - (a) A comprehensive description of all activities conducted by the watershed Copermittees to meet all requirements of section E of Order No. R9-2007-0001.
    - (b) Any updates to the watershed map.
    - (c) An updated assessment and analysis of the watershed's current and past applicable water quality data, reports, analyses, and other information, including identification of the watershed's water quality problems and high priority water quality problem(s) during the reporting period. The annual report shall clearly state if the watershed's high priority water quality problem(s) changed from the previous reporting period, and provide justification for the change(s).
    - (d) Identification of the likely sources, pollutant discharges, and/or other factors causing the high priority water quality problems within the watershed. The annual report shall clearly describe any changes to the identified sources, pollutant discharges, and/or other factors that have occurred since the previous reporting period, and provide justification for the changes.

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<sup>13</sup> The first annual report to be submitted is not anticipated to be an update to the WURMP, since it will cover the reporting period which begins immediately after WURMP submittal.

- (e) An updated list of potential Watershed Water Quality Activities. The annual report shall clearly describe any changes to the list of Watershed Water Quality Activities that have occurred since the previous reporting period, and provide justification for the changes.
- (f) Identification and description of the Watershed Water Quality Activities implemented by each Copermittee during the reporting period, including information on the activities' location(s), as well as information exhibiting that the activities in active implementation phase reduced discharged pollutant loads, abated pollutant sources, or resulted in other quantifiable benefits to discharge or receiving water quality, in relation to the watershed's high priority water quality problem(s). The annual report shall clearly describe any changes to Watershed Water Quality Activities implementation that have occurred since the previous reporting period, and provide justification for the changes.
- (g) An updated list of potential Watershed Education Activities. The annual report shall clearly describe any changes to the list of Watershed Education Activities that have occurred since the previous reporting period, and provide justification for the changes.
- (h) Identification and description of the Watershed Education Activities implemented by each Copermittee for the reporting period, including information exhibiting that the activities directly targeted the sources and discharges of pollutants causing the watershed's high priority water quality problems, and that activities in active implementation phase changed target audience attitudes, knowledge, awareness, or behavior. The annual report shall clearly describe any changes to Watershed Education Activities implementation that have occurred since the previous reporting period, and provide justification for the changes.
- (i) A description of the public participation mechanisms used during the reporting period and the parties that were involved.
- (j) A description of Copermittee collaboration efforts.
- (k) A description of efforts implemented to encourage collaborative, watershed-based, land-use planning.
- (l) A description of all TMDL activities implemented (including BMP Implementation Plan or equivalent plan activities) for each approved TMDL in the watershed. The description shall include:
  - i. Any additional source identification information;
  - ii. The number, type, location, and other relevant information about BMP implementation, including any expanded or better tailored BMPs necessary to meet the WLAs;
  - iii. Updates in the BMP implementation prioritization and schedule;
  - iv. An assessment of the effectiveness of the BMP Implementation Plan, which meets the requirements of section I.4 Order No. R9-2007-0001; and

- v. A discussion of the progress to date in meeting the TMDL Numeric Targets and WLAs, which incorporates the results of the effectiveness assessment, compliance monitoring, and an evaluation of additional efforts needed to date.
- (m) An assessment of the effectiveness of the WURMP, which meets the requirements of section I.2 of Order No. R9-2007-0001. The effectiveness assessment shall attempt to qualitatively or quantitatively exhibit the impact that implementation of the Watershed Water Quality Activities and the Watershed Education Activities had on the high priority water quality problem(s) within the watershed. This information shall document changes in pollutant load discharges, urban runoff and discharge quality, and receiving water quality, where applicable and feasible.
- (3) Principal Permittee – The Unified Watershed Urban Runoff Management Program Annual Report shall contain the nine separate Watershed Urban Runoff Management Program Annual Reports. Each Lead Watershed Copermittee shall submit to the Principal Permittee a Watershed Urban Runoff Management Program Annual Report by the date specified by the Principal Permittee. The Principal Permittee shall assemble and submit the Unified Watershed Urban Runoff Management Program Annual Report to the Regional Board by January 31, 2009 and every January 31 thereafter. The reporting period for these annual reports shall be the previous fiscal year. For example, the report submitted January 31, 2009 shall cover the reporting period July 1, 2007 to June 30, 2008.
- c. REGIONAL URBAN RUNOFF MANAGEMENT PROGRAM ANNUAL REPORTS

The Principal Permittee shall generate the Regional Urban Runoff Management Program Annual Reports. All Copermittees shall collaborate with the Principal Permittee to generate the Regional Urban Runoff Management Program Annual Reports. Each Regional Urban Runoff Management Program Annual Report shall be a comprehensive documentation of all regional activities conducted by the Copermittees during the previous annual reporting period to meet all requirements of section F of Order No. R9-2007-0001.

The Principal Permittee shall submit the Regional Urban Runoff Management Program Annual Report to the Regional Board by January 31, 2009 and every January 31 thereafter. The reporting period for these annual reports shall be the previous fiscal year. For example, the report submitted January 31, 2009 shall cover the reporting period July 1, 2007 to June 30, 2008.

Each Regional Urban Runoff Management Program Annual Report shall, at a minimum, contain the following:

- (1) A common activities section that describes the urban runoff management activities or BMPs implemented on a regional level, including information on how the activities complied with jurisdictional or watershed requirements, if applicable.
- (2) A description of steps taken to facilitate assessment of the effectiveness of jurisdictional, watershed, and regional programs.

- (3) A description of the regional residential education activities implemented as part of the regional residential education program.
- (4) A description of steps taken to develop and implement the standardized fiscal analysis method.
- (5) An assessment of the effectiveness of the Regional Urban Runoff Management Program which meets the requirements of section I.3 of Order No. R9-2007-0001.

**4. Interim Reporting Requirements** - For the July 2006–June 2007 reporting period, Jurisdictional URMP and Watershed URMP Annual Reports shall be submitted on January 31, 2008. Each Jurisdictional URMP and Watershed URMP Annual Report submitted for this reporting period shall at a minimum be comprehensive descriptions of all activities conducted to fully implement the Copermittees' Jurisdictional URMP and Watershed URMP documents, as those documents were developed to comply with the requirements of Order No. 2001-01. The Principal Permittee shall be responsible for submitting these documents in a unified manner, consistent with the unified reporting requirements of Order No. 2001-01.

#### **5. Annual Report Integration**

- a. The Copermittees are encouraged to submit, for Regional Board review and approval, an annual reporting format which integrates the information submitted in the JURMP, WURMP, and RURMP Annual Reports and Monitoring Reports. This document shall be called the "Integrated Annual Report Format." The Integrated Annual Report Format should:
  - (1) Exhibit compliance with all requirements of JURMP, WURMP, and RURMP sections D, E, and F of Order No. R9-2007-0001.
  - (2) Report all information required in section J.3 of Order No. R9-2007-0001.
  - (3) Report all information required in the Monitoring and Reporting program.
  - (4) Provide consistent and comparable reporting of jurisdictional and watershed information by all Copermittees and watershed groups.
  - (5) Specifically identify all types of information that will be reported (e.g., amount of debris collected during street sweeping), including reporting criteria for each type of information (e.g., reported in tons).
  - (6) Describe quality assurance/quality control methods to be used to assess accuracy of jurisdictional and watershed information conveyed.
  - (7) Describe each Copermittee's reporting responsibilities under the format.
  - (8) Improve the Copermittees' ability to assess JURMP and WURMP effectiveness in terms of water quality.
  - (9) Include a separate section for reporting on each Copermittee's activities.
  - (10) Include a separate section for reporting on each watershed's activities.
- b. Upon approval of the Integrated Annual Report Format by the Regional Board, an Integrated Annual Report shall be submitted annually, which may substitute for the JURMP Annual Reports, WURMP Annual Reports, RURMP Annual Report, and/or Monitoring Reports, as approved by the Regional Board. The Principal Permittee shall be responsible for the generation and submittal of the Integrated Annual Reports. Each Copermittee shall be responsible for the information in the Integrated Annual Report pertaining to its jurisdictional, watershed, regional, and monitoring responsibilities. The Integrated Annual Report shall be submitted the first January 31 following approval of the reporting format by the Regional Board, and every January



31 thereafter. The reporting period for Integrated Annual Reports shall be the previous fiscal year. For example, a report submitted January 31, 2010 shall cover the reporting period July 1, 2008 to June 30, 2009.

- c. The format and information provided in Integrated Annual Reports shall match and be consistent with the format and information described in the Integrated Annual Report Format.

## **6. Universal Reporting Requirements**

All submittals shall include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee shall submit a signed certified statement covering its responsibilities for each applicable submittal. The Principal Permittee shall submit a signed certified statement covering its responsibilities for each applicable submittal and the sections of the submittals for which it is responsible.

## **K. MODIFICATION OF PROGRAMS**

Modifications of Jurisdictional Urban Runoff Management Programs, Watershed Urban Runoff Management Programs, and/or the Regional Urban Runoff Management Program may be initiated by the Executive Officer or by the Copermittees. Requests by Copermittees shall be made to the Executive Officer, and shall be submitted during the annual review process. Requests for modifications should be incorporated, as appropriate, into the Annual Reports or other deliverables required or allowed under this Order.

1. Minor Modifications – Minor modifications to Jurisdictional Urban Runoff Management Programs, Watershed Urban Runoff Management Programs, and/or the Regional Urban Runoff Management Program may be accepted by the Executive Officer where the Executive Officer finds the proposed modification complies with all discharge prohibitions, receiving water limitations, and other requirements of this Order.
2. Modifications Requiring an Amendment to this Order – Proposed modifications that are not minor shall require amendment of this Order in accordance with this Order's rules, policies, and procedures.

## **L. ALL COPERMITTEE COLLABORATION**

1. Each Copermittee 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. Management Structure - All Copermittees shall jointly execute and submit to the Regional Board no later than 180 days after adoption of this Order, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum:
    - (1) Identifies and defines the responsibilities of the Principal Permittee and Lead Watershed Permittees;
    - (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; and
- (7) Includes any and all other collaborative arrangements for compliance with this Order.

#### **M. PRINCIPAL PERMITTEE RESPONSIBILITIES**

Within 180 days of adoption of this Order, the Copermittees shall designate the Principal Permittee and notify the Regional Board of the name of the Principal Permittee. The Principal Permittee shall, at a minimum:

1. Serve as liaison between the Copermittees and the Regional Board on general permit issues, and when necessary and appropriate, represent the Copermittees before the Regional Board.
2. Coordinate permit activities among the Copermittees and facilitate collaboration on the development and implementation of programs required under this Order.
3. Integrate individual Copermittee documents and reports into single unified documents and reports for submittal to the Regional Board as required under this Order.
4. Produce and submit documents and reports as required by section J of this Order and Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R9-2007-0001.
5. Submit to the Regional Board, within 180 days of adoption of this Order, a formal agreement between the Copermittees which provides a management structure for meeting the requirements of this Order (as described in section L).
6. Coordinate joint development by all of the Copermittees of standardized format(s) for all documents and reports required under this Order (e.g., JURMPs, WURMPs, annual reports, monitoring reports, etc.). The standardized reporting format(s) shall be used by all Copermittees. The Principal Permittee shall submit the standardized format(s) to the Regional Board for review no later than 180 days after adoption of this Order.

#### **N. RECEIVING WATERS MONITORING AND REPORTING PROGRAM**

Pursuant to CWC section 13267, the Copermittees shall comply with all the requirements contained in Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R9-2007-0001.

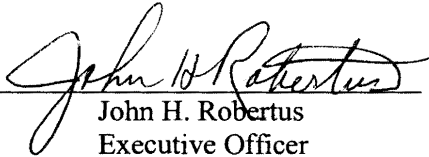
#### **O. STANDARD PROVISIONS, REPORTING REQUIREMENTS, AND NOTIFICATIONS**

1. Each Copermittee shall comply with Standard Provisions, Reporting Requirements, and Notifications contained in Attachment B of this Order. This includes 24 hour/5day reporting requirements for any instance of non-compliance with this Order as described

in section 5.e of Attachment B.

2. All plans, reports and subsequent amendments submitted in compliance with this Order shall be implemented immediately (or as otherwise specified). All submittals by Copermittees must be adequate to implement the requirements of this Order.

*I, John H. Robertus, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on January 24, 2007.*

  
John H. Robertus  
Executive Officer

**ATTACHMENT A****BASIN PLAN PROHIBITIONS**

California Water Code Section 13243 provides that a Regional Board, in a water quality control plan, may specify certain conditions or areas where the discharge of waste, or certain types of waste is not permitted. The following discharge prohibitions are applicable to any person, as defined by Section 13050(c) of the California Water Code, who is a citizen, domiciliary, or political agency or entity of California whose activities in California could affect the quality of waters of the state within the boundaries of the San Diego Region.

1. The discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in California Water Code Section 13050, is prohibited.
2. The discharge of waste to land, except as authorized by waste discharge requirements or the terms described in California Water Code Section 13264 is prohibited.
3. The discharge of pollutants or dredged or fill material to waters of the United States except as authorized by a NPDES permit or a dredged or fill material permit (subject to the exemption described in California Water Code Section 13376) is prohibited.
4. Discharges of recycled water to lakes or reservoirs used for municipal water supply or to inland surface water tributaries thereto are prohibited, unless this Regional Board issues a NPDES permit authorizing such a discharge; the proposed discharge has been approved by the State Department of Health Services and the operating agency of the impacted reservoir; and the discharger has an approved fail-safe long-term disposal alternative.
5. The discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited. Allowances for dilution may be made at the discretion of the Regional Board. Consideration would include streamflow data, the degree of treatment provided and safety measures to ensure reliability of facility performance. As an example, discharge of secondary effluent would probably be permitted if streamflow provided 100:1 dilution capability.
6. The discharge of waste in a manner causing flow, ponding, or surfacing on lands not owned or under the control of the discharger is prohibited, unless the discharge is authorized by the Regional Board.
7. The dumping, deposition, or discharge of waste directly into waters of the state, or adjacent to such waters in any manner which may permit its being transported into the waters, is prohibited unless authorized by the Regional Board.
8. Any discharge to a storm water conveyance system that is not composed entirely of "storm water" is prohibited unless authorized by the Regional Board. [The federal regulations, 40 CFR 122.26(b)(13), define storm water as storm water runoff, snow melt runoff, and surface runoff and drainage. 40 CFR 122.26(b)(2) defines an illicit discharge as any discharge to a storm water conveyance system that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from

fire fighting activities. [§122.26 amended at 56 FR 56553, November 5, 1991; 57 FR 11412, April 2, 1992].

9. The unauthorized discharge of treated or untreated sewage to waters of the state or to a storm water conveyance system is prohibited.
10. The discharge of industrial wastes to conventional septic tank/subsurface disposal systems, except as authorized by the terms described in California Water Code Section 13264, is prohibited.
11. The discharge of radioactive wastes amenable to alternative methods of disposal into the waters of the state is prohibited.
12. The discharge of any radiological, chemical, or biological warfare agent into waters of the state is prohibited.
13. The discharge of waste into a natural or excavated site below historic water levels is prohibited unless the discharge is authorized by the Regional Board.
14. The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited.
15. The discharge of treated or untreated sewage from vessels to Mission Bay, Oceanside Harbor, Dana Point Harbor, or other small boat harbors is prohibited.
16. The discharge of untreated sewage from vessels to San Diego Bay is prohibited.
17. The discharge of treated sewage from vessels to portions of San Diego Bay that are less than 30 feet deep at mean lower low water (MLLW) is prohibited.
18. The discharge of treated sewage from vessels, which do not have a properly functioning US Coast Guard certified Type I or Type II marine sanitation device, to portions of San Diego Bay that are greater than 30 feet deep at mean lower low water (MLLW) is prohibited.

**ATTACHMENT B****STANDARD PROVISIONS, REPORTING REQUIREMENTS, AND NOTIFICATIONS****1. STANDARD PROVISIONS – PERMIT COMPLIANCE [40 CFR 122.41]**

- (a) *Duty to comply* [40 CFR 122.41(a)].
- (1) The Copermitttee must comply with all of the conditions of this Order. Any noncompliance constitutes a violation of the Clean Water Act (CWA) and the California Water Code (CWC) and is grounds for enforcement action, for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.
  - (2) The Copermitttee shall comply with effluent standards or prohibitions established under section 307(a) of the CWA toxic pollutants and with standards for sewage sludge use or disposal established under section 405(d) of the CWA within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if the Order has not yet been modified to incorporate the requirement.
- (b) *Need to halt or reduce activity not a defense* [40 CFR 122.41(c)]. It shall not be a defense for the Copermitttee 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 Order.
- (c) *Duty to mitigate* [40 CFR 122.41(d)]. The Copermitttee shall take all reasonable steps to minimize or prevent any discharge or prevent any discharge or sludge use or disposal in violation of this Order that has a reasonable likelihood of adversely affecting human health or the environment.
- (d) *Proper operation and maintenance* [40 CFR 122.41(e)]. The Copermitttee 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 Copermitttee to achieve compliance with the conditions of this Order. 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 that are installed by the Copermitttee only when necessary to achieve compliance with the conditions of this Order.
- (e) *Property rights* [40 CFR 122.41(g)].
- (1) This Order does not convey any property rights of any sort or any exclusive privilege.
  - (2) The issuance of this Order does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations.
- (f) *Inspection and entry* [40 CFR 122.41(i)]. The Copermitttee shall allow the Regional Water Quality Control Board, San Diego Region (Regional Board), State Water Resources Control Board (SWRCB), United States Environmental Protection Agency (USEPA), and/or their authorized representatives (including an authorized contractor acting as their representative), upon presentation of credentials and other documents as may be required by law, to:

- (1) Enter upon the Copermittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this Order;
- (2) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this Order;
- (3) Inspect and photograph, at reasonable times, any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this Order; and
- (4) Sample or monitor, at reasonable times, for the purpose of assuring Order compliance or as otherwise authorized by the CWA or the CWC, any substances or parameters at any location.

(g) *Bypass* [40 CFR 122.41(m)]

(1) Definitions:

- i) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.
- ii) "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 that 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.

(2) Bypass not exceeding limitations - The Copermittee may allow any bypass to occur which does not cause exceedances of effluent limitations, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions listed in Standard Provisions – Permit Compliance (g)(3), (g)(4) and (g)(5) below.

(3) Prohibition of Bypass - Bypass is prohibited, and the Regional Board may take enforcement action against a Copermittee for bypass, unless:

- i) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- ii) 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
- iii) The Copermittee submitted notice as required under Standard Provisions – Permit Compliance (g)(3) above.

(4) Notice

- i) Anticipated bypass. If the Copermittee knows in advance of the need for a bypass, it shall submit a notice, if possible at least ten days before the date of the bypass.
- ii) Unanticipated bypass. The Copermittee shall submit notice of an unanticipated bypass as required in Standard Provisions 5(e) below (24-hour notice).

- (h) *Upset* [40 CFR 122.41(n)] Upset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based effluent limitations because of factors beyond the reasonable control of the Copermittee. 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.
- (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 requirements of Standard Provisions – Permit Compliance (h)(2) below are met. 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. A Copermittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
- i) An upset occurred and that the Copermittee can identify the cause(s) of the upset;
  - ii) The permitted facility was at the time being properly operated;
  - iii) The Copermittee submitted notice of the upset as required in Standard Provisions – Permit Compliance (5)(e)(ii)(B) below (24-hour notice); and
  - iv) The Copermittee complied with any remedial measures required under Standard Provisions – Permit Compliance 1(c) above.
- (3) Burden of Proof. In any enforcement proceeding, the Copermittee seeking to establish the occurrence of an upset has the burden of proof.

## **2. STANDARD PROVISIONS – PERMIT ACTION**

- (a) *General* [40 CFR 122.41(f)] This Order may be modified, revoked and reissued, or terminated for cause. The filing of a request by the Copermittee for modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any Order condition.
- (b) *Duty to reapply* [40 CFR 122.41(b)]. If the Copermittee wishes to continue an activity regulated by this Order after the expiration date of this Order, the Copermittee must apply for and obtain new permit.
- (c) *Transfers*. This Order is not transferable to any person except after notice to the Regional Board. The Regional Board may require modification or revocation and reissuance of the Order to change the name of the Copermittee and incorporate such other requirements as may be necessary under the CWA and the CWC.

## **3. STANDARD PROVISIONS – MONITORING**

- (a) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity. [40 CFR Section 122.41 (j) (1)]
- (b) Monitoring results must be conducted according to test procedures under 40 CFR Part 136, or in the case of sludge use or disposal, approved under 40 CFR Part 136 unless otherwise



specified in 40 CFR Part 503 unless other test procedures have been specified in this Order [40 CFR Section 122.41(j)(4)][40 CFR Section 122.44(i)(1)(iv)].

#### 4. STANDARD PROVISIONS – RECORDS

- (a) Except for records of monitoring information required by this Order related to the Copermittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR Part 503), the Copermittee shall 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 Order, and records of all data used to complete the application for this Order, for a period of at least three (3) years from the date of the sample, measurement, report or application. This period may be extended by request of the Regional Water Board Executive Officer at any time [40 CFR Section 122.41(j)(2)].
- (b) *Records of monitoring information* [40 CFR 122.41(j) (3)] shall include:
- (1) The date, exact place, and time 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.
- (c) *Claims of confidentiality* [40 CFR Section 122.7(b)] of the following information will be denied:
- (1) The name and address of any permit applicant or Copermittee; and
  - (2) Permit applications and attachments, permits and effluent data.

#### 5. STANDARD PROVISIONS – REPORTING

- (a) *Duty to provide information* [40 CFR 122.41(h)]. The Copermittee shall furnish to the Regional Board, SWRCB, or USEPA within a reasonable time, any information which the Regional Board, SWRCB, or USEPA may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this Order or to determine compliance with this Order. Upon request, the Copermittee shall also furnish to the Regional Board, SWRCB, or USEPA, copies of records required to be kept by this Order.
- (b) *Signatory and Certification Requirements* [40 CFR 122.41(k)]
- (1) All applications, reports, or information submitted to the Regional Board, SWRCB, or USEPA shall be signed and certified in accordance with Standard Provisions – Reporting 5(b)ii), 5(b)iii), 5(b)iv), and 5(b) (see 40 CFR 122.22)
  - (2) *Applications* [40 CFR 122.22(a)(3)] All permit applications shall be signed by either a principal executive officer or ranking elected official.
  - (3) *Reports* [40 CFR 122.22(b)]. All reports required by this Order, and other information requested by the Regional Board, SWRCB, or USEPA shall be signed by a person described in Standard Provisions – Reporting 5(b)(2) above, or by 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 in Standard Provisions-Reporting 5(b)(2) above;
  - 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 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 company. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.); and,
  - iii) The written authorization is submitted to the Regional Water Board and State Water Board.
- (4) *Changes to authorization* [40 CFR Section 122.22(c)] If an authorization under Standard Provisions – Reporting 5(b)(3) of this reporting requirement 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 Standard Provisions – Reporting 5(b)(3) above must be submitted to the Regional Water Board and State Water Board prior to or together with any reports, information, or applications to be signed by an authorized representative.
- (5) *Certification* [40 CFR Section 122.22(d)] Any person signing a document under Standard Provisions – Reporting 5(b)(2), or 5(b)(3) above shall make the following certification:

”I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons 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.”

(c) *Monitoring reports.* [40 CFR 122.41(l)(4)]

- (1) Monitoring results shall be reported at the intervals specified in the Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R9-2007-0001.
- (2) Monitoring results must be reported on a Discharge Monitoring Report (DMR) form or forms provided or specified by the Regional Board or SWRCB for reporting results of mentoring of sludge use or disposal practices.
- (3) If the Copermitee monitors any pollutant more frequently than required by this Order using test procedures approved under 40 CFR Part 136 or, in the case of sludge use or disposal, approved under 40 CFR Part 136 unless otherwise specified in 40 CFR Part 503, or as specified in this Order, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the Regional Board.

- (4) Calculations for all limitations, which require averaging of measurements, shall utilize an arithmetic mean unless otherwise specified in this Order.
- (d) *Compliance schedules.* [40 CFR Section 122.41(l)(5)] Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this Order shall be submitted no later than 14 days following each schedule date.
- (e) *Twenty-four hour reporting* [40 CFR Section 122.41(l)(6)]
- (1) The Copermittee shall report any noncompliance that may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the Copermittee becomes aware of the circumstances. A written submission shall also be provided within five (5) days of the time the Copermittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.
  - (2) The following shall be included as information, which must be reported within 24 hours under this paragraph:
    - i) Any unanticipated bypass that exceeds any effluent limitation in the Order (See 40 CFR 122.41(g)).
    - ii) Any upset which exceeds any effluent limitation in this Order.
  - (3) The Regional Board may waive the above-required written report under this provision on a case-by-case basis if the oral report has been received within 24 hours.
- (f) *Planned changes.* [40 CFR Section 122.41(l)(1)] The Copermittee shall give notice to the Regional Board as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required under this provision only when:
- (1) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source 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, which are not subject to effluent limitations in this Order.
  - (3) The alteration or addition results in a significant change in the Copermittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing Order, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan.
- (g) *Anticipated noncompliance.* [40 CFR Section 122.41(l)(7)] The Copermittee shall give advance notice to the Regional Board or SWRCB of any planned changes in the permitted facility or activity, which may result in noncompliance with Order requirements.

- (h) *Other noncompliance* [40 CFR Section 122.41(l) 7)] The Copermittee shall report all instances of noncompliance not reported under Standard Provisions 5(c), 5(d), and 5(e) above, at the time monitoring reports are submitted. The reports shall contain the information listed in Standard Provision – Reporting 5(e) above.
- (i) *Other information* [40 CFR Section 122.41(l)(8)] When the Copermittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Regional Board, SWRCB, or USEPA, the Copermittee shall promptly submit such facts or information.

## 6. STANDARD PROVISIONS – ENFORCEMENT

- (a) The Regional Board is authorized to enforce the terms of this permit under several provisions of the CWC, including, but not limited to, Sections 13385, 13386, and 13387.

## 7. ADDITIONAL STANDARD PROVISIONS

- (a) *Municipal separate storm sewer systems* [40 CFR 122.42(c)]. 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 40 CFR 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. 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 conditions. Such proposed changes shall be consistent with 40 CFR 122.26(d)(2)(iii); and
  - (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and 40 CFR 122.26(d)(2)(v);
  - (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year;
  - (5) Annual expenditures and budget for year following each annual report;
  - (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; and
  - (7) Identification of water quality improvements or degradation.
- (b) *Storm water discharges* [40 CFR 122.42(d)]. The initial permits for discharges composed entirely of storm water issued pursuant to 40 CFR 122.26(e)(7) 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.
- (c) *Other Effluent Limitations and Standards* [40 CFR 122.44(b)(1)]. If any toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under Section 307(a) of the CWA for a toxic pollutant which is present in the discharge and that standard or prohibition is more stringent than any limitation on the pollutant in this Order, the Regional Board may institute

proceedings under these regulations to modify or revoke and reissue the Order to conform to the toxic effluent standard or prohibition.

- (d) *Discharge is a privilege* [CWC section 13263(g)]. No discharge of waste into the waters of the State, whether or not such discharge is made pursuant to waste discharge requirements, shall create a vested right to continue such discharge. All discharges of waste into waters of the State are privileges, not rights.
- (e) *Review and revision of Order* [CWC section 13263(e)]. Upon application by any affected person, or on its own motion, the Regional Board may review and revise this permit.
- (f) *Termination or modification of Order* [CWC section 13381]. This permit may be terminated or modified for causes, including, but not limited to, all of the following:
  - (1) Violation of any condition contained in this Order;
  - (2) Obtaining this Order 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 permitted discharge.
- (g) *Transfers*. When this Order is transferred to a new owner or operator, such requirements as may be necessary under the CWC may be incorporated into this Order.
- (h) *Conditions not stayed*. The filing of a request by the Copermittee for modification, revocation and reissuance, or termination of this Order, or a notification of planned change in or anticipated noncompliance with this Order does not stay any condition of this Order.
- (i) *Availability*. A copy of this Order shall be kept at a readily accessible location and shall be available to on-site personnel at all times.
- (j) *Duty to minimize or correct adverse impacts*. The Copermittees shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this Order, including such accelerated or additional monitoring as may be necessary to determine the nature and impact of the noncompliance.
- (k) *Interim Effluent Limitations*. The Copermittee shall comply with any interim effluent limitations as established by addendum, enforcement action, or revised waste discharge requirements which have been, or may be, adopted by this Regional Board.
- (l) *Responsibilities, liabilities, legal action, penalties* [CWC sections 13385 and 13387]. The Porter-Cologne Water Quality Control Act provides for civil and criminal penalties comparable to, and in some cases greater than, those provided for under the CWA.

Nothing in this Order shall be construed to protect the Copermittee from its liabilities under federal, state, or local laws.

Except as provided for in 40CFR 122.41(m) and (n), nothing in this Order shall be construed to relieve the Copermittee from civil or criminal penalties for noncompliance.

Nothing in this Order shall be construed to preclude the institution of any legal action or relieve the Copermittee from any responsibilities, liabilities, or penalties to which the Copermittee is or may be subject to under Section 311 of the CWA.

Nothing in this Order shall be construed to preclude institution of any legal action or relieve the Copermittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or regulation under authoring preserved by Section 510 of the CWA.

- (m) *Noncompliance.* Any noncompliance with this Order constitutes violation of the CWC and is grounds for denial of an application for modification of the Order (also see 40 CFR 122.41(a)).
- (n) *Director.* For purposes of this Order, the term “Director” used in parts of 40 CFR incorporated into this Order by reference and/or applicable to this Order shall have the same meaning as the term “Regional Board” used elsewhere in this Order, except that in 40 CFR 122.41(h) and (I), “Director” shall mean “Regional Board, SWRCB, and USEPA.”
- (o) The Regional Board has, in prior years, issued a limited number of individual NPDES permits for non-storm water discharges to MS4s. The Regional Board or SWRCB may in the future, upon prior notice to the Copermittee(s), issue an NPDES permit for any non-storm water discharge (or class of non-storm water discharges) to a MS4. Copermittees may prohibit any non-storm water discharge (or class of non-storm water discharges) to a MS4 that is authorized under such separate NPDES permits.
- (p) *Effective date.* This Order shall become effective on the date of its adoption provided the USEPA has no objection. If the USEPA objects to its issuance, this Order shall not become effective until such objection is withdrawn. This Order supersedes Order No. 2001-01 upon the effective date of this Order.
- (q) *Expiration.* This Order expires five years after adoption.
- (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.
- (s) *Applications.* Any application submitted by a Copermittee for reissuance or modification of this Order shall satisfy all applicable requirements specified in federal regulations as well as any additional requirements for submittal of a Report of Waste Discharge specified in the CWC and the California Code of Regulations.
- (t) *Confidentiality.* Except as provided for in 40 CFR 122.7, no information or documents submitted in accordance with or in application for this Order will be considered confidential, and all such information and documents shall be available for review by the public at the Regional Board office.
- (u) *Severability.* The provisions of this Order are severable, and if any provision of this Order, or the application of any provisions of this Order to any circumstance, is held invalid, the application of such provision to other circumstances and the remainder of this Order shall not be affected thereby.
- (v) *Report submittal.* The Copermittee shall submit reports and provide notifications as required by this Order to the following:

SOUTHERN WATERSHED PROTECTION UNIT  
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION  
9174 SKY PARK COURT, SUITE 100  
SAN DIEGO CA 92123-4340  
Telephone: (858) 467-2952 Fax: (858) 571-6972

EUGENE BROMLEY  
US ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
PERMITS ISSUANCE SECTION (W-5-1)  
75 HAWTHORNE STREET  
SAN FRANCISCO CA 94105

Unless otherwise directed, the Copermitee shall submit one hard copy for the official record and one electronic copy of each report required under this Order to the Regional Board and one electronic copy to the EPA.

**ATTACHMENT C****DEFINITIONS**

**Advanced Treatment**- Using mechanical or chemical means to flocculate and remove suspended sediment from runoff from construction sites prior to discharge.

**Anthropogenic Litter** – Trash generated from human activities, not including sediment.

**Basin Plan** – Water Quality Control Plan, San Diego Basin, Region 9, and amendments, developed by the Regional Board.

**Beneficial Uses** - 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” of the waters of the State that may be protected 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. Existing beneficial uses are uses that were attained in the surface or ground water on or after November 28, 1975; and potential beneficial uses are uses that would probably develop in future years through the implementation of various control measures. “Beneficial Uses” are equivalent to “Designated Uses” under federal law. [California Water Code Section 13050(f)].

**Best Management Practices (BMPs)** - Defined in 40 CFR 122.2 as 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. In the case of municipal storm water permits, BMPs are typically used in place of numeric effluent limits.

**Bioassessment** - The use of biological community information to evaluate the biological integrity of a water body and its watershed. With respect to aquatic ecosystems, bioassessment is the collection and analysis of samples of the benthic macroinvertebrate community together with physical/habitat quality measurements associated with the sampling site and the watershed to evaluate the biological condition (i.e. biological integrity) of a water body.

**Biocriteria** - Under the CWA, numerical values or narrative expressions that define a desired biological condition for a water body that are legally enforceable. The USEPA defines biocriteria as: “numerical values or narrative expressions that describe the reference biological integrity of aquatic communities inhabiting waters of a given designated aquatic life use...(that)...describe the characteristics of water body segments least impaired by human activities.”

**Biological Integrity** - Defined in Karr J.R. and D.R. Dudley. 1981. Ecological perspective on water quality goals. Environmental Management 5:55-68 as: “A balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of natural habitat of the region.” Also referred to as ecosystem health.

**Clean Water Act Section 402(p) [33 USC 1342(p)]** - The federal statute requiring municipal and industrial dischargers to obtain NPDES permits for their discharges of storm water.



**Clean Water Act Section 303(d) Water Body** - An impaired water body in which water quality does not meet applicable water quality standards and/or is not expected to meet water quality standards, even after the application of technology based pollution controls required by the CWA. The discharge of urban runoff to these water bodies by the Copermittees is significant because these discharges can cause or contribute to violations of applicable water quality standards.

**Construction Site** – Any project, including projects requiring coverage under the General Construction Permit, that involves soil disturbing activities including, but not limited to, clearing, grading, disturbances to ground such as stockpiling, and excavation.

**Contamination** - As defined in the Porter-Cologne Water Quality Control Act, contamination is “an impairment of the quality of 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.”

**Critical Channel Flow (Qc)** – The channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Qc, it should be based on the weakest boundary material – either bed or bank.

**CWA** – Federal Clean Water Act

**CWC** – California Water Code

**Development Projects** - 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.

**Dry Season** – May 1 through September 30 of each year.

**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, businesses, and municipal employees.

**Effectiveness Assessment Outcome Level 3** - Behavioral Change 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, or beneficial use attainment.

**Effluent Limitations** – Any restriction imposed on quantities, discharge rates, and concentrations of pollutants, which are discharged from point sources into waters of the State. The limitations are designed to ensure that the discharge does not cause water quality objectives to be exceeded in the receiving water and does not adversely affect beneficial uses. Effluent limits are typically numeric (e.g., 10 mg/l), but can also be narrative (e.g., no toxics in toxic amounts).

**Erosion** – 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.

**Environmentally Sensitive Areas (ESAs)** - Areas that include but are not limited to all Clean Water Act Section 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the State Water Resources Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); water bodies designated with the RARE beneficial use by the State Water Resources Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); areas designated as preserves or their equivalent under the Multi Species Conservation Program within the Cities and County of San Diego; and any other equivalent environmentally sensitive areas which have been identified by the Copermittees.

**Feasibility Analysis** – Detailed description of the selection process for the treatment control BMPs for a Priority Development Project, including justification of why one BMP is selected over another. For a Priority Development Project where a treatment control BMP with a low removal efficiency ranking (as identified by the Model SUSMP) is proposed, the analysis shall include a detailed and adequate justification exhibiting the reasons implementation of a treatment control BMP with a higher removal efficiency is infeasible for the Priority Development Project or portion of the Priority Development Project.

**Flow Duration** – 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). The simplest way to visualize this is to consider a histogram of pre- and post-project flows using long-term records of hourly data. To maintain pre-project flow duration means that the total number of hours (counts) within each range of flows in a flow-duration histogram cannot increase between the pre- and post-project condition. Flow duration within the range of geomorphologically significant flows is important for managing erosion.

**GIS** – Geographic Information System

**Grading** - The cutting and/or filling of the land surface to a desired slope or elevation.

**Hazardous Material** – Any substance that poses a threat to human health or the environment due to its toxicity, corrosiveness, ignitability, explosive nature or chemical reactivity. These also include materials named by the USEPA in 40 CFR 116 to be reported if a designated quantity of the material is spilled into the waters of the U.S. or emitted into the environment.

**Hazardous Waste** - Hazardous waste is defined as “any waste which, under Section 600 of Title 22 of this code, is required to be managed according to Chapter 30 of Division 4.5 of Title 22 of this code” [CCR Title 22, Division 4.5, Chapter 11, Article 1].

**Household Hazardous Waste** – Paints, cleaning products, and other wastes generated during home improvement or maintenance activities.

**Hydromodification** – 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.

**Illicit Connection** – Any connection to the MS4 that conveys an illicit discharge.

**Illicit Discharge** - Any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from fire fighting activities [40 CFR 122.26(b)(2)].

**Implementation Assessment** – 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.

**Inactive Slopes** – Slopes on which no grading or other soil disturbing activities are conducted for 10 or more days.

**Integrated Assessment** – Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality.

**Jurisdictional Urban Runoff Management Plan (JURMP)** – A written description of the specific jurisdictional urban runoff management measures and programs that each Copermittee will implement to comply with this Order and ensure that pollutant discharges in urban runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards.

**Low Impact Development (LID)** – 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.

**Maximum Extent Practicable (MEP)** – The technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) that operators of MS4s must meet. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of source control and treatment control BMPs. MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) in combination with treatment methods serving as a backup (additional line of defense). MEP considers economics and is generally, but not necessarily, less stringent than BAT. A definition for MEP is not provided either in the statute or in the regulations. Instead the definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their urban runoff management programs. Their total collective and individual activities conducted pursuant to the urban runoff management programs becomes their

proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for MS4 maintenance). In the absence of a proposal acceptable to the Regional Board, the Regional Board defines MEP.

In a memo dated February 11, 1993, entitled "Definition of Maximum Extent Practicable," Elizabeth Jennings, Senior Staff Counsel, SWRCB addressed the achievement of the MEP standard as follows:

*“To achieve the MEP standard, municipalities must employ whatever Best Management Practices (BMPs) are technically feasible (i.e., are likely to be effective) and are not cost prohibitive. The major emphasis is on technical feasibility. Reducing pollutants to the MEP means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, or the BMPs would not be technically feasible, or the cost would be prohibitive. In selecting BMPs to achieve the MEP standard, the following factors may be useful to consider:*

- a. Effectiveness: Will the BMPs address a pollutant (or pollutant source) of concern?*
- b. Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?*
- c. Public Acceptance: Does the BMP have public support?*
- d. Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?*
- e. Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc?*

*The final determination regarding whether a municipality has reduced pollutants to the maximum extent practicable can only be made by the Regional or State Water Boards, and not by the municipal discharger. If a municipality reviews a lengthy menu of BMPs and chooses to select only a few of the least expensive, it is likely that MEP has not been met. On the other hand, if a municipal discharger employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit derived, it would have met the standard. Where a choice may be made between two BMPs that should provide generally comparable effectiveness, the discharger may choose the least expensive alternative and exclude the more expensive BMP. However, it would not be acceptable either to reject all BMPs that would address a pollutant source, or to pick a BMP base solely on cost, which would be clearly less effective. In selecting BMPs the municipality must make a serious attempt to comply and practical solutions may not be lightly rejected. In any case, the burden would be on the municipal discharger to show compliance with its permit. After selecting a menu of BMPs, it is the responsibility of the discharger to ensure that all BMPs are implemented.”*

**Municipal Separate Storm Sewer System (MS4)** – 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 designated and approved management agency under section 208 of the CWA that discharges to

waters of the United States; (ii) Designated or used for collecting or conveying storm water; (iii) Which is not a combined sewer; (iv) Which is not part of the Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.26.

**National Pollutant Discharge Elimination System (NPDES)** - The national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 318, 402, and 405 of the CWA.

**NOI** – Notice of Intent

**Non-Storm Water** - All discharges to and from a MS4 that do not originate from precipitation events (i.e., all discharges from a MS4 other than storm water). Non-storm water includes illicit discharges, non-prohibited discharges, and NPDES permitted discharges.

**Nuisance** - As defined in the Porter-Cologne Water Quality Control Act a nuisance is “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.”

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**Person** - A person is defined as an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof [40 CFR 122.2].

**Point Source** - 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 operations, landfill leachate collection systems, 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** - 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.

**Pollution** - As defined in the Porter-Cologne Water Quality Control Act: “the alteration of the quality of the waters of the State by waste, to a degree that unreasonably affects the either of the following: 1) The waters for beneficial uses; or 2) Facilities that serve these beneficial uses.” Pollution may include contamination.

**Pollutants of Concern** – Pollutants for which water bodies are listed as impaired under CWA section 303(d), pollutants associated with the land use type of a development, and/or pollutants commonly associated with urban runoff. Pollutants commonly associated with urban runoff include total suspended solids; sediment; pathogens (e.g., bacteria, viruses, protozoa); heavy metals (e.g., copper, lead, zinc, and cadmium); petroleum products and polynuclear aromatic hydrocarbons; synthetic organics (e.g., pesticides, herbicides, and PCBs); nutrients (e.g., nitrogen and phosphorus fertilizers); oxygen-demanding substances (decaying vegetation, animal waste, and anthropogenic litter).

**Pollution Prevention** - Pollution prevention is defined as practices and processes that reduce or eliminate the generation of pollutants, in contrast to source control BMPs, treatment control BMPs, or disposal.

**Post-Construction BMPs** - A subset of BMPs including structural and non-structural controls which detain, retain, filter, or educate to prevent the release of pollutants to surface waters during the final functional life of developments.

**Pre-Project or Pre-Development Runoff Conditions (Discharge Rates, Durations, Etc.)** – 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.

**Principal Permittee** – County of San Diego

**Priority Development Projects** - New development and redevelopment project categories listed in Section D.1.d(2) of Order No. R9-2007-0001.

**Receiving Waters** – Waters of the U.S.

**Receiving Water Limitations (RWLs)** - Waste discharge requirements issued by the Regional Board typically include both: (1) “Effluent Limitations” (or “Discharge Limitations”) that specify the technology-based or water-quality-based effluent limitations; and (2) “Receiving Water Limitations” that specify the water quality objectives in the Basin Plan as well as any other limitations necessary to attain those objectives. In summary, the “Receiving Water Limitations” provision is the provision used to implement the requirement of CWA section 301(b)(1)(C) that NPDES permits must include any more stringent limitations necessary to meet water quality standards.

**Redevelopment** - The creation, addition, and or replacement of impervious surface on an already developed site. Examples include the expansion of a building footprint, road widening, the addition to or replacement of a structure, and creation or addition of impervious surfaces. Replacement of impervious surfaces includes any activity that is not part of a routine maintenance activity where impervious material(s) are removed, exposing underlying soil during construction. Redevelopment does not include trenching and resurfacing associated with utility work; resurfacing and reconfiguring surface parking lots and existing roadways; new sidewalk construction, pedestrian ramps, or bikelane on existing roads; and routine replacement of damaged pavement, such as pothole repair.

**Regional Urban Runoff Management Plan (RURMP)** – A written description of the specific regional urban runoff management measures and programs that the Copermitees will collectively implement to comply with this Order and ensure that pollutant discharges in urban runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards.

**Sediment** - Soil, sand, and minerals washed from land into water. Sediment resulting from anthropogenic sources (i.e. human induced land disturbance activities) is considered a pollutant. This Order regulates only the discharges of sediment from anthropogenic sources and does not regulate naturally occurring sources of sediment. Sediment can destroy fish-nesting areas, clog animal habitats, and cloud waters so that sunlight does not reach aquatic plants.

**Shared Treatment Control BMP** - BMPs used by multiple developments to infiltrate, filter, or treat the required volume or flow prior to discharge to a receiving water. This could include, for example, a treatment BMP at the end of an enclosed storm drain that collects runoff from several commercial developments.

**Source Control BMP** – 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.

**Storm Water** – Per 40 CFR 122.26(b)(13), means storm water runoff, snowmelt runoff and surface runoff and drainage.

**Standard Urban Storm Water Mitigation Plan (SUSMP)** – A plan developed to mitigate the impacts of urban runoff from Priority Development Projects.

**Third Party Inspectors** - Industrial and commercial facility inspectors who are not contracted or employed by a regulatory agency or group of regulatory agencies, such as the Regional Board or Copermittees. The third party inspector is not a regular facility employee self-inspecting their own facility. The third party inspector could be a contractor or consultant employed by a facility or group of businesses to conduct inspections.

**Total Maximum Daily Load (TMDL)** - The maximum amount of a pollutant that can be discharged into a water body from all sources (point and non-point) and still maintain water quality standards. Under CWA section 303(d), TMDLs must be developed for all water bodies that do not meet water quality standards after application of technology-based controls.

**Toxicity** - Adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). The water quality objectives for toxicity provided in the Water Quality Control Plan, San Diego Basin, Region 9, (Basin Plan), state in part...“All waters shall be free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life....The survival of aquatic life in surface waters subjected to a waste discharge or other controllable water quality factors, shall not be less than that for the same water body in areas unaffected by the waste discharge”.

**Treatment Control BMP** – Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants, filtration, biological uptake, media absorption or any other physical, biological, or chemical process.

**Urban Runoff** - 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).

**Waste** - As defined in CWC Section 13050(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.”

Article 2 of CCR Title 23, Chapter 15 (Chapter 15) contains a waste classification system that applies to solid and semi-solid waste, which cannot be discharged directly or indirectly to water of the state and which therefore must be discharged to land for treatment, storage, or disposal in accordance with Chapter 15. There are four classifications of waste (listed in order of highest to lowest threat to water quality): hazardous waste, designated waste, non-hazardous solid waste, and inert waste.

**Water Quality Assessment** – Assessment conducted to evaluate the condition of non-storm water and storm water discharges, and the water bodies which receive these discharges.

**Water Quality Objective** - Numerical or narrative limits on constituents or characteristics of water designated to protect designated beneficial uses of the water. [California Water Code Section 13050 (h)]. California's water quality objectives are established by the State and Regional Water Boards in the Water Quality Control Plans.

Numeric or narrative limits for pollutants or characteristics of water designed to protect the beneficial uses of the water. In other words, a water quality objective is the maximum concentration of a pollutant that can exist in a receiving water and still generally ensure that the beneficial uses of the receiving water remain protected (i.e., not impaired). Since water quality objectives are designed specifically to protect the beneficial uses, when the objectives are violated the beneficial uses are, by definition, no longer protected and become impaired. This is a fundamental concept under the Porter Cologne Act. Equally fundamental is Porter Cologne's definition of pollution. A condition of pollution exists when the water quality needed to support designated beneficial uses has become unreasonably affected or impaired; in other words, when the water quality objectives have been violated. These underlying definitions (regarding beneficial use protection) are the reason why all waste discharge requirements implementing the federal NPDES regulations require compliance with water quality objectives. (Water quality objectives are also called water quality criteria in the CWA.)

**Water Quality Standards** - The beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.) of water and the water quality objectives necessary to protect those uses.

**Waters of the State** - Any water, surface or underground, including saline waters within the boundaries of the State [CWC section 13050 (e)]. The definition of the Waters of the State is broader than that for the Waters of the United States in that all water in the State is considered to be a Waters of the State regardless of circumstances or condition. Under this definition, a MS4 is always considered to be a Waters of the State.

**Waters of the United States** - As defined in the 40 CFR 122.2, the Waters of the U.S. are defined as: "(a) 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; (b) All interstate waters, including interstate "wetlands;" (c) All other waters such as intrastate 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: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition: (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition; (f) The territorial seas; and (g) "Wetlands" adjacent to waters (other



than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. 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 the EPA.”

**Watershed** - That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as drainage area, catchment, or river basin).

**Watershed Urban Runoff Management Plan (WURMP)** – A written description of the specific watershed urban runoff management measures and programs that each watershed group of Copermittees will implement to comply with this Order and ensure that pollutant discharges in urban runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards.

**WDRs** – Waste Discharge Requirements

**Wet Season** – October 1 through April 30 of each year.

**ATTACHMENT D****SCHEDULED SUBMITTALS SUMMARY**

<b>Submittal</b>	<b>Permit Section</b>	<b>Completion Date</b>	<b>Frequency</b>
Submit identification of discharges not to be prohibited and BMPs required for treatment of discharges not prohibited	B.2	365 days after adoption of the Order	One Time
Submit Certified Statement of Adequate Legal Authority	C.2	365 days after adoption of the Order	One Time
Long-Term Effectiveness Assessment	I.5 and J.2.b	210 days prior to Order expiration	One Time
Submit to Principal Permittee(s) individual JURMPs	J.1.a.(1)	Prior to 365 days after adoption of the Order (Principal Permittee specifies date of submittal)	One Time
Principal Permittee submits JURMPs to Regional Board	J.1.a.(2)	365 days after adoption of the Order	One Time
Lead Watershed Permittees submit WURMPs to Principal Permittee	J..1.b.(2)	Prior to 365 days after adoption of the Order (Principal Permittee specifies date of submittal)	One Time
Principal Permittee submits WURMPs to Regional Board	J.1.b.(3)	365 days after adoption of the Order	One Time
Principal Permittee submits RURMP to Regional Board	J.1.c.(2)	365 days after adoption of the Order	One Time
Principal Permittee submits Hydromodification Management Plan workplan	J.2.a.(2)(a)	180 days after adoption of the Order	One Time
Principal Permittee submits Hydromodification Management Plan progress report	J.2.a.(2)(b)	18 months after adoption of the Order	One Time
Principal Permittee submits draft Hydromodification Management Plan	J.2.a.(2)(c)	2 years after adoption of the Order	One Time
Principal Permittee submits final Hydromodification Management Plan	J.2.a.(2)(d)	180 days after receiving comments from Regional Board	One Time
Principal Permittee submits Model SUSMP update	J.2.b	18 months after adoption of the Order	One Time
Copermittees submit local SUSMP updates	J.2.b	365 days after acceptance of updated Model SUSMP	One Time
Principal Permittee submits Report of Waste Discharge and Long-Term Effectiveness Assessment	J.2.c-d	210 days prior to Order expiration	One Time
Principal Permittee submits Notification of Principal Permittee	M	180 days after adoption of the Order	One Time
Principal Permittee submits formal agreement between Copermittees which provides management structure for meeting Order requirements	M.5	180 days after adoption of Order	One Time
Submit to Principal Permittee individual Jurisdictional Urban Runoff Management Program Annual Reports	J.3.a.(1)	Prior to September 30, 2008, and annually thereafter (Principal Permittee specifies date of submittal)	Annually
Principal Permittee submits unified Jurisdictional Urban Runoff Management Program Annual Report to Regional Board	J.3.a.(2)	September 30, 2008, and annually thereafter	Annually
Lead Watershed Permittees submit to Principal Permittee Watershed Urban Runoff Management Program Annual Reports	J.3.b.(3)	Prior to January 31, 2009 and annually thereafter (Principal Permittee specifies date of submittal)	Annually
Principal Permittee submits unified Watershed Urban Runoff Management Program Annual Report to Regional Board	J.3.b.(3)	January 31, 2009 and annually thereafter	Annually
Principal Permittee submits Regional Urban Runoff	J.3.c	January 31, 2009 and	Annually

<b>Submittal</b>	<b>Permit Section</b>	<b>Completion Date</b>	<b>Frequency</b>
Management Program Annual Report to Regional Board		annually thereafter	
Principal Permittee submits description of Receiving Waters Monitoring Program	Monitoring and Reporting Program, III.A.1	September 1, 2007 and annually thereafter	Annually
Principal Permittee submits description of various monitoring program components	Monitoring and Reporting Program, III.A.3	July 1, 2007 and July 1, 2008	Twice
Principal Permittee submits Receiving Waters Monitoring Program Annual Report	Monitoring and Reporting Program, III.A.2	January 31, 2009 and annually thereafter	Annually
Principal Permittee submits interim Receiving Waters Monitoring Program Annual Report	Monitoring and Reporting Program, III.B	January 31, 2007 and January 31, 2008	Twice
Principal Permittee submits unified interim Jurisdictional URMP and Watershed URMP Annual Reports	J.4	January 31, 2007 and January 31, 2008	Twice
Principal Permittee(s) shall submit standardized formats for all reports required under this Order	M.6	180 days after adoption of Order	One Time

**RECEIVING WATERS AND URBAN RUNOFF MONITORING AND REPORTING  
PROGRAM NO. R9-2007-0001**

**I. PURPOSE**

- A. This Receiving Waters and Urban Runoff Monitoring and Reporting Program is intended to meet the following goals:
1. Assess compliance with Order No. R9-2007-0001;
  2. Measure and improve the effectiveness of the Copermittees' urban runoff management programs;
  3. Assess the chemical, physical, and biological impacts to receiving waters resulting from urban runoff discharges;
  4. Characterize urban runoff discharges;
  5. Identify sources of specific pollutants;
  6. Prioritize drainage and sub-drainage areas that need management actions;
  7. Detect and eliminate illicit discharges and illicit connections to the MS4; and
  8. Assess the overall health of receiving waters.
- B. In addition, this Receiving Waters and Urban Runoff Monitoring and Reporting Program is designed to answer the following core management questions:
1. Are conditions in receiving waters protective, or likely to be protective, of beneficial uses?
  2. What is the extent and magnitude of the current or potential receiving water problems?
  3. What is the relative urban runoff contribution to the receiving water problem(s)?
  4. What are the sources of urban runoff that contribute to receiving water problem(s)?
  5. Are conditions in receiving waters getting better or worse?

**II. MONITORING PROGRAM**

**A. Receiving Waters Monitoring Program**

Each Copermittee shall collaborate with the other Copermittees to develop, conduct, and report on a year round watershed based Receiving Waters Monitoring Program. The monitoring program design, implementation, analysis, assessment, and reporting shall be conducted on a watershed basis for each of the hydrologic units. The monitoring program shall be designed to meet the goals and answer the questions listed in section I above. The monitoring program shall include the following components:

1. MASS LOADING STATION (MLS) MONITORING
  - a. The following existing mass loading stations shall continue to be monitored: Santa Margarita River,<sup>1</sup> San Luis Rey River, Agua Hedionda Creek, Escondido Creek, San Dieguito River, Penasquitos, Tecolote Creek, San Diego River,

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<sup>1</sup> For the Santa Margarita River mass loading station, if Camp Pendleton will not conduct the required monitoring or prevents access for the Copermittees to conduct the required monitoring, the mass loading station location shall be moved to where the County of San Diego has land-use jurisdiction.

Chollas Creek, Sweetwater River, and Tijuana River. The mass loading stations shall be monitored at the frequency identified in Table 1.

Table 1. Monitoring Rotation and Number of Stations in Watersheds

Watershed Management Area	Watershed	Permit Year 1 2007-2008				Permit Year 2 2008-2009				Permit Year 3 2009-2010				Permit Year 4 2010-2011				Permit Year 5 2011-2012									
		MLS	TWAS	ABLM	BA	MLS	TWAS	ABLM	BA	MLS	TWAS	ABLM	BA	MLS	TWAS	ABLM	BA	MLS	TWAS	ABLM	BA						
Santa Margarita	Santa Margarita River	1			4	1							1				4										
San Luis Rey	San Luis Rey River	1	2		3	1							1	2			3										
Carlsbad	Buena Vista Creek		1		1									1			1										
	Agua Hedionda Creek	1	1		2	1							1	1			2										
	Escondido Creek	1	1		2	1							1	1			2										
San Dieguito	San Dieguito River	1	2	Implement refined program based on assessment	3	1	Bight '08			Implement refined program based on assessment			1	2	Implement refined program based on assessment	3			Implement refined program based on assessment								
Penasquitos	Penasquitos	1	2		3	1						1	2	3													
Mission Bay	Rose Creek										1	1										1	1				
	Tecolote Creek					1					1	1											1	1		2	
San Diego River	San Diego River					1					1	3				4						1	3			4	
San Diego Bay	Chollas Creek	1				1		1								1	1					1	1			1	
	Sweetwater River							1								1	1						1	1		2	
	Otay River															1								1		1	
Tijuana	Tijuana River							1								1	2							1	1		2

- b. Each mass loading station to be monitored in a given year shall be monitored twice during wet weather events and twice during dry weather flow events. The exception is the 2008-2009 monitoring year, which shall include monitoring of all mass loading stations for one wet weather flow event only if the Copermittees participate in Bight '08.

- c. Each mass loading station shall be monitored for the first wet weather event of the season which meets the USEPA's criteria as described in 40 CFR 122.21(g)(7). Monitoring of the second wet weather event shall be conducted after February 1. Dry weather mass loading monitoring events shall be sampled in September or October prior to the start of the wet weather season and in May or June after the end of the wet weather season. If flows are not evident in September or October, then sampling shall be conducted during non-rain events in the wet weather season.
- d. Mass loading sampling and analysis protocols shall be consistent with 40 CFR 122.21(g)(7)(ii) and with the USEPA Storm Water Sampling Guidance Document (EPA 833-B-92-001). If practicable, the protocols for mass loading sampling and analysis should be SWAMP comparable. If the mass loading sampling and analysis are determined to be impracticable with the SWAMP standards, the Copermittees should provide explanation and discussion to this effect in the Receiving Waters and Urban Runoff Monitoring Annual Report. Wet weather samples shall be flow-weighted composites, collected for the duration of the entire runoff event, where practical. Where such monitoring is not practical, such as for large watersheds with significant groundwater recharge flows, composites shall be collected at a minimum during the first 3 hours of flow. Dry weather event samples shall be flow-weighted composites, collected for a time duration adequate to be representative of changes in pollutant concentrations and runoff flows which may occur over a typical 24 hour period. A minimum of 3 sample aliquots, separated by a minimum of 15 minutes, shall be taken for each hour of monitoring, unless the Regional Board Executive Officer approves an alternate protocol. Automatic samplers shall be used to collect samples from mass loading stations. Grab samples shall be taken for temperature, pH, specific conductance, biochemical oxygen demand, oil and grease, total coliform, fecal coliform, and enterococcus.
- e. Copermittees shall measure or estimate flow rates and volumes for each mass loading station sampling event in order to determine mass loadings of pollutants. Data from nearby USGS gauging stations may be utilized, or flow rates may be estimated in accordance with the USEPA Storm Water Sampling Guidance Document (EPA-833-B-92-001), Section 3.2.1.
- f. In the event that the required number of events are not sampled during one monitoring year at any given station, the Copermittees shall submit, with the subsequent Receiving Waters Monitoring Annual Report, a written explanation for a lack of sampling data, including streamflow data from the nearest USGS gauging station.
- g. The following constituents shall be analyzed for each monitoring event at each station:

Table 2. Analytical Testing for Mass Loading and Temporary Watershed Assessment Stations

Conventionals, Nutrients, Hydrocarbons	Pesticides	Metals (Total and Dissolved)	Bacteriological
Total Dissolved Solids Total Suspended Solids Turbidity Total Hardness pH Specific Conductance Temperature Dissolved Phosphorus Nitrite Nitrate Total Kjeldahl Nitrogen Ammonia Biological Oxygen Demand, 5-day Chemical Oxygen Demand Total Organic Carbon Dissolved Organic Carbon Methylene Blue Active Substances Oil and Grease	Diazinon Chlorpyrifos Malathion	Antimony Arsenic Cadmium Chromium Copper Lead Nickel Selenium Zinc	Total Coliform Fecal Coliform Enterococcus

- h. In addition to the constituents listed in Table 2 above, monitoring stations in the Chollas Creek watershed shall also analyze samples for polychlorinated biphenyls (PCBs), Chlordane, and polycyclic aromatic hydrocarbons (PAHs) for each monitoring event.
  - i. The following toxicity testing shall be conducted for each monitoring event at each station as follows:
    - (1) 7-day chronic test with the cladoceran *Ceriodaphnia dubia* (USEPA protocol EPA-821-R-02-013).
    - (2) Chronic test with the freshwater algae *Selenastrum capricornutum* (USEPA protocol EPA-821-R-02-013).
    - (3) Acute survival test with amphipod *Hyaella azteca* (USEPA protocol EPA-821-R-02-012).
  - j. The presence of acute toxicity shall be determined in accordance with USEPA protocol (EPA-821-R-02-012). The presence of chronic toxicity shall be determined in accordance with USEPA protocol (EPA-821-R-02-013).
  - k. The Copermittees shall collaborate to develop and implement a program to assess the presence of trash (anthropogenic litter) in receiving waters. The program shall collect and evaluate trash data in conjunction with collection and evaluation of analytical data. This monitoring program shall be implemented within each watershed and shall begin no later than the 2007-2008 monitoring year.
2. TEMPORARY WATERSHED ASSESSMENT STATION (TWAS) MONITORING
- a. The minimum number of temporary watershed assessment stations to be monitored in a given monitoring year is identified in Table 1. The number of stations located within each watershed may change from the number identified in Table 1, provided the total number of stations monitored in a given year is not reduced below the minimum number of stations identified in Table 1. The

temporary watershed assessment stations shall be monitored and located according to a systematic plan which:

- (1) Ensures that the Copermittees' Receiving Waters Monitoring Program most effectively answers questions 1-5 of section I.B above.
  - (2) Provides statistically useful information.
  - (3) Identifies the extent and magnitude of receiving water problems within each watershed.
  - (4) Provides spatial coverage of each watershed.
  - (5) Monitors previously un-assessed sub-watershed areas.
  - (6) Focuses on specific areas of concern and high priority areas.
  - (7) Provides adequate information to assess the effectiveness of implemented programs and control measures in reducing discharged pollutant loads and improving urban runoff and receiving water quality.
- b. For each temporary watershed assessment station identified to be monitored in a given year, the station shall be monitored twice during wet weather events and twice during dry weather flow events.
  - c. Temporary watershed assessment stations shall be monitored in the same manner as the mass loading stations in accordance with the monitoring protocols and requirements outlined in sections II.A.1.c-k above.
3. BIOASSESSMENT (BA) MONITORING
- a. The minimum number of bioassessment stations to be monitored in each watershed in a given monitoring year is identified in Table 1. Bioassessment stations shall include an adequate number of reference stations, with locations of reference stations identified according to protocols outlined in "A Quantitative Tool for Assessing the Integrity of Southern Coastal California Streams," by Ode, et al. 2005.<sup>2</sup>
  - b. Bioassessment stations shall be collocated with both mass loading stations and temporary watershed assessment stations where feasible.
  - c. Bioassessment stations to be monitored in a given monitoring year shall be monitored in May or June (to represent the influence of wet weather on the communities) and September or October (to represent the influence of dry weather flows on the communities). The timing of monitoring of bioassessment stations shall coincide with dry weather monitoring of mass loading and temporary watershed assessment stations.
  - d. Monitoring of bioassessment stations shall utilize the targeted riffle composite approach, as specified in the Surface Water Ambient Monitoring Program (SWAMP) Quality Assurance Management Plan (QAMP), as amended.

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<sup>2</sup> Ode, et al. 2005. "A Quantitative Tool for Assessing the Integrity of Southern Coastal California Streams." Environmental Management. Vol. 35, No. 1, pp. 1-13.



- e. Monitoring of bioassessment stations shall incorporate assessment of periphyton in addition to macroinvertebrates, using the USEPA's 1999 Rapid Bioassessment Protocols for Use in Wadeable Streams and Rivers.<sup>3</sup>
  - f. Bioassessment analysis procedures shall include calculation of the Index of Biotic Integrity (IBI) for benthic macroinvertebrates for all bioassessment stations, as outlined in "A Quantitative Tool for Assessing the Integrity of Southern Coastal California Streams," by Ode, et al. 2005.
  - g. A professional environmental laboratory shall perform all sampling, laboratory, quality assurance, and analytical procedures.
4. FOLLOW-UP ANALYSIS AND ACTIONS

When results from the chemistry, toxicity, and bioassessment monitoring described above indicate urban runoff-induced degradation at a mass loading or temporary watershed assessment station, Copermittees within the watershed shall evaluate the extent and causes of urban runoff pollution in receiving waters and prioritize and implement management actions to eliminate or reduce sources. Toxicity Identification Evaluations (TIEs) shall be conducted to determine the cause of toxicity as outlined in Table 3 below. Other follow-up activities which shall be conducted by the Copermittees are also identified in Table 3. Once the cause of toxicity has been identified by a TIE, the Copermittees shall perform source identification projects as needed and implement the measures necessary to reduce the pollutant discharges and abate the sources causing the toxicity.

Table 3. Triad Approach to Determining Follow-Up Actions

	<b>Chemistry<sup>4</sup></b>	<b>Toxicity<sup>5</sup></b>	<b>Bioassessment<sup>6</sup></b>	<b>Action</b>
1.	Persistent exceedance of water quality objectives (high frequency constituent of concern identified)	Evidence of persistent toxicity	Indications of alteration	Conduct TIE to identify contaminants of concern, based on TIE metric.  Address upstream sources as a high priority.
2.	No persistent exceedances of water quality objectives	No evidence of persistent toxicity	No indications of alteration	No action necessary.

<sup>3</sup> USEPA, 1999. Rapid Bioassessment Protocols for Use in Wadeable Streams and Rivers. EPA-841-B-99-002.

<sup>4</sup> Persistent exceedance shall mean exceedances of established water quality objectives, benchmarks, or action levels by a pollutant known to cause toxicity for two wet weather and/or two dry weather samples in a given year.

<sup>5</sup> Toxicity shall mean when the Lowest Observed Effect Concentration (LOEC) (for chronic toxicity tests) or median lethal concentration (LC<sub>50</sub>) (for acute toxicity tests) for any given species is less than or equal to 100% of the test sample and observed effects are significantly different from the control. Evidence of persistent toxicity shall mean toxicity to a specific test organism in more than 50% of the samples taken for a given location during a given monitoring year. When a monitoring event has the potential to indicate evidence of persistent toxicity (e.g. the third event of four monitoring events), sufficient samples shall be collected in order to conduct any TIEs that may be required. When a sample collected in order to conduct a TIE does not result in mortality or exhibit a toxic effect in at least 50% of the applicable test organisms in the 100% storm water sample, the TIE may be conducted with a sample collected during the next monitoring event.

<sup>6</sup> Indications of alteration shall mean an IBI score of Poor or Very Poor.

	<b>Chemistry<sup>4</sup></b>	<b>Toxicity<sup>5</sup></b>	<b>Bioassessment<sup>6</sup></b>	<b>Action</b>
3.	Persistent exceedance of water quality objectives (high frequency constituent of concern identified)	No evidence of persistent toxicity	No indications of alteration	Address upstream sources as a low priority.
4.	No persistent exceedances of water quality objectives	Evidence of persistent toxicity	No indications of alteration	Conduct TIE to identify contaminants of concern, based on TIE metric.  Address upstream sources as medium priority.
5.	No persistent exceedances of water quality objectives	No evidence of persistent toxicity	Indications of alteration	No action necessary to address toxic chemicals.  Address potential role of urban runoff in causing physical habitat disturbance.
6.	Persistent exceedance of water quality objective (high frequency constituent of concern identified)	Evidence of persistent toxicity	No indications of alteration	If chemical and toxicity tests indicate persistent degradation, conduct TIE to identify contaminants of concern, based on TIE metric and address upstream source as a medium priority.
7.	No persistent exceedances of water quality objectives	Evidence of persistent toxicity	Indications of alteration	Conduct TIE to identify contaminants of concern, based on TIE metric.  Address upstream sources as a high priority.  Address potential role of urban runoff causing physical habitat disturbance.
8.	Persistent exceedance of water quality objectives objective (high frequency constituent of concern identified)	No evidence of persistent toxicity	Indications of alteration	Address upstream source as a high priority.

5. AMBIENT BAY AND LAGOON MONITORING (ABLM)

- a. Ambient Bay and Lagoon Monitoring shall be conducted according to the schedule identified in Table 1.
- b. If results of the Ambient Bay and Lagoon Monitoring assessment indicate a general relationship and/or linkage between conditions in bays/lagoons/estuaries with conditions at mass loading stations, then monitoring shall be conducted at the following locations: Santa Margarita River Estuary, Oceanside Harbor, San Luis Rey Estuary, Buena Vista Lagoon, Agua Hedionda Lagoon, Baticuitos Lagoon, San Elijo Lagoon, San Dieguito Lagoon, Los Penasquitos Lagoon, Mission Bay, Sweetwater River Estuary, and Tijuana River Estuary. This monitoring shall be designed to most effectively answer each of questions 1-5 of section I.B above as they pertain to bays/lagoons/estuaries.

- c. If results of the Ambient Bay and Lagoon Monitoring assessment do not indicate a relationship and/or linkage between conditions in bays/lagoons/estuaries with conditions at mass loading stations, then monitoring shall be conducted for special investigations of the bays/lagoons/estuaries. These special investigations shall be designed to most effectively answer each of questions 1-5 of section I.B above as they pertain to bays/lagoons/estuaries, with an emphasis on answering question 4.
  - d. Ambient Bay and Lagoon Monitoring shall utilize the triad approach, analyzing chemistry, toxicity, and benthic infauna data.
  - e. Ambient Bay and Lagoon Monitoring shall include a water column monitoring component as necessary to supply information needed for the development, implementation, and assessment of Total Maximum Daily Loads (TMDLs).
6. COASTAL STORM DRAIN MONITORING

The Copermittees shall collaborate to develop and implement a coastal storm drain monitoring program. The monitoring program shall include:

- a. Identification of coastal storm drains which discharge to coastal waters.
- b. Monthly sampling of all flowing coastal storm drains identified in section II.A.6.a for total coliform, fecal coliform, and enterococcus.<sup>7</sup> Where flowing coastal storm drains are discharging to coastal waters, paired samples from the storm drain discharge and coastal water (25 yards down current of the discharge) shall be collected. If flowing coastal storm drains are not discharging to coastal waters, only the storm drain discharge needs to be sampled.
  - (1) Frequency of sampling of coastal storm drains may be reduced to every other month if the paired coastal storm drain data:
    - (a) Exhibits three consecutive storm drain samples with all bacterial indicators below the Copermittees' sampling frequency reduction criteria, as the sampling frequency reduction criteria was developed under Order No. 2001-01.
    - (b) Exhibits that the three consecutive samples discussed in (a) above are paired with receiving water samples that do not exceed Assembly Bill (AB) 411 or Basin Plan standards.
    - (c) Exhibits that less than 20% of the storm drain samples were above any of the sampling frequency reduction criteria during the previous year.
  - (2) The Copermittees shall notify the Regional Board of any coastal storm drains eligible for sampling frequency reduction prior to October 1 of each year. Sampling frequency reduction shall not occur prior to Regional Board

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<sup>7</sup> Coastal storm drains where sampler safety, habitat impacts from sampling, or inaccessibility are issues need not be sampled. Such coastal storm drains shall be added to the Copermittee's dry weather field screening and analytical monitoring program where feasible.

notification.

- (3) Re-sampling shall be implemented within one business day of receipt of analytical results for coastal storm drains where:
  - (a) Both storm drain and receiving water samples exceed AB 411 or Basin Plan standards for any bacterial indicator.
  - (b) The storm drain sample exceeds 95<sup>th</sup> percentile observations of the previous year's data for any bacterial indicator.
- (4) If re-sampling conducted under section (3) above exhibits continued exceedances of a AB 411 or Basin Plan standards in either the storm drain or receiving water, investigations of sources of bacterial contamination shall commence within one business day of receipt of analytical results.
- (5) Investigations of sources of bacterial contamination shall occur immediately if evidence of abnormally high flows, sewage releases, restaurant discharges, and/or similar evidence is observed during sampling.
- (6) Exceedances of public health standards for bacterial indicators shall be reported to the County Department of Environmental Health as soon as possible.

#### 7. PYRETHROIDS MONITORING

The Copermittees shall collaborate to develop and implement a monitoring program to measure and assess the presence of pyrethroids in receiving waters. This monitoring program shall be implemented within each watershed and shall begin no later than the 2007-2008 monitoring year.

### **B. Urban Runoff Monitoring**

Each Copermittee shall collaborate with the other Copermittees to develop, conduct, and report on a year round watershed based Urban Runoff Monitoring Program. The monitoring program design, implementation, analysis, assessment, and reporting shall be conducted on a watershed basis for each of the hydrologic units. The monitoring program shall be designed to meet the goals and answer the questions listed in section I above. The monitoring program shall include the following components

#### 1. MS4 OUTFALL MONITORING

The Copermittees shall collaborate to develop and implement a monitoring program to characterize pollutant discharges from MS4 outfalls in each watershed during wet and dry weather. The program shall include rationale and criteria for selection of outfalls to be monitored. The program shall at a minimum include collection of samples for those pollutants causing or contributing to violations of water quality standards within the watershed. This monitoring program shall be implemented within each watershed and shall begin within the 2007-2008 monitoring year.

2. SOURCE IDENTIFICATION MONITORING

The Copermittees shall collaborate to develop and implement a monitoring program to identify sources of discharges of pollutants causing the priority water quality problems within each watershed. The monitoring program shall include focused monitoring which moves upstream into each watershed as necessary to identify sources. The monitoring program shall use source inventories and "Threat to Water Quality" analysis to guide monitoring efforts. This monitoring program shall be implemented within each watershed and shall begin no later than the 2008-2009 monitoring year.

3. DRY WEATHER FIELD SCREENING AND ANALYTICAL MONITORING

As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall update as necessary its dry weather field screening and analytical monitoring program to meet or exceed the requirements of this section. Dry weather analytical and field screening monitoring consists of (1) field observations; (2) field screening monitoring; and (3) analytical monitoring at selected stations. The Dry Weather Field Screening and Analytical Monitoring program is not required to be SWAMP comparable. Each Copermittee's program shall be designed to detect and eliminate illicit connections and illegal discharges to the MS4 using frequent, geographically widespread dry weather discharge monitoring and follow-up investigations. Each Copermittee shall conduct the following dry weather field screening and analytical monitoring tasks:

a. Select Dry Weather Field Screening and Analytical Monitoring Stations

Based upon a review of its past Dry Weather Monitoring Program, each Copermittee shall select dry weather field screening and analytical monitoring stations within its jurisdiction. No more than 500 dry weather field screening and analytical monitoring stations (excluding alternate stations) need to be selected by any individual Copermittee for any given year. Stations shall be selected according to one of the following methods:

- (1) Stations shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the MS4 by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the MS4 or major outfall. This random selection has to use the following guidelines and criteria:
  - (a) A grid system consisting of perpendicular north-south and east-west lines spaced  $\frac{1}{4}$  mile apart shall be overlaid on a map of the MS4, creating a series of cells;
  - (b) All cells that contain a segment of the MS4 shall be identified and one dry weather analytical monitoring station shall be selected in each cell.
  - (c) Each Copermittee shall determine alternate stations to be sampled in place of selected stations that do not have flow.
- (2) Stations may be selected non-randomly provided adequate coverage of the entire MS4 system is ensured and that the selection of stations meets,

exceeds, or provides equivalent coverage to the requirements given above. The dry weather analytical and field screening monitoring stations shall be established using the following guidelines and criteria:

- (a) Stations should be located downstream of any sources of suspected illegal or illicit activity;
- (b) Stations shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system within each cell;
- (c) Hydrological conditions, total drainage area of the site, traffic density, age of the structures or buildings in the area, history of the area, and land use types shall be considered in locating stations;
- (d) Each Copermittee shall determine alternate stations to be sampled in place of selected stations that do not have flow.

b. Complete MS4 Map

Each Copermittee shall clearly identify each dry weather field screening and analytical monitoring station on its MS4 Map as either a separate GIS layer or a map overlay hereafter referred to as a Dry Weather Field Screening and Analytical Stations Map. Each Copermittee shall confirm that each drainage area within its jurisdiction contains at least one station.

c. Develop Dry Weather Field Screening and Analytical Monitoring Procedures

Each Copermittee shall develop and/or update written procedures for dry weather field screening and analytical monitoring (for analytical monitoring only, these procedures must be consistent with 40 CFR part 136), including field observations, monitoring, and analyses to be conducted. At a minimum, the procedures must meet the following guidelines and criteria:

- (1) Determining Sampling Frequency: Dry weather field screening and analytical monitoring shall be conducted at each identified station at least once between May 1st and September 30th of each year or as often as the Copermittee determines is necessary to comply with the requirements of section D.4 of Order No. R9-2007-0001.
- (2) If flow or ponded runoff is observed at a dry weather field screening or analytical monitoring station and there has been at least seventy-two (72) hours of dry weather, make observations and collect at least one (1) grab sample. Record general information such as time since last rain, quantity of last rain, site descriptions (i.e., conveyance type, dominant watershed land uses), flow estimation (i.e., width of water surface, approximate depth of water, approximate flow velocity, flow rate), and visual observations (i.e., odor, color, clarity, floatables, deposits/stains, vegetation condition, structural condition, and biology).
- (3) At a minimum, collect samples for analytical laboratory analysis of the following constituents for at least twenty five percent (25%) of the dry weather monitoring stations where water is present:

- (a) Total Hardness
  - (b) Oil and Grease
  - (c) Diazinon and Chlorpyrifos
  - (d) Cadmium (Dissolved)
  - (e) Lead (Dissolved)
  - (f) Zinc (Dissolved)
  - (g) Copper (Dissolved)
  - (h) Enterococcus bacteria<sup>8</sup>
  - (i) Total Coliform bacteria<sup>8</sup>
  - (j) Fecal Coliform bacteria<sup>8</sup>
- (4) At a minimum, conduct field screening analysis of the following constituents at all dry weather monitoring stations where water is present:
- (a) Specific conductance (calculate estimated Total Dissolved Solids).
  - (b) Turbidity
  - (c) pH
  - (d) Reactive Phosphorous
  - (e) Nitrate Nitrogen
  - (f) Ammonia Nitrogen
  - (g) Surfactants (MBAS)
- (5) If the station is dry (no flowing or ponded runoff), make and record all applicable observations and select another station from the list of alternate stations for monitoring.
- (6) Develop and/or update criteria for dry weather field screening and analytical monitoring results whereby exceedance of the criteria will require follow-up investigations to be conducted to identify and eliminate the source causing the exceedance of the criteria.
- (7) Assess the presence of trash in receiving waters and urban runoff at each dry weather field screening or analytical monitoring station. Assessments of trash shall provide information on the spatial extent and amount of trash present, as well as the nature of the types of trash present.
- (8) Dry weather field screening and analytical monitoring stations identified to exceed dry weather monitoring criteria for any constituents shall continue to be screened in subsequent years.
- (9) Develop and/or update procedures for source identification follow up investigations in the event of exceedance of dry weather field screening and analytical monitoring result criteria. These procedures shall be consistent with procedures required in section D.4.d of Order No. R9-2007-0001.
- (10) Develop and/or update procedures to eliminate detected illicit discharges and connections. These procedures shall be consistent with each Copermittes

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<sup>8</sup> Colilert and Enterolert may be used as alternative methods with Fecal Coliform determined by calculations.

Illicit Discharge and Elimination component of its Jurisdictional Urban Runoff Management Plan as discussed in section D.4 of Order No. R9-2007-0001.

d. Conduct Dry Weather Field Screening and Analytical Monitoring

The Copermittees shall commence implementation of dry weather field screening and analytical monitoring under the requirements of this Order by May 1, 2008. Each Copermittee shall conduct dry weather analytical and field screening monitoring in accordance with its storm water conveyance system map and dry weather analytical and field screening monitoring procedures as described in section II.B.3 above. If monitoring indicates an illicit connection or illegal discharge, conduct the follow-up investigation and elimination activities as described in submitted dry weather field screening and analytical monitoring procedures and sections D.4.d and D.4.e of Order No. R9-2007-0001. Until the dry weather field screening and analytical monitoring program is implemented under the requirements of this Order, each Copermittee shall continue to implement dry weather field screening and analytical monitoring as it was most recently implemented pursuant to Order No. 2001-01.

**C. Regional Monitoring Program**

1. The Copermittees shall participate and coordinate with federal, state, and local agencies and other dischargers in development and implementation of a regional watershed monitoring program as directed by the Executive Officer.
2. Bight '08
  - a. During the 2008-2009 monitoring year (Permit Year 2), the Copermittees may participate in the Bight '08 study. The Copermittees shall ensure that such participation results in collection and analysis of data useful in addressing the goals and management questions of the Receiving Waters Monitoring Program. Any participation shall include the contribution of all funds not otherwise spent on full implementation of mass loading station, temporary watershed assessment station, ambient bay and lagoon, and bioassessment monitoring. All other monitoring shall continue during the 2008-2009 monitoring year (Permit Year 2) as required.
  - b. If the Copermittees do not participate in Bight '08, mass loading station, temporary watershed assessment station, ambient bay an lagoon, and bioassessment monitoring shall be conducted as follows:
    - (1) Permit Year 3 (2009-2010) monitoring shall be conducted in Permit Year 2 (2008-2009) (see Table 1).
    - (2) Permit Year 4 (2010-2011) monitoring shall be conducted in Permit Year 3 (2009-2010) (see Table 1).
    - (3) Permit Year 5 (2011-2012) monitoring shall be conducted in Permit Year 4 (2010-2011).



(4) Permit Year 1 (2007-2008) monitoring shall be conducted in Permit Year 5 (2011-2012).

- c. If the Copermittees partially participate in Bight '08, monitoring shall be conducted as described in section II.C.2.b above, with the exception of any monitoring offset by the contribution of funds to Bight '08.

#### **D. Special Studies**

##### 1. TMDL MONITORING

- a. All monitoring shall be conducted as required in Investigation Order No. R9-2004-0277 for Chollas Creek.

##### 2. REGIONAL HARBOR MONITORING

- a. The Copermittees which discharge to harbors shall participate in the development and implementation of the Regional Harbor Monitoring Program.

3. The Copermittees shall conduct special studies, including any monitoring required for TMDL development and implementation, as directed by the Executive Officer.

#### **E. Monitoring Provisions**

All monitoring activities shall meet the following requirements:

1. Where procedures are not otherwise specified in this Receiving Waters Monitoring and Reporting Program (e.g., Dry Weather Field Screening and Analytical Monitoring), sampling, analysis and quality assurance/quality control must be conducted in accordance with the Quality Assurance Management Plan (QAMP) for the State of California's Surface Water Ambient Monitoring Program (SWAMP), adopted by the State Water Resources Control Board (SWRCB).
2. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity [40 CFR 122.41(j)(1)].
3. The Copermittees shall retain records of all monitoring information, including all calibration and maintenance of monitoring instrumentation, copies of all reports required by this Order, and records of all data used to complete the Report of Waste Discharge and application for this Order, for a period of at least five (5) years from the date of the sample, measurement, report, or application. This period may be extended by request of the Regional Board or USEPA at any time and shall be extended during the course of any unresolved litigation regarding this discharge. [40 CFR 122.41(j)(2), CWC section 13383(a)]
4. Records of monitoring information shall include [40 CFR 122.41(j)(3)]:
  - a. The date, exact place, and time of sampling or measurements;
  - b. The individual(s) who performed the sampling or measurements;
  - c. The date(s) analyses were performed;

- d. The individual(s) who performed the analyses;
  - e. The analytical techniques or methods used; and
  - f. The results of such analyses.
5. All sampling, sample preservation, and analyses must be conducted according to test procedures approved under 40 CFR part 136, unless other test procedures have been specified in this Receiving Waters Monitoring and Reporting Program or approved by the Executive Officer [40 CFR 122.41(j)(4)].
  6. The CWA provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Order 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. [40 CFR 122.41(j)(5)]
  7. Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified in this Receiving Waters Monitoring and Reporting Program. [40 CFR 122.41(l)(4)(iii)]
  8. All chemical, bacteriological, and toxicity analyses shall be conducted at a laboratory certified for such analyses by the California Department of Health Services or a laboratory approved by the Executive Officer.
  9. For priority toxic pollutants that are identified in the California Toxics Rule (CTR) (65 Fed. Reg. 31682), the Copermittees shall instruct its laboratories to establish calibration standards that are equivalent to or lower than the Minimum Levels (MLs) published in Appendix 4 of the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP). If a Copermittee can demonstrate that a particular ML is not attainable, in accordance with procedures set forth in 40 CFR 136, the lowest quantifiable concentration of the lowest calibration standard analyzed by a specific analytical procedure (assuming that all the method specified sample weights, volumes, and processing steps have been followed) may be used instead of the ML listed in Appendix 4 of the SIP. The Copermittee must submit documentation from the laboratory to the Regional Board for approval prior to raising the ML for any priority toxic pollutant.
  10. The Regional Board Executive Officer or the Regional Board may make revisions to this Receiving Waters and Urban Runoff Monitoring and Reporting Program at any time during the term of Order No. R9-2007-0001, and may include a reduction or increase in the number of parameters to be monitored, locations monitored, the frequency of monitoring, or the number and size of samples collected.
  11. The Clean Water Act 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. [40 CFR 122.41(k)(2)]

12. Monitoring shall be conducted according the USEPA test procedures approved under 40 CFR 136, "Guidelines Establishing Test Procedures for Analysis of Pollutants under the Clean Water Act" as amended, unless other test procedures have been specified in this Receiving Waters and Urban Runoff Monitoring and Reporting Program, in Order No. R9-2007-0001, or by the Executive Officer.
13. If the discharger monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR part 136, unless otherwise specified in the Order, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the reports requested by the Regional Board. [40 CFR 122.41(l)(4)(ii)]

### **III. REPORTING PROGRAM**

#### **A. Monitoring Reporting**

1. The Principal Permittee shall submit a description of the Receiving Waters and Urban Runoff Monitoring Program to be implemented for every monitoring year. The submittals shall begin on September 1, 2007, and continue every year thereafter. The submittals shall describe all monitoring to be conducted during the upcoming monitoring year. For example, the September 1, 2007 submittal shall describe the monitoring to be conducted from October 1, 2007 through September 30, 2008.

If the Copermittees participate in Bight '08, their submittal for the 2008-2009 monitoring year shall describe the monitoring to be conducted for Bight '08 and exhibit how the monitoring will result in collection and analysis of data useful in addressing the goals and management questions of the Receiving Waters and Urban Runoff Monitoring Program.

2. The Principal Permittee shall submit the Receiving Waters and Urban Runoff Monitoring Annual Report to the Regional Board on January 31 of each year, beginning on January 31, 2009. Receiving Waters and Urban Runoff Monitoring Annual Reports shall meet the following requirements:
  - a. Annual monitoring reports shall include the data/results, methods of evaluating the data, graphical summaries of the data, and an explanation/discussion of the data for each monitoring program component.
  - b. Annual monitoring reports shall include a watershed-based analysis of the findings of each monitoring program component. Each watershed-based analysis shall include:
    - (1) Identification and prioritization of water quality problems within each watershed.
    - (2) Identification and description of the nature and magnitude of potential sources of the water quality problems within each watershed.
    - (3) Exhibition of pollutant load and concentration increases or decreases at each mass loading and temporary watershed assessment station.

- (4) Evaluation of pollutant loads and concentrations at mass loading and temporary watershed assessment stations with respect to land use, population, sources, and other characteristics of watersheds using tools such as multiple linear regression, factor analysis, and cluster analysis.
  - (5) Identification of links between source activities/conditions and observed receiving water impacts.
  - (6) Identification of recommended future monitoring to identify and address sources of water quality problems.
  - (7) Results and discussion of any TIE conducted, together with actions that will be implemented to reduce the discharge of pollutants and abate the sources causing the toxicity.
- c. Annual monitoring reports shall include a detailed description of all monitoring conducted under Investigation Order No. R9-2004-0277 for Chollas Creek. Annual monitoring reports shall also include all information required by Investigation Order No. R9-2004-0277.
  - d. Annual monitoring reports shall include discussions for each watershed which answer each of the management questions listed in section I.B of this Receiving Waters Monitoring and Reporting Program.
  - e. Annual monitoring reports shall identify how each of the goals listed in section I.A of this Receiving Waters Monitoring and Reporting Program has been addressed by the Copermittees' monitoring.
  - f. Annual monitoring reports shall include identification and analysis of any long-term trends in storm water or receiving water quality. Trend analysis shall use nonparametric approaches, such as the Mann-Kendall test, including exogenous variables in a multiple regression model, and/or using a seasonal nonparametric trend model, where applicable.
  - g. Annual monitoring reports shall provide an estimation of total pollutant loads (wet weather loads plus dry weather loads) due to urban runoff for each of the watersheds specified in Table 4 of Order No. R9-2007-0001.
  - h. Annual monitoring reports shall for each monitoring program component listed above, include an assessment of compliance with applicable water quality standards.
  - i. Annual monitoring reports shall describe monitoring station locations by latitude and longitude coordinates, frequency of sampling, quality assurance/quality control procedures, and sampling and analysis protocols.
  - j. Annual monitoring reports shall use a standard report format and shall include the following:
    - (1) A stand alone comprehensive executive summary addressing all sections of the monitoring report;
    - (2) Comprehensive interpretations and conclusions; and

- (3) Recommendations for future actions.
- k. All monitoring reports submitted to the Principal Permittee or the Regional Board shall contain the certified perjury statement described in Attachment B of Order No. R9-2007-0001.
  - l. Annual monitoring reports shall be reviewed prior to submittal to the Regional Board by a committee (consisting of no less than three members). All review comments shall also be submitted to the Regional Board.
  - m. Annual monitoring reports shall be submitted in both electronic and paper formats.
3. The Principal Permittee shall submit by July 1, 2007 a detailed description of the monitoring programs to be implemented under requirements II.A.1.k, II.A.7, and II.B.3.c.(7) of Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R9-2007-0001. The Principal Permittee shall submit by July 1, 2008, a detailed description of the monitoring programs to be implemented under requirement II.B.1 and II.B.2 of Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R9-2007-0001. The description shall identify and provide the rationale for the constituents monitored, locations of monitoring, frequency of monitoring, and analyses to be conducted with the data generated.
  4. By January 31, 2010, the City of San Diego shall submit a report which evaluates the data and assumptions used to estimate the WLA to Shelter Island Yacht Basin of 30 kg Cu/year. The report shall evaluate if any changes have occurred in the watershed which could cause or contribute to a higher copper urban runoff discharge and any actions necessary to address these changes. The report shall be an attachment to the Watershed Urban Runoff Management Program Annual Report for the San Diego Bay watershed.
  5. Monitoring programs and reports shall comply with section II.E of Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R9-2007-0001 and Attachment B of Order No. R9-2007-0001.
  6. Following completion of an annual cycle of monitoring in October, the Copermittees shall make the monitoring data and results available to the Regional Board at the Regional Board's request.

#### **B. Interim Reporting Requirements**

For the October 2005-October 2006 and October 2006-October 2007 monitoring periods, the Principal Permittee shall submit the Receiving Waters Monitoring Annual Reports on January 31, 2007 and January 31, 2008, respectively. The Receiving Waters Monitoring Annual Report shall address the monitoring conducted to comply with the requirements of Order No. 2001-01.

**SECTION 7  
DOCUMENTATION  
IN SUPPORT OF TEST CLAIM  
IN RE  
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD  
ORDER NO. R9-2013-0001  
NPDES NO. CAS 0109266  
OF  
COUNTY OF SAN DIEGO  
VOLUME II  
STATE AND FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES**

**INDEX TO SECTION 7 DOCUMENTATION**  
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**STATE AND FEDERAL CONSTITUTIONAL PROVISIONS, STATUTES AND**  
**REGULATIONS**

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII A. [TAX LIMITATION INITIATIVE]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII A Note (2015)

**Art. XIII A Note**

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CONSTITUTION OF THE STATE OF CALIFORNIA  
 Article XIII A. [TAX LIMITATION INITIATIVE]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII A § 1 (2015)

**§ 1. Maximum amount of ad valorem tax**

(a) 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. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.

(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any of the following:

(1) Indebtedness approved by the voters prior to July 1, 1978.

(2) Bonded indebtedness for the acquisition or improvement of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting on the proposition.

(3) Bonded indebtedness incurred by a school district, community college district, or county office of education for the construction, reconstruction, rehabilitation, or replacement of school facilities, including the furnishing and equipping of school facilities, or the acquisition or lease of real property for school facilities, approved by 55 percent of the voters of the district or county, as appropriate, voting on the proposition on or after the effective date of the measure adding this paragraph. This paragraph shall apply only if the proposition approved by the voters and resulting in the bonded indebtedness includes all of the following accountability requirements:

(A) A requirement that the proceeds from the sale of the bonds be used only for the purposes specified in Article XIII A, Section 1(b)(3), and not for any other purpose, including teacher and administrator salaries and other school operating expenses.

(B) A list of the specific school facilities projects to be funded and certification that the school district board, community college board, or county office of education has evaluated safety, class size reduction, and information technology needs in developing that list.

(C) A requirement that the school district board, community college board, or county office of education conduct an annual, independent performance audit to ensure that the funds have been expended only on the specific projects listed.

(D) A requirement that the school district board, community college board, or county office of education conduct an annual, independent financial audit of the proceeds from the sale of the bonds until all of those proceeds have been expended for the school facilities projects.

(c) Notwithstanding any other provisions of law or of this Constitution, school districts, community college districts, and county offices of education may levy a 55 percent vote ad valorem tax pursuant to subdivision (b).

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII A. [TAX LIMITATION INITIATIVE]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII A § 2 (2015)

**§ 2. Assessment at full cash value; Definitions**

(a) The "full cash value" means the county assessor's valuation of real property as shown on the 1975-76 tax bill under "full cash value" or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 full cash value may be reassessed to reflect that valuation. For purposes of this section, "newly constructed" does not include real property that is reconstructed after a disaster, as declared by the Governor, where the fair market value of the real property, as reconstructed, is comparable to its fair market value prior to the disaster. For purposes of this section, the term "newly constructed" does not include that portion of an existing structure that consists of the construction or reconstruction of seismic retrofitting components, as defined by the Legislature.

However, the Legislature may provide that, under appropriate circumstances and pursuant to definitions and procedures established by the Legislature, any person over the age of 55 years who resides in property that is eligible for the homeowner's exemption under subdivision (k) of Section 3 of Article XIII and any implementing legislation may transfer the base year value of the property entitled to exemption, with the adjustments authorized by subdivision (b), to any replacement dwelling of equal or lesser value located within the same county and purchased or newly constructed by that person as his or her principal residence within two years of the sale of the original property. For purposes of this section, "any person over the age of 55 years" includes a married couple one member of which is over the age of 55 years. For purposes of this section, "replacement dwelling" means a building, structure, or other shelter constituting a place of abode, whether real property or personal property, and any land on which it may be situated. For purposes of this section, a two-dwelling unit shall be considered as two separate single-family dwellings. This paragraph shall apply to any replacement dwelling that was purchased or newly constructed on or after November 5, 1986.

In addition, the Legislature may authorize each county board of supervisors, after consultation with the local affected agencies within the county's boundaries, to adopt an ordinance making the provisions of this subdivision relating to transfer of base year value also applicable to situations in which the replacement dwellings are located in that county and the original properties are located in another county within this State. For purposes of this paragraph, "local affected agency" means any city, special district, school district, or community college district that receives an annual property tax revenue allocation. This paragraph applies to any replacement dwelling that was purchased or newly constructed on or after the date the county adopted the provisions of this subdivision relating to transfer of base year value, but does not apply to any replacement dwelling that was purchased or newly constructed before November 9, 1988.

The Legislature may extend the provisions of this subdivision relating to the transfer of base year values from original properties to replacement dwellings of homeowners over the age of 55 years to severely disabled homeowners, but only with respect to those replacement dwellings purchased or newly constructed on or after the effective date of this paragraph.

## Cal Const, Art. XIII A § 2

(b) The full cash value base may reflect from year to year the inflationary rate not to exceed 2 percent for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction, or may be reduced to reflect substantial damage, destruction, or other factors causing a decline in value.

(c) For purposes of subdivision (a), the Legislature may provide that the term "newly constructed" does not include any of the following:

(1) The construction or addition of any active solar energy system.

(2) The construction or installation of any fire sprinkler system, other fire extinguishing system, fire detection system, or fire-related egress improvement, as defined by the Legislature, that is constructed or installed after the effective date of this paragraph.

(3) The construction, installation, or modification on or after the effective date of this paragraph of any portion or structural component of a single- or multiple-family dwelling that is eligible for the homeowner's exemption if the construction, installation, or modification is for the purpose of making the dwelling more accessible to a severely disabled person.

(4) The construction, installation, removal, or modification on or after the effective date of this paragraph of any portion or structural component of an existing building or structure if the construction, installation, removal, or modification is for the purpose of making the building more accessible to, or more usable by, a disabled person.

(d) For purposes of this section, the term "change in ownership" does not include the acquisition of real property as a replacement for comparable property if the person acquiring the real property has been displaced from the property replaced by eminent domain proceedings, by acquisition by a public entity, or governmental action that has resulted in a judgment of inverse condemnation. The real property acquired shall be deemed comparable to the property replaced if it is similar in size, utility, and function, or if it conforms to state regulations defined by the Legislature governing the relocation of persons displaced by governmental actions. This subdivision applies to any property acquired after March 1, 1975, but affects only those assessments of that property that occur after the provisions of this subdivision take effect.

(e)

(1) Notwithstanding any other provision of this section, the Legislature shall provide that the base year value of property that is substantially damaged or destroyed by a disaster, as declared by the Governor, may be transferred to comparable property within the same county that is acquired or newly constructed as a replacement for the substantially damaged or destroyed property.

(2) Except as provided in paragraph (3), this subdivision applies to any comparable replacement property acquired or newly constructed on or after July 1, 1985, and to the determination of base year values for the 1985-86 fiscal year and fiscal years thereafter.

(3) In addition to the transfer of base year value of property within the same county that is permitted by paragraph (1), the Legislature may authorize each county board of supervisors to adopt, after consultation with affected local agencies within the county, an ordinance allowing the transfer of the base year value of property that is located within another county in the State and is substantially damaged or destroyed by a disaster, as declared by the Governor, to comparable replacement property of equal or lesser value that is located within the adopting county and is acquired or newly constructed within three years of the substantial damage or destruction of the original property as a replacement for that property. The scope and amount of the benefit provided to a property owner by the transfer of base year value of property pursuant to this paragraph shall not exceed the scope and amount of the benefit provided to a property owner by the transfer of base year value of property pursuant to subdivision (a). For purposes of this paragraph, "affected local agency" means any city, special district, school district, or community college district that receives an annual allocation of ad valorem property tax revenues. This paragraph applies to any comparable replacement property that is acquired or newly constructed as a replacement for property substantially damaged or destroyed by a disaster, as declared by the Governor, occurring on or after October 20, 1991, and to the determination of base year values for the 1991-92 fiscal year and fiscal years thereafter.

(f) For the purposes of subdivision (e):

(1) Property is substantially damaged or destroyed if it sustains physical damage amounting to more than 50 percent of its value immediately before the disaster. Damage includes a diminution in the value of property as a result of restricted access caused by the disaster.

(2) Replacement property is comparable to the property substantially damaged or destroyed if it is similar in size, utility, and function to the property that it replaces, and if the fair market value of the acquired property is comparable to the fair market value of the replaced property prior to the disaster.

(g) For purposes of subdivision (a), the terms "purchased" and "change in ownership" do not include the purchase or transfer of real property between spouses since March 1, 1975, including, but not limited to, all of the following:

(1) Transfers to a trustee for the beneficial use of a spouse, or the surviving spouse of a deceased transferor, or by a trustee of such a trust to the spouse of the trustor.

(2) Transfers to a spouse that take effect upon the death of a spouse.

(3) Transfers to a spouse or former spouse in connection with a property settlement agreement or decree of dissolution of a marriage or legal separation.

(4) The creation, transfer, or termination, solely between spouses, of any coowner's interest.

(5) The distribution of a legal entity's property to a spouse or former spouse in exchange for the interest of the spouse in the legal entity in connection with a property settlement agreement or a decree of dissolution of a marriage or legal separation.

(h)

(1) For purposes of subdivision (a), the terms "purchased" and "change in ownership" do not include the purchase or transfer of the principal residence of the transferor in the case of a purchase or transfer between parents and their children, as defined by the Legislature, and the purchase or transfer of the first one million dollars (\$1,000,000) of the full cash value of all other real property between parents and their children, as defined by the Legislature. This subdivision applies to both voluntary transfers and transfers resulting from a court order or judicial decree.

(2)

(A) Subject to subparagraph (B), commencing with purchases or transfers that occur on or after the date upon which the measure adding this paragraph becomes effective, the exclusion established by paragraph (1) also applies to a purchase or transfer of real property between grandparents and their grandchild or grandchildren, as defined by the Legislature, that otherwise qualifies under paragraph (1), if all of the parents of that grandchild or those grandchildren, who qualify as the children of the grandparents, are deceased as of the date of the purchase or transfer.

(B) A purchase or transfer of a principal residence shall not be excluded pursuant to subparagraph (A) if the transferee grandchild or grandchildren also received a principal residence, or interest therein, through another purchase or transfer that was excludable pursuant to paragraph (1). The full cash value of any real property, other than a principal residence, that was transferred to the grandchild or grandchildren pursuant to a purchase or transfer that was excludable pursuant to paragraph (1), and the full cash value of a principal residence that fails to qualify for exclusion as a result of the preceding sentence, shall be included in applying, for purposes of subparagraph (A), the one-million-dollar (\$1,000,000) full cash value limit specified in paragraph (1).

(i)

(1) Notwithstanding any other provision of this section, the Legislature shall provide with respect to a qualified contaminated property, as defined in paragraph (2), that either, but not both, of the following apply:

(A)

(i) Subject to the limitation of clause (ii), the base year value of the qualified contaminated property, as adjusted as authorized by subdivision (b), may be transferred to a replacement property that is acquired or newly constructed as a replacement for the qualified contaminated property, if the replacement real property has a fair market value that is equal to or less than the fair market value of the qualified contaminated property if that property were not contaminated and, except as otherwise provided by this clause, is located within the same county. The base year value of the qualified contaminated property may be transferred to a replacement real property located within another county if the board of supervisors of that other county has, after consultation with the affected local agencies within that county, adopted a resolution authorizing an intercounty transfer of base year value as so described.

(ii) This subparagraph applies only to replacement property that is acquired or newly constructed within five years after ownership in the qualified contaminated property is sold or otherwise transferred.

**(B)** In the case in which the remediation of the environmental problems on the qualified contaminated property requires the destruction of, or results in substantial damage to, a structure located on that property, the term "new construction" does not include the repair of a substantially damaged structure, or the construction of a structure replacing a destroyed structure on the qualified contaminated property, performed after the remediation of the environmental problems on that property, provided that the repaired or replacement structure is similar in size, utility, and function to the original structure.

**(2)** For purposes of this subdivision, "qualified contaminated property" means residential or nonresidential real property that is all of the following:

**(A)** In the case of residential real property, rendered uninhabitable, and in the case of nonresidential real property, rendered unusable, as the result of either environmental problems, in the nature of and including, but not limited to, the presence of toxic or hazardous materials, or the remediation of those environmental problems, except where the existence of the environmental problems was known to the owner, or to a related individual or entity as described in paragraph (3), at the time the real property was acquired or constructed. For purposes of this subparagraph, residential real property is "uninhabitable" if that property, as a result of health hazards caused by or associated with the environmental problems, is unfit for human habitation, and nonresidential real property is "unusable" if that property, as a result of health hazards caused by or associated with the environmental problems, is unhealthy and unsuitable for occupancy.

**(B)** Located on a site that has been designated as a toxic or environmental hazard or as an environmental cleanup site by an agency of the State of California or the federal government.

**(C)** Real property that contains a structure or structures thereon prior to the completion of environmental cleanup activities, and that structure or structures are substantially damaged or destroyed as a result of those environmental cleanup activities.

**(D)** Stipulated by the lead governmental agency, with respect to the environmental problems or environmental cleanup of the real property, not to have been rendered uninhabitable or unusable, as applicable, as described in subparagraph (A), by any act or omission in which an owner of that real property participated or acquiesced.

**(3)** It shall be rebuttably presumed that an owner of the real property participated or acquiesced in any act or omission that rendered the real property uninhabitable or unusable, as applicable, if that owner is related to any individual or entity that committed that act or omission in any of the following ways:

**(A)** Is a spouse, parent, child, grandparent, grandchild, or sibling of that individual.

**(B)** Is a corporate parent, subsidiary, or affiliate of that entity.

**(C)** Is an owner of, or has control of, that entity.

**(D)** Is owned or controlled by that entity.

If this presumption is not overcome, the owner shall not receive the relief provided for in subparagraph (A) or (B) of paragraph (1). The presumption may be overcome by presentation of satisfactory evidence to the assessor, who shall not be bound by the findings of the lead governmental agency in determining whether the presumption has been overcome.

**(4)** This subdivision applies only to replacement property that is acquired or constructed on or after January 1, 1995, and to property repairs performed on or after that date.

**(j)** Unless specifically provided otherwise, amendments to this section adopted prior to November 1, 1988, are effective for changes in ownership that occur, and new construction that is completed, after the effective date of the amendment. Unless specifically provided otherwise, amendments to this section adopted after November 1, 1988, are effective for changes in ownership that occur, and new construction that is completed, on or after the effective date of the amendment.

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CONSTITUTION OF THE STATE OF CALIFORNIA  
 Article XIII A. [TAX LIMITATION INITIATIVE]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII A § 3 (2015)

**§ 3. Vote required to change state statute resulting in taxpayer paying a higher tax; "Tax"; Void taxes; Burden of proof that levy, charge, or other exaction is not tax**

(a) Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

(b) As used in this section, "tax" means any levy, charge, or exaction of any kind imposed by the State, except the following:

(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 State of conferring the benefit or granting the privilege to the payor.

(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 State of providing the service or product to the payor.

(3) A charge imposed for the reasonable regulatory costs to the State incident to 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 state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or the State, as a result of a violation of law.

(c) Any tax adopted after January 1, 2010, but prior to the effective date of this act, that was not adopted in compliance with the requirements of this section is void 12 months after the effective date of this act unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.

(d) The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, 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.

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII A. [TAX LIMITATION INITIATIVE]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII A § 4 (2015)

**§ 4. Special local taxes**

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.



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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII A. [TAX LIMITATION INITIATIVE]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII A § 5 (2015)

**§ 5. Refunds**

This article shall take effect for the tax year beginning on July 1 following the passage of this Amendment, except Section 3 which shall become effective upon the passage of this article.

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII A. [TAX LIMITATION INITIATIVE]

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Cal Const, Art. XIII A § 6 (2015)

**§ 6. Severability**

If any section, part, clause, or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected but will remain in full force and effect.

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII A. [TAX LIMITATION INITIATIVE]

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Cal Const, Art. XIII A § 7 (2015)

**§ 7. Nonapplicability to Children and Families First Act**

Section 3 of this article does not apply to the California Children and Families First Act of 1998.

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII C. [VOTER APPROVAL FOR LOCAL TAX LEVIES]

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Cal Const, Art. XIII C Note (2015)

**Art. XIII C Note**

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CONSTITUTION OF THE STATE OF CALIFORNIA  
 Article XIII C. [VOTER APPROVAL FOR LOCAL TAX LEVIES]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII C § 1 (2015)

**§ 1. Definitions**

As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

(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.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activ-

ity, 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.

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII C. [VOTER APPROVAL FOR LOCAL TAX LEVIES]

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Cal Const, Art. XIII C § 2 (2015)

**§ 2. Local government tax limitation**

Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) 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. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII C. [VOTER APPROVAL FOR LOCAL TAX LEVIES]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII C § 3 (2015)

**§ 3. Initiative power**

Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.



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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII D Note (2015)

**Art. XIII D Note**

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII D § 1 (2015)

**§ 1. Application of article**

Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this article or Article XIII C shall be construed to:

- (a) Provide any new authority to any agency to impose a tax, assessment, fee, or charge.
- (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.
- (c) Affect existing laws relating to the imposition of timber yield taxes.

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII D § 2 (2015)

**§ 2. Definitions**

As used in this article:

(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.

(b) "Assessment" means 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."

(c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.

(d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.

(e) "Fee" or "charge" means 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.

(f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.

(g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

(h) "Property-related service" means a public service having a direct relationship to property ownership.

(i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII D § 3 (2015)

**§ 3. Limitation of property taxes, assessments, fees and charges**

(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 except:

- (1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.
- (2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.
- (3) Assessments as provided by this article.
- (4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII D § 4 (2015)

**§ 4. Procedures and requirements for assessments**

(a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

(b) All assessments shall be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

(f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e).

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII D § 5 (2015)

**§ 5. Effective date**

Pursuant to subdivision (a) of Section 10 of Article II, the provisions of this article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all existing, new, or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4:

(a) 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. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in those assessments shall be subject to the procedures and approval process set forth in Section 4.

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CONSTITUTION OF THE STATE OF CALIFORNIA  
Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Const, Art. XIII D § 6 (2015)

**§ 6. 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.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) 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. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for



purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

**(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 similar to those for increases in assessments in the conduct of elections under this subdivision.

**(d) Beginning July 1, 1997, all fees or charges shall comply with this section.**

**Citation #1**  
**33 usc 1311**

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\*\*\* Current through PL 114-19, approved 5/22/15 \*\*\*

TITLE 33. NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL  
STANDARDS AND ENFORCEMENT

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33 USCS § 1311

§ 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 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 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 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 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.

(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.

**Citation #2**  
**33 usc 1313**

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\*\*\* Current through PL 114-19, approved 5/22/15 \*\*\*

TITLE 33. NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL  
STANDARDS AND ENFORCEMENT

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33 USCS § 1313

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards.

(1) In order to carry out the purpose of this Act [33 USCS §§ 1251 et seq.], any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. If the Administrator makes such a determination he shall, within three months after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this Act [33 USCS §§ 1251 et seq.] unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3) (A) Any State which prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972] has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of

this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations.

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], if--

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication.

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2) (A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act [33 USCS §§ 1251 et seq.]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 307(a)(1) of this Act [33 USCS § 1317(a)(1)] for which criteria have been published under section 304(a) [33 USCS § 1314(a)], the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 304(a)(8) [33 USCS § 1314(a)(8)]. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act [33 USCS §§ 1251 et seq.], such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act [33 USCS §§ 1251 et seq.], he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water

quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act [33 USCS §§ 1251 et seq.], or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act [33 USCS §§ 1251 et seq.].

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this Act [33 USCS §§ 1251 et seq.].

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision.

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) [33 USCS § 1311(b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 [33 USCS § 1311] are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) 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 304(a)(2) [33 USCS § 1314(a)(2)] 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.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 304(a)(2)(D) [33 USCS § 1314(a)(2)(D)], for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality

standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained. For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process.

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this Act [33 USCS §§ 1251 et seq.].

(2) Each State shall submit not later than 120 days after the date of the enactment of the Water Pollution Control Amendments of 1972 [enacted Oct. 18, 1972] to the Administrator for his approval a proposed continuing planning process which is consistent with this Act [33 USCS §§ 1251 et seq.]. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this Act [33 USCS §§ 1251 et seq.]. The Administrator shall not approve any State permit program under title IV of this Act [33 USCS §§ 1341 et seq.] for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 301(b)(1), section 301(b)(2), section 306, and section 307 [33 USCS §§ 1311(b)(1), (2), 1316, 1317], and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 208 [33 USCS § 1288], and applicable basin plans under section 209 of this Act [33 USCS § 1289];

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 301 and 302 [33 USCS §§ 1311, 1312].

(f) Earlier compliance. Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 301(b)(1) and 301(b)(2) [33 USCS § 1311(b)(1), (2)] nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards. Water quality standards relating to heat shall be consistent with the requirements of section 316 of this Act [33 USCS § 1326].

(h) Thermal water quality standards. For the purposes of this Act [33 USCS §§ 1251 et seq.] the term "water quality standards" includes thermal water quality standards.

(i) Coastal recreation water quality criteria.

(1) Adoption by States.

(A) Initial criteria and standards. Not later than 42 months after the date of the enactment of this subsection [enacted Oct. 10, 2000], each State having coastal recreation waters shall adopt and submit to the Administrator water quality



criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 304(a) [33 USCS § 1314(a)].

(B) New or revised criteria and standards. Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 304(a)(9) [33 USCS § 1314(a)(9)], each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt.

(A) In general. If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception. If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B), the Administrator shall publish any revised or new standard under this subsection not later than 42 months after the date of the enactment of this subsection [enacted Oct. 10, 2000].

(3) Applicability. Except as expressly provided by this subsection, the requirements and procedures of subsection (c) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

**HISTORY:**

(June 30, 1948, ch 758, Title III, § 303, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 846; Feb. 4, 1987, P.L. 100-4, Title III, § 308(d), Title IV, § 404(b), 101 Stat. 39, 68; Oct. 10, 2000, P.L. 106-284, § 2, 114 Stat. 870.)

**Citation #3**  
**33 usc 1342**

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\*\*\* Current through PL 114-19, approved 5/22/15 \*\*\*

TITLE 33. NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL  
PERMITS AND LICENSES

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33 USCS § 1342

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [33 USCS § 407], shall be deemed to be permits issued under this title [33 USCS §§ 1341 et seq.], and permits issued under this title [33 USCS §§ 1341 et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [33 USCS § 407], pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act [33 USCS §§ 1251 et seq.], to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each

such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.]. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343];

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act [33 USCS § 1318] or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act [33 USCS § 1318];

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act [33 USCS § 1317(b)] into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 [33 USCS § 1316] if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 [33 USCS § 1311] if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308 [33 USCS §§ 1284(b), 1317, 1318].

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator.

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)].

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.]. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph [enacted Dec. 27, 1977], the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.].

(e) Waiver of notification requirement. In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories. The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants. Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works. In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 309(a) of this Act [33 USCS § 1319(a)] that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited. Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [33 USCS § 1319].

(j) Public information. A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [33 USCS §§ 1319, 1365], with sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343], except any standard imposed under section 307 [33 USCS § 1317] for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act [33 USCS § 1311, 1316, or 1342], or (2) section 13 of the Act of March 3, 1899 [33 USCS § 407], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899 [33 USCS § 407], the discharge by such source shall not be a violation of this Act [33 USCS §§ 1251 et seq.] if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement.

(1) Agricultural return flows. The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations. The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and

which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities.

(A) NPDES permit requirements for silvicultural activities. The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) Other requirements. Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 404 [33 USCS § 1344], existing permitting requirements under section 402 [33 USCS § 1342], or from any other federal law.

(C) The authorization provided in Section 505(a) [33 USCS § 1365(a)] does not apply to any non-permitting program established under 402(p)(6) [33 USCS § 1342(p)(6)] for the silviculture activities listed in 402(l)(3)(A) [33 USCS § 1342(l)(3)(A)], or to any other limitations that might be deemed to apply to the silviculture activities listed in 402(l)(3)(A) [33 USCS § 1342(l)(3)(A)].

(m) Additional pretreatment of conventional pollutants not required. To the extent a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act [33 USCS § 1317(b)(1)]. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act [33 USCS §§ 1317, 1319], affect State and local authority under sections 307(b)(4) and 510 of this Act [33 USCS §§ 1317(b)(4), 1370], relieve such treatment works of its obligations to meet requirements established under this Act [33 USCS §§ 1251 et seq.], or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program.

(1) State submission. The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage. A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval or major category partial permit programs. The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs. The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

## (o) Anti-backsliding.

(1) General prohibition. In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) [33 USCS § 1314(b)] subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) [33 USCS § 1311(b)(1)(C) or 1313(d) or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4) [33 USCS § 1313(d)(4)].

(2) Exceptions. A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if--

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B) (i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) [33 USCS § 1311(c), (g), (h), (i), (k), (n), or 1326(a)]; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification). Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act [33 USCS §§ 1251 et seq.] or for reasons otherwise unrelated to water quality.

(3) Limitations. In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 [33 USCS § 1313] applicable to such waters.

## (p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.



(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 [33 USCS § 1311].

(B) Municipal discharge. Permits for discharges from municipal storm sewers--

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

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

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

(4) Permit application requirements.

(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows.

(1) Requirement for permits, orders, and decrees. Each permit, order, or decree issued pursuant to this Act [33 USCS §§ 1251 et seq.] after the date of enactment of this subsection [enacted Dec. 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance. Not later than July 31, 2001, and after providing notice and

opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report. Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels. No permit shall be required under this Act [33 USCS §§ 1251 et seq.] by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

**HISTORY:**

(June 30, 1948, ch 758, Title IV, § 402, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 880; Dec. 27, 1977, P.L. 95-217, §§ 33(c), 54(c)(1), 65, 66, 91 Stat. 1577, 1591, 1599, 1600; Feb. 4, 1987, P.L. 100-4, Title IV, §§ 401-403, 404(a), (c) [(d)], 405, 101 Stat. 65-69; Oct. 31, 1992, P.L. 102-580, Title III, § 364, 106 Stat. 4862; Dec. 21, 1995, P.L. 104-66, Title II, Subtitle B, § 2021(e)(2), 109 Stat. 727; Dec. 21, 2000, P.L. 106-554, § 1(a)(4), 114 Stat. 2763; July 30, 2008, P.L. 110-288, § 2, 122 Stat. 2650.)

(As amended Feb. 7, 2014, P.L. 113-79, Title XII, Subtitle C, § 12313, 128 Stat. 992.)

**Citation #4**  
**33 usc 1362**

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TITLE 33. NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL  
GENERAL PROVISIONS

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33 USCS § 1362

§ 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.)

**Citation #5**  
**33 usc 1365**

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TITLE 33. NAVIGATION AND NAVIGABLE WATERS  
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33 USCS § 1365

§ 1365. Citizen suits

(a) Authorization; jurisdiction. Except as provided in subsection (b) of this section and section 309(g)(6) [33 USCS § 1319(g)(6)], any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act [33 USCS §§ 1251 et seq.] or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [33 USCS §§ 1251 et seq.] which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act [33 USCS § 1319(d)].

(b) Notice. No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act [33 USCS §§ 1316, 1317(a)]. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected.

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting



such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States. Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs. The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted. Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation. For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act [33 USCS § 1311(a)]; (2) an effluent limitation or other limitation under section 301 or 302 of this Act [33 USCS § 1311 or 1312]; (3) standard of performance under section 306 of this Act [33 USCS § 1316]; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act [33 USCS § 1317]; (5) certification under section 401 of this Act [33 USCS § 1341]; (6) a permit or condition thereof issued under section 402 of this Act [33 USCS § 1342], which is in effect under this Act [33 USCS §§ 1251 et seq.] (including a requirement applicable by reason of section 313 of this Act [33 USCS § 1323]); or (7) a regulation under section 405(d) of this Act [33 USCS § 1345(d)],.

(g) "Citizen" defined. For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors. A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act [33 USCS §§ 1251 et seq.] the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

**HISTORY:**

(June 30, 1948, ch 758, Title V, § 505, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 888; Feb. 4, 1987, P.L. 100-4, Title III, § 314(c), Title IV, § 406(d)(2), Title V, §§ 504, 505(c), 101 Stat. 49, 73, 75, 76.)

**Citation #8**  
**33 usc 1370**

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\*\*\* Current through PL 114-19, approved 5/22/15 \*\*\*

TITLE 33. NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL  
GENERAL PROVISIONS

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33 USCS § 1370

§ 1370. State authority

Except as expressly provided in this Act [33 USCS §§ 1251 et seq.], nothing in this Act [33 USCS §§ 1251 et seq.] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act [33 USCS §§ 1251 et seq.], such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act [33 USCS §§ 1251 et seq.]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

**HISTORY:**

(June 30, 1948, ch. 758, Title V, § 510, as added, Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 893.)

**Citation #9**  
**40 C.F.R. 123.1**

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\*\*\* issue of the Federal Register \*\*\*

TITLE 40 -- PROTECTION OF ENVIRONMENT  
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY  
SUBCHAPTER D -- WATER PROGRAMS  
PART 123 -- STATE PROGRAM REQUIREMENTS  
SUBPART A -- GENERAL

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40 CFR 123.1

§ 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National Pollutant Discharge Elimination System -- NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator will approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program.

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under § 123.23(b) for activities within the scope of the

newly approved program. The authorized State will retain jurisdiction over its existing permits as described in paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

NOTE: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

(i) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

NOTE: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

**HISTORY:** [48 FR 14178, Apr. 1, 1983, as amended at 54 FR 256, Jan. 4, 1989; 54 FR 18784, May 2, 1989; 58 FR 67981, Dec. 22, 1993; 59 FR 64343, Dec. 14, 1994; 63 FR 45114, 45122, Aug. 24, 1998]

**AUTHORITY:** AUTHORITY NOTE APPLICABLE TO ENTIRE PART:  
Clean Water Act, 33 U.S.C. 1251 et seq.

**NOTES:**

[EFFECTIVE DATE NOTE: 63 FR 45114, 45122, Aug. 24, 1998, revised paragraphs (a) and (c), effective Sept. 23, 1998.]

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 123 Reorganizations, see: 62 FR 61170, Nov. 14, 1997.]

**Citation #:**

**40 C.F.R. 122.26**



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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

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40 CFR 122.26

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

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

- (i) A discharge with respect to which a permit has been issued prior to February 4, 1987;
- (ii) A discharge associated with industrial activity (see § 122.26(a)(4));
- (iii) A discharge from a large municipal separate storm sewer system;
- (iv) A discharge from a medium municipal separate storm sewer system;

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

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

- (A) The location of the discharge with respect to waters of the United States as defined at 40 CFR 122.2.
- (B) The size of the discharge;
- (C) The quantity and nature of the pollutants discharged to waters of the United States; and

(D) Other relevant factors.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(8) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or

title VI of the Clean Water Act. See 40 CFR part 35, subpart I, appendix A(b)H.2.j.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

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

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

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

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

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

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

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

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

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

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

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

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

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

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

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

(iii) Which is not a combined sewer; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) The value of the rainfall erosivity factor ("R" in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. The rainfall erosivity factor is determined in accordance with Chapter 2 of Agriculture Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning With the Revised Universal Soil Loss Equation (RUSLE), pages 21-64, dated January 1997. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C 552(a) and 1 CFR part 51. Copies may be obtained from EPA's Water Resource Center, Mail Code RC4100, 1200 Pennsylvania Ave., NW., Washington, DC 20460. A copy is also available for inspection at the U.S. EPA Water Docket, 1200 Pennsylvania Ave., NW., Washington, DC 20460, or the Office of the Federal Register, 800 N. Capitol Street N.W. Suite 700, Washington, DC. An operator must certify to the Director that the construction activity will take place during a period when the value of the rainfall erosivity factor is less than five; or

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

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

EXHIBIT 1 TO § 122.26(b)(15).--SUMMARY OF COVERAGE  
 OF "STORM WATER DISCHARGES ASSOCIATED WITH SMALL  
 CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

Automatic Designation:	. Construction activities that result in a
Required Nationwide Coverage	land disturbance of equal to or greater than one acre and less than five acres.
	. Construction activities disturbing less than one acre if part of a larger common



<p>Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator. Potential Waiver: Waiver from Requirements as Determined by the NPDES Permitting Authority.</p>	<p>plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (see § 122.26(b)(15)(i).)</p> <p>. Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (see § 122.26(b)(15)(ii).)</p> <p>Any automatically designated construction activity where the operator certifies: (1) A rainfall erosivity factor of less than five, or (2) That the activity will occur within an area where controls are not needed based on a TMDL or, for non-impaired waters that do not require a TMDL, an equivalent analysis for the pollutant(s) of concern. (see § 122.26(b)(15)(i).)</p>
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(16) Small municipal separate storm sewer system means all separate storm sewers that are:

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

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

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

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

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

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

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

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

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

(A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under 40 CFR 262.34); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

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

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

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

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

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

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

(3) Oil and grease, pH, BOD<sub>5</sub>, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

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

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

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

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

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

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

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

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

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

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

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

(F) The name of the receiving water.

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

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

(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is

or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

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

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

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

(2) [Reserved]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under section 314(a) of the CWA (include the following: A description of those publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);

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

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

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

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

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

(D) Field screening. Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents (or surfactants) shall be provided along with a description of the flow rate. Where the field analysis does not involve

analytical methods approved under 40 CFR part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

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

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

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

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

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

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

(7) Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced 1/4 mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be undertaken at these major outfalls.

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

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

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

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

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

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

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

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

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

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

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

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

(ii) Source identification. The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(1) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

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

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

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

good cause for such exemptions);

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

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

Total suspended solids (TSS)

Total dissolved solids (TDS)

COD

BOD[5]

Oil and grease

Fecal coliform

Fecal streptococcus

pH

Total Kjeldahl nitrogen

Nitrate plus nitrite

Dissolved phosphorus

Total ammonia plus organic nitrogen

Total phosphorus

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

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under § 122.21(c)(7)) for BOD[sub]5, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

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

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is



representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

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

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

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

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

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

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

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

(6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

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

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed

where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

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

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

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

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

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

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

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

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

(2) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: Any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(7) (vi) and (vii).

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

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

impacts;

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a

municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of

storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by 40 CFR 35.2005(b)(11) that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

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

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

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

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

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

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

(iii) Submit the signed certification to the NPDES permitting authority once every five years;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Materials or products from past industrial activity;

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

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

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

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

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

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

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

(K) Particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an

air quality control permit, and evident in the storm water outflow;

(iv) All "no exposure" certifications must include the following certification statement, and be signed in accordance with the signatory requirements of § 122.22: "I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of "no exposure" and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

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

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

**NOTES:**

[EFFECTIVE DATE NOTE: 77 FR 72970, 72974, Dec. 7, 2012, revised paragraph (b)(14)(ii), effective Jan. 7, 2013.]

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

**LexisNexis (R) Notes:**

RESEARCH GUIDES 2-8(IV) Bender's Federal Practice Forms, (Matthew Bender), Rule 8(IV). General Rules of Pleading --"Environmental Law" through "Insurance", Form No. 8(IV):3 Complaint to Halt Violations of Clean Water



Act.

**Citation #:**

**40 C.F.R. 122.44**

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\*\*\* This document is current through the June 4, 2015 \*\*\*  
\*\*\* issue of the Federal Register \*\*\*

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

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40 CFR 122.44

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(a)(1) Technology-based effluent limitations and standards based on: effluent limitations and standards promulgated under section 301 of the CWA, or new source performance standards promulgated under section 306 of CWA, on case-by-case effluent limitations determined under section 402(a)(1) of CWA, or a combination of the three, in accordance with § 125.3 of this chapter. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of § 122.29(d) (protection period).

(2) Monitoring waivers for certain guideline-listed pollutants.

(i) The Director may authorize a discharger subject to technology-based effluent limitations guidelines and standards in an NPDES permit to forego sampling of a pollutant found at 40 CFR Subchapter N of this chapter if the discharger has demonstrated through sampling and other technical factors that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(ii) This waiver is good only for the term of the permit and is not available during the term of the first permit issued to a discharger.

(iii) Any request for this waiver must be submitted when applying for a reissued permit or modification of a reissued permit. The request must demonstrate through sampling or other technical information, including information generated during an earlier permit term that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(iv) Any grant of the monitoring waiver must be included in the permit as an express permit condition and the reasons supporting the grant must be documented in the permit's fact sheet or statement of basis.

(v) This provision does not supersede certification processes and requirements already established in existing effluent limitations guidelines and standards.

(b)(1) Other effluent limitations and standards under sections 301, 302, 303, 307, 318 and 405 of CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the Director shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. See also § 122.41(a).

(2) Standards for sewage sludge use or disposal under section 405(d) of the CWA unless those standards have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator. When there are no applicable standards for sewage sludge use or disposal, the permit may include requirements developed on a case-by-case basis to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge. If any applicable standard for sewage sludge use or disposal is promulgated under section 405(d) of the CWA and that standard is more stringent than any limitation on the pollutant or practice in the permit, the Director may initiate proceedings under these regulations to modify or revoke and reissue the permit to conform to the standard for sewage sludge use or disposal.

(3) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I, J, and N of this chapter.

(c) Reopener clause: For any permit issued to a treatment works treating domestic sewage (including "sludge-only facilities"), the Director shall include a reopener clause to incorporate any applicable standard for sewage sludge use or disposal promulgated under section 405(d) of the CWA. The Director may promptly modify or revoke and reissue any permit containing the reopener clause required by this paragraph if the standard for sewage sludge use or disposal is more stringent than any requirements for sludge use or disposal in the permit, or controls a pollutant or practice not limited in the permit.

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) 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 the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

(iii) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a

discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

(iv) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

(v) Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

(1) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(2) The fact sheet required by § 124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(3) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(4) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(vii) When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or

both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.

(2) Attain or maintain a specified water quality through water quality related effluent limits established under section 302 of CWA;

(3) Conform to the conditions to a State certification under section 401 of the CWA that meets the requirements of § 124.53 when EPA is the permitting authority. If a State certification is stayed by a court of competent jurisdiction or an appropriate State board or agency, EPA shall notify the State that the Agency will deem certification waived unless a finally effective State certification is received within sixty days from the date of the notice. If the State does not forward a finally effective certification within the sixty day period, EPA shall include conditions in the permit that may be necessary to meet EPA's obligation under section 301(b)(1)(C) of the CWA;

(4) Conform to applicable water quality requirements under section 401(a)(2) of CWA when the discharge affects a State other than the certifying State;

(5) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of CWA;

(6) Ensure consistency with the requirements of a Water Quality Management plan approved by EPA under section 208(b) of CWA;

(7) Incorporate section 403(c) criteria under part 125, subpart M, for ocean discharges;

(8) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors," under 40 CFR part 125, subpart D;

(9) Incorporate any other appropriate requirements, conditions, or limitations (other than effluent limitations) into a new source permit to the extent allowed by the National Environmental Policy Act, 42 U.S.C. 4321 et seq. and section 511 of the CWA, when EPA is the permit issuing authority. (See § 122.29(c)).

(e) Technology-based controls for toxic pollutants. Limitations established under paragraphs (a), (b), or (d) of this section, to control pollutants meeting the criteria listed in paragraph (e)(1) of this section. Limitations will be established in accordance with paragraph (e)(2) of this section. An explanation of the development of these limitations shall be included in the fact sheet under § 124.56(b)(1)(i).

(1) Limitations must control all toxic pollutants which the Director determines (based on information reported in a permit application under § 122.21(g)(7) or in a notification under § 122.42(a)(1) or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c) of this chapter; or

(2) The requirement that the limitations control the pollutants meeting the criteria of paragraph (e)(1) of this section will be satisfied by:

(i) Limitations on those pollutants; or

(ii) Limitations on other pollutants which, in the judgment of the Director, will provide treatment of the pollutants under paragraph (e)(1) of this section to the levels required by § 125.3(c).

(f) Notification level. A "notification level" which exceeds the notification level of § 122.42(a)(1)(i), (ii) or (iii), upon a petition from the permittee or on the Director's initiative. This new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c)

(g) Twenty-four hour reporting. Pollutants for which the permittee must report violations of maximum daily discharge limitations under § 122.41(1)(6)(ii)(C) (24-hour reporting) shall be listed in the permit. This list shall include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(h) Durations for permits, as set forth in § 122.46.

(i) Monitoring requirements. In addition to § 122.48, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall;

(iii) Other measurements as appropriate including pollutants in internal waste streams under § 122.45(i); pollutants in intake water for net limitations under § 122.45(f); frequency, rate of discharge, etc., for noncontinuous discharges under § 122.45(e); pollutants subject to notification requirements under § 122.42(a); and pollutants in sewage sludge or other monitoring as specified in 40 CFR part 503; or as determined to be necessary on a case-by-case basis pursuant to section 405(d)(4) of the CWA.

(iv) According to sufficiently sensitive test procedures (i.e., methods) approved under 40 CFR part 136 for the analysis of pollutants or pollutant parameters or required under 40 CFR chapter I, subchapter N or O.

(A) For the purposes of this paragraph, a method is "sufficiently sensitive" when:

(1) The method minimum level (ML) is at or below the level of the effluent limit established in the permit for the measured pollutant or pollutant parameter; or

(2) 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 (i)(1)(iv)(A): Consistent with 40 CFR part 136, applicants or permittees have the option of providing matrix or sample specific minimum levels rather than the published levels. Further, where an applicant or permittee 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 Director should select a different method from the remaining EPA-approved methods that is sufficiently sensitive consistent with 40 CFR 122.44(i)(1)(iv)(A). Where no other EPA-approved methods exist, the Director should select a method consistent with 40 CFR 122.44(i)(1)(iv)(B).

(B) In the case of pollutants or pollutant parameters for which there are no approved methods under 40 CFR part 136 or methods are not otherwise required under 40 CFR chapter I, subchapter N or O, monitoring shall be conducted according to a test procedure specified in the permit for such pollutants or pollutant parameters.

(2) Except as provided in paragraphs (i)(4) and (i)(5) of this section, requirements to report monitoring results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year. For sewage sludge use or disposal practices, requirements to monitor and report results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the sewage sludge use or disposal practice; minimally this shall be as specified in 40 CFR part 503 (where applicable), but in no case less than once a year.

(3) Requirements to report monitoring results for storm water discharges associated with industrial activity which

are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(4) Requirements to report monitoring results for storm water discharges associated with industrial activity (other than those addressed in paragraph (i)(3) of this section) shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. At a minimum, a permit for such a discharge must require:

(i) The discharger to conduct an annual inspection of the facility site to identify areas contributing to a storm water discharge associated with industrial activity and evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed;

(ii) The discharger to maintain for a period of three years a record summarizing the results of the inspection and a certification that the facility is in compliance with the plan and the permit, and identifying any incidents of non-compliance;

(iii) Such report and certification be signed in accordance with § 122.22; and

(iv) Permits for storm water discharges associated with industrial activity from inactive mining operations may, where annual inspections are impracticable, require certification once every three years by a Registered Professional Engineer that the facility is in compliance with the permit, or alternative requirements.

(5) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under § 122.41(l) (1), (4), (5), and (6) at least annually.

(j) Pretreatment program for POTWs. Requirements for POTWs to:

(1) Identify, in terms of character and volume of pollutants, any Significant Industrial Users discharging into the POTW subject to Pretreatment Standards under section 307(b) of CWA and 40 CFR part 403.

(2)(i) Submit a local program when required by and in accordance with 40 CFR part 403 to assure compliance with pretreatment standards to the extent applicable under section 307(b). The local program shall be incorporated into the permit as described in 40 CFR part 403. The program must require all indirect dischargers to the POTW to comply with the reporting requirements of 40 CFR part 403.

(ii) Provide a written technical evaluation of the need to revise local limits under 40 CFR 403.5(c)(1), following permit issuance or reissuance.

(3) For POTWs which are "sludge-only facilities," a requirement to develop a pretreatment program under 40 CFR part 403 when the Director determines that a pretreatment program is necessary to assure compliance with Section 405(d) of the CWA.

(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

(2) Authorized under section 402(p) of the CWA for the control of storm water discharges;

(3) Numeric effluent limitations are infeasible; or

(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.



NOTE TO PARAGRAPH (k)(4): Additional technical information on BMPs and the elements of BMPs is contained in the following documents: Guidance Manual for Developing Best Management Practices (BMPs), October 1993, EPA No. 833/B-93-004, NTIS No. PB 94-178324, ERIC No. W498); Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices, September 1992, EPA No. 832/R-92-005, NTIS No. PB 92-235951, ERIC No. N482); Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA No. 833/R-92-001, NTIS No. PB 93-223550; ERIC No. W139; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices, September 1992; EPA 832/R-92-006, NTIS No. PB 92-235969, ERIC No. N477; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA 833/R-92-002, NTIS No. PB 94-133782; ERIC No. W492. Copies of those documents (or directions on how to obtain them) can be obtained by contacting either the Office of Water Resource Center (using the EPA document number as a reference) at (202) 260-7786; or the Educational Resources Information Center (ERIC) (using the ERIC number as a reference) at (800) 276-0462. Updates of these documents or additional BMP documents may also be available. A list of EPA BMP guidance documents is available on the OWM Home Page at <http://www.epa.gov/owm>. In addition, States may have BMP guidance documents.

These EPA guidance documents are listed here only for informational purposes; they are not binding and EPA does not intend that these guidance documents have any mandatory, regulatory effect by virtue of their listing in this note.

(1) Reissued permits. (1) Except as provided in paragraph (1)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62.)

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) Exceptions -- A permit with respect to which paragraph (1)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if --

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(1) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous

effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) Limitations. In no event may a permit with respect to which paragraph (l)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

(m) Privately owned treatment works. For a privately owned treatment works, any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this part. Alternatively, the Director may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The Director's decision to issue a permit with no conditions applicable to any user, to impose conditions on one or more users, to issue separate permits, or to require separate applications, and the basis for that decision, shall be stated in the fact sheet for the draft permit for the treatment works.

(n) Grants. Any conditions imposed in grants made by the Administrator to POTWs under sections 201 and 204 of CWA which are reasonably necessary for the achievement of effluent limitations under section 301 of CWA.

(o) Sewage sludge. Requirements under section 405 of CWA governing the disposal of sewage sludge from publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established, in accordance with any applicable regulations.

(p) Coast Guard. When a permit is issued to a facility that may operate at certain times as a means of transportation over water, a condition that the discharge shall comply with any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, that establish specifications for safe transportation, handling, carriage, and storage of pollutants.

(q) Navigation. Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with § 124.59 of this chapter.

(r) Great Lakes. When a permit is issued to a facility that discharges into the Great Lakes System (as defined in 40 CFR 132.2), conditions promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132.

(s) Qualifying State, Tribal, or local programs. (1) For storm water discharges associated with small construction activity identified in § 122.26(b)(15), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. Where a qualifying State, Tribal, or local program does not include one or more of the elements in this paragraph (s)(1), then the Director must include those elements as conditions in the permit. A qualifying State, Tribal, or local erosion and sediment control program is one that includes:

(i) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

(ii) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(iii) Requirements for construction site operators to develop and implement a storm water pollution prevention plan. (A storm water pollution prevention plan includes site descriptions, descriptions of appropriate control measures,

copies of approved State, Tribal or local requirements, maintenance procedures, inspection procedures, and identification of non-storm water discharges); and

(iv) Requirements to submit a site plan for review that incorporates consideration of potential water quality impacts.

(2) For storm water discharges from construction activity identified in § 122.26(b)(14)(x), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. A qualifying State, Tribal or local erosion and sediment control program is one that includes the elements listed in paragraph (s)(1) of this section and any additional requirements necessary to achieve the applicable technology-based standards of "best available technology" and "best conventional technology" based on the best professional judgment of the permit writer.

**HISTORY:** [48 FR 14153, Apr. 1, 1983, as amended at 49 FR 31842, Aug. 8, 1984; 49 FR 38049, Sept. 26, 1984; 50 FR 6940, Feb. 19, 1985; 50 FR 7912, Feb. 27, 1985; 54 FR 256, Jan. 4, 1989; 54 FR 18783, May 2, 1989; 54 FR 23895, June 2, 1989; 57 FR 11413, Apr. 2, 1992; 57 FR 33049, July 24, 1992; 60 FR 15386, Mar. 23, 1995; 64 FR 42434, 42469, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 64 FR 68722, 68847, Dec. 8, 1999; 65 FR 30886, 30908, May 15, 2000; 65 FR 43586, 43661, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001; 66 FR 65256, 65337, Dec. 18, 2001; 69 FR 41576, 41682, July 9, 2004; 70 FR 60134, 60191, Oct. 14, 2005; 71 FR 35006, 35040, June 16, 2006; 72 FR 11200, 11212, Mar. 12, 2007; 79 FR 49001, 49013, Aug. 19, 2014, as corrected at 79 FR 56274, 56275, Sept. 19, 2014]

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

**NOTES:**

[EFFECTIVE DATE NOTE: 79 FR 49001, 49013, Aug. 19, 2014, revised paragraph (i)(1)(iv), effective Sept. 18, 2014.]

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

**Citation #32**  
**40 C.F.R. 130.2**

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\*\*\* issue of the Federal Register \*\*\*

TITLE 40 -- PROTECTION OF ENVIRONMENT  
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY  
SUBCHAPTER D -- WATER PROGRAMS  
PART 130 -- WATER QUALITY PLANNING AND MANAGEMENT

**Go to the CFR Archive Directory**

40 CFR 130.2

§ 130.2 Definitions.

- (a) The Act. The Clean Water Act, as amended, 33 U.S.C. 1251 et seq.
- (b) Indian Tribe. Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.
- (c) Pollution. The man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.
- (d) Water quality standards (WQS). Provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.
- (e) Load or loading. An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (natural background loading).
- (f) Loading capacity. The greatest amount of loading that a water can receive without violating water quality standards.
- (g) Load allocation (LA). The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.
- (h) Wasteload allocation (WLA). 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.
- (i) Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint

sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

(j) Water quality limited segment. Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

(k) Water quality management (WQM) plan. A State or areawide waste treatment management plan developed and updated in accordance with the provisions of sections 205(j), 208 and 303 of the Act and this regulation.

(l) Areawide agency. An agency designated under section 208 of the Act, which has responsibilities for WQM planning within a specified area of a State.

(m) Best Management Practice (BMP). Methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.

(n) Designated management agency (DMA). An agency identified by a WQM plan and designated by the Governor to implement specific control recommendations.

**HISTORY:** [50 FR 1779, Jan. 11, 1985, as amended at 54 FR 14359, Apr. 11, 1989; 65 FR 43586, 43662, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001]

**AUTHORITY:** AUTHORITY NOTE APPLICABLE TO ENTIRE PART:  
33 U.S.C. 1251 et seq.

**NOTES:**

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 130 Notice of change in procedures, see: 73 FR 52928, Sept. 12, 2008.]

**Citation #11**  
**cal. water code 13000**

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WATER CODE  
Division 7. Water Quality  
Chapter 1. Policy

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Wat Code § 13000 (2015)

**§ 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.



**Citation #12**  
**cal. water code 13001**

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WATER CODE  
Division 7. Water Quality  
Chapter 1. Policy

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Wat Code § 13001 (2015)

**§ 13001. Power and duty of state board and regional boards**

It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality. The state board and regional boards in exercising any power granted in this division shall conform to and implement the policies of this chapter and shall, at all times, coordinate their respective activities so as to achieve a unified and effective water quality control program in this state.

**HISTORY:**

Added Stats 1969 ch 482 § 18, operative January 1, 1970.

**Citation #13**  
**cal. water code 13370**

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WATER CODE  
Division 7. Water Quality  
Chapter 5.5. Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Wat Code § 13370 (2015)

**§ 13370. Public interest in state implementation of provisions of federal act, etc.**

The Legislature finds and declares as follows:

(a) The Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.), as amended, provides for permit systems to regulate the discharge of pollutants and dredged or fill material 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 Control Act for the purpose of carrying out its responsibilities under this program.

**HISTORY:**

Added Stats 1972 ch 1256 § 1, effective December 19, 1972. Amended Stats 1978 ch 746 § 1; Stats 1980 ch 676 § 319; Stats 1987 ch 1189 § 1.

**Citation #14**  
**cal. gov. code 17500**

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GOVERNMENT CODE  
Title 2. Government of the State of California  
Division 4. Fiscal Affairs  
Part 7. State-Mandated Local Costs  
Chapter 1. Legislative Intent

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Gov Code § 17500 (2015)

**§ 17500. Legislative findings and declarations**

The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.

It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution. Further, the Legislature intends that the Commission on State Mandates, as a quasi-judicial body, will act in a deliberative manner in accordance with the requirements of Section 6 of Article XIII B of the California Constitution.

**HISTORY:**

Added Stats 1984 ch 1459 § 1. Amended Stats 2004 ch 890 § 2 (AB 2856).

**Citation #15**  
**cal. gov. code 17514**

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GOVERNMENT CODE  
Title 2. Government of the State of California  
Division 4. Fiscal Affairs  
Part 7. State-Mandated Local Costs  
Chapter 2. General Provisions

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

Cal Gov Code § 17514 (2015)

**§ 17514. "Costs mandated by the state"**

"Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

**HISTORY:**

Added Stats 1984 ch 1459 § 1.



**SECTION 7  
DOCUMENTATION  
IN SUPPORT OF TEST CLAIM  
IN RE  
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD  
ORDER NO. R9-2013-0001  
NPDES NO. CAS 0109266  
OF  
COUNTY OF SAN DIEGO  
VOLUME III  
COURT AND ADMINISTRATIVE DECISIONS**

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<i>Rancho Cucamonga v. Regional Water Quality Control Board – Santa Ana Region</i> (2006) 135 Cal.App.4th 1377	9	7-749 – 7-757

LEXSEE

**COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY et al.,  
Plaintiffs, Cross-defendants and Appellants; CALIFORNIA ASSOCIATION OF  
SANITATION AGENCIES et al., Plaintiffs and Appellants, v. COUNTY OF KERN,  
Defendant, Cross-complainant and Appellant; KERN COUNTY BOARD OF  
SUPERVISORS, Defendant and Appellant; ARVIN-EDISON WATER STORAGE  
DISTRICT et al., Interveners and Respondents.**

**F043095**

**COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT**

**127 Cal. App. 4th 1544; 27 Cal. Rptr. 3d 28; 2005 Cal. App. LEXIS 516; 2005 Cal.  
Daily Op. Service 2907; 2005 Daily Journal DAR 3974; 35 ELR 20070**

**April 1, 2005, Filed**

**SUBSEQUENT HISTORY:** Rehearing denied by County Sanitation Dist. No. 2 v. County of Kern, 2005 Cal. App. LEXIS 702 (Cal. App. 5th Dist., Apr. 25, 2005)

**PRIOR HISTORY:** [\*\*\*1] Superior Court of Tulare County, No. 189564, Paul A. Vortmann, Judge.

**COUNSEL:** Lewis Brisbois Bisgaard & Smith, Daniel V. Hyde and Paul J. Beck for Plaintiff, Cross-defendant and Appellant County Sanitation District No. 2 of Los Angeles County.

Woodruff, Spradlin & Smart, Thomas L. Woodruff, Tami S. Crosby, Roberta A. Kraus and M. Lois Bobak for Plaintiff, Cross-defendant and Appellant Orange County Sanitation District.

Rockard J. Delgadillo, City Attorney, Christopher M. Westhoff, Assistant City Attorney, and Keith W. Pritsker, Deputy City Attorney, for Plaintiff, Cross-defendant and Appellant City of Los Angeles.

[\*1557] Somach, Simmons & Dunn and Roberta L. Larson for Plaintiff and Appellant California Association of Sanitation Agencies.

Griswold, LaSalle, Cobb, Dowd & Gin, Robert M. Dowd and Raymond L. Carlson for Plaintiff and Appellant Southern California Alliance of Publicly Owned

Treatment Works.

Jones & Beardsley, Mark A. Jones; Borton, Petrini & Conron and Roger A. Parkinson for Plaintiff and Appellant Responsible Biosolids Management, Inc.

Bernard C. Barmann, Sr., County Counsel, James H. Thebeau, Deputy County Counsel; Hogan Guiney Dick and Michael M. Hogan [\*\*\*2] for Defendant, Cross-complainant and Appellant and for Defendant and Appellant.

Law Offices of Young Wooldridge, Ernest A. Conant, Scott K. Kuney and Steven M. Torigiani for Intervener and Respondent Arvin-Edison Water Storage District.

McMurtrey, Hartsock & Worth, James A. Worth; and Linda Alvarado for Interveners and Respondents Cawelo Water District and West Kern Water District.

**JUDGES:** Dawson, J., with Dibiaso, Acting P. J., and Vartabedian, J., concurring.

**OPINION BY:** DAWSON [\*\*35]

**OPINION**

**DAWSON, J.**--This appeal concerns the validity of an ordinance that restricts the application of sewage sludge on land located within the jurisdiction of Kern County. <sup>1</sup> Sanitation agencies from Southern California <sup>2</sup>

appeal adverse rulings from the trial court. The sanitation agencies contend (1) County was required to prepare an environmental impact report (EIR) under the California Environmental Quality Act (CEQA) <sup>3</sup> prior to adopting the ordinance, (2) the ordinance violated the commerce clause as well as other constitutional and statutory provisions, and (3) a biosolids impact fee of \$ 3.37 per ton violated the prohibition in Vehicle Code section 9400.8 against [\*1558] local fees for [\*\*\*3] the privilege of using roads. County contests all of these allegations. It contends that the ordinance benefited the Kern County environment and that any potential adverse environmental impacts were too remote and speculative to justify preparing an EIR.

1 The ordinance was enacted by the Kern County Board of Supervisors, on behalf of the County of Kern (collectively, defendants or County). For purposes of this opinion, "County" refers to the governmental entity and "Kern County" refers to the geographical area.

2 Plaintiffs, cross-defendants and appellants are County Sanitation District No. 2 of Los Angeles County (CSDLAC), Orange County Sanitation District (OCSD), and the City of Los Angeles (Bureau of Sanitation; CLABS); plaintiffs and appellants are California Association of Sanitation Agencies (CASA), Responsible Biosolids Management, Inc. (RBM), and the Southern California Alliance of Publicly Owned Treatment Works (SCAP).

3 Public Resources Code section 21000 et seq. All further statutory references are to the Public Resources Code unless otherwise indicated.

[\*\*\*4] We hold County was required to prepare an EIR under CEQA. This is because CEQA requires the preparation of an EIR whenever substantial evidence supports a fair argument that an ordinance will cause potentially significant adverse environmental impacts. CEQA thus sets a low threshold for the required preparation of an EIR. Here, the evidence in the administrative record establishes a reasonable possibility that the ordinance will have both positive and adverse impacts on the environment in Kern County and other areas of California, principally because alternative methods of disposal must be implemented. The positive effects of a project do not absolve the public agency from the responsibility of preparing an EIR to analyze the potentially significant negative environmental effects of

the project, because those negative effects might be reduced through the adoption of feasible alternatives or mitigation measures analyzed in the EIR. Therefore, County was required to prepare an EIR.

We hold also that plaintiffs have failed to show that the ordinance discriminates against interstate commerce. We reject plaintiffs' constitutional and statutory attacks on the validity of the ordinance, [\*\*\*5] except that we hold the biosolids impact fee [\*\*36] was invalid to the extent it was a local fee for road use.

We will remand with directions to the trial court to issue a writ of mandate directing County to prepare an EIR for the ordinance, and for further proceedings to determine the extent to which the biosolids impact fee was a fee for road use. Otherwise, the rulings of the trial court in favor of County on plaintiffs' complaint will be affirmed.

County cross-appeals from the trial court's denial of its CEQA cross-claims against the sanitation agencies. We address County's contention that CEQA required those agencies to conduct an environmental examination in connection with certain biosolids disposal contracts they entered into or extended near the time the ordinance in question was enacted. We hold that the agencies' contract activities were within the scope of their program EIR's covering their wastewater treatment projects and, therefore, were "[s]ubsequent activities in the program" that should have been subjected to an examination in accordance with title 14, section 15168 of the California Code of Regulations <sup>4</sup> to determine if further CEQA review was necessary. We [\*1559] further hold [\*\*\*6] that, as to expired contracts, this question is moot. Therefore, judgment on County's cross-claims will be reversed and the matter remanded to the trial court with directions to (1) conduct further proceedings to make a complete determination of which contracts have expired, (2) enter an order dismissing as moot County's causes of action that are based on contracts that have expired, and (3) issue writs of mandate under the remaining causes of action directing the appropriate sanitation agency to conduct an examination to determine if additional environmental documents must be prepared in connection with the contracts and extensions.

4 In all further citations, title 14, section 15000 et seq. of the California Code of Regulations will be referred to as the Guidelines.

## HISTORICAL BACKGROUND

Sewage sludge is a product of wastewater treatment. The safe and efficient disposal of sludge is a modern and worldwide concern--a by-product of population growth and modernization.<sup>5</sup> Recent decades have witnessed [\*\*\*7] increasing governmental involvement in the effort to safely and efficiently treat sewage and dispose of sewage sludge. In the United States, efforts at regulation have involved the executive, legislative and judicial branches of government at the federal, state and local levels. This historical background briefly describes the process that reduces sewage to sewage sludge and then discusses the disposal and use of that sludge.

5 European Commission Joint Research Centre, Institute for Environment and Sustainability, Soil and Waste Unit, Organic Contaminants in Sewage Sludge for Agricultural Use (Oct. 18, 2001) <[http://europa.eu.int/comm/environment/waste/sludge/organics\\_in\\_sludge.pdf](http://europa.eu.int/comm/environment/waste/sludge/organics_in_sludge.pdf)> (as of Apr. 1, 2005).

(1) "Sewage sludge" is defined by federal regulations as the "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works." (40 C.F.R. § 503.9(w) (2005).) More generally, sewage sludge refers to the mud-like deposit originating from sewage [\*\*\*8] and created by the treatment processes used to decontaminate wastewater before it is released into local waterways.<sup>6</sup> [\*\*\*37] Sewage sludge typically consists of water and 2 to 28 percent solids.<sup>7</sup> (68 Fed.Reg. 61084, 61086 (Oct. 24, 2003).) To illustrate, the Joint Water Pollution Control Plant located in Carson, California (Carson Plant) produces sewage sludge by detaining wastewater solids in an anaerobic digester for approximately 18 days. After digestion, the remaining solids are dewatered in a centrifuge that produces a residue that is approximately 25 percent solids. The Carson Plant refers to these residues as [\*1560] "biosolids"--a term that is not defined by federal regulation, and the meaning of which varies with the context in which it is used. (Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Env'tl. Aff. L.Rev. at p. 688.) Some use the term to mean sewage sludge that has been stabilized and disinfected for beneficial use. (*Id.*, fn. 6.) To others, the term helps emphasize the material is a recyclable resource with potential beneficial properties. (Goldfarb, *Sewage Sludge*, at p. 688.)

6 Goldfarb et al., *Unsafe Sewage Sludge or*

*Beneficial Biosolids?: Liability, Planning, and Management Issues Regarding the Land Application of Sewage Treatment Residuals* (1999) 26 B.C. Env'tl. Aff. L.Rev. 687, 688 (Goldfarb, *Sewage Sludge*).

[\*\*\*9]

7 Because the percentage of solids in sewage sludge varies, there is no constant for converting the wet weight of sewage sludge to its dry weight. Dry weight is defined by federal regulation to mean the mass reached after drying to essentially 100 percent solids content. (40 C.F.R. § 503.9(h) (2005).)

*Scope of Sewage Sludge Production*

*National Production*

The United States Environmental Protection Agency (EPA) recently estimated the annual production of sewage sludge from the 16,000 wastewater treatment plants in the United States at both 7 million tons and 8 million dry metric tons.<sup>8</sup> (Compare 68 Fed.Reg. 68813, 68817 (Dec. 10, 2003) with 68 Fed.Reg. 61086 (Oct. 24, 2003).) In 2003, the EPA estimated that approximately 60 percent of sewage sludge was treated and applied to farmland, 17 percent was buried in landfills, 20 percent was incinerated, and 3 percent was used as landfill or mine reclamation cover. (68 Fed.Reg. 68817 (Dec. 10, 2003).) The land application of sewage sludge occurred [\*\*\*10] on approximately 0.1 percent of the agricultural land in the United States. (68 Fed.Reg. 61086 (Oct. 24, 2003).) Other application sites include forests, strip-mines, reclamation sites, and public spaces like parks, golf courses, and highway median strips. (*Ibid.*)

8 The EPA has estimated the United States production of human sanitary waste, a precursor of sewage sludge, at approximately 150 million wet tons per year. (68 Fed.Reg. 7176, 7180 (Feb. 12, 2003).) This figure can be restated as about 0.518 wet tons per person per year (*ibid.*) or 2.8 pounds per person per day. By comparison, in 1997, the United States annual production of animal waste from cattle, hogs, chickens and turkeys (which includes more than manure) was estimated at 1,365,661,300 tons, or roughly 5 tons for every person in the United States.

*California*

CASA estimated that in 1998 California produced approximately 672,330 dry tons of biosolids and approximately 67.8 percent was applied [\*\*\*11] to land, 10.6 percent was composted, 9.1 percent was buried in landfills, 5.6 percent was incinerated, and 6.9 percent was put in onsite and offsite storage.<sup>9</sup>

9 State Water Resources Control Board (State Water Board), Draft EIR, General Waste Discharge Requirements for Biosolids Land Application (June 28, 1999) figure 2-2 (State Water Board's 1999 Draft EIR), which was in the administrative record and is available at <<http://www.swrcb.ca.gov/programs/biosolids/deir/chapters/ch2.pdf>> (as of Apr. 1, 2005).

[\*1561] The EPA estimated that in 2003 California produced 777,480 dry tons of treated sewage sludge.<sup>10</sup> Approximately 50 [\*\*38] percent of this sewage sludge was applied to land, 30 percent was put in landfills, 10 percent was transported out of state, 3 percent was incinerated, and the balance was put in long-term storage or treatment or put to other uses.<sup>11</sup>

10 State Water Board, Final Statewide Program EIR, General Waste Discharge Requirements for Biosolids Land Application (June 2004) page 3-3 (State Water Board's 2004 Final PEIR for Biosolids), which is available at <[http://www.swrcb.ca.gov/hearings/docs/finalbio\\_chap3.pdf](http://www.swrcb.ca.gov/hearings/docs/finalbio_chap3.pdf)> (as of Apr. 1, 2005).

[\*\*\*12]

11 State Water Board's 2004 Final PEIR for Biosolids, page 3-4.

Conflict between urban and rural interests has caused controversy over the land application of sewage sludge in California. In 1998, approximately 73 percent of land-applied biosolids in California was applied within the geographical jurisdiction of the Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board), a region that generated only 16.7 percent of California's total production. In contrast, the Los Angeles and San Francisco Regions generated 37.9 percent and 14.4 percent, respectively, and received less than 0.1 percent and 1.8 percent, respectively, of the total land-applied biosolids.<sup>12</sup> The proportion of biosolids applied to land in the Central Valley Region has decreased as a result of restrictive ordinances adopted by counties.<sup>13</sup>

12 State Water Board's 1999 Draft EIR, table 2-2 and figure 2-2.

13 In 1998, the Counties of Kings, Kern, Fresno, and Riverside did not have ordinances that prohibited the land application of Class B biosolids. (See State Water Board's 2004 Final PEIR for Biosolids, p. 3-8.) By early 2004, these counties had adopted ordinances that prohibited the land application of Class B biosolids and were among the 17 of the 58 counties in California that had some type of ordinance related directly to the land application of biosolids. (*Ibid.*)

[\*\*\*13] *Kern County*

In 1998, approximately one-third of the biosolids applied to land in California was applied in Kern County.<sup>14</sup> In 1999, County estimated that one million wet tons of sewage sludge were applied to approximately 23,594 acres of irrigated agricultural land in Kern County.<sup>15</sup> The acreage, which was distributed among 14 noncontiguous sites, represented approximately 3 percent of the harvested cropland in Kern County.

14 State Water Board's 1999 Draft EIR, table 2-1 (Kern County received 148,000 dry tons).

15 The administrative record contains a document dated September 1, 1999, that estimated the volume of Class B biosolids brought into Kern County at 823,350 wet tons per year. The four largest sources were the City of Los Angeles (273,700), Los Angeles County (214,000), Orange County (130,300) and "Fresno" (85,000).

[\*1562] *Statutory and Regulatory Framework*

#### *Federal*

Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 896) [\*\*\*14] to restore and maintain the quality of the nation's waters (33 U.S.C.A. § 1251(a)) by addressing various sources of pollution, including municipal sewage. In addition to providing extensive federal grants to finance the construction of local sewage treatment facilities, the 1972 amendments increased the role of the federal government by extending water quality standards to intrastate waters, setting technology-based effluent limitations, and implementing the water quality standards through a discharge permit system.<sup>16</sup> The Clean Water Act reflected the judgment of

Congress [\*\*39] that the problem of water pollution caused by the discharge of municipal sewage outweighed problems associated with treating the sewage and disposing of the sewage sludge.<sup>17</sup> The federal legislation stimulated the building of sewage treatment facilities which, in turn, significantly increased the national production of sewage sludge. (See *Leather Industries of America, Inc. v. E.P.A.* (D.C. Cir. 1994) 309 U.S. App. D.C. 136 [40 F.3d 392, 394].)

16 The federal legislation became commonly known as the Clean Water Act (33 U.S.C.A. § 1251 et seq.) as a result of amendments adopted in 1977. (Pub.L. No. 95-217, § 2 (Dec. 27, 1977) 91 Stat. 1566.)

[\*\*\*15]

17 "According to Milton Russell and Michael Gruber, 'Risk Assessment in Environmental Policy-Making,' 236 *Science* 286, 289 (April 17, 1989), 'the removal of pollutants from waste water produces sludge that must be either disposed of on land, incinerated, or dumped at sea. None of these procedures are without risk to human health or the environment.'" (Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993) p. 97, fn. 111.)

(2) The Clean Water Act addressed the problem of sewage sludge disposal in four ways. First, the use or disposal of sewage sludge was subjected to a permitting program (33 U.S.C.A. § 1345(a)-(c)).<sup>18</sup> Second, the EPA was directed to develop comprehensive regulations establishing standards for sewage sludge use and disposal (33 U.S.C.A. § 1345(d)).<sup>19</sup> Third, states were allowed to establish more stringent standards (33 U.S.C.A. § 1345(e)).<sup>20</sup> Fourth, grants were authorized for the conduct of scientific [\*1563] studies, demonstration projects, and public information and education programs [\*\*\*16] concerning the safe and beneficial management of sewage sludge (33 U.S.C.A. § 1345(g)).

18 The National Pollutant Discharge Elimination System (NPDES) permitting program set forth in the Clean Water Act regulates point sources of pollution that reach the waters of the United States. (33 U.S.C.A. § 1342.) Congress delegated the authority to issue permits to discharge pollutants under the NPDES to states with approved water quality programs.

19 The Water Quality Act of 1987 (Pub.L. No.

100-4 (Feb. 4, 1987) 101 Stat. 7) amended the Clean Water Act to require the EPA to identify and set numeric limits for toxic pollutants in sewage sludge and establish management practices for the use and disposal of sewage sludge containing those pollutants. (33 U.S.C.A. § 1345(d)(2).)

20 Similarly, legislation adopted by the European Union sets minimum standards for the use of sewage sludge in agriculture and also allows member states to impose more stringent measures. (See Council Directive 86/278/EEC of 12 June 1986, Protection of the Environment, and in Particular of the Soil, When Sewage Sludge Is Used in Agriculture, 1986 Official J. Eur. Coms. (L181), pp. 0006-0012 <[http://europa.eu.int/smartapi/cgi/sga\\_d oc?smartapi!celexapi!prod!CELEXnumdoc&lg =EN&nu mdoc=31986L0278&model=guichett](http://europa.eu.int/smartapi/cgi/sga_d oc?smartapi!celexapi!prod!CELEXnumdoc&lg =EN&nu mdoc=31986L0278&model=guichett)> [as of Apr. 1, 2005].) The Web site maintained by the European Union that summarizes the legislation is <<http://europa.eu.int/scadplus/leg/en/lv b/128088.htm>> (as of Apr. 1, 2005).

[\*\*\*17] (3) Eventually, in 1993,<sup>21</sup> the EPA complied with the directive regarding regulations by promulgating Standards for the Use or Disposal of Sewage Sludge (40 C.F.R. § 503 (2005)) (Part 503), which specify that sewage-sludge may be (1) applied to land, (2) placed in a surface disposal site, such as a sewage-sludge-only landfill, (3) burned in a sewage sludge incinerator, or (4) disposed of in a municipal solid waste landfill that complies with the minimum criteria set forth in 40 Code of Federal Regulations part 258. (Part 503, subparts B [land application], C [surface disposal] & E [incineration]; 40 C.F.R. § 503.4 (2005) [\*\*\*40] [disposal in municipal solid waste landfill].)<sup>22</sup>

21 The history of the EPA's regulation of sewage sludge prior to the final adoption of Part 503 in 1993 is described in Goldfarb, *Sewage Sludge, supra*, 26 B.C. Env'tl. Aff. L.Rev. at pages 697-704. The EPA has described the recent legal history of its regulation of sewage sludge in the Federal Register. (See 68 Fed.Reg. 75533 (Dec. 31, 2003).)

22 A fifth option, ocean dumping of sewage sludge, was eliminated as a legal disposal option effective December 31, 1991, by the federal

Ocean Dumping Ban Act of 1988. (33 U.S.C.A. §§ 1401-1445.) (See *City of New York v. United States EPA* (S.D.N.Y. 1981) 543 F. Supp. 1084 [prior to statutory ban, City of New York and EPA litigated deleterious impacts of ocean dumping versus other methods of disposal].)

[\*\*\*18] The land application provisions of subpart B of Part 503 establish concentration ceilings as well as annual and cumulative loading rates for arsenic, cadmium, copper, lead, mercury, nickel, selenium and zinc (40 C.F.R. § 503.13 (2005)); establish management practices for the protection of water quality and public health (40 C.F.R. § 503.14 (2005)); set the standards for the reduction of pathogens<sup>23</sup> and vector attraction<sup>24</sup> (40 C.F.R. § 503.15 (2005)); and include requirements for monitoring (40 C.F.R. § 503.16 (2005)), recordkeeping (40 C.F.R. § 503.17 (2005)), and reporting (40 C.F.R. § 503.18 (2005)).

23 Pathogenic organisms cause disease and "include, but are not limited to, certain bacteria, protozoa, viruses, and viable" eggs of parasitic worms (40 C.F.R. § 503.31(f) (2005)), such as tapeworms, whipworms, roundworms, and hookworms.

24 Vectors are rodents, flies, mosquitoes, or other organisms capable of transporting infectious agents; vector attraction refers to the characteristic of sewage sludge that attracts these carriers. (See 40 C.F.R. § 503.31(k) (2005).)

[\*\*\*19] [\*1564] (4) Pathogen reduction standards contained in Part 503 are used to differentiate between Class A sewage sludge and Class B sewage sludge. (See 40 C.F.R. § 503.32 (2005).) While Class A sewage sludge is sufficiently treated to essentially eliminate pathogens, Class B sewage sludge is treated only to substantially reduce them. As a result, the requirements for land application of Class B sewage sludge are more stringent than the requirements imposed on Class A sewage sludge.

At the time of their adoption, the EPA stated it was confident the regulations in Part 503 adequately protected the environment and public health from all reasonably anticipated adverse effects. (58 Fed.Reg. 9248, 9249 (Feb. 19, 1993).) Nevertheless, Part 503 has been described as "quite controversial."<sup>25</sup> Citizens and environmental organizations have questioned the adequacy of the chemical and pathogen standards

contained in Part 503.<sup>26</sup> As a result of [\*\*41] these concerns and the requirement in the Clean Water Act that the sewage sludge regulations be reviewed every two years, the EPA commissioned the National Research Council (NRC) of the National Academy of Sciences to independently [\*\*\*20] review the scientific basis of the regulations governing the land application of sewage sludge.<sup>27</sup>

25 Goldfarb, *Sewage Sludge, supra*, 26 B.C. Env'tl. Aff. L.Rev. at page 708; see Comment, *Sewage Sludge and Land Application Practices: Do the Section 503 Standards Guarantee Safe Fertilizer Usage?* (2000) 9 Dick. J. Env'tl. L. & P. 147, 169 (asserting EPA failed to account for variability of contaminants in sludge and how combinations of contaminants may affect public health and environment, and failed to foresee problems caused by lackadaisical monitoring and labeling requirements and by the lack of remedies for failure to comply with requirements). Another aspect of the controversy is illustrated by the dispute created when the Agricultural Marketing Service of the United States Department of Agriculture considered allowing the use of sewage sludge in "organic" production. The proposal was based on the view of the federal government that "there is no current scientific evidence that use of sewage sludge in the production of foods presents unacceptable risks to the environment or human health." (65 Fed.Reg. 13514 (Mar. 13, 2000).) Overwhelming public opposition led to the rejection and replacement of the proposal with a regulation that "prohibit[ed] sewage sludge] use in the production" of all organic foods. (*Ibid.* ["275,603 commenters ... almost universally opposed the use of [sewage sludge] in organic production systems"]; see 7 C.F.R. §§ 205.105(g) & 205.301(f)(2) (2005).)

[\*\*\*21]

26 See EPA, Office of Water, Use and Disposal of Biosolids (Sewage Sludge) (Dec. 2003) <[http://www.epa.gov/ost/biosolids/dec03f\\_actsheet.html](http://www.epa.gov/ost/biosolids/dec03f_actsheet.html)> (as of Apr. 1, 2005).

27 See EPA, Office of Water, Use and Disposal of Biosolids (Sewage Sludge), *supra*; 33 U.S.C.A. § 1345(d)(2)(C) (two-year review of regulations).

In July 2002, the NRC published its report--Biosolids Applied to Land: Advancing Standards



and Practices--and made the following overarching findings: "There is no documented scientific evidence that the Part 503 rule has failed to protect public health. However, additional scientific work is needed to reduce persistent uncertainty about the potential for adverse human health effects from exposure to biosolids. There have been anecdotal [\*1565] allegations of disease,[<sup>28</sup>] and many scientific advances have occurred since the Part 503 rule was promulgated. To assure the public and to protect public health, there is a critical need to update the scientific basis of the rule to (1) ensure that the chemical and pathogen standards are supported by current scientific [\*\*\*22] data and risk-assessment methods, (2) demonstrate effective enforcement of the Part 503 rule, and (3) validate the effectiveness of biosolids-management practices." (NRC, *Biosolids Applied to Land: Advancing Standards and Practices* (July 2002) p. 3 <<http://www.epa.gov/waterscience/biosolids/nas/complete.pdf>> [as of Apr. 1, 2005].)

28 The anecdotal allegations of which the EPA is aware (but unconvinced) include (1) over 350 claims of adverse effects collected by the Cornell Waste Management Institute, (2) the deaths of Shayne Conner, Tony Behun, and Daniel Pennock, and (3) the deaths of 300 dairy cattle on a farm near Augusta, Georgia that resulted in a \$ 550,000 jury verdict in a state court action. (G. Tracy Mehan, III, EPA, letter to Joseph Mendelson, III, Center for Food Safety, and Thomas Alan Linzey, Community Environmental Legal Defense Fund, Inc., Dec. 22, 2003, pp. 3, 5-7 [denying petition to stop land application of sewage sludge] <<http://www.centerforfoodsafety.org/pubs/SewageSludgePetitionResponse12-22-03.pdf> f> [as of Apr. 1, 2005].) The claims related to the dairy cattle also are described in the administrative record and in *Boyce v. Augusta-Richmond County* (S.D.Ga. 2000) 111 F. Supp. 2d 1363. The medical examiner's autopsy report for Shayne Conner is in the administrative record and it concludes the cause of his death is unknown.

[\*\*\*23] In response to the NRC report, the EPA developed a final action plan that established objectives and identified research and regulatory projects designed to strengthen its sewage sludge use and disposal program.

(68 Fed.Reg. 75531, 75533 (Dec. 31, 2003); see EPA, Office of Water, Use and Disposal of Biosolids (Sewage Sludge), *supra*.) As an example of one project, the EPA intends to conduct an incident-tracking workshop to obtain input on developing a program focused on individuals who have received medical attention and suspect that they may have been affected by sewage sludge application practices, and to thereby isolate the causes of any health problems. (68 Fed.Reg. 75535 (Dec. 31, 2003).) As of the date of this opinion, the implementation of the final action plan is an ongoing process, and some of the activities have not been commenced. (See EPA, Office of Water, Use and Disposal of Biosolids (Sewage Sludge), *supra*.)

### California

(5) In response to Congress's delegation of authority to the states to issue NPDES permits (see fn. 18, *ante*), the California [\*\*42] Legislature amended the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 [\*\*\*24] et seq.) to require the State Water Board and its regional counterparts to issue discharge permits that ensure compliance with the Clean Water Act. (See Wat. Code, § 13370 et seq.) As a result, on May 14, 1973, California became the first [\*1566] state to be approved by the EPA to administer the NPDES permit program. (See 54 Fed.Reg. 40664 (Oct. 3, 1989); *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1452 [126 Cal. Rptr. 2d 389].)

In August 1993, as part of administering the NPDES permit program, the Central Valley Water Board adopted a general order setting the waste discharge requirements (WDR) for the use of sewage sludge as a soil amendment and approved an initial study and negative declaration in connection with that general order. Under the general order, a person wanting to apply biosolids to agricultural land could file with the Central Valley Water Board a notice of intent to comply with the general order, a filing fee, and a preapplication report and, upon receiving an approval letter from the Central Valley Water Board, could begin to apply biosolids subject to the terms and conditions in the [\*\*\*25] general order. Projects using sewage sludge that did not fit the conditions contained in the general order were required to apply for individual WDR's.

On May 26, 1995, the Central Valley Water Board modified its earlier general order by adopting Order No.

95-140 titled "Waste Discharge Requirements General Order For Reuse of Biosolids and Septage on Agricultural, Forest, and Reclamation Sites." The order set minimum standards for the use of biosolids, including Class B sewage sludge, as a soil amendment.

(6) Also in 1995, the California Legislature specifically addressed the land application of sewage sludge by adopting Water Code section 13274 (Stats. 1995, ch. 613, § 1, p. 4590), which required the State Water Board or the regional boards to prescribe general WDR's for the discharge of treated sewage sludge used as a soil amendment. (Wat. Code, § 13274, subds. (a) & (b).) Water Code section 13274 also states that it does not restrict the authority of local government agencies to regulate the application of sewage sludge to land within their jurisdiction. (*Id.*, subd. (i).)

(7) Other California legislation affecting the [\*\*\*26] disposal and use of sewage sludge is the California Integrated Waste Management Act of 1989 (Pub. Resources Code, § 40000 et seq., also known as Assem. Bill No. 939 (1989-1990 Reg. Sess.); see Stats. 1989, ch. 1095, § 22, p. 3812), which requires the use of recycling and source reduction to reduce the amount of solid waste going into landfills. (§ 41780.) More specifically, counties were required to adopt integrated waste management plans that described how 25 percent of the solid waste <sup>29</sup> stream would be recycled, reduced or composted [\*1567] by 1995 and how 50 percent would be achieved by 2000. (See § 41780; *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1419, fn. 2 [23 Cal. Rptr. 2d 910].) This legislation caused sewage sludge to be diverted from disposal in landfills in favor of recycling it as a fertilizer applied to agricultural land. <sup>30</sup> For example, in 1995 the [\*\*\*43] City of Oxnard purchased 1,280 acres in Kern County for \$ 1,174,000 as part of a program to apply its sewage sludge to agricultural land and thus reduce its use of landfills.

<sup>29</sup> The California Integrated Waste Management Act of 1989 defines "solid waste" to include "dewatered, treated, or chemically fixed sewage sludge [that] is not hazardous waste, manure, vegetable or animal solid ... ." (§ 40191, subd. (a).)

[\*\*\*27]

<sup>30</sup> According to one set of estimates, the portion of California's annual sewage sludge production

disposed of in landfills was 60.2 percent in 1988, 43.3 percent in 1991, 9.1 percent in 1998, and 30 percent in 2003. (State Water Board's 1999 Draft EIR, table 2-2 & fig. 2-2; State Water Board's 2004 Final PEIR for Biosolids, p. 3-4.)

By 2000, several of the nine regional boards had issued WDR's for the use of biosolids as a soil amendment. To provide a single regulatory framework for the land application of treated sewage sludge in California, in August 2000, the State Water Board issued Water Quality Order No. 2000-10-DWQ, entitled "General Waste Discharge Requirements for the Discharge of Biosolids to Land for Use as a Soil Amendment in Agricultural, Silvicultural, Horticultural, and Land Reclamation Activities" (General Order 2000-10). <sup>31</sup> General Order 2000-10 also was intended to comply with the directive in Water Code section 13274 and streamline the permitting process. The State Water Board's final program EIR relating to General Order 2000-10 was approved on June 30, 2000, and [\*\*\*28] it is part of the appellate record as a result of the superior court granting a request for judicial notice. General Order 2000-10 allowed Class B biosolids to be applied to agricultural land subject to numerous conditions, including site, crop, and harvesting restrictions.

<sup>31</sup> General Order 2000-10 is available on the State Water Board's Web site. (See <<http://www.swrcb.ca.gov/resdec/wqorders/2000/wqo2000-10.doc>> [as of Apr. 1, 2005].)

The State Water Board's approval of General Order 2000-10 and certification of the final program EIR was vacated as a result of a CEQA lawsuit brought by County. (*County of Kern v. State Water Resources Control Board* (Jan. 13, 2003, C039485) [nonpub. opn.].) <sup>32</sup> The Third Appellate District held the EIR was defective because it did not evaluate, as alternatives to General Order 2000-10, either a requirement that sewage sludge be treated to Class A standards before application as a soil amendment or a prohibition on the use of treated sewage sludge where fruits and vegetables [\*\*\*29] are grown.

<sup>32</sup> County referred to the Third Appellate District's unpublished decision in its reply brief and cited a statement made by the State Water Board in an appellate brief it filed in that case. Our reference to this unpublished opinion as part of a factual narrative of the historical

development of California's regulation of sewage sludge is not a citation or reliance upon that opinion as legal authority for purposes of California Rules of Court, rule 976.

[\*1568] To comply with that decision, the State Water Board's 2004 Final PEIR for Biosolids considered, but rejected, the two alternatives specified by the Third Appellate District. Based on that final EIR, the State Water Board adopted Water Quality Order No. 2004-0012 on July 22, 2004 (General Order 2004-0012). 33 General Order 2004-0012 allows Class B biosolids to be applied to agricultural land subject to numerous conditions, including site and crop restrictions.

33 General Order 2004-0012 is available at <<http://www.swrcb.ca.gov/resdec/wqorders/2004/wqo/wqo2004-0012.pdf>> (as of Apr. 1, 2005).

[\*\*\*30] *Kern County*

County first attempted to regulate the application of sewage sludge to agricultural land within its jurisdiction in August 1998, when it adopted Ordinance No. G-6528, an interim urgency ordinance which became operative on September 1, 1998, and was repealed effective December 31, 1999. Ordinance No. G-6528 allowed the application of Class A and Class B sewage sludge in Kern County by any person who [\*\*44] obtained a permit from the County Environmental Health Services Department, paid a \$ 7,250 application fee, and observed specified management practices, site restrictions and other requirements.

On October 19, 1999, the Kern County Board of Supervisors adopted Ordinance No. G-6638 (Ordinance G-6638) to substitute a new chapter 8.05 into the Kern County Ordinance Code. Ordinance G-6638 provided for two regulatory stages. The first stage, which lasted three years, allowed the application of Class B sewage sludge on sites that had already been approved, but precluded the approval of any new sites. The second stage was scheduled to become effective on January 1, 2003, and allowed only exceptional quality (EQ) sewage sludge<sup>34</sup> to be applied to land in Kern County.

34 EQ sewage sludge must meet one of the Class A pathogen reduction alternatives set forth in 40 Code of Federal Regulations part 503.32(a) (2005); the more stringent pollutant concentration

standards set forth in 40 Code of Federal Regulations part 503.13(b)(3) (2005); and a level of vector attraction reduction required by 40 Code of Federal Regulations part 503.33 (2005).

[\*\*\*31] Ordinance G-6638 is the subject of this appeal and its pertinent provisions are set forth, *post*, in Facts and Proceedings.

In late 2002, County adopted Ordinance No. 6931, which amended chapter 8.05 of the county code to impose a permitting requirement on the application of EQ biosolids to land within the unincorporated area of Kern County, and found that the project was exempt from CEQA pursuant to section 15308 of the Guidelines, which concerns actions by regulatory agencies to protect the environment. This appeal does not directly involve the 2002 amendment.

[\*1569] *Overview of California Cases Involving Land Application of Sewage Sludge*

The application of sewage sludge to land has been the topic of litigation before this and other appellate courts located in California.

This court considered the application of CEQA to Kings County's sewage sludge ordinance in *Magan v. County of Kings* (2002) 105 Cal.App.4th 468 [129 Cal. Rptr. 2d 344]. In that case, the Kings County Board of Supervisors determined that its ordinance regulating the application of sewage sludge to land in Kings County was categorically exempt from review under CEQA, and this court upheld that determination. (105 Cal.App.4th at pp. 476-477.) [\*\*\*32]

As described earlier, in January 2003, the Third Appellate District considered County's challenge to the adequacy of the EIR the State Water Board prepared in connection with its adoption of General Order 2000-10. (*County of Kern v. State Water Resources Control Board, supra*, C039485 [nonpub. opn.].) That litigation led to the certification of the State Water Board's 2004 Final PEIR for Biosolids and the adoption of General Order 2004-0012.

In *U.S. v. Cooper* (9th Cir. 1999) 173 F.3d 1192, the defendant sludge hauler directly applied sludge to a local farm instead of taking the sludge to a composting site first as required by a NPDES permit issued to the City of San Diego by the regional water quality board. The

sludge hauler was convicted under the Clean Water Act of knowingly violating conditions imposed by the permit on the disposal of sewage sludge. The Ninth Circuit Court of Appeals upheld the conviction and ruled, among other things, that Part 503--which encouraged the direct land application of sewage sludge, but did not require state and local governments to allow it--did not preempt the conditions in the permit that [\*\*45] the sludge hauler violated. (*U.S. v. Cooper, supra*, at pp. 1200-1201.) [\*\*\*33]

In addition to the foregoing appellate cases, the briefing in this appeal mentions other cases before state and federal trial courts concerning County's efforts to regulate the land application of sewage sludge. County contends that Shaen Magan brought two state court actions challenging Ordinance G-6638 and that the judgments entered in County's favor in those actions are now final. In addition, County represents that another state court action brought against it has been stayed by the Tulare County Superior Court pending the resolution of this appeal, and that CASA and others have sued it in a federal action attacking an amended version of the ordinance.

#### [\*1570] FACTS AND PROCEEDINGS

In connection with its consideration and adoption of an ordinance regulating the land application of biosolids within its jurisdiction, County undertook a process that involved the public and produced an administrative record of over 25,000 pages.

In 1997, County established a Biosolids Ordinance Advisory Committee to assist in the preparation of a draft ordinance. The committee included representatives from farming organizations, sludge generators and applicators, environmental groups, County [\*\*\*34] staff and other interested parties. In all, the committee held five public meetings between November 20, 1997, and April 29, 1999. Expert presentations on the scientific issues involving biosolids were received at two public hearings held by County.

In January 1998, County pursued early consultation with public agencies and interested parties to obtain comments on the potential environmental effect of its proposed form of biosolids ordinance. After revisions to the proposed ordinance, County again sought early consultation in May 1999 in connection with determining whether compliance with CEQA would require

preparation of an EIR for the proposed ordinance. After the second consultation period was complete, an initial study was prepared.

On August 10, 1999, an environmental checklist form was completed which found the project--that is, enactment of the ordinance--would not have a significant effect on the environment, and which recommended the preparation of a negative declaration.

County's Planning Department prepared a proposed negative declaration for the biosolids ordinance and published the corresponding notice of availability for public review on August 13, 1999. On October 19, 1999, after [\*\*\*35] the period for public review of the negative declaration expired, County enacted Ordinance G-6638 and adopted the negative declaration. Section 3 of Ordinance G-6638 amended chapter 8.05 of the Kern County Ordinance Code (Kern Code) effective January 1, 2000, to provide in part:

#### "8.05.010 PURPOSE AND INTENT

"There are numerous unanswered questions about the safety, environmental effect, and propriety of land applying Biosolids or sewage sludge, even when applied in accordance with federal and state regulations. Biosolids may contain heavy metals, pathogenic organisms, chemical pollutants, and synthetic organic compounds, which may pose a risk to public health and the environment if improperly handled. There is a lack of adequate scientific [\*1571] understanding concerning the risk land applying of Biosolids may pose to land, air and water and to human and animal health. ... Consequently, in order to promote the general health, safety and welfare of Kern County and its inhabitants, it is [\*\*46] the intent of this chapter that the land application of Biosolids shall be prohibited in the unincorporated area of Kern County.

"The County recognizes there are existing permitted sites involved in the land [\*\*\*36] application of Biosolids. Consistent with the protection of private property rights under the United States and California constitutions, this ordinance contains a three year amortization period to permit the orderly discontinuation of the land application of Biosolids by January 1, 2003.

"The County also recognizes that Exceptional Quality Biosolids, as defined in this chapter, are considered by the U.S. Environmental Protection Agency to be a product ... that can be applied as freely as any

other fertilizer or soil amendment to any type of land. Therefore, the provisions of this chapter do not apply to Exceptional Quality Biosolids unless specifically stated herein. Further, the provisions of this chapter do not apply to Compost, as defined herein, manufactured from Biosolids at composting facilities that are otherwise regulated by the County through Solid Waste and Conditional Use Permits.

#### "8.05.020 DEFINITIONS

"A. **Agency** means an authorized representative of the Environmental Health Services Department of the County. ... [¶] ... [¶]

"E. **Biosolids** are treated solid, semi-solid or liquid residues generated during the treatment of sewage in a wastewater [\*\*\*37] treatment facility that meet [certain federal requirements for pathogen reduction, vector attraction reduction and pollutant concentrations]. ... Biosolids as used in this chapter excludes Biosolids products that are in a bag or container packaged for routine retail sales through regular retail outlets which are primarily used for landscaping.

"F. **Biosolids Impact Fee** means the fee per ton of Biosolids charged to Biosolids applicators for mitigating the impacts to the Kern County infrastructure shown to be caused by the transport of Biosolids. Permittees which can establish the lack of impact on County infrastructure shall be exempt from payment of the fee. [¶] ... [¶]

[\*1572] "H. **Class A Biosolids** are Biosolids that meet the pathogen reduction requirements in 40 CFR 503.32[(a) <sup>35</sup>] and contain constituents in concentrations not exceeding the concentrations listed in 40 CFR 503.13, Table 1 or Table 3.

35 This reference was probably intended to be limited to subsection (a), which states the pathogen reduction requirements for sewage sludge to be classified Class A.

[\*\*\*38] "I. **Class B Biosolids** are Biosolids that meet the pathogen reduction requirements in 40 CFR 503.32(b).

"J. **Compost** means the product resulting from the controlled biological decomposition of organic materials which may include Biosolids. Facilities where compost is produced are required to obtain Solid Waste Facilities

and Conditional Use Permits as a condition of operation. Compost products are required to meet or exceed product quality criteria as established by the California Integrated Waste Management Board. [¶] ... [¶]

"M. **Exceptional Quality Biosolids** are Class A Biosolids that meet the pollutant concentrations in 40 CFR 503.13, Table 3 and have achieved a level of vector attraction reduction required by 40 CFR 503.33. Additionally, Class A Biosolids must meet both the fecal coliform and Salmonella sp. bacteria limits contained in alternatives 1 through 6 of 40 CFR 503.32(a) to be Exceptional [\*\*47] Quality. For the purposes of this chapter, Exceptional Quality Biosolids are in bulk form and shall not include Compost which meets or exceeds Exceptional Quality [\*\*\*39] criteria. [¶] ... [¶]

"P. **Land Application** means the placement of Biosolids on agricultural land at a predetermined agronomic rate to support vegetative growth. For purposes of this chapter, placement includes the spraying or spreading of Biosolids onto the land surface, the injection of Biosolids below the surface, or the incorporation of Biosolids into the soil. [¶] ... [¶]

"R. **Permit** means a Land Application Permit issued by the Agency jointly to an Applier and all POTWs or other generators who supply Biosolids to the Applier. Such permit authorizes the Land Application of Biosolids in the County. Permits are not transferable to other parties without the prior approval of the Agency as provided in Section 8.05.040.R. [¶] ... [¶]

"T. **POTW** means publicly or privately owned treatment works that process wastewater and generate Biosolids. ... [¶] ... [¶]

#### [\*1573] "8.05.030 GENERAL REQUIREMENTS

"A. Prior to commencing any Land Application activities under this chapter, the Applier shall obtain a Permit and pay all applicable fees. Only Sites with an Existing Permit shall be eligible for issuance of a Permit under this chapter. [¶] ... [¶]

"H. Biosolids [\*\*\*40] Impact Fee.

"1. There is levied by the County of Kern a fee of \$ 3.37 per ton for each ton of Biosolids land applied within the county. The amount of the fee shall be calculated

based on the monthly activity report as required by section 8.05.070(I) and is to be remitted to the Agency along with the filing of the monthly activity report. Permittees are subject to enforcement action, including revocation of the Permit, for non-payment. Where the Permittee can demonstrate the land application of Biosolids does not have an impact on County infrastructure or roads, the Agency may waive this fee.

"2. Permittees, either directly or through the wastewater treatment plant generating the Biosolids to be applied on the Permittee's property, which separately contract with the County or are determined to provide a reciprocal benefit, as determined by the Board of Supervisors, shall be exempt from this fee.

"3. Funds generated by this impact fee and other permit fees may be available to fund the following uses: Expenses associated with the inspection of properties within the County which have permits for the land application of Biosolids; development and operation of a GIS tracking system for all [\*\*\*41] Biosolids land applied within the County so that there is an accurate data base containing this information; technical studies and pilot projects which provide additional data on Biosolids land application; correction of any infrastructure deficiencies directly associated with the hauling of Biosolids; and, the cost of public outreach and education programs to ensure that the standards expressed within this ordinance and contained in the federal guidance for the beneficial use of Biosolids are adhered to. The budget for the expenditure of the Biosolids Mitigation Fund on mitigating the impact of Biosolids land application within the County as set forth above, shall be prepared by the Director of the Resource Management Agency for approval by the Board of Supervisors annually. [¶] ... [¶]

#### "8.05.040 PERMIT APPLICATION

[\*\*48] " A. It shall be unlawful for any person to apply Biosolids to land within the unincorporated area of the County without obtaining a Permit from the Agency and being in compliance with the terms and conditions as stated herein.

[\*1574] "B. The application for a Permit shall be filed with the Agency on an application form furnished by the Agency, accompanied by an [\*\*\*42] eight thousand dollar (\$ 8,000) fee. ... [¶] ... [¶]

"G. The Agency may deny an application for one (1)

or more of the following reasons:

"1. Prior significant non-compliance with local, state or federal regulations or permits related to the land application of biosolids.

"2. Inadequate, incomplete, or inaccurate application information.

"3. The land application proposal would not be in conformance with the applicable requirements of this chapter. [¶] ... [¶]

"M. Fees to review and process Permit applications, appeal an action of the Agency, as specified herein, inspect Sites, engage in enforcement activities and compensate for infrastructure impacts shall be established by the Board of Supervisors. [¶] ... [¶]

#### "8.05.050 MANAGEMENT PRACTICES

"A. Transportation, Storage and Land Application of Biosolids shall not degrade the groundwater or surface water.

"B. Discharge of Biosolids to surface waters or surface water drainage courses is prohibited and all Biosolids shall be confined to within the boundaries of the Site.

"C. All irrigation tailwater on Sites utilized for Biosolids application shall be maintained on the permitted Site and shall not be allowed [\*\*\*43] to flow on to adjacent properties, either by means of surface or subsurface flows. [¶] ... [¶]

#### "8.05.080 INSPECTION AND ENFORCEMENT

"A. The Agency shall inspect all Sites at least one (1) time per week during the period when Biosolids are being applied and may inspect more frequently or at any time.

"B. The Agency may charge for services not specifically described that are rendered by personnel that are necessary for the enforcement of the provisions of this ordinance. The charge will be calculated on the per-hour fee of [\*1575] seventy-five (\$ 75.00) dollars as established in Section 8.04.100. Any laboratory analysis will be charged at the Agency's actual costs as charged by a Certified Laboratory retained by Agency for any testing.

"C. Any person violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor.

"D. In addition, any violation of this chapter may be deemed by the Agency to be a public nuisance, and may be abated, or enjoined by the Agency, irrespective of any other remedy herein provided.

#### **"8.05.090 EFFECTIVE DATE**

"The provisions of this chapter shall expire on December 31, 2002, unless otherwise extended by the board of [\*\*\*44] supervisors."

Section 4 of Ordinance G-6638 replaced the expired version of chapter 8.05 with a new chapter 8.05 scheduled to become effective on January 1, 2003. Provision 8.05.010 was revised slightly but still stated that the chapter did not apply to EQ biosolids or compost. The definitions of EQ biosolids and compost were not changed. The substantive requirements of that new chapter 8.05 stated:

#### [\*\*49] " **8.05.040 BIOSOLIDS PROHIBITED**

"A. It shall be unlawful for any person to land apply Biosolids to property within the unincorporated area of the County. Any Site for which a Permit was issued prior to ... January 1, 2003 shall discontinue land application of Biosolids upon the effective date of this chapter.[<sup>36</sup>]

36 All subsequent references to Kern Code provision 8.05.040(A), Ordinance G-6638, are to this version, which was contained in section 4 of Ordinance G-6638 and was scheduled to become effective on January 1, 2003. The substantive requirements of provision 8.05.040(A) were reenacted by the adoption of Ordinance No. G-6931, which repealed Ordinance G-6638. All subsequent references to the "heightened treatment standards" are to those substantive requirements; this term was chosen because the effect of those requirements was that sewage sludge could not be applied to land in the unincorporated areas of Kern County unless the sludge was treated to the higher standards used to define EQ biosolids.

"B. The discharge of Biosolids to surface waters or surface water drainage courses, including wetlands and water ways, is prohibited."

[\*\*\*45] Section 5 of Ordinance G-6638 declared that the provisions of Ordinance G-6638 were severable and that the invalidity of any clause or provision would not affect the validity of the other provisions of the ordinance.

[\*1576] On November 8, 1999, CSDLAC, OCSO, CLABS, SCAP, CASA, and RBM filed a petition for writ of mandate and complaint for injunction and declaratory relief. The first cause of action in the petition alleged County violated CEQA by approving the negative declaration and making findings that Ordinance G-6638 would not have significant impact on the environment. The second cause of action asserted the adoption of Ordinance G-6638 was an invalid exercise of police power and a violation of the commerce clause. The third cause of action alleged the imposition of the biosolids impact fee violated provisions of the California Constitution concerning taxes, as well as the equal protection and due process clauses of the United States and California Constitutions, by unfairly discriminating against vehicles carrying biosolids.<sup>37</sup>

37 The theory of discrimination alleged was that vehicles loaded with Class B biosolids should not be singled out, and that all vehicles using the same roads and carrying a load of similar weight caused damage to the roads and thus should be charged the same fee.

[\*\*\*46] On March 1, 2000, County filed its cross-action against CSDLAC, OCSO and CLABS challenging changes made in their sewage sludge disposal programs. After amendment on June 19, 2000, County's cross-action contained (1) four causes of action alleging CLABS violated CEQA by entering certain contracts and amendments relating to the disposal of biosolids generated at its facilities without performing any environmental review; (2) one cause of action alleging CSDLAC violated CEQA by failing to undertake any environmental review when it and Yakima Company amended and extended their contract for the transportation of sewage sludge from CSDLAC's facilities to Kern County for application on farm land; and (3) five causes of action alleging OCSO violated CEQA by entering biosolids management agreements or options for the purchase of real estate used in connection with the disposal or use of biosolids generated at its facilities without performing any environmental review.

The superior court granted plaintiffs' request that

their CEQA cause of action be bifurcated, took all of the CEQA claims under submission on August 30, 2000, and by written ruling entered on November 22, [\*50] 2000, denied the CEQA [\*\*\*47] claims of all parties.

Approximately a year and a half later, the superior court heard and denied plaintiffs' motions for summary judgment, and granted County's motion for a protective order regarding depositions and written discovery requested by CSDLAC, OCSO and Shaen Magan relating to the remaining non-CEQA causes of action that challenged the validity of County's legislative act of adopting Ordinance G-6638.

[\*1577] On June 3, 2002, the parties agreed to present their cases by trial briefs. After considering the briefs filed by the parties, the superior court entered an order on November 25, 2002, denying the non-CEQA claims alleged in plaintiffs' second and third causes of action. The superior court filed a statement of decision on January 7, 2003, which ruled that (1) Ordinance G-6638 was not an invalid exercise of police power or a violation of the commerce clause and (2) the biosolids impact fee passed constitutional scrutiny because it had a rational basis and was not an illegal general or special tax. On March 10, 2003, judgment was entered in favor of County on all causes of action asserted by plaintiffs and in favor of the cross-defendants on all causes of action asserted by [\*\*\*48] County in its cross-action.

CSDLAC, OCSO, CLABS, CASA, RBM and SCAP timely filed an appeal. County timely filed a notice of appeal from the judgment that denied its cross-action.

## DISCUSSION

Plaintiffs contend County erroneously found that Ordinance G-6638 would not have a significant effect on California's environment and, therefore, County violated CEQA when it approved the negative declaration and adopted Ordinance G-6638. The superior court ruled the approval of the negative declaration was appropriate because there was no "substantial evidence of a fair argument that adoption of this ordinance, which continues to allow application of biosolids but requires [plaintiffs] to upgrade them to protect the environment, would have an adverse impact on the environment."

We hold that the preparation of an EIR was mandatory under the low threshold imposed by the fair argument standard because the administrative record

contained sufficient, credible evidence that the heightened treatment standards for the application of sewage sludge to land in the unincorporated areas of Kern County might have a significant adverse effect on California's environment. Furthermore, the possibility [\*\*\*49] that the net overall impact of the ordinance was beneficial did not override the requirement in CEQA for the preparation of an EIR addressing the significant adverse environmental impacts the ordinance may have caused. (Guidelines, § 15063, subd. (b).)

### I. CEQA Standard of Review

#### A. General Principles

(8) It is well established in CEQA proceedings that (1) the public agency is the finder of fact, (2) the superior court's findings are not binding on the appellate court, and (3) the scope and standard of review applied by [\*1578] the appellate court to the agency's decision is the same as that applied by the superior court. (See §§ 21168, 21168.5; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277 [19 Cal. Rptr. 2d 402] [county's approval of a negative declaration and conditional use permit reinstated and trial court reversed].)

(9) When a CEQA petition challenges action of a public agency that is legislative or quasi-legislative in character, the standard of review contained in section 21168.5 [\*\*51] and the procedures for traditional mandamus set forth in Code of Civil Procedure section 1085 are applied. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566-567 [8 Cal. Rptr. 2d 139, 888 P.2d 1268].) [\*\*\*50] Section 21168.5 provides: "In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."

(10) Amendment or adoption of an ordinance is a legislative act subject to review under section 21168.5. (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 172, fn. 2 [105 Cal. Rptr. 2d 214, 19 P.3d 567] [§ 21168.5 applied to CEQA challenge to city ordinance that removed certain properties from register of



historic landmarks]; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68 [118 Cal. Rptr. 34, 529 P.2d 66] [city's adoption of ordinances without CEQA compliance was governed by § 21168.5]; *Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482, 488 [82 Cal. Rptr. 2d 705] [county's amendment of a zoning ordinance reviewed [\*\*\*51] under § 21168.5.) Accordingly, the Kern County Board of Supervisors' adoption of Ordinance G-6638 is reviewable under section 21168.5 for a prejudicial abuse of discretion.

#### B. Fair Argument Test

(11) CEQA requires a governmental agency to "prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment." (§ 21100, subd. (a); see Guidelines, § 15064, subd. (a)(1).) Conversely, a negative declaration--rather than an EIR--is appropriate when the administrative record before the [\*1579] governmental agency does not contain substantial evidence that the project may have a significant effect on the environment. (§ 21080, subd. (c).)

(12) When a court reviews an agency's decision to certify a negative declaration, the court must determine whether substantial evidence supports a "fair argument" that the project may have a significant effect on the environment. (See §§ 21080, subs. (c) & (d), 21151; *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123 [26 Cal. Rptr. 2d 231, 864 P.2d 502]; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151 [39 Cal. Rptr. 2d 54] [Ct. App., 5th Dist. voided negative declaration and mandated preparation of EIR].) The determination by an appellate court under the fair argument test involves a question of law decided independent of any ruling by the superior court. (*Stanislaus Audubon Society, Inc.*, at p. 151.) Consequently, "we independently 'review the record and determine whether there is substantial evidence in support of a fair argument [the proposed project] may have a significant environmental impact, while giving [the lead agency] the benefit of a doubt on any legitimate, disputed issues of credibility.'" (*Ibid.*, quoting *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1603 [35 Cal. Rptr. 2d 470]; see § 21151.)

(13) California courts, including the Fifth Appellate District, routinely describe [\*\*52] the fair argument test as a low threshold requirement for the initial preparation of an EIR that reflects a preference for resolving doubts in favor of environmental review. (See *Stanislaus Audubon Society, Inc. v. County of Stanislaus, supra*, 33 Cal.App.4th at p. 151; [\*\*\*53] *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316-1317 [8 Cal. Rptr. 2d 473] [Ct. App., 1st Dist., Div. 1]; see also *No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal.3d at p. 84.)

In contrast to this description of the fair argument test, County asserts that "[a]ny reasonable doubts whether substantial evidence exists must be resolved in favor of the agency's decision." This assertion is rejected because (1) it misstates the low threshold of the fair argument test and (2) the case relied upon by County did not actually involve the fair argument test or the approval of a negative declaration. (See *Marin Mun. Water Dist. v. KG Land California Corp.* (1991) 235 Cal. App. 3d 1652, 1660 [1 Cal. Rptr. 2d 767] [court explicitly stated it was applying the substantial evidence standard to the agency's approval of the EIR].) Where the question is the sufficiency of the evidence to support a fair argument, "deference to the agency's determination is not appropriate ... ." (*Sierra Club v. County of Sonoma, supra*, 6 Cal.App.4th at pp. 1317-1318.) [\*1580]

(14) A logical deduction from the formulation of the fair argument test is that, if substantial evidence [\*\*\*54] establishes a reasonable possibility of a significant environmental impact, then the existence of contrary evidence in the administrative record is not adequate to support a decision to dispense with an EIR. (Guidelines, § 15064, subd. (f)(1); *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905 [60 Cal. Rptr. 2d 821].) The environmental review necessary to complete an EIR prepares the agency to weigh the conflicting substantial evidence on each side of an issue and make its findings of fact.

(15) The fair argument test also requires the preparation of an EIR where "there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial ... ." (Guidelines, § 15063, subd. (b)(1); see *San Joaquin Raptor/Wildlife*

*Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 614-615 [49 Cal.Rptr.2d 494].) In other words, for projects that may cause both beneficial and adverse significant impacts on the environment, preparation of an EIR is required because the consideration of feasible [\*\*\*55] alternatives and mitigation measures might result in changes to the project that decrease its adverse impacts on California's environment. Consequently, the argument that an EIR was unnecessary because the net overall effect of Ordinance G-6638 was beneficial to the environment must fail, regardless of potential environmental benefits, if substantial evidence shows a reasonable possibility of one or more significant adverse environmental impacts.

### C. Definitions Relevant to the Fair Argument Test

The fair argument test contains several terms that are defined further by CEQA, the Guidelines, or case law.

(16) First, the term "substantial evidence" is defined by the Guidelines to mean "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a); see *No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d at p. 75.) CEQA specifically provides that "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact" (§ 21080, subd. (e)(1)) and excludes [\*\*\*56] "argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (*Id.*, subd. (e)(2); see Guidelines, § 15384, subd. (a).) Thus, the existence of a public controversy is not a substitute for substantial evidence. (Guidelines, § 15064, subd. (f)(4).)

[\*1581] (17) Second, a project "may" have a significant effect on the environment if there is a "reasonable possibility" that it will result in a significant impact. (*No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d at p. 83, fn. 16.)

Third, "environment" is defined by CEQA as "the physical conditions [that] exist within the area [that] will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§ 21060.5.) Section 15360 of the

Guidelines explains this definition by providing: "The area involved shall be the area in which significant effects would occur either directly or indirectly as a result of the project. The 'environment' includes both [\*\*\*57] natural and man-made conditions."

Fourth, the phrase "significant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in the environment." (§ 21068; see Guidelines, § 15382.) "In determining whether an effect will be adverse or beneficial, the lead agency shall consider the views held by members of the public in all areas affected as expressed in the whole record before the lead agency." (Guidelines, § 15064, subd. (c).)

Fifth, the "significance" of an environmental effect requires the evaluation of "direct physical changes in the environment [that] may be caused by the project and reasonably foreseeable indirect physical changes in the environment [that] may be caused by the project." (Guidelines, § 15064, subd. (d); see § 21065.)<sup>38</sup> In this context, "direct" means "caused by and immediately related to the project." (Guidelines, § 15064, subd. (d)(1).) "Indirect" means "not immediately related to the project, but ... caused indirectly by the project" such as a physical change caused by a direct physical change. (*Id.*, subd. (d)(2).) The test for the strength of the nexus between the project and an indirect physical [\*\*\*58] change is whether "that change is a reasonably foreseeable impact [that] may be caused by the project." (*Id.*, subd. (d)(3).) The "reasonably foreseeable" test excludes physical changes that are speculative or not likely to occur. (*Ibid.*)

38 The Guidelines caution that an ironclad definition of "significant effect" is not possible because the significance of an activity may vary with the setting. (Guidelines, § 15064, subd. (b).)

Sixth, "effects" and "impacts" are synonymous and include (1) "[d]irect or primary effects [that] are caused by the project and occur at the same time and place" and (2) "[i]ndirect or secondary effects [that] are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable." (Guidelines, § 15358, subd. (a).) A common example of an indirect effect is the pollution that results from the growth-inducing effect of a project. (See Guidelines, §§ 15064, subd. (d)(2), 15382.) [\*1582]

[\*\*54] II. *An EIR is Required Under the Low [\*\*\*59] Threshold of the Fair Argument Test*

Plaintiffs contend the implementation of Ordinance G-6638 created a reasonable possibility of significant environmental impacts both inside and outside Kern County. Plaintiffs contend these significant impacts included (1) increased vehicle traffic, (2) increased air pollution in the form of vehicle emissions, dust and volatilization of pesticides, (3) degraded water quality from the use of alternative fertilizers, (4) increased burdens on landfills, (5) increased energy and fuel consumption, (6) increased soil erosion, (7) increased use of irrigation water, (8) increased exposure of humans to pathogens, (9) loss of habitat for small animals, and (10) loss of productivity of marginal farmland.

County contends the fair argument test was not met because (1) the relevant environment was approximately 23,594 acres of farmland<sup>39</sup> in Kern County where Class B biosolids were applied and (2) it was not reasonably possible that significant adverse environmental impacts would occur on that farmland. To support its first contention, County asserts that any broader sweep of the ordinance would depend on alternative methods of biosolids disposal chosen [\*\*\*60] by plaintiffs, and that the environmental impacts resulting from those methods were thus too uncertain and speculative for County to evaluate. To support its second contention, County asserts EQ biosolids would serve as an adequate substitute for the Class B biosolids that could no longer be applied by farmers.

39 This farmland represents about 3 percent of the total harvested cropland in Kern County.

CEQA defines the relevant geographical environment as the area where physical conditions will be affected by the proposed project. (§ 21060.5.) Consequently, the project area does not define the relevant environment for purposes of CEQA when a project's environmental effects will be felt outside the project area. (See *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369 [110 Cal. Rptr. 2d 579].) Moreover, "the purpose of CEQA would be undermined if the appropriate governmental agencies went forward without an awareness of the effects a project will have on areas outside [\*\*\*61] of the boundaries of the project area." (*Ibid.*)

We agree with County that some of the physical changes to the environment resulting from the adoption of Ordinance G-6638 would depend on the reactions of plaintiffs and others to its requirements. Consequently, we will not limit our review to a particular geographical area, but begin by examining (1) the reasonably foreseeable reactions of those affected by the heightened treatment standards, (2) how such reactions might cause physical changes to [\*1583] the environment, and (3) the environmental significance of those physical changes. The two main groups directly affected by Ordinance G-6638 were sewage sludge generators and the farmers who used Class B biosolids as a fertilizer. We will analyze each group separately.

*A. Reactions of Sewage Sludge Generators and Related Impacts*

Under the heightened treatment standards of Ordinance G-6638, sludge generators such as CSDLAC, CLABS and OCSD that applied Class B biosolids to agricultural land in Kern County were required to either reduce their production of biosolids or dispose of their biosolids in some other way.

[\*\*55] 1. *Continued production and disposal of sewage sludge [\*\*\*62] was foreseeable*

It was reasonably foreseeable that the City of Los Angeles, and the Counties of Los Angeles and Orange would continue to produce sewage sludge and would need to dispose of it. County does not dispute this point. The administrative record includes documents stating that the generation of biosolids will continue to increase along with the state's population. Therefore, at the time County certified the negative declaration, it was reasonably foreseeable that the heightened treatment standards would compel CSDLAC, CLABS, OCSD and other agencies to find a substitute for applying Class B biosolids on land within the jurisdiction of Kern County.

2. *Alternative methods of disposal were reasonably foreseeable*

*a. Foreseeability of disposal alternatives*

The following alternatives were foreseeable, because of the applicable rules of law governing the use and disposal of sewage sludge and because of information contained in the administrative record: (1) further treatment to convert Class B biosolids to EQ biosolids

followed by land application, (2) land application of Class B biosolids somewhere other than Kern County, (3) incineration, or (4) disposal [\*\*\*63] in a landfill.

The applicable rules of law set forth in state statute and federal regulations address land application, <sup>40</sup> landfilling, and incineration of sewage sludge. (See Wat. Code, § 13274, subs. (d), (f) & (g); 40 C.F.R. § 503, subparts B [land application], C [surface disposal, i.e., landfill] & E [incineration].) <sup>41</sup> [\*1584] Also, land application of sewage sludge that has been treated to heightened standards is suggested by Ordinance G-6638 itself.

<sup>40</sup> Land application may involve sewage sludge that has received various levels of treatment. For example, composting may be an intermediate step that prepares the sewage sludge to be applied to land as EQ biosolids.

<sup>41</sup> See generally Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Env'tl. Aff. L.Rev. at pages 690-697 (discussing the three main ways to dispose of sewage sludge: landfilling, incineration and land application).

The administrative record contains a vast amount of information about the alternative methods for [\*\*\*64] disposing of Class B biosolids. Part of that information was presented in comments from persons familiar with the disposal of sewage sludge. For instance, a September 13, 1999, declaration of James F. Stahl, an assistant chief engineer and assistant general manager of CSDLAC, identified the four alternatives and provided historical data showing the disposal options California had used in the past: "[I]n 1998 approximately 1,849 dry tons per day of sludge were generated in California. Of that amount, approximately 67.8% was land applied, while about 7% was in storage, 5.6% was incinerated, 9% was disposed of in landfills, and 10.6% [was] used in compost. In California, the most common use of land-applied biosolids is for agricultural crop production. ... [A]bout one-third of all land-applied biosolids in the State of California in 1998 were applied in Kern County." <sup>42</sup>

<sup>42</sup> Mr. Stahl relied on a survey conducted by CASA that was described in the State Water Board's 1999 Draft EIR, figure 2-2.

[\*\*\*65] A letter from the Chief of the Office of Clean Water Act Compliance of Region IX of the EPA indicated the alternatives were (1) treatment to Class A

standards, (2) hauling further distances for land application, [\*\*56] and (3) adding the organic, nitrogen-rich material to landfills. These methods and incineration were identified in the September 13, 1999, comments jointly submitted by CASA and SCAP and a June 14, 1999, letter signed by attorneys for OCSO, CSDLAC and CLABS. In addition, a letter from the Chair of the Central Valley Water Board mentions landfilling and incineration as alternative methods of disposal.

As a result of the foregoing comments and existing law, the foreseeable alternative methods of disposal of Class B biosolids included (1) land application outside Kern County, (2) further treatment to EQ biosolids standards followed by land application, (3) landfilling and (4) incineration.

*b. Reasonableness limitation on foreseeable alternatives*

(18) Next, we consider which of the foreseeable alternatives were *reasonably* foreseeable under the circumstances of this case. Under the fair argument test, the inquiry into what is reasonably foreseeable depends on whether [\*\*\*66] the administrative record contains enough evidence to show a reasonable possibility that a particular alternative would be used in the future.

[\*1585] OCSO, CSDLAC and CLABS were among the entities affected by Ordinance G-6638 that submitted comments to County predicting how they would respond to the ordinance.

An assistant general manager of OCSO, Blake P. Anderson, stated in a September 9, 1999, declaration that OCSO intended to respond to the ordinance by (1) converting Class B biosolids to EQ biosolids and (2) hauling the portion of the Class B biosolids not converted to more distant locations for land application. At that time, OCSO was "in the process [of] developing a request for proposals in order to obtain bids for the conversion of OCSO's Class B biosolids to exceptional quality biosolids." Earlier, in comments attached to its June 14, 1999, letter, OCSO discussed the limitations on landfills in Southern California and indicated that the landfills most likely to be used to dispose of Class B biosolids were located in Arizona and Utah.

The declaration of Mr. Stahl, CSDLAC's assistant general manager, stated adoption of the ordinance would cause CSDLAC to apply its biosolids to [\*\*\*67] land

further away and, if the sites with permits for land application of Class B biosolids did not have sufficient capacity, to treat the biosolids to meet Class A or EQ standards. Mr. Stahl also addressed the potential alternatives of incineration and local landfilling by stating that (1) incineration was not feasible in Southern California because of its adverse impact on air quality and (2) local landfilling lacked viability because of various constraints placed on those landfills, which included the recycling requirements of the California Integrated Waste Management Act of 1989. Also, Gregory M. Adams, the head of the air quality engineering section of CSDLAC, opined that the incineration of sewage sludge in Southern California was not feasible because of its adverse impact on air quality.

A September 10, 1999, letter from CLABS stated that "[t]o date, our analysis indicates that the alternative with the highest likelihood of immediate success is the conversion of Class B biosolids to what are known as exceptional quality biosolids under the federal regulations." The letter described the testing undertaken for the conversion of Class B biosolids at its Terminal Island wastewater [\*\*\*68] treatment plant and its Hyperion treatment plant and stated that it was reasonably foreseeable that within three years CLABS would be converting 100,000 wet tons per year of Class B biosolids to EQ biosolids. The letter also mentioned that the City of Los Angeles [\*\*57] had examined potential alternative sites for land application of Class B biosolids as well as the use of a landfill in Arizona as a backup method for disposal.

[\*1586] The foregoing predictions by entities that would have to change their practices when the heightened treatment standards went into effect are not rendered speculative by virtue of being predictions of future methods of compliance. Predicting the physical changes a project will bring about is an inescapable part of CEQA analysis. (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 919 [100 Cal. Rptr. 2d 173] [CEQA compels reasonable forecasting]; <sup>43</sup> see *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 398-399 [253 Cal. Rptr. 426, 764 P.2d 278].)

43 In addressing forecasting, i.e., predicting or estimating what will occur in the future, the Guidelines state that "[d]rafting an EIR or

preparing a negative declaration necessarily involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can." (Guidelines, § 15144.)

[\*\*\*69] (19) County contends that, when it adopted Ordinance G-6638, it could only speculate as to which alternative biosolids generators would adopt when the heightened treatment standards went into effect on January 1, 2003. Determining whether alternative methods of compliance with a new ordinance are reasonably foreseeable or speculative depends on the facts in the record rather than a bright-line rule of law. A bright-line rule--stating that the existence of alternative means of compliance with a new rule or regulation would cause each alternative to be so uncertain that it was not reasonably foreseeable--would contradict the requirements for environmental analysis imposed by section 21159, subdivision (a). That subdivision provides that when specified agencies adopt a rule or regulation concerning pollution control, performance standards, or treatment requirements, the agency must perform "an environmental analysis of the reasonably foreseeable methods of compliance." <sup>44</sup> Thus, CEQA recognizes that the existence of alternative methods of compliance does not, in itself, make the alternatives not reasonably foreseeable. Nothing in logic dictates a different conclusion when the new edict is [\*\*\*70] a county ordinance, even though the express terms of section 21159 do not cover ordinances. Consequently, regardless of whether the situation concerns a new rule, regulation or ordinance, whether one or more methods of future compliance are reasonably foreseeable depends upon the quality and quantity of evidence in the administrative record.

44 The section in the Guidelines corresponding to section 21159, subdivision (a) provides that adoption of a rule or regulation concerning pollution control, performance standards, or treatment requirements by specified state agencies requires an "environmental analysis of the reasonably foreseeable methods by which compliance ... will be achieved." (Guidelines, § 15187, subd. (a).)

The evidence in this case includes predictions of OCSD, CSDLAC and CLABS that are supported by a

reasoned analysis of the options available to them, an investigation into the practicalities of those options, and the plans or [\*1587] intentions they had formed at that stage of their investigation. Accordingly, [\*\*\*71] the predictions and the information upon which the predictions were based constitute substantial evidence supporting a fair argument that the reasonably foreseeable alternatives for disposing of sewage sludge that otherwise would have been applied to Kern County farmland as Class B biosolids were (1) hauling the Class B biosolids to other locations [\*\*58] where land application was allowed, (2) treating the Class B biosolids to meet more stringent standards, and (3) depositing the Class B biosolids in landfills. In other words, based on the record cited on appeal (see Cal. Rules of Court, rule 14(a)(1)(C)), the only alternative method of disposal that was not *reasonably* foreseeable was incineration.

### 3. *Significance of environmental impacts of disposal alternatives*

(20) The next inquiry under the fair argument test is whether the likelihood of implementation of the reasonably foreseeable disposal alternatives created a reasonable possibility of a significant effect on the environment. A project will have a significant effect on the environment if it will cause "a substantial, or potentially substantial, adverse change in" (§ 21068) "the physical conditions [that] [\*\*\*72] exist within the area [that] will be affected by [the] project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§§ 21060.5 [defining "environment"], 21068 [defining "significant effect on the environment"]; see Guidelines, §§ 15360, 15382.)

One illustration of the foreseeability of secondary environmental impacts occurred in *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398 [117 Cal. Rptr. 2d 582] where a county approved amendments that modified its general plan relating to land use regulation of unincorporated territory within a city's sphere of influence. The general plan amendment caused the slope development standards to become more lenient in certain areas and created the possibility for development of land previously considered too steep for development. (*Id.* at pp. 412-413.) The Fourth Appellate District held that an expected secondary effect of the adoption of a general plan amendment was an increase in grading that would destroy the natural contours of

hillsides and possibly eliminate the natural habitat for plants and animals. (*Id.* at p. 413.) Despite the county's [\*\*\*73] argument that the evidence lacked the necessary specificity and the absence of a particular development project, the court concluded the administrative record contained [\*1588] "substantial evidence of a fair argument that the amendments [to the general plan] may have a significant effect on the environment." (*Id.* at p. 414.) Thus, the trial court's decision to require the preparation of an EIR was upheld. (*Ibid.*)

#### a. *Hauling*

Mr. Anderson stated that OCS D anticipated hauling at least five truckloads of Class B biosolids per day to Kings County and two truckloads per day to Yuma, Arizona, which would involve a total of 2,000 vehicle miles per day and 1,200 vehicle miles per day, respectively.

Mr. Stahl stated Ordinance G-6638 would cause CSDLAC to apply Class B biosolids to land "at a currently-permitted location in Kings County for which [CSDLAC has] an existing contract" and at more remote permitted locations because the permitted capacity in Kings County could only accept about two-thirds of the biosolids generated by CSDLAC, OCS D and CLABS. Mr. Stahl also stated the additional hauling distance to the location in Kings County was approximately 45 miles [\*\*\*74] one way. Based on this additional mileage and the amount of wet tons of sewage sludge CSDLAC produced, Mr. Adams stated that the additional hauling of CSDLAC alone would result in nitrogen oxide (NOx) emissions of 63 pounds per day. Daily operations-related emissions that exceed 55 pounds per day of NOx are considered significant under the thresholds [\*\*59] established by the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD). <sup>45</sup> (See Guidelines, § 15064.7 [public agencies encouraged to develop and publish thresholds of significance]; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 [126 Cal. Rptr. 2d 441] [adopting quantitative standard as threshold of significance "promotes consistency, efficiency, and predictability in deciding whether to prepare an EIR"].) Accordingly, Mr. Adams concluded that the additional hauling of sewage sludge produced by CSDLAC would have a significant effect on the environment.

45 The SJVUAPCD and the South Coast Air

Quality Management District (SCAQMD) have both established thresholds of significance for direct and indirect project emissions, such as NO<sub>x</sub>, reactive organic gases (ROG), carbon monoxide (CO), sulfur oxide (SO<sub>x</sub>) and fine particulate matter (PM-10).

[\*\*\*75] The information in the administrative record supported a reasonable inference that the totality of additional hauling of Class B biosolids beyond sites in Kern County to locations in Kings County and further north would create additional NO<sub>x</sub> emissions that would have a significant adverse impact on the air quality within the jurisdiction of the SJVUAPCD. This determination is based on the levels of significance established by the SJVUAPCD. (See [\*1589] Guidelines, § 15064.7.) Accordingly, under the fair argument test, an EIR should have been prepared to consider the impact of Ordinance G-6638 on air quality.

b. *Treatment to EQ standards*

Mr. Stahl's declaration also stated CSDLAC had not built facilities sufficient to process its biosolids to meet Class A or EQ standards, but the design parameters for a pasteurization facility to accomplish that processing had been calculated by CSDLAC and would require approximately 700 MMBTUH<sup>46</sup> for heating in a natural gas boiler and 3,200 Hp<sup>47</sup> for pumping and handling.

46 Million British thermal units per hour. A British thermal unit is a unit of energy defined as the quantity of heat required to raise the temperature of one pound of water one degree Fahrenheit.

[\*\*\*76]

47 Horsepower, which is a unit of power that can be defined as 550 foot pounds per second or 745.7 watts.

The declaration of Mr. Adams states that for the 700 MMBTUH design parameter calculated by CSDLAC for a pasteurization facility, a natural gas fired boiler of that capacity "would emit approximately 111 lbs of NO<sub>x</sub> and 581 lbs of CO per day at their BACT [best available control technology] levels (i.e., 5 ppm NO<sub>x</sub> and 50 ppm CO)." This estimate of the per day emission of NO<sub>x</sub> is more than twice the threshold of significance set by the SCAQMD, and the estimate of CO emission also exceeds the threshold of significance of 550 pounds per day. Mr. Adams also stated that the processing activity necessary

for another sanitation agency to convert 100,000 tons of Class B biosolids to EQ biosolids per year would also exceed the thresholds of significance for NO<sub>x</sub> and CO.

In addition, the declaration of Robert A. Gillette, a civil engineer and principal of Carollo Engineers, described the energy consumption associated with the additional treatment processes used to convert Class B biosolids to Class A biosolids. In his declaration, Mr. Gillette expressed the opinion that the most viable processes for converting Class B biosolids to Class A at a treatment plant were in-vessel composting, heat drying, and lime stabilization. Based on these processes and other data, Mr. Gillette estimated: [\*60] "If only one third of the Class B biosolids presently used in Kern County are converted to Class A, the electricity usage for these alternatives is equivalent on an annual average basis to the amount used by between 1,500 and 5,000 homes in Southern California, according to data from Southern California Edison. The natural gas usage is equivalent on an annual average basis to the amount used by between 3,000 and 6,000 homes in Southern California according to data from the Southern California Gas Company."

[\*1590] Mr. Gillette also stated his opinion that if 200,000 wet tons per year of Class B biosolids were converted to more stringent standards instead of applied to land in Kern County, "the environmental impact from the additional use of energy would be very significant."

While we recognize that OCSD, CSDLAC and CLABS each had choices in deciding what combination of further treatment and [\*\*\*78] hauling to distant sites to implement, we conclude that a fair argument can be made that the aggregate impact of the alternatives adopted by these entities and the publicly and privately owned treatment works (POTW) serving Kern County communities<sup>48</sup> may cause a substantial, or potentially substantial, adverse change in the air quality within the jurisdiction of the SCAQMD and the SJVUAPCD. Furthermore, a fair argument can be made that the increased energy use caused by further treatment processes would cause a significant effect on the environment.

48 A Central Valley Water Board letter of September 17, 1999, stated the negative declaration "should also address the impacts of the proposed ban on POTWs serving Kern County communities."

c. *Landfill capacity*

The historical data in the administrative record shows that the biggest changes in the disposal and use of biosolids in California between 1988 and 1998 were the reduction in the use of landfills (60.2 percent to 9.1 percent) and the increase in [\*\*\*79] the use of land application (12.7 percent to 67.8 percent). From this data, it is reasonable to infer that land application has acted as a substitute for disposal in landfills and, as land application becomes more difficult, the use of landfills will be a partial substitute for land application. For instance, page 2-2 of the State Water Board's 1999 Draft EIR links the "huge increase in land application" reflected in the 1998 data with the reduction in the use of landfills.

The California Integrated Waste Management Act of 1989 includes the legislative findings that the "amount of solid waste generated in the state coupled with diminishing landfill space and potential adverse environmental impacts from landfilling constitutes an urgent need for state and local agencies to enact and implement an aggressive new integrated waste management program" (§ 40000, subd. (d)), and that the reuse of solid waste would preserve landfill capacity and protect the state's environment (*id.*, subd. (e)).

Based in part on (1) the volume of Class B biosolids applied to land in Kern County before the heightened treatment standards became effective, (2) the use of landfills as a substitute for land [\*\*\*80] application of biosolids, and (3) the legislative findings regarding diminishing landfill capacity and the adverse [\*1591] environmental impact associated with landfilling, we conclude that a fair argument exists that the potential increased use of California's limited landfill space to dispose of an organic, nitrogen-rich material may have a significant adverse effect on the environment. Accordingly, [\*\*61] that potential environmental impact should be assessed in an EIR.

d. *Summary*

(21) The reasonably foreseeable reactions of sewage sludge generators to Ordinance G-6638, and the reasonably foreseeable environmental impacts of those reactions, include: (1) increased fuel consumption and vehicle emissions resulting from hauling Class B biosolids greater distances; (2) the consumption of energy for the heating, pumping and handling involved in

treating Class B biosolids to meet more stringent standards, and the emissions generated by the additional treatment; and (3) loss of landfill capacity.<sup>49</sup>

49 In determining the foreseeability of a significant environmental impact, predicting what combination of alternatives will be used is less important when environmental impacts are associated with each alternative in the limited array of choices available.

[\*\*\*81] B. *Farmer Reaction and Related Impacts*

Plaintiffs argue that the reaction of Kern County farmers to the heightened treatment standards for sewage sludge applied to land after December 31, 2002, would result in significant impacts, "including the loss of productivity of marginal farmland (EPA, Garvey, Magan), increased air pollution from volatilization of increased pesticide usage, increased dust, and additional truck traffic (EPA, Regional Board, Garvey, Wilson, Tow, Anderson, Stahl, Adams, Hyde, Nixon, Westhoff) ... increased energy and fuel consumption (Wilson, Gillette, Anderson, Stahl, Nixon), increased erosion and dust (Garvey, Tow), increased water use (Garvey, Dixon, Tow), increased risks to human health (Nixon, Gerba), and loss of habitat for small animals (Garvey)." (Fn. omitted.)

County argues that the evidence referred to by plaintiffs is too general and does not show that "the Ordinance will result in significant environmental impacts on the land to which it applies." County asserts the lack of site-specific evidence occurred because "no physical changes would occur in the unincorporated area during the first three years because the Ordinance allowed the continued [\*\*\*82] use of Class B biosolids; and no significant impacts [\*1592] would occur after January 1, 2003 because the Ordinance allows the continued land application of EQ biosolids."

1. *Reasonably foreseeable farmer reactions*

Plaintiffs predicted that farmers who could not apply Class B biosolids after December 31, 2002, would react by (1) taking land out of agricultural production, (2) applying animal manure as a substitute for the biosolids, or (3) using chemical fertilizers. County asserts plaintiffs have indulged in assumptions unsupported by facts and have "ignore[d] evidence showing it is far more likely sludge generators will convert their Class B biosolids to



EQ, ensuring an adequate substitute for Class B biosolids for anyone who wishes to use them." County supports its prediction by referring to various contracts and related documents of the sanitation agencies that contemplate the use of composting as a disposal option.<sup>50</sup>

50 Reliance upon these documents could be an after-the-fact justification because the documents were not part of the administrative record before the Kern County Board of Supervisors when it decided to adopt Ordinance G-6638 and to certify the negative declaration.

[\*\*\*83] In effect, County has argued its forecast of how farmers would react when they could no longer apply Class B biosolids was the only forecast supported by substantial [\*\*62] evidence. (See Guidelines, § 15144 [forecasting].) This position is rejected for three reasons.

First, the documents cited by County in its appellate brief were not considered by County in adopting Ordinance G-6638 as they were not a part of the administrative record. (See § 21003, subd. (b) [document cannot be "meaningful and useful to decisionmakers" if it was not available to them].)

Second, County has cited and this court has located no evidence in the administrative record that supports the factual assertion that EQ biosolids are "an adequate substitute for Class B biosolids." Indeed, the evidence in the administrative record, including a letter from the EPA, indicates that most treatment processes for Class B biosolids reduce the nitrogen levels considerably and therefore reduce its value as fertilizer. County contends this evidence is unreliable because another document that was not in the administrative record shows that one of the primary land application sites used by OCSD in Kern County did not need [\*\*\*84] additional nitrogen for crop growth and would not be available for land application of Class B biosolids for a year or more. This attack on the evidence is faulty because (1) it is based on a document that is not in the administrative record; (2) it pertains to only one of the many land application sites in Kern County and provides no basis for inferring that all the other sites have the same characteristic; and (3) the [\*1593] period the site was unavailable was not shown to extend to the time the heightened treatment standards went into effect.<sup>51</sup>

51 In other words, County failed to show that by January 1, 2003, nitrogen levels at the site would

have remained so high that EQ biosolids could have been used as fertilizer without any need for an additional source of nitrogen.

Third, even if one were to assume EQ biosolids and Class B biosolids were equivalents as fertilizer, the administrative record does not contain evidence which supports County's assumption that EQ biosolids would be available in sufficient quantities [\*\*\*85] to completely replace Class B biosolids at all land application sites in Kern County. Some of the Class B biosolids that would have been applied in Kern County would be hauled to more distant locations or placed in landfills, which supports the inference that the EQ biosolids generated by the conversion of Class B biosolids would not be sufficient to completely replace the use of Class B biosolids.

Consequently, we reject County's position that the only reasonable forecast of the farmers' reaction to the implementation of the heightened treatment standards was that they all would use EQ biosolids as a substitute for Class B biosolids. Instead, substantial evidence in the administrative record shows that it was reasonable to forecast that the farmer reactions also would include taking marginal land out of production and substituting other types of fertilizer to replace the Class B biosolids. (See *League for Protection of Oakland's etc. Historic Resources v. City of Oakland*, supra, 52 Cal.App.4th at pp. 904-905 [substantial evidence of one impact is not negated if the record also contains substantial evidence showing a different impact will result].)

The forecast [\*\*\*86] that farmers would take land out of production was reasonable because one farmer told the Kern County Board of Supervisors that the availability of Class B biosolids made it feasible for him to bring 1,200 acres of marginal alkali soil into production, and another stated that the availability of biosolids as a free fertilizer allowed him to break even on a [\*\*63] 160-acre parcel. Shaen Magan wrote a letter indicating that if he was unable to continue farming with the use of biosolids, then approximately 4,000 acres of his farmland located in Kern County would revert to open-range land. From these statements, it is reasonable to infer that without the free application of Class B biosolids, the marginal land would be taken out of production.

The forecast that some land would remain in production and substitutes would be used was reasonable

because Pat McCarthy stated that he was currently applying Class B biosolids in his family's farming operations and, similar to gypsum, sulfur, animal waste and dairy waste, it was just one tool available to farmers. This statement supports an inference that he would [\*1594] continue to farm by using one or more other types of fertilizer available to replace the [\*\*\*87] Class B biosolids.

## 2. Potential environmental impacts of farmer reactions

### a. Dust and air quality

Plaintiffs claim substantial evidence shows that "[a]t marginal sites that are currently used for Class B biosolids application, there will be a significant increase in soil loss of approximately 28,800 tons per year as PM-10 (Dust)" and cite to a letter prepared by Harry A. Tow, a principal engineer with Quad Knopf, Inc. In his letter, Tow states that sites left fallow and unfarmed will experience a significant increase in soil loss through wind erosion. The figure of 28,800 tons per year calculated by Tow equates to approximately 157,808 pounds per day, which is over 1,000 times the 150 pounds per day threshold of significance established for PM-10 by the SJVUAPCD for any project.

Tow also stated that more dust and odor is likely to be created where animal manure is used as a substitute for Class B biosolids because the transport and application of dry manure is not regulated and it could be applied in wind conditions where the application of biosolids would not be allowed.

[\*1595] Plaintiffs also cite a September 10, 1999, letter written on behalf of OCS D by Diane D. [\*\*\*88] Garvey, who has a degree in civil and environmental engineering and a 20-year career in biosolids management. Garvey's company is Garvey Resources, Inc., and it is located in Lansdale, Pennsylvania. In Garvey's opinion, farmers who use chemical fertilizers as a substitute for biosolids will suffer increased soil loss from wind erosion because biosolids reduce soil erosion by increasing the amount of organic matter in the soil, which improves the soil's structure and cohesion. To support her opinion, Garvey quotes from an article titled "Agricultural Tillage Systems: Water Erosion and Sedimentation" published by the Soil and Water Conservation Society.

### b. Increased use of animal manure

Plaintiffs contend a fair argument exists that increased use of animal manure by farmers affected by Ordinance G-6638 would lead to more surface water pollution, more groundwater pollution and the spread of pathogens such as cryptosporidium, giardia, salmonella and E. coli. This argument is supported by a report by the United States Geological Survey and a report prepared for United States Senator Tom Harkin, both of which are in the administrative record, and show that animal manure has had [\*\*\*89] an adverse impact on the environment at locations across the country and in California.

Plaintiffs also cite the September 10, 1999, letter written by Garvey which asserted that increased use of animal manure [\*\*64] would increase (1) nitrate contamination of groundwater and (2) the spread of disease because animal manure is not treated to reduce pathogens like Class B biosolids. Garvey asserts biosolids cause less nitrate contamination because biosolids are closely monitored and more consistent in quality; in contrast, the quality of animal manure can vary greatly in solids and nitrogen content based on the age of the manure, storage method, the feed given to the animals and their weight. The inconsistent quality of manure means that some areas of a field will receive more nitrogen than can be used by the crops and the excess nitrates will contaminate the groundwater.

With respect to the pathogens in animal manure, plaintiffs cite a September 13, 1999, letter from Charles P. Gerba, Ph.D., from the Department of Soil, Water and Environmental Science at the University of Arizona, which described some of the pathogens found in animal manure, asserted outbreaks of some of these pathogens were [\*\*\*90] associated with the use of animal manure as a fertilizer, and observed that animal manure that is land applied is not regulated for pathogen removal, unlike Class B biosolids.<sup>52</sup> The lack of regulatory oversight to the land application of animal manure also is mentioned in the comments submitted to County by the EPA.

52 Under Part 503, sewage sludge must be treated to significantly reduce pathogens to obtain Class B status. (See 40 C.F.R. § 503.32(b) (2005) [Class B pathogen requirements and site restrictions].)

### c. Increased use of concentrated chemical fertilizers

Plaintiffs assert substantial evidence shows that

increased use of concentrated chemical fertilizers by affected farmers would lead to a number of adverse environmental impacts including (1) soil erosion,<sup>53</sup> (2) surface water pollution, (3) groundwater pollution, (4) increased use of irrigation water, (5) decreased crop production and (6) increased use of pesticides.

53 The soil loss from wind erosion is discussed in part II.B.2.a., *ante*.

[\*\*\*91] We agree that it is reasonable to forecast that this farmland will have a lower organic content than it would have had if Class B biosolids had continued to be applied. There is ample evidence in the administrative record showing that the application of biosolids increases the organic content of soil. For example, the September 9, 1999, letter submitted to County by Robert C. Dixon, a certified professional agronomist, indicates that biosolids are an organic soil amendment with a high level of organic matter.

[\*1596] Both Garvey and Dixon asserted that the substitution of chemical fertilizers for biosolids could result in adverse impacts to the environment by (1) decreasing the ability of the soil to retain water and thus increasing the amount of water used to irrigate crops, and (2) increasing the amount of nutrients likely to leach below the root zone before they can be utilized by the crops and thereby increasing the amount of nutrients that leach into and pollute the groundwater.

Dixon also asserted that the increase in organic matter from biosolids increases the ability of the soil to hold onto pesticides, fertilizers and the soil itself. Thus, the water runoff from fields using biosolids [\*\*\*92] would pollute surface water less because the runoff would transport fewer nutrients, pesticides and sediment.

Garvey asserted that the decrease in organic matter would decrease beneficial microbial populations in the soil and would increase farmer dependence on pesticides.

[\*\*65] 3. *Significance of potential impacts from farmer reactions*

On our own initiative, we could provide bases on which to attack the significance of the above noted potential impacts to the environment arising from the reasonably foreseeable reactions of affected farmers.<sup>54</sup> County, however, has not provided any detailed analysis of the potential impacts plaintiffs have identified, other

than to argue (1) the potential impacts will not arise because farmers will use EQ biosolids as a replacement for Class B biosolids and (2) plaintiffs' claims are based on (a) unsupported assumptions and opinions and (b) biased and unreliable information. (See § 21080, subd. (e); Guidelines, § 15384, subd. (a); *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal. App. 3d 1337, 1349 [272 Cal. Rptr. 372] [agency entitled to disbelieve biased witness].)

54 For example, Tow's analysis of the impact of dust on air quality suffers from a rather glaring deficiency--his failure to compare the potential dispersal of PM-10 after January 1, 2003, to the dispersal of PM-10 from the same land while it was farmed and biosolids were applied to it. The question, of course, is *change* to the environment which might arise from the ordinance. (See § 21068; Remy et al., *Guide to the Cal. Environmental Quality Act (CEQA)* (10th ed. 1999) p. 162 (Remy, *Guide to CEQA*).)

[\*\*\*93] Neither of County's arguments is compelling. First, substantial evidence in the record establishes a reasonable possibility that farmers would react to the heightened treatment standards in various ways (see part II.B.1., *ante*) and thus would not limit their reaction to using EQ biosolids as a complete substitute for Class B biosolids. Moreover, County's argument appears to be an after-the-fact rationalization for a decision already made because the [\*1597] administrative record contains no evidence that County seriously investigated whether EQ biosolids would be a complete substitute for the Class B biosolids that had been used.<sup>55</sup> The after-the-fact nature of the position is illustrated by County's inability to cite any supporting evidence in the administrative record. (See fn. 50, *ante*.)

55 For instance, in completing the initial study County did not investigate the basic question of quantity--whether the volume of EQ biosolids available for application to farmland in Kern County would be sufficient to replace the volume of Class B biosolids that had been used.

[\*\*\*94] (22) Second, County's generalized assertion that the evidence relied upon by plaintiffs was biased and unreliable fails because County (1) did not make any express credibility findings in connection with its approval of the negative declaration and (2) has not shown that there were "legitimate, disputed issues of

credibility.' [Citation.]" (*Stanislaus Audubon Society, Inc. v. County of Stanislaus*, *supra*, 33 Cal.App.4th at p. 151.) Were we to accept County's broad-brush assertion of the incredibility of plaintiffs' evidence, the fair argument test would be effectively eviscerated because much of the evidence submitted in administrative proceedings concerning CEQA projects comes from people and entities who are interested in the outcome of the lead agency's decision. Instead, we hold that before an agency may rely on its purported rejection of evidence as incredible, it must first identify that evidence with sufficient particularity<sup>56</sup> to allow the reviewing court to determine whether there were legitimate, disputed issues of credibility. (E.g., *Leonoff v. Monterey County Bd. of Supervisors*, *supra*, 222 Cal. [\*\*66] App. 3d at pp. 1351-1353 [court [\*\*\*95] upheld county's rejection of project opponents' evidence of purportedly significant traffic impacts].)

56 Under the facts of this case, we need not decide whether that identification must take place in explicit findings by the agency, elsewhere in the administrative record, or in the briefing submitted by the lead agency to the court.

We refrain from supplying arguments County has not made, or from requesting further briefing, because to do so would not reflect County's actual analysis but would simply create more after-the-fact justifications. Moreover, it would not change the need to remand this matter with directions to County to prepare an EIR. (See part II.A., *ante*.)

(23) We also agree with plaintiffs that, under CEQA, the lead agency bears a burden to investigate potential environmental impacts. "If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of [\*\*\*96] fair argument by lending a logical plausibility to a wider range of inferences." (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311 [248 Cal. Rptr. 352].) [\*1598]

In this case, Tow's calculation regarding the creation of 28,800 tons per year of PM-10 is not a reasonable prediction. Nevertheless, County failed to study the impact of dust on air quality and, as a result, there exists a plausible inference that the heightened treatment standard could cause, in the aggregate, the addition of 150 pounds per day of PM-10 to the air within the jurisdiction of the

SJVUAPCD based on (1) Tow's analysis of wind erosion from fallow land, (2) Tow's analysis of the additional dust that will result from the use of animal manure, (3) Garvey's claim that increased use of chemical fertilizers will affect soil structure and lead to more wind erosion, and (4) the PM-10 from the additional truck emissions created by further hauling distances. Accordingly, the heightened treatment standards may have a significant adverse impact on the amount of PM-10 in the air and an EIR should address this potential impact.

In addition, we conclude the impacts from the increased use of animal [\*\*\*97] manure and the increased use of chemical fertilizers may have a significant adverse impact on the environment and should be addressed in an EIR.

#### C. *Magan v. County of Kings Is Distinguishable*

In *Magan v. County of Kings*, *supra*, 105 Cal.App.4th 468, the Kings County Board of Supervisors found that an ordinance regulating the application of sewage sludge to land in Kings County was categorically exempt from review under CEQA as an action taken by a regulatory agency for the protection of the environment. (See Guidelines, § 15308 [class 8 categorical exemption concerning protection of the environment]; see also § 21084.) In upholding the superior court's denial of a writ of mandate, this court determined that (1) the county met its burden of showing substantial evidence supported the board of supervisors' decision that the ordinance fell within the categorical exemption (*Magan*, at p. 476) and (2) that the petitioner failed to meet his burden of producing substantial evidence showing a reasonable possibility of adverse environmental impact sufficient to remove the ordinance from the categorically exempt class (*ibid.*). In particular, this [\*\*\*98] court observed that the petitioner "has failed to support his claims with *any* evidence in the record. The claims are based entirely on speculation." (*Id.* at p. 477.)

The present case is distinguished easily from *Magan v. County of Kings* based on [\*\*67] the contents of the administrative record.<sup>57</sup> In this case, the administrative record contains a large quantity of specific information about alternative methods of disposing of the Class B biosolids that otherwise [\*1599] would have been applied to Kern County farmland and the environmental significance of the impact of those alternatives on energy consumption, air quality within the jurisdiction of the SJVUAPCD, and landfill capacity. Thus, plaintiffs in this

case have done exactly what the petitioner in *Magan v. County of Kings* failed to do--produced substantial evidence to support their argument that the ordinance would indirectly cause "a substantial, or potentially substantial, adverse change in" "the physical conditions [that] exist" inside and outside the county. (§§ 21060.5, 21068; Guidelines, §§ 15360, 15382; *Heninger v. Board of Supervisors* (1986) 186 Cal. App. 3d 601, 609-611 [231 Cal. Rptr. 11] [\*\*\*99] ["considerable body of evidence" supported a fair argument that an ordinance amendment authorizing installation of alternative private sewage disposal systems might have a significant effect on the environment; thus, a negative declaration was inappropriate and the preparation of an EIR was required].)

57 This court has emphasized the importance of connecting one's arguments to the contents of the administrative record in a CEQA proceeding. (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362 [1 Cal. Rptr. 3d 726]; see Cal. Rules of Court, rule 14(a)(1)(C).)

#### D. Deferral of Environmental Analysis

County asserts deferring the preparation of an EIR was appropriate because the uncertainty over how the sanitation agencies would react to Ordinance G-6638 rendered environmental analysis of those reactions premature.

##### 1. Deferral and the fair argument test

(24) A threshold issue is how the concept of deferral of environmental analysis interacts with the fair argument [\*\*\*100] test. When a public agency is preparing an EIR and decides to defer environmental review of an action that may be taken in the future, courts analyze the decision to defer environmental review under a specific test. (See *National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505, 1516-1520 [50 Cal. Rptr. 2d 339] [deferral of environmental analysis in the context of EIR preparation and the test for deferral].) That test provides that the "discussion of a [future potential action] is not required in an EIR for the project ... if: (1) obtaining more detailed useful information is not meaningfully possible at the time when the EIR for the project is prepared, and (2) it is not necessary to have such additional information at an earlier stage in determining whether or not to proceed with the project." (*Id.* at p. 1518.)<sup>58</sup>

58 A dispute over the application of the test for deferral often is closely related to a dispute concerning the proper scope of the project and whether a line can be drawn between the project covered by the EIR and the future action for which environmental analysis is deferred. (See *National Parks & Conservation Assn. v. County of Riverside*, *supra*, 42 Cal.App.4th at pp. 1514-1515; see also *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal. App. 3d 223, 236-237 [242 Cal. Rptr. 37] [discussion of pipelines in an EIR for exploration phase of multistage oil project need not address specific pipeline routes because quantity and quality of oil discovery was uncertain and another EIR would be prepared in connection with the city's approval of a specific pipeline route].)

[\*\*\*101] [\*1600] (25) In the context of a negative declaration, however, the courts have not [\*\*68] used this test to determine whether the approval of the negative declaration complies with CEQA. (See *Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 580 [80 Cal. Rptr. 2d 294] (*Pala Band*) [applying fair argument test, court held preparation of EIR would be premature; upheld negative declaration]; *Sundstrom v. County of Mendocino*, *supra*, 202 Cal. App. 3d at pp. 306-307 [deferring environmental assessment related to mitigation measures violated CEQA; negative declaration held invalid].) Further, we believe that use of an inquiry separate from the fair argument test would be inappropriate if it were used to raise or lower the threshold imposed by that test. Because the concept of deferral of environmental review does not change the threshold imposed by the fair argument test, there is no need for a separate inquiry. In other words, the idea of deferral is subsumed in the fair argument test, which considers whether a potential environmental impact is speculative or reasonably foreseeable; undertaking a separate inquiry would be redundant.

##### 2. Timing and [\*\*\*102] Guidelines section 15004

County contends preparation of an EIR would have been premature because "meaningful information for environmental assessment" (Guidelines, § 15004, subd. (b)) was not available at the time Ordinance G-6638 was adopted.

Section 15004 of the Guidelines addresses the time for preparation of an EIR or negative declaration, and

subdivision (b) states: "Choosing the precise time for CEQA compliance involves a balancing of competing factors. EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." The "Discussion" that follows section 15004 of the Guidelines states: "This section codifies the requirement that EIRs and Negative Declarations be prepared before an agency makes a decision on the project and early enough to help influence the project's plans or design. For EIRs and Negative Declarations to be effective in serving the purposes of CEQA, the preparation of these documents must be coordinated with the planning, review, and approval processes [\*\*\*103] as described in subsection (c). Early preparation is necessary for the legal validity of the process and for the usefulness of the documents. Early preparation enables agencies to make revisions in projects to reduce or avoid adverse environmental effects before [\*1601] the agency has become so committed to a particular approach that it can make changes only with difficulty." <sup>59</sup>

59 The Discussion is available on the Internet at <[http://ceres.ca.gov/topic/env\\_law/ceqa/guidelines/art1.html](http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art1.html)> (as of Apr. 1, 2005). (See generally *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1987) 189 Cal. App. 3d 498, 503, fn. 1 [234 Cal. Rptr. 527] [judicial notice taken of the "Discussion" that followed a section of the Guidelines].)

County's timing argument is ill-suited to the facts of this case because it (1) confuses deferring environmental analysis of Ordinance G-6638 with avoiding it and (2) treats the reactions of the sanitation agencies as though they were part of the same [\*\*\*104] CEQA project. <sup>60</sup>

60 The project description contained in County's proposed negative declaration states the project is "the adoption of a Kern County ordinance regulating the land application of Class A and B biosolids ... ." The project description does not include any biosolids management activities that might be undertaken by sanitation agencies in response to the ordinance.

[\*\*69] An agency's deferral of environmental assessment was appropriate in *Pala Band, supra*, 68

Cal.App.4th 556, and *Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464 [11 Cal. Rptr. 2d 792] (*Kaufman & Broad*) because the agency had the opportunity to assess all of the physical impacts of its multistage activity in an EIR prepared by the agency at a later stage of the project. Thus, those cases do not use timing considerations to justify an agency's completely avoiding the preparation of an EIR for its project.

In *Pala Band, supra*, 68 Cal.App.4th 556, the County of [\*\*\*105] San Diego adopted a countywide integrated waste management plan, which was a statutory prerequisite to the development of new landfills in the county. The court held the preparation of an EIR would be premature where all 10 proposed landfill sites identified in the siting element of the plan were only "tentatively reserved" and the county had made no commitment to develop any of the sites. (*Id.* at pp. 574-575, 580.) Thus, it was not "reasonably foreseeable at the current planning stage that any of the sites will actually be developed" (*id.* at p. 575), and the county could wait and subsequently prepare an EIR to help it decide which sites to actually develop.

Similarly, in *Kaufman & Broad, supra*, 9 Cal.App.4th 464, a school district formed a consolidated facilities district (CFD) but did not prepare an EIR. The formation of the CFD was merely an initial step and many alternative courses of action remained open to the school district. (*Id.* at p. 476.) For instance, formation of the CFD did not commit the school district to build a new facility, buy or lease portable classrooms, or rehabilitate existing facilities. [\*\*\*106] (*Id.* at pp. 474-475.) The formation of the CFD caused no physical changes to the environment and it was not an essential step culminating in [\*1602] activity that might cause physical changes to the environment. (*Id.* at p. 474.) In other words, physical changes would not occur until the district actually committed to building a new facility or some other course of action. Therefore, the school district itself had the opportunity to prepare an EIR when it committed to a stage of the project that would cause a physical change to the environment. <sup>61</sup> (Cf. Guidelines, § 15165 [issues raised by multiple and phased projects where significant environmental impacts arise earlier in the process].)

61 The analogy between the adoption of a land use ordinance and the multistage activities involved in *Pala Band* and *Kaufman & Broad* is

weak. The stronger analogy is between the adoption of Ordinance G-6638 and the adoption of (1) an amendment to a general plan, (2) revised sphere of influence guidelines, or (3) development plans for an area surrounding an airport. (See *City of Redlands v. County of San Bernardino*, *supra*, 96 Cal.App.4th at pp. 412-413 [adoption of negative declaration set aside and county required to prepare an EIR in connection with general plan amendment]; *City of Livermore v. Local Agency Formation Com.* (1986) 184 Cal. App. 3d 531 [230 Cal. Rptr. 867] [LAFCO's negative declaration vacated and preparation of EIR required for changes in sphere of influence guidelines regarding urban development]; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, *supra*, 91 Cal.App.4th at p. 369 [final subsequent EIR certified in connection with approval of updated specific plan for development of area surrounding county airport properly considered "project's effect on growth and housing ... felt outside of the project area"].)

[\*\*\*107] [\*\*70] The present case is distinguishable from *Pala Band* and *Kaufman & Broad* because the adoption of Ordinance G-6638 was a definitive action by County that *completed* its project and, accordingly, County had no opportunity to assess the indirect physical impacts of Ordinance G-6638 before those impacts occurred. Therefore, we reject County's attempts to use cases upholding a public agency's deferral of EIR preparation as support for its avoidance of EIR preparation.

Furthermore, in this case the CEQA "project" was Ordinance G-6638 itself. (See fn. 58, *ante*.) The final form of that project was proposed at the time Ordinance G-6638 was proposed, and County's commitment to the project became final when it adopted that ordinance. By avoiding the preparation of an EIR, County committed to a particular approach and completed its project without the benefit of the environmental analysis and information an EIR would have contained.

### 3. Each agency has separate CEQA responsibilities

Another aspect of County's deferral argument is that (1) the sanitation agencies are responsible for performing an environmental review of the potential environmental impacts resulting [\*\*\*108] from the changes those agencies make in their biosolids management programs,

and (2) plaintiffs are trying to [\*1603] avoid this responsibility by foisting it on County. We reject County's argument because it misses the mark on how CEQA operates. If only the sanitation agencies were required to prepare, supplement, or amend their EIR's, there would be no environmental review of (1) feasible alternatives to the heightened treatment standards adopted in Ordinance G-6638, (2) its cumulative impacts, and (3) mitigation measures available to County but not the sanitation agencies. Under this approach, the environmental review contemplated by CEQA would contain a gap, and California's environment would be deprived of the benefits that might result from County's consideration of feasible alternatives, cumulative impacts, and mitigation measures.<sup>62</sup>

62 Plaintiffs point to the State Water Board's 1999 Draft EIR contained in the administrative record and argue that if the adoption of General Order 2000-10 at the state level created potential impacts that could be foreseen and required analysis, then the potential impacts from the adoption of Ordinance G-6638 (which represented a greater change from the status quo) also must be foreseeable. In plaintiffs' view, consistent application of CEQA's concept of foreseeability at the state and county level requires rejection of County's position that the potential physical impacts of Ordinance G-6638 were so attenuated as to be unforeseeable.

[\*\*\*109] (26) Furthermore, the fact that County must prepare an EIR does not absolve the sanitation agencies of their responsibilities to comply with CEQA. (See part VII., *post*.)<sup>63</sup> As noted by the Third Appellate District in *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal. App. 3d 433 [243 Cal. Rptr. 727], "Each public agency is required to comply with CEQA and meet its responsibilities, including evaluating mitigation measures and project alternatives. (See Guidelines, § 15020.)" (*Id.* at p. 442, fn. 8.) When agencies--even agencies with antagonistic positions--comply with their responsibilities for environmental review under CEQA, their action should be taken after consideration of the other's position and, [\*\*71] as a result, their action may achieve a measure of coordination that would not have existed without that review. (See § 21000, subs. (d) & (f).)

63 Justice Stephen Breyer has described the

problem of regulatory inconsistency which can arise when agencies ignore their regulatory program's environmental effect on other programs. (See Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation*, *supra*, pp. 21-22.)

[\*\*\*110] E. *Relief Appropriate Under Section 21168.9*

Section 21168.9 sets forth the requirements for the court order entered after a failure to comply with CEQA has been found. (See *San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (2001) 89 Cal.App.4th 1097, 1102-1103 [109 Cal. Rptr. 2d 108].) An order granting relief for CEQA violations "shall include only those mandates ... necessary to achieve compliance with [CEQA] and only those specific project activities in noncompliance with [CEQA]." (§ 21168.9, subd. (b).) In this case, the specific project activity that did not comply with CEQA was the approval of the negative declaration and the adoption of the heightened treatment standards.

[\*1604] (27) Accordingly, the order could mandate that County void all or part of its decision to approve the negative declaration and adopt the heightened treatment standards. (§ 21168.9, subd. (a).) The order also could mandate that County take specific action necessary to bring its decision into compliance with CEQA. (§ 21168.9, subd. (a)(3).)

We requested supplemental briefing concerning how section 21168.9 should be applied in this case and what directions should be given to the superior [\*\*\*111] court on remand. (Gov. Code, § 68081.) We asked whether the heightened treatment standard should be voided or allowed to remain in effect pending the completion of an EIR, and whether the adoption of Ordinance No. G-6931, which repealed Ordinance G-6638 but reenacted the heightened treatment standards, should affect the relief ordered.

The parties concurred that the heightened treatment standards should remain operative pending County's (1) completion of an EIR in good faith and without unnecessary delay and (2) approval of whatever replacement version of the biosolids ordinance is generated as a result of completing the EIR. <sup>64</sup> This position presumes (1) the severability of the heightened treatment standards from the other provisions in Ordinance G-6638 as well as from the additional

provisions added by Ordinance No. G-6931, such as the licensing permit required for the land application of EQ biosolids, and (2) that the equities favor it. Because we conclude both of these presumptions are appropriate, we will accept the position adopted by the parties.

64 At the time County begins the EIR process, it will not know the exact terms of the ordinance that it might approve at the end of that process because the terms it initially proposes, i.e., the "project," may be revised after considering feasible alternatives and mitigation measures.

[\*\*\*112] (28) First, we conclude that the heightened treatment standards are grammatically, functionally, and volitionally severable from the remainder of chapter 8.05 as adopted by Ordinance G-6638 or as currently in effect under Ordinance No. G-6931. (See *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821-822 [258 Cal. Rptr. 161, 771 P.2d 1247].) <sup>65</sup> Therefore, the CEQA violations relating to the adoption of the heightened treatment standards do not infect the other provisions of the ordinances. (See § 21168.9, subd. (b).)

65 This conclusion regarding severability does not mean, however, that the heightened treatment standards are the entire "project" for purposes of determining the scope of the EIR.

Second, County and CSDLAC both state they are unaware of any published [\*\*72] case in which (1) a negative declaration that related to the adoption of an ordinance, regulation or general order was ruled invalid under CEQA, and (2) the appellate court did not invalidate the ordinance, regulation or general [1605] order itself. (Cf. [\*\*\*113] *Friends of Sierra Madre v. City of Sierra Madre*, *supra*, 25 Cal.4th at p. 196 [appropriate relief for noncompliance with CEQA was invalidation of ordinance; ordinance not allowed to remain in effect pending compliance with CEQA]; *No Oil, Inc. v. City of Los Angeles*, *supra*, 13 Cal.3d at p. 88 [superior court directed to set aside three ordinances].) Nevertheless, a remedy less severe than immediately voiding the heightened treatment standards may be ordered if supported by equitable principles. (See *Laurel Heights Improvement Assn. v. Regents of University of California*, *supra*, 47 Cal.3d at pp. 423-425; *San Bernardino Valley Audubon Society v. Metropolitan Water Dist.*, *supra*, 89 Cal.App.4th at p. 1104.) Because the heightened treatment standards currently contained in



Ordinance No. G-6931 have been in effect for over two years, we will follow the more steady course of allowing the status quo to continue pending the completion of an EIR. The alternative of reverting to a situation where the application of Class B biosolids is not subject to any local regulation and then, after an EIR is completed, [\*\*\*114] possibly returning to a situation where Class B biosolids either cannot be land applied or are highly regulated by County would be disruptive to County, the sanitation agencies, and the members of the biosolids industry that are subject to the ordinances.

In light of (1) the position of the parties, (2) the authority given to the courts in section 21168.9 to fashion the terms of the writ of mandate, and (3) the equitable considerations relevant to this proceeding, we hold that the heightened treatment standards may continue in effect provided that County prepares, in good faith without unnecessary delay, an EIR that complies with CEQA. If County decides to forgo regulating the application of biosolids to land, or does not prepare an EIR in good faith<sup>66</sup> and without unnecessary delay, then the superior court shall enter an order that immediately invalidates the heightened treatment standards. Questions concerning County's good faith or lack of diligence, if raised, shall be decided by the superior court in the first instance.

<sup>66</sup> One issue that may arise in connection with the good faith of County's attempt to prepare an EIR is whether its definition of the scope of the EIR appropriately considers the "project" to include the "whole of an action" actually implemented by County in regulating the land application of sewage sludge. (Guidelines, § 15378, subd. (a); see *Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 637-640 [10 Cal. Rptr. 3d 560].)

[\*\*\*115] III. *Ordinance G-6638 Is Consistent with Water Code Section 13274*

In the proceedings before the superior court, County argued that Ordinance G-6638 was a local determination concerning sewage sludge that was authorized by Part 503 and by Water Code section 13274. Plaintiffs agree that Water Code section 13274 allows a county to impose stricter regulations than [\*1606] those contained in the federal regulations on the land application of Class B biosolids. Plaintiffs contend, however, that County has imposed an outright ban and thus has gone further than

Water Code section 13274 allows when it is read in conjunction with Part 503. (See *Blanton v. Amelia County* (2001) 261 Va. 55 [540 S.E.2d 869] [\*\*73] [county ordinance banning use of biosolids on farmland held invalid because of conflict with Virginia statute and regulations]; *O'Brien v. Appomattox County* (W.D.Va. 2003) 293 F. Supp. 2d 660 [same]; *Franklin County v. Fieldale Farms Corp.* (1998) 270 Ga. 272 [507 S.E.2d 460] [Georgia water quality statute regulating land application of [\*\*\*116] sludge implicitly preempted county ordinance regulating land application of sewage sludge, except in area of monitoring].)

Plaintiffs' contention presents an issue of statutory construction concerning the meaning of subdivision (i) of section 13274 of the Water Code, which provides: "Nothing in this section restricts the authority of a local government agency to regulate the application of sewage sludge and other biological solids to land within the jurisdiction of that agency, ..." (Italics added.)

(29) Under plaintiffs' statutory construction, the word "regulate" does not include the authority to prohibit an activity. Accepting this narrow view of the word "regulate" for purposes of argument,<sup>67</sup> it does not follow that County lacks the authority to prohibit the application of Class B biosolids to land within its jurisdiction. This is because the statute refers to "sewage sludge" and not specifically to Class B biosolids.<sup>68</sup> Ordinance G-6638 did not prohibit "the application of sewage sludge ... to land within the jurisdiction of [County]" (Wat. Code, § 13274, subd. (i)) within the usual, ordinary meaning of that [\*\*\*117] language because it would have allowed the application of sewage sludge that has been treated to specified, stringent standards. By allowing the land application of EQ biosolids, Ordinance G-6638 would have regulated how much treatment sewage sludge must receive before it was applied within the unincorporated area of Kern County. Accordingly, the heightened treatment standards do not conflict with Water Code section 13274 when the term "sewage sludge" is given its usual, ordinary meaning--that is, read literally.<sup>69</sup>

<sup>67</sup> But see *Young v. Department of Fish & Game* (1981) 124 Cal. App. 3d 257, 279 [177 Cal. Rptr. 247] ("power to regulate includes the power to prohibit"); *Watkins v. Naifeh* (Tenn. 1982) 635 S.W.2d 104, 107 ("extremely broad powers to regulate the sale ... of alcoholic beverages ... extends even to the power to ban such sales"); see

also *Personal Watercraft Coalition v. Marin County Bd. of Supervisors* (2002) 100 Cal.App.4th 129, 150 [122 Cal. Rptr. 2d 425].

68 Class B biosolids are one category of "sewage sludge," which Part 503 defines as the "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works." (40 C.F.R. § 503.9(w) (2005).)

[\*\*\*118]

69 We need not reach the question of statutory construction concerning whether the authority to "regulate" includes or excludes the authority to ban an entire activity. Thus, although we requested supplemental briefing on whether it would be appropriate for this court to take judicial notice of State Water Board's General Order 2004-0012, which states the Water Code does not preempt the authority of local agencies to prohibit the use of biosolids, we need not consider the weight to give the regulatory agency's construction of the statute. (See generally *Yamaha Corp. of America v. State Bd. of Equalization* (1999) 19 Cal.4th 1, 6-8 [78 Cal. Rptr. 2d 1, 960 P.2d 1031].)

[\*1607] Furthermore, plaintiffs have not demonstrated a legislative purpose that justifies narrowly construing the term "sewage sludge" to mean only Class B biosolids rather than using the broader, literal construction of the term set forth in 40 Code of Federal Regulations part 503.9(w) (2005). (See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal. Rptr. 115, 755 P.2d 299] [literal construction should prevail unless contrary to legislative purpose].) [\*\*\*119] Thus, the heightened treatment standards do not conflict with [\*\*74] Water Code section 13274 when that section is read in conjunction with Part 503. (See 40 C.F.R. § 503.5(b) (2005) [state and local government authorized to impose more stringent requirements].)

#### IV. Commerce Clause Analysis

Plaintiffs contend that the heightened treatment standards in Kern Code provision 8.05.040(A), 70 Ordinance G-6638, violate the commerce clause of the United States Constitution (U.S. Const., art. I, § 8, cl. 3) in that those standards (1) impermissibly discriminate against out-of-county biosolids by allowing municipalities located in Kern County to apply their own Class B biosolids on land in the incorporated areas of

Kern County, and (2) were adopted for the protectionist purpose of banning out-of-county biosolids in order to prevent damage to the reputation of agricultural products grown in Kern County.

70 See footnote 36, *ante*.

As factual support for the first of these [\*\*\*120] contentions, plaintiffs point out that the City of Bakersfield maintains an extensive Class B biosolids application program within its incorporated area. At an April 27, 1999, hearing before the Kern County Board of Supervisors, Lauren Fondahl, the biosolids coordinator for the EPA regional office in San Francisco, observed that the proposed ordinance would not prevent Bakersfield and other cities in Kern County from applying Class B biosolids on city lands, and stated that "Bakersfield has been applying for many years now on lands across from East Planz Road[,] Wasco, Taft, Delano and North of Kern in Kern Community Service District have also been applying on city lands for years."

71

71 According to the Web site maintained by the City of Bakersfield Public Works Department, approximately 3,541 dry tons per year of Class B biosolids produced from two treatment plants are applied to 5,000 acres of farmland owned by the city. (<<http://www.bakersfieldcity.us/cityservices/pubwrks/wastewater>> [as of Apr. 1, 2005].) Assuming an even distribution, each square foot of farmland would receive approximately five ounces of Class B biosolids per year.

[\*\*\*121] [\*1608] In contrast to the Bakersfield example, however, the administrative record also shows that not all municipalities located in Kern County were able to apply their Class B biosolids on land within an incorporated area of Kern County. A September 13, 1999, letter from the City of Shafter indicated that the city had applied biosolids from its treatment plant to neighboring agricultural land that was in the unincorporated area of Kern County and stated that the proposed ordinance would "force local, smaller communities, which rely on cost-saving alternatives to promote growth and development, to explore other methods of biosolid use or treatment that require technology and resources that we may not be able to acquire."

#### A. Scope of the Dormant Commerce Clause

(30) The commerce clause of the federal Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." (U.S. Const., art. I, § 8, cl. 3.) This explicit grant of power has been interpreted as an implied limitation on the power of states and local government to adopt statutes, regulations and ordinances that burden or interfere with interstate [\*\*\*122] commerce. (*West Lynn Creamery, Inc. v. Healy* (1994) 512 U.S. 186, 192 [129 L. Ed. 2d 157, 114 S. Ct. 2205].) Known as the "dormant" or "negative" commerce clause (*Barclays Bank [\*\*75] PLC v. Franchise Tax Bd. of Cal.* (1994) 512 U.S. 298, 311, fn. 9 [129 L. Ed. 2d 244, 114 S. Ct. 2268]), this limitation has been characterized as "predicated upon the implications of the commerce clause itself, [citations], or upon the presumed intention of Congress, where Congress has not spoken, [citations]." (*Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761, 768 [89 L. Ed. 1915, 65 S. Ct. 1515].) Consequently, where Congress has spoken and specifically authorized the state or local government action, the dormant commerce clause does not apply. (*White v. Mass. Council of Constr. Employers* (1983) 460 U.S. 204, 213 [75 L. Ed. 2d 1, 103 S. Ct. 1042] (*White*).)

The threshold question is whether Ordinance G-6638 is subject to analysis under the dormant commerce clause.<sup>72</sup> This question will be answered in the [\*1609] affirmative if (1) an article of commerce is involved and (2) Congress did not specifically authorize the adoption of such an ordinance.

72 The parties did not address this threshold question in their initial briefs, but followed the approach used by others in analyzing the validity of local sewage sludge regulation. For example, the parties in a case involving a ban on biosolids application by a county in Virginia appear to have assumed the dormant commerce clause applied and argued whether the sewage sludge ordinance violated a particular test. (*Welch v. Bd. of Sup'rs of Rappahannock County, Va.* (W.D.Va. 1995) 888 F. Supp. 753, 758 (*Welch*); see *Synagro-WWT, Inc. v. Rush Tp., Penn.* (M.D.Pa. 2002) 204 F. Supp. 2d 827, 842-843 [allegations sufficient to state a claim under two-tiered analysis applied to violations of dormant commerce clause]; Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Env'tl. Aff. L.Rev. at pp. 718-727 [discussion of dormant commerce clause does not

address whether enactment of Clean Water Act restricts or eliminates application of dormant commerce clause to local sewage sludge regulations]; Harrison & Eaton, *The Role of Municipalities in Regulating the Land Application of Sewage Sludges and Septage* (2001) 41 Nat. Resources J. 77, 112-115 [overview of commerce clause does not address threshold question].) Accordingly, this court requested supplement briefing on this threshold question. (See Gov. Code, § 68081.)

#### [\*\*\*123] B. Article of Commerce

(31) The United States Supreme Court has held that the processing and disposal of solid waste in landfills is an article of commerce. (*C & A Carbone, Inc. v. Clarkstown* (1994) 511 U.S. 383, 391 [128 L. Ed. 2d 399, 114 S. Ct. 1677]; see *Philadelphia v. New Jersey* (1978) 437 U.S. 617, 628 [57 L. Ed. 2d 475, 98 S. Ct. 2531]; Nowak & Rotunda, *Constitutional Law* (5th ed. 1995) § 8.8, pp. 299-300 [out-of-state buyers purchased space in landfill, waste was not purchased]; but see Cox, *Burying Misconceptions About Trash and Commerce: Why It Is Time to Dump Philadelphia v. New Jersey* (1991) 20 Cap. U. L.Rev. 813, 829 [trash is not a commodity but a regulated stream to which the commerce clause should not apply].) Sewage sludge differs from solid waste in that economic benefits are realized by farmers using treated sewage sludge as a fertilizer. This difference creates a stronger case for concluding that an article of commerce is involved in transactions concerning the use of sewage sludge on agricultural land. Accordingly, based on the strength of the analogy to solid waste and the commercial value resulting from the application of treated [\*\*\*124] sewage sludge to land, we conclude that the land application of sewage sludge is an article of commerce for purposes of the commerce clause.

#### C. Congress Authorized Local Sewage Sludge Ordinances

Congress has not been silent on the issue of local regulation of the land application of sewage sludge. Specifically, the Clean Water Act authorizes some degree of local control over the use and disposal of [\*\*76] sewage sludge so long as federal regulatory standards are met: "The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment

works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations." (33 U.S.C.A. § 1345(e).)

The regulations of the EPA reiterate this aspect of local control: "Nothing in this part precludes a State or political subdivision thereof ... from imposing requirements for the use or disposal of sewage sludge more [\*1610] stringent than the requirements in this part [\*\*\*125] or from imposing additional requirements for the use or disposal of sewage sludge." (40 C.F.R. § 503.5(b) (2005).)

(32) The foregoing statutory and regulatory language must be examined to determine if Congress affirmatively permitted the adoption of a local ordinance like Ordinance G-6638. (*White, supra*, 460 U.S. at p. 213 [applicable federal statute and regulations examined to determine if they authorized City of Boston's requirement that construction contracts it entered must be with firms that hire half or more of their workers from Boston].) "Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 [89 L. Ed. 1915, 65 S. Ct. 1515] (1945)." (*Ibid.*) As the United States Supreme Court has noted, however, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." (*South-Central Timber Dev. v. Wunnicke* (1984) 467 U.S. 82, 91 [81 L. Ed. 2d 71, 104 S. Ct. 2237].)

(33) It is unmistakably clear that Congress [\*\*\*126] intended "the manner of disposal or use of sludge [to be] a local determination" so long as minimum federal standards were met. (33 U.S.C.A. § 1345(e).) (34) It is equally clear that the restriction in Ordinance G-6638--that only sewage sludge meeting the heightened treatment standards can be applied to land in Kern County--reflects a local determination of the manner of disposal or use of sewage sludge.<sup>73</sup> Thus, the heightened treatment standards are the type of local regulation expressly authorized by the Clean Water Act. (Cf. *Welch, supra*, 888 F. Supp. at p. 760 [ordinance banning the land application of sewage sludge permissible under Clean Water Act].) Because Congress authorized a local ban on the land application of sewage sludge (*Welch, supra*, at pp. 757-758), one can strongly infer that Congress also

authorized local governments to impose a lesser burden on commerce such as the heightened treatment standards in Kern Code provision 8.05.040(A), Ordinance G-6638. (See *Posadas de Puerto Rico Assoc. v. Tourism Co.* (1986) 478 U.S. 328, 345-346 [92 L. Ed. 2d 266, 106 S. Ct. 2968] [the greater power to ban an activity necessarily [\*\*\*127] includes the lesser power to impose conditions on the activity].)

73 Plaintiffs argue the statutory phrase "local determination" refers only to the decisions made by a wastewater treatment agency and excludes ordinances adopted by land use agencies such as County. We reject this statutory construction because, among other things, it cannot be reconciled with the EPA's regulation concerning local imposition of requirements for the use or disposal of sewage sludge. (See 40 C.F.R. § 503.5(b) (2005).)

In light of the foregoing, plaintiffs' assertion that Ordinance G-6638 is a step [\*\*77] towards the balkanization of the sewage sludge industry misses the [\*1611] mark; the natural consequence of Congress's authorization of local control is variety and inconsistency in the way localities choose to address the subject. What plaintiffs characterize as balkanization is more appropriately characterized as Congress's choosing to exploit one of the strengths of our federal system--its flexibility--by allowing states [\*\*\*128] and localities to (1) experiment with different approaches (see *New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311 [76 L. Ed. 747, 52 S. Ct. 371] (dis. opn. of Brandeis, J.) [describing states as laboratories that can experiment with different laws]), subject to the minimum national standard contained in Part 503, and (2) adapt their regulations to local conditions, such as geography, climate, soil types and population density.

#### D. Discrimination Against Interstate Commerce

Plaintiffs contend, however, that although Congress has authorized some local determinations concerning the land application of sewage sludge, it has not expressly authorized ordinances that discriminate against interstate commerce. (Cf. *White, supra*, 460 U.S. at p. 213 [federal program authorized local favoritism in hiring construction workers as a means for economic revitalization and providing opportunities for the poor, minorities, and unemployed].) We will address this contention by considering whether the Clean Water Act

authorized discriminatory local ordinances and, if not, whether Ordinance G-6638 discriminates against interstate commerce.

1. *The Clean Water [\*\*\*129] Act does not authorize discrimination*

(35) The Clean Water Act does not explicitly authorize local governmental units to discriminate against sewage sludge that arrives in a state through interstate commerce. (See 33 U.S.C.A. § 1345(e).) Nor is there anything in the statutory language that gives rise to a reasonable inference that Congress intended such a result. Also, County has cited no legislative history revealing such a Congressional intent. Thus, County has failed to establish that Congress demonstrated an unmistakably clear intent to allow discriminatory state regulation of the land application of sewage sludge. (See *South-Central Timber Dev. v. Wunnicke*, *supra*, 467 U.S. at p. 91.) Consequently, any discriminatory aspect of a local ordinance regulating the land application of sewage sludge is still subject to scrutiny under the limitation imposed on discrimination by the dormant commerce clause.

2. *Ordinance G-6638 is not facially discriminatory*

(36) Unless Congress has provided otherwise, an ordinance that discriminates against interstate commerce, as opposed to one that regulates evenhandedly, is virtually always invalid [\*\*\*130] under the dormant commerce clause. (*Oregon [\*1612] Waste Systems v. Dept. of Env. Quality* (1994) 511 U.S. 93, 99 [128 L. Ed. 2d 13, 114 S. Ct. 1345] [landfill disposal fees imposed by Oregon statute were higher for waste generated in other states than for waste generated in Oregon and, thus, were facially discriminatory and invalid].) In this context, discrimination means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." (*Ibid.*)

Ordinance G-6638 does not on its face discriminate against interstate commerce, because its provisions apply to the land application of all sewage sludge regardless of its geographical origin. (See Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Env'tl. Aff. [\*\*78] L.Rev. at p. 722 ["local ordinance upheld in *Welch* banned all land application of sewage sludge, not just sewage sludge generated out-of-state"].) Consequently, Ordinance G-6638 is distinguishable from a Michigan statute that violated the dormant commerce clause by creating

separate categories for in-county and out-of-county solid waste. (*Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources* (1992) 504 U.S. 353 [119 L. Ed. 2d 139, 112 S. Ct. 2019]; [\*\*\*131] see *Philadelphia v. New Jersey*, *supra*, 437 U.S. at p. 624 [New Jersey's prohibition on the importation of solid waste unconstitutional].)

3. *Ordinance G-6638 is not discriminatory in effect*

In addition to facial discrimination, an ordinance may be discriminatory "in practical effect." (*Hughes v. Oklahoma* (1979) 441 U.S. 322, 336 [60 L. Ed. 2d 250, 99 S. Ct. 1727].) Plaintiffs' claim of discrimination in practical effect is based on an incorrect comparison of the impacts of different regulations, rather than different impacts caused by the challenged ordinance. Plaintiffs compare (a) the effect of the ordinance within the geographical area that comprises the jurisdiction of County to (b) the effect of other regulations, or the lack of regulations, applicable to the incorporated areas of Kern County. The incorporated areas of Kern County are necessarily outside the jurisdiction and authority of County; County's authority extends only to the unincorporated areas within its borders. (See Cal. Const., art. XI, § 7 ["A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict [\*\*\*132] with general laws"]; *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 274-275 [17 Cal. Rptr. 2d 845] [only unincorporated area of a county is "within its limits"].) Therefore, the correct comparison is between the impact of the ordinance on sewage sludge generated outside the jurisdictional authority of County and the impact on sewage sludge generated within that area. (See *Associated Industries of Missouri v. Lohman* (1994) 511 U.S. 641, 650 [128 L. Ed. 2d 639, 114 S. Ct. 1815] ["discrimination is appropriately assessed with reference to the specific subdivision in which applicable laws reveal differential treatment"].) In this case, the ordinance's burden on the sewage sludge [\*1613] industry is the same without regard to the place of origin of the sewage sludge. Sewage sludge, regardless of whether it originates in Kern County, other counties in California, or out of state must be treated to the same standards before it is allowed to be applied to land in the unincorporated areas of Kern County.

Plaintiffs stated at oral argument that discrimination in practical effect occurred because no in-county

producer of sewage sludge needed access to land within the unincorporated area [\*\*\*133] of Kern County to dispose of its sewage sludge. This argument is rejected because it is factually inaccurate. The administrative record contains a letter from the City of Shafter indicating that it had applied biosolids from its treatment plant to neighboring agricultural land that was in the unincorporated area of Kern County.

Consequently, plaintiffs have failed to meet their burden of showing that the ordinance, in practical effect, treats out-of-state economic interests <sup>74</sup> differently than [\*\*79] in-state economic interests. (See *Pacific Merchant Shipping Assn. v. Voss* (1995) 12 Cal.4th 503, 517 [48 Cal. Rptr. 2d 582, 907 P.2d 430] [party raising commerce clause challenge has burden of showing discrimination].) In other words, plaintiffs have failed to show that Ordinance G-6638 causes an out-of-county producer of sewage sludge to be at a disadvantage to an in-county producer of sewage sludge in the competition among those producers to acquire the right to place their sewage sludge on agricultural land located in the unincorporated areas of Kern County. <sup>75</sup>

74 If Ordinance G-6638 were shown to discriminate against out-of-county interests, that discrimination, by definition, would include discrimination against out-of-state interests. (See *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, *supra*, 504 U.S. 353.) Thus, even though the record does not show any sewage sludge originating outside California was ever shipped to Kern County, we will treat plaintiffs' arguments as implicating interstate commerce.

[\*\*\*134]

75 This lack of discrimination also means the heightened treatment standards do not violate the equal protection clause.

Plaintiffs condemn Ordinance G-6638 as illegitimate economic protectionism prohibited by the commerce clause. But the possibility that the reputation of agricultural produce from Kern County benefited from the enactment of Ordinance G-6638 is not enough to violate the commerce clause. First, Ordinance G-6638 still falls within the scope of what Congress authorized. Second, the possibility that consumers might view Kern County produce more favorably does not render the ordinance discriminatory against interstate commerce

from the perspective of (1) in-county farmers who are selling sewage sludge disposal services and applying biosolids to their land in the unincorporated areas of Kern County or (2) the producers of sewage sludge, regardless of their location, that are buying sewage sludge disposal services. RBM focuses on the farmers who applied Class B biosolids and argues [\*1614] Ordinance G-6638 had the practical effect of discriminating against them for the benefit of farmers who [\*\*\*135] claimed the reputation of their products was harmed by allowing the land application of Class B biosolids in Kern County. This theory of discrimination and protectionism fails because all in-county farmers are subject to the same practical effect of Ordinance G-6638--they can no longer apply Class B biosolids to their land. Furthermore, this result was not achieved at the expense of out-of-state competition. (See *Hunt v. Washington Apple Advertising Comm'n* (1977) 432 U.S. 333 [53 L. Ed. 2d 383, 97 S. Ct. 2434] [out-of-state competition improperly discriminated against by North Carolina statute that prohibited sale of closed apple containers displaying another state's grading classification]; see also *Oregon Waste Systems v. Dept. of Env. Quality*, *supra*, 511 U.S. at pp. 106-107.)

#### E. Burden on Interstate Commerce

As we have stated, though the Clean Water Act does not authorize discrimination against interstate commerce, it does explicitly authorize local governmental entities to regulate the land application of sewage sludge. Because Congress has specifically and unmistakably authorized nondiscriminatory local ordinances like Ordinance G-6638, our analysis [\*\*\*136] of the dormant commerce clause need not consider "whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits,' *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 [25 L. Ed. 2d 174, 90 S. Ct. 844] (1970)." (*C & A Carbone, Inc. v. Clarkstown*, *supra*, 511 U.S. at p. 390.) Application of the *Pike* test is inappropriate in this case because the enactment of the Clean Water Act reflects a determination by Congress that local regulation is appropriate, which necessarily implies that localities have a legitimate purpose in regulating the use and disposal of [\*\*80] sewage sludge within their jurisdictional boundaries and that the local benefits from such a regulation outweigh any nondiscriminatory burdens on interstate commerce that might result.

#### V. California Constitutional Limitations on Exercise of

### *Police Power*

Plaintiffs contend that the Kern County Board of Supervisors failed to consider the effect of the ordinance on surrounding areas beyond the borders of Kern County, and that this failure renders the ordinance a defective exercise of the police powers granted to County by the [\*\*\*137] California Constitution. (See Cal. Const., art. XI, § 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"].)

(37) The California Supreme Court has identified the standard for determining whether the adoption of a land use restriction is a valid exercise of the [\*1615] police power granted under the California Constitution. An ordinance is valid "if it is fairly debatable that the [land use] restriction in fact bears a reasonable relation to the general welfare." (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 601 [135 Cal. Rptr. 41, 557 P.2d 473].) The "general welfare" that must be considered may extend beyond the geographical limits of the local governmental entity adopting the ordinance. "[I]f a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region." (*Ibid.*)

In ruling against the plaintiffs on this claim, the superior court stated "that OCS D has not [\*\*\*138] presented any evidence of the impact on the entire region as is required pursuant to *Associated Home Builders ...* ." The superior court observed that the administrative record did not contain a study of the ordinance's regional impact and found OCS D was collaterally estopped from raising the issue again because it had already been presented in the CEQA portion of the lawsuit.

We previously held that the imposition of heightened treatment standards in Kern Code provision 8.05.040(A), Ordinance G-6638, was not valid under CEQA. An EIR should have been prepared because plaintiffs presented substantial evidence to support a fair argument that the heightened treatment standards might have a significant effect on the environment, including effects occurring outside Kern County. (See part II.A., *ante.*) Assuming for purposes of argument that County exceeded the limitations imposed by the California Constitution on the exercise of police power when it adopted Ordinance G-6638, the preparation of the EIR required by this

decision would have the effect of addressing the alleged failure to consider the general welfare outside Kern County. Therefore, we need not rule separately on this constitutional [\*\*\*139] challenge to the heightened treatment standards.

### VI. *The Biosolids Impact Fee Violates Vehicle Code Section 9400.8*

Vehicle Code section 9400.8 provides in pertinent part: "Notwithstanding any other provision of law, ... no local agency may impose a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads, after December 31, 1990, unless the local agency had imposed the fee prior to June 1, 1989." <sup>76</sup>

76 This statutory provision became operative because voters approved Senate Constitutional Amendment No. 1 of the 1989-1990 Regular Session (Prop. 111) at the June 5, 1990, primary election. (See *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 583, fn. 13 [7 Cal. Rptr. 2d 245, 828 P.2d 147].)

[\*1616] [\*\*81] In moving for summary adjudication of issues, OCS D asserted that the biosolids impact fee was invalid because it was barred by Vehicle Code section 9400.8. [\*\*\*140] The superior court denied summary adjudication and ruled "[t]his issue was not raised by OCS D's pleadings and the pleadings control. Pleadings must give notice of the claim. [Citation.]" OCS D raised the issue again at trial and requested leave to amend its complaint. The superior court denied this request and stated that "[a]mendment at this time would be unduly prejudicial to ... County."

Plaintiffs contend that the complaint raised the preemption issue, although it did not specifically reference Vehicle Code section 9400.8, and that the superior court's refusal to consider the issue at the motion for summary adjudication or at trial was a prejudicial abuse of discretion. County argues that plaintiffs' claim is procedurally defective because they did not exhaust their administrative remedies and failed to file a timely motion to amend their complaint. County also asserts that the biosolids impact fee imposed by the ordinance is a bona fide impact fee and not a fee for the privilege of using the streets and highways in Kern County. <sup>77</sup>

77 The provisions of Ordinance G-6638

relevant to the biosolids impact fee are contained in Kern Code provisions 8.05.020(F) and 8.05.030(H), which expired on December 31, 2002. (See FACTS AND PROCEEDINGS, *ante*.)

[\*\*\*141] **(38)** We independently review issues of statutory construction and the application of that construction to a set of undisputed facts as questions of law. (*Twedt v. Franklin* (2003) 109 Cal.App.4th 413, 417 [134 Cal. Rptr. 2d 740].)

#### A. Exhaustion Doctrine

County asserts that plaintiffs did not raise Vehicle Code section 9400.8 during the administrative proceedings and, as a result, "are barred by the exhaustion doctrine from seeking judicial review of this claim. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal. App. 3d 1194, 1197-1198 [200 Cal. Rptr. 855].)"

*Coalition for Student Action v. City of Fullerton* did not involve a claim that a local ordinance was preempted by a state statute. (See *Coalition for Student Action v. City of Fullerton*, *supra*, 153 Cal. App. 3d 1194.) In that case, the plaintiffs failed to assert CEQA violations at the administrative level and then sought to set aside approval of construction plans based on alleged violations of CEQA. The superior court denied their petition for a writ of mandate based on the failure to exhaust administrative remedies, and the Court of Appeal affirmed. [\*\*\*142] (*Id.* at p. 1198.) [\*1617]

Alleged violations of CEQA are distinguishable from alleged violations of Vehicle Code section 9400.8 because (1) CEQA expressly requires the exhaustion of administrative remedies (§ 21177; see Remy, Guide to CEQA, *supra*, pp. 578-588 [exhaustion of administrative remedies] and (2) compliance with CEQA is first determined by a public agency rather than the courts. In contrast, a claim that an ordinance violates Vehicle Code section 9400.8 is not given to the exclusive jurisdiction of a county's board of supervisors. (See *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390-391 [6 Cal. Rptr. 2d 487, 826 P.2d 730] [exhaustion doctrine applies where an agency alone has jurisdiction over a case].) In asserting its [\*\*82] theory of exhaustion, County has not shown that there was an available administrative procedure for asserting the ordinance violated the prohibition contained in Vehicle Code section 9400.8. (See *People v. Beaumont Inv., Ltd.*

(2003) 111 Cal.App.4th 102, 125 [3 Cal. Rptr. 3d 429] [exhaustion doctrine does not apply in the absence of an available administrative remedy].) [\*\*\*143] The coincidental existence of a CEQA administrative procedure did not confer exclusive jurisdiction over the preemption challenge on the Kern County Board of Supervisors, or require the preemption challenge to be raised in the CEQA proceeding, before a court could obtain jurisdiction over such a challenge.

**(39)** Accordingly, we hold that the doctrine of exhaustion of administrative remedies does not apply to the claim that the biosolids impact fee imposed by the ordinance is preempted by Vehicle Code section 9400.8.

#### B. Mitigation Fee Act Does Not Apply to the Biosolids Impact Fee

County asserts that the biosolids impact fee was adopted by County pursuant to the Mitigation Fee Act, Government Code section 66000 et seq. and therefore the prohibition in Vehicle Code section 9400.8 does not apply.

**(40)** We do not address the issues of statutory construction raised in connection with the Mitigation Fee Act in detail because the prohibition on certain fees contained in Vehicle Code section 9400.8 is not overridden by the Mitigation Fee Act. Vehicle Code section 9400.8 [\*\*\*144] expressly states that its prohibition applies "[n]otwithstanding any other provision of law." The Mitigation Fee Act was in effect at the time Vehicle Code section 9400.8 became operative and thus was among the other provisions of law covered by the quoted phrase. In short, despite the existence of the Mitigation Fee Act, a local agency may not impose a charge for the privilege of using its streets and highways.

#### C. Prejudice and Leave to Amend to Reference Specific Code Section

**(41)** The superior court found that allowing plaintiffs to amend their pleadings to assert a violation of Vehicle Code section 9400.8 would prejudice County. This finding is not supported by any evidence. Indeed, County [\*1618] did not even assert it experienced prejudice in its trial brief, reply trial brief, or appellate brief. "A pleading may be amended at the time of trial unless the adverse party can establish prejudice. [Citation.] Where a party is allowed to prove facts to establish one cause of action, an amendment which would allow the same facts to



establish another cause of action is favored, and a trial court abuses its discretion by prohibiting [\*\*\*145] such an amendment when it would not prejudice another party. [Citations.] A variance between pleading and proof does not justify the denial of an amendment to conform pleading to proof unless the unamended pleading 'misled the adverse party to his prejudice in maintaining his action or defense upon the merits.' [Citations.]" (*Brady v. Elixir Industries* (1987) 196 Cal. App. 3d 1299, 1303 [242 Cal. Rptr. 324], overruled on another ground in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1248-1251 [32 Cal. Rptr. 2d 223, 876 P.2d 1022].)

(42) As a general rule, where the evidence to support the cause of action in the amendment is already before the court, the opposing party will not experience prejudice if the amendment is allowed. (See Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2004) ¶ 12:394, p. 12-79 (rev. # 1, 2004).) In this case, the general rule applies because the evidence relied upon by [\*\*83] plaintiffs was contained in the administrative record and was discussed before the superior court in connection with the constitutional challenges raised against the biosolids impact fee. In addition, County has not shown that the lack of a specific reference [\*\*\*146] to Vehicle Code section 9400.8 in the complaint misled it in the presentation of its defense, either in terms of the evidence it would have produced or in a manner not related to evidence. Thus, County has not shown that this situation falls within an exception to the general rule. Accordingly, we conclude that plaintiffs should have been allowed to assert that the biosolids impact fee was prohibited by Vehicle Code section 9400.8.

#### D. Vehicle Code Section 9400.8 Preempts the Biosolids Impact Fee

The general principles governing state law preemption of a local ordinance were set forth by the California Supreme Court in *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893 [16 Cal. Rptr. 2d 215, 844 P.2d 534] as follows:

(43) "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.' [Citations.] [¶] 'A conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' [Citations.] [¶] Local legislation is 'duplicative' of general law when it is coextensive

[\*\*\*147] therewith. [Citation.]

[\*1619] "Similarly, local legislation is 'contradictory' to general law when it is inimical thereto. [Citation.]

"Finally, local legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area [citation], or when it has impliedly done so in light of one of the following indicia of intent: '(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. [Citations.]" (*Sherwin-Williams Co. v. City of Los Angeles, supra*, 4 Cal.4th at pp. 897-898.)

(44) By adopting Vehicle Code section 9400.8, the Legislature expressly [\*\*\*148] prohibited a county from "impos[ing] a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads ... ." (*Ibid.*) This language raises two questions of statutory construction. First, was the biosolids impact fee a "tax, permit fee, or other charge"? Second, do fees "for the privilege of using its streets or highways" <sup>78</sup> include fees designed to cover damage resulting from the use of a county's roads?

78 "Highway" and "street" are both defined as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." (Veh. Code, §§ 360, 590.)

County does not argue that the biosolids impact fee was not a "permit fee or other charge" for purposes of Vehicle Code section 9400.8. The parties' dispute focuses on the second issue. County specifically [\*\*84] argues the fee was not for road use, but was a bona fide impact fee: "The [\*\*\*149] fee is imposed only on permittees to recover the costs for repairing damage or upgrading county roads due to the incremental increase in truck traffic transporting biosolids to be land applied in Kern County."

In describing the underlying basis for the fee, County states in its appellate brief that it "commissioned an engineering firm to determine the condition of local roads used for biosolids transport, the volume of traffic attributable to trucks hauling biosolids on ... those roads, and the estimated cost of maintaining the roads in their current condition. [Citation.] The study specifically identified the roads affected, the length of the road segments, the required thickness of paving overlay needed to maintain them, and the price [\*1620] of the required materials. [Citation.] Based on this information, ... County determined the amount of the fee needed to pay the estimated cost of the required maintenance. [Citation.]"

County explicitly argues that a fee for the privilege of using its roads is distinguishable from a fee "for mitigating the impacts to the ... County infrastructure shown to be caused by the transport of Biosolids." (Ordinance G-6638, Kern Code provision 8.05.020(F) [definition [\*\*\*150] of biosolids impact fee].) Whether such a distinction should be recognized is a matter of statutory construction.

(45) A reviewing court's fundamental task in determining the meaning of a statute "is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citation.]" (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [105 Cal. Rptr. 2d 457, 19 P.3d 1196].) The analysis starts with an examination of the actual words of the statute, giving them their usual, ordinary meaning. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 [66 Cal. Rptr. 2d 319, 940 P.2d 906].) A court may refer to the definitions contained in a dictionary to obtain the usual and ordinary meaning of a word. (*Martinez v. Enterprise Rent-A-Car Co.* (2004) 119 Cal.App.4th 46, 54, fn. 3 [13 Cal. Rptr. 3d 857].)

Webster's Third New International Dictionary (1986), page 2524, states the verb "use" "is general and indicates any putting to service of a thing, usu. for an intended or fit purpose ... ." This definition is quite broad because it covers "any putting to service" (italics added). If the Legislature employed the literal meaning of this definition, then the "privilege of using" a road would cover the privilege of putting that road [\*\*\*151] to service. Because trucks hauling loads within the legal weight limit are putting to service the roads over which they travel and they have the privilege of traveling over those roads as a result of being properly licensed and

registered, it follows that a literal reading of the phrase the "the privilege of using [a county's] streets or highways" includes driving a truck on a road even if it causes incremental damage to the road. In other words, a road maintenance or impact fee is simply one type of fee for the privilege of using a road.

Before adopting the literal meaning of the word "using," we must check the resulting statutory construction to determine if it comports with, or frustrates, the purpose of the statutory scheme. (See *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 777 [63 Cal. Rptr. 2d 859, 937 P.2d 290] [statutory language must be construed in context by referring to the nature and purpose of the statutory scheme as a whole]; *Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645 [335 P.2d 672] [legislative purpose will not be sacrificed to a literal construction].) [\*1621]

[\*\*85] First, neither Vehicle Code section 9400.8 [\*\*\*152] nor the remainder of article 3 of chapter 6 of division 3 of the Vehicle Code--which addresses weight fees assessed at vehicle registration--contains an express exception for local fees or charges that attempt to recover damage to streets or highways caused by vehicle use.

Second, such an exception cannot be implied. Vehicle Code section 9400.8 expressly creates an exception for "extra legal loads" and authorizes local agencies to collect a permit fee for those types of loads. Because the exception for extra legal loads shows the Legislature was capable of expressing its intent to except certain uses, it creates the inference that the Legislature did not intend any exceptions that were not expressly stated. (See Code Civ. Proc., § 1858 [judge may not insert what Legislature has omitted]; see *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230 [32 Cal. Rptr. 2d 19, 876 P.2d 505] [express statutory exemptions generally preclude implied exemptions].)

Third, Vehicle Code section 9400.8 is part of article 3 of chapter 6 of division 3 of the Vehicle Code. Division 3 concerns the registration of vehicles and [\*\*\*153] certificates of title. Chapter 6 addresses registration and weight fees. Article 3, which includes Vehicle Code sections 9400 through 9410, concerns weight fees. For example, subdivision (b) of Vehicle Code section 9400 sets forth registration fees based on unladen weight for commercial motor vehicles with not more than two axles, and subdivision (c) does the same for commercial motor

vehicles with three or more axles and certain trailers and dollies. <sup>79</sup> Thus, it appears that Vehicle Code section 9400.8 is part of a statutory scheme that regulates fees based on vehicle weight. <sup>80</sup> This statutory scheme as set forth in article 3 of chapter 6 of division 3 of the Vehicle Code, and the Legislature's statement in the legislation that added section 9400.8 to the Vehicle Code that "[n]othing in this act shall be construed to allow local governments to impose fees not otherwise authorized by statute" (Stats. 1989, ch. 1337, § 4, p. 5498), support the conclusion that the Legislature intended to fully occupy the field of fees related to the weight of vehicles carrying legal [\*\*\*154] loads.

<sup>79</sup> Vehicle Code section 9400.1 became effective on September 29, 2000, and sets forth a range of fees based on gross vehicle weight for commercial motor vehicles with declared gross vehicle weight of 10,001 pounds or more. (Stats. 2000, ch. 861, § 50.)

<sup>80</sup> The commercial weight fees collected under this statutory scheme are deposited with the State Treasurer, who, on order of the Controller, shall deposit the money in the State Highway Account in the State Transportation Fund. (Veh. Code, § 42205, subd. (a).) Funds from the commercial weight fee not used to cover the administration costs related to the fee may be appropriated by the Legislature to various uses including the maintenance and construction of public streets and highways. (Veh. Code, § 42205, subd. (b); see Cal. Const., art. XIX, §§ 1, 2.)

[\*1622] In opposition to the foregoing reasoning, County has cited no case law, legislative history, published legal opinion of the [\*\*\*155] Attorney General, treatise, article or other authority that adopts or endorses the distinction between fees for the privilege of using roads and fees that recover damages caused by a specific type of road use. Nor has County offered an explanation as to how such a distinction would further the purpose of the statutory scheme. In other words, County has not shown the Legislature intended to allow local agencies to charge fees for road use that causes incremental damage to the roads.

(46) Accordingly, Vehicle Code section 9400.8 must be construed to prohibit a local agency from imposing fees or charges on legal [\*\*\*86] loads that are hauled on its roads, even though hauling such loads may cause

damage beyond minor wear and tear to the roads.

The final step of our analysis is to determine if the biosolids impact fee was in fact the type of fee prohibited by Vehicle Code section 9400.8. This is necessary because, on its face, the biosolids impact fee was not assessed on miles driven on roads. Instead, the biosolids impact fee was assessed primarily on tons of Class B biosolids applied to land in the unincorporated areas of Kern County. Although this [\*\*\*156] basis of assessment is attenuated from actual road use, that attenuation is insufficient to save the entire biosolids impact fee. The undisputed facts in the administrative record establish that the per-ton amount of the biosolids impact fee was derived from (1) the miles of Kern County roads used in the hauling of biosolids, <sup>81</sup> (2) the quality of those roads, <sup>82</sup> (3) an estimate of the total weight of Class B biosolids that would be hauled before the January 1, 2003, deadline, (4) the load and volume of nonbiosolid traffic experienced by the road segments, and (5) the amount of load and volume of traffic added to each road segment by the transport of biosolids. The funds generated by the biosolids impact fee were to be used to maintain and repair roads and correct any other "infrastructure deficiencies directly associated with the hauling of Biosolids" (Ordinance G-6638, Kern Code provision 8.05.030(H)(3)), but also were available for other purposes not related to roads and other infrastructure.

<sup>81</sup> An inventory of those roads established their total length at 153.5 miles.

<sup>82</sup> The roads were classified into three categories. According to the biosolids staff report dated October 5, 1999, issued by the County Resource Management Agency, category 3 roads were designed for heavy truck traffic and, as a result, "[t]he increased truck traffic due to the biosolids transport [would] not have any noticeable effect on the structural integrity of these roads."

[\*\*\*157] (47) The way County calculated the biosolids impact fee and the way funds generated could be applied leads inescapably to the conclusion that the fee was, at least in part, a fee imposed on road use. This conclusion is reinforced by the exception in Kern Code provision 8.05.03(H)(1), Ordinance G-6638, [\*1623] that allows a waiver of the fee "[w]here the Permittee can demonstrate the land application of Biosolids does not

have an impact on County infrastructure or roads." Because the primary purpose of the biosolids impact fee was to collect funds based on the use of streets or highways located in Kern County, it violated Vehicle Code section 9400.8.

#### E. Remedy

Although the primary purpose of the biosolids impact fee was to pay for road repair and maintenance, that was not its exclusive purpose. Kern Code provision 8.05.030(H)(3), Ordinance G-6638, was in effect from January 1, 2000, through December 31, 2002, and stated that the money generated by the biosolids impact fee and other permit fees would be available to fund a number of different uses, some of which were not related to the impact of hauling biosolids over County roads.

Because of these multiple purposes, we asked [\*\*\*158] OCSD and County to submit supplemental letter briefs on the issue of what relief is appropriate when an ordinance imposes a fee for more than one purpose and one of the purposes conflicts with a statute and other purposes do not. We asked OCSD and County whether the superior court should be directed to (1) uphold the entire biosolids impact fee, (2) invalidate the entire fee, or (3) determine what portion of the fee, if any, was or will [\*\*87] be used for purposes not contrary to Vehicle Code section 9400.8 and allow that portion to stand.

The first alternative--upholding the entire fee based on the existence of some potentially valid uses of the funds generated by that fee--is not appropriate because such a remedy would allow public agencies to adopt fees with illegal purposes and save those fees from invalidation by appending one valid purpose for which the fees could be used. Thus, when a fee has both valid and invalid purposes, the entire fee cannot be upheld as valid.

Conversely, it would be unduly harsh to completely invalidate a fee when part of the funds would be used for proper purposes and the formula by which the fee is calculated--in this case, tons of [\*\*\*159] biosolids applied to the unincorporated areas of Kern County--does not itself run afoul of a statutory prohibition.<sup>83</sup>

83 A stronger argument for invalidating the entire fee might exist if the formula by which the fee is applied to the public were itself contrary to

a statute.

(48) Accordingly, we hold the appropriate relief when a fee is imposed for both valid and invalid purposes is to uphold the fee to the extent that the funds generated are applied to valid purposes and those purposes are otherwise severable from the invalid ones. (See *Williams Communications v. City* [\*1624] of *Riverside* (2003) 114 Cal.App.4th 642, 656-660 [8 Cal. Rptr. 3d 96] [unlawful portion of school facilities fee imposed on developer ordered refunded under Gov. Code, § 66020, subd. (e)].)<sup>84</sup>

84 Government Code section 66020 is not applicable to the biosolids impact fee, but it provides a useful analogy for determining the appropriate relief in this case.

[\*\*\*160] In this case, Ordinance G-6638 expressly stated that (1) the invalidity of any of its provisions would not affect the validity of its other provisions and (2) its provisions were severable. (See *City and County of San Francisco v. Flying Dutchman Park, Inc.* (2004) 122 Cal.App.4th 74, 79 [18 Cal. Rptr. 3d 532] [illegal allocation did not require invalidation of entire parking tax ordinance or reduction of parking tax arrearages because offending clause was severable under ordinance's savings clause].) Furthermore, the rate used to determine the biosolids impact fee as well as the funds generated by the fee are inherently divisible, at least down to the penny. We conclude that the appropriate relief is to invalidate the biosolids impact fee to the extent it was or will be used for purposes that violated Vehicle Code section 9400.8.

OCSD contends this court should direct the superior court to invalidate the entire biosolids impact fee and order a refund of that fee with interest. Recognizing that Kern Code provision 8.05.030(H)(3), Ordinance G-6638, created the possibility of valid purposes mixed with invalid purposes, OCSD asserts: "To the extent that ... 8.05.030(H)(3) [\*\*\*161] could be read as authorizing the use of biosolids impact fees for property inspections or the GIS tracking system, then the annual permit fee would have to be reduced and the overpayment would have to be refunded--the County cannot recover the same cost twice."

OCSD's assertion is based on the factual premise that the annual permit fees collected were sufficient to pay for all of the valid uses and, therefore, the funds generated by

the biosolids impact fee were not needed, and will not be budgeted, for valid uses. We are unable to confirm this factual premise based on the current appellate record.

Relief in the form of apportionment or allocation between valid and invalid purposes cannot be granted without further [\*\*88] findings of fact. Therefore, this matter will be remanded to the superior court for further proceedings to consider how the funds generated by the biosolids impact fee were spent or will be spent and how to separate the valid applications of funds, if any, from the invalid applications.<sup>85</sup>

85 Deciding these broad questions may involve the consideration of a wide variety of specific factual and legal issues. For example, if the terms of section 3 of Ordinance G-6638, Kern Code provision 8.05.040(M) are construed to allow the biosolids impact fee to be used to pay costs and expenses incurred in "enforcement activities," then funds from the biosolids impact fee might appropriately be allocated to cover various amounts expended in connection with *Kern County Environmental Health Services v. Arciero Ranches* (Aug. 9, 2001, F035181) (nonpub. opn.). These issues and others are best addressed in the first instance by the superior court.

[\*\*162] [\*1625] Because of the relief that will be granted on remand, we need not address the claims that the biosolids impact fee violated the equal protection clause of the United States Constitution and constituted an illegal general or special tax. (See fn. 37, *ante*; see also *Waters-Pierce Oil Co. v. City of Hot Springs* (1908) 85 Ark. 509 [109 S.W. 293] [taxing vehicles differently based on contents--petroleum products, ice or other--instead of capacity and size unconstitutional].) On one hand, if all or a portion of the biosolids impact fee is invalidated under Vehicle Code section 9400.8, then addressing other grounds of invalidity would be redundant. On the other hand, if all or a portion of the biosolids impact fee was or will be allocated to expenditures specifically related to County's biosolids regulatory program, then a rational basis exists for imposing a per ton fee on Class B biosolids and not imposing a per ton fee on other materials carried by truck. The existence of a rational basis for distinguishing between biosolids and other materials means the distinction does not violate equal protection. (See *Genesis Environmental Services v. San Joaquin Valley Unified*

*Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 605 [6 Cal. Rptr. 3d 574] [\*\*\*163] [equal protection claims are based on the lack of a rational basis for treating similarly situated persons differently].) Similarly, funds allocated to valid uses do not constitute illegal general or special taxes. (See *City of Dublin v. County of Alameda, supra*, 14 Cal.App.4th 264 [county landfill \$ 6 per ton surcharge valid as a reasonably necessary charge for cost of the program].)

## VII. County's Cross-action

County's cross-action alleged that a number of contracts and contract extensions entered by CSDLAC, CLABS, and OCS D relating to the transport and disposal of biosolids were projects for purposes of CEQA, and that some level of CEQA review should have been performed before they were entered. Environmental assessment was required, according to County, because the new contracts and extensions were either separate projects or modifications of prior projects that may have triggered the need for a subsequent EIR, supplemental EIR or subsequent negative declaration.

The superior court ruled against County on all of the causes of action in its cross-action and concluded that (1) some of the actions by the sanitation agencies were covered by program [\*\*164] EIR's that did not require additional CEQA documentation, (2) the Central Valley Water Board rather than the sanitation agency was the lead agency for some of the projects, and (3) CEQA review of an option to purchase real estate was premature under the [\*1626] provisions of Guidelines section 15004 [\*\*89] . County appeals from the rulings related to nine contracts.<sup>86</sup>

86 The first, second, fourth, seventh, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action of County's cross-action each address one of the nine contracts.

### A. Mootness of Expired Contracts and Extensions

(49) The termination dates for some of the contracts and extensions have passed since the ruling by the superior court. Consequently, we directed the parties to submit supplemental letter briefs on the question whether County's CEQA challenges to those contracts or extensions are moot. The standard this court applies in determining the mootness of a CEQA appeal is whether any effective relief can be granted the appellant. (

*Association for a Cleaner Environment v. Yosemite Community College Dist.*, *supra*, 116 Cal.App.4th 629 [\*\*\*165] [question whether initial study should have been prepared was not moot]; *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888-889 [92 Cal. Rptr. 2d 268] [completing and opening car wash project for operations while appeal was pending did not render preparation of EIR moot because modification or removal of project remained possible.]

#### 1. Extension of CSDLAC-Yakima Agreement

On November 9, 1994, CSDLAC and Yakima Company (Yakima) entered into an agreement for the removal, transportation and reuse of biosolids (Yakima Agreement) pursuant to which biosolids produced at the Carson Plant would be transported to Kern County and applied to a specific site owned and cultivated by the Buttonwillow Land and Cattle Company. The Yakima Agreement required Yakima to (1) obtain all the necessary licenses, permits and other approvals needed to perform the agreement, (2) keep complete records, (3) conduct testing of soil, groundwater and plant tissue, (4) provide CSDLAC access to the site and records for inspection purposes, (5) provide CSDLAC with copies of all regulatory reports, and (6) maintain insurance. Yakima agreed to remove up to 1,000 wet tons of [\*\*\*166] biosolids per week from CSDLAC's treatment plant and was paid \$ 25 per wet ton.

The Yakima Agreement began on November 9, 1994, remained effective for a period of three years, and provided for two 3-year renewal periods upon agreement of Yakima and CSDLAC's chief engineer. Yakima was granted the right to terminate the Yakima Agreement by giving 24 hours' notice if it could no longer legally perform the required services.

In October 1997, CSDLAC and Yakima agreed to the first extension of the Yakima Agreement. Almost two years later, in a letter dated September 16, [\*1627] 1999, CSDLAC stated: "The first three-year extension was granted and will expire on November 8, 2000. Due to the current uncertain situation involving proposed ordinances in the County of Kern, which may place restrictions on the land application of biosolids, [CSDLAC's] preference is to extend the contract through the second allowable three-year period. It is our understanding that Yakima is interested and will participate in this arrangement at the original biosolids

management fee of \$ 25.00 per wet ton."

Yakima agreed to the second extension by countersigning the letter and, as a result, the termination [\*\*\*167] date of the extended contract became November 8, 2003.

#### [\*\*90] a. Previous CEQA review and documentation

CSDLAC's final program EIR for the "Joint Outfall System 2010 Master Facilities Plan, June 1995" (1995 final Program EIR), discussed the Yakima Agreement: "Since circulation of the draft EIR, some changes in the reuse sites have occurred. ... Ag Tech has opened an additional land application site near Delano, California, that now receives some of the Districts' biosolids. The Districts also have initiated new land application contracts with the Yakima Company near Buttonwillow, California; McCarthy Family Farms near Corcoran, California; and one short-term contract with Bio Gro Systems near Blythe, California." The 1995 final Program EIR also stated that in January 1995, approximately 1,699 wet tons per week were delivered to McCarthy Family Farms and 580 wet tons per week were delivered to Yakima Company.

CSDLAC's draft Program EIR recognized that NOx emissions generated by trucks transporting biosolids from the Carson Plant to disposal or use sites would be considered a significant impact under the thresholds adopted by the South Coast Air Basin and the Southeast [\*\*\*168] Desert Air Basin. To mitigate this impact, CSDLAC stated it would perform maintenance on its trucks at least as frequently as recommended by the manufacturer.

The 1995 final Program EIR also references the mitigated negative declarations from the Central Valley Water Board obtained by McCarthy Family Farms and Yakima Company in connection with the permits that authorize them to land apply biosolids. More specifically, the Central Valley Water Board adopted resolution No. 95-011 approving the initial study and adopting a mitigated negative declaration for the issuance of a WDR relating to Yakima Company's application of biosolids to 1,372 acres of farmland in Kern County.

Based on the 1995 final Program EIR and the mitigated negative declaration of the Central Valley Water Board, CSDLAC contends that both the [\*1628] hauling and the land application aspects of the extension

of the Yakima Agreement were covered by CEQA documents and that further CEQA review was unnecessary. In contrast, County argues that CSDLAC violated CEQA by (1) approving the extension of the Yakima Agreement without performing the review required by Guidelines section 15168 and (2) failing to prepare a subsequent or supplemental [\*\*\*169] EIR that analyzed the extension.

b. *Mootness*

In responding to our inquiry, both parties have agreed that the November 8, 2003, termination date rendered County's CEQA challenge to the extension of the Yakima Agreement moot. (See *Giles v. Horn* (2002) 100 Cal.App.4th 206 [123 Cal. Rptr. 2d 735] [challenges to county contracts moot because contracts had been fully performed and had expired].) County, however, asserts that we should exercise our discretion to address the controversy because of its importance and the likelihood similar controversies will recur. We also conclude the challenge to the Yakima Agreement is moot. Furthermore, we decline County's invitation to render an advisory opinion because the future disputes between County and CSDLAC regarding CSDLAC's disposal activities are likely to be factually distinct. Thus, any ruling made now would do little to prevent future disputes from arising.

2. *CLABS Contract No. C-87685*

In January 1994, CLABS entered contract No. C-87685 (Contract C-87685) with [\*\*91] Gardner-Arciero for the loading, transporting and beneficial use of biosolids produced by CLABS. Gardner-Arciero applied the biosolids to farms near Cantil, [\*\*\*170] California. On February 11, 2000, the Los Angeles City Council approved amendment No. 3 to Contract C-87685, which included an extension of the contract through February 14, 2003. The second cause of action in County's cross-action alleged CLABS violated CEQA by failing to perform any environmental review before approving the amendment of Contract C-87685. The superior court rejected the second cause of action and ruled (1) the Central Valley Water Board, not CLABS, was the lead agency for the project, (2) the contract had been reviewed under a program EIR prepared by CLABS, and (3) the amendment did not expand the project in a way that required additional review under CEQA.

The date for the expiration of the amendment to Contract C-87685 has passed, but County asserts its CEQA claim regarding the amendment of Contract C-87685 is not moot unless that contract cannot be renewed or extended.

As with the CSDLAC-Yakima Agreement, we conclude that County's CEQA challenges to CLABS's February 11, 2000, approval of amendment [\*1629] No. 3 to Contract C-87685 is moot because the contract is no longer in effect. (See *Giles v. Horn, supra*, 100 Cal.App.4th 206.) Moreover, the mere [\*\*\*171] prospect that Contract C-87685 or a similar contract might become operative because of future actions taken by CSDLAC and Gardner-Arciero does not create an actual, present controversy.

3. *CLABS Contract No. C-94375*

In October 1996, CLABS entered contract No. C-94375 (Contract C-94375) with RBM and Valley Communities, Inc. (collectively, RBM-Valley) for the loading, transporting and beneficial use of biosolids produced at the Terminal Island and Hyperion treatment plants. RBM-Valley agreed to load CLABS's biosolids onto its trucks, transport the biosolids to RBM-Valley's sites, unload the biosolids at designated sites, and beneficially use the biosolids in accordance with applicable laws and regulations. The term of Contract C-94375 was to run for three years from the date of the first load.

On October 26, 1999, the Los Angeles City Council approved an amendment of Contract C-94375 to provide CLABS the option of renewing it for two additional three-year terms, the first of which would be from October 31, 1999, through October 30, 2002. The first cause of action in County's cross-action alleged the extension of Contract C-94375 was a project for purposes of CEQA, and CLABS violated CEQA [\*\*\*172] by failing to perform any environmental review before approving the extension. The superior court rejected this claim, ruling the extension already had been reviewed under a program EIR adopted by CLABS and further review was not required.

In its supplemental letter brief, CLABS represented that Contract C-94375 was amended again in 2000 and that the contract, as then amended, remains in effect. RBM<sup>87</sup> and CLABS assert that performing CEQA review at this point, such as preparing an EIR or the

checklist referenced in Guidelines section 15168, subdivision (c)(4), would be pointless because the particular amendment to Contract C-94375 challenged in the cross-action is no [\*92] longer in effect. In contrast, County contends that its CEQA claim regarding Contract C-94375 is not moot because the contract has remained in effect as a result of the subsequent amendment in 2000.

87 RBM also submitted a supplemental letter brief and requested that we consider it. That request is granted.

We conclude that County's cause of [\*\*\*173] action based on Contract C-94375 is not moot. First, a court order addressing Contract C-94375 may still be able to provide effective relief. For example, if an environmental assessment actually is performed by CLABS, such assessment could lead to mitigation [\*1630] measures, either as part of a supplemental EIR or a subsequent mitigated negative declaration, that affect the performance of Contract C-94375. (See *Association for a Cleaner Environment v. Yosemite Community College Dist.*, *supra*, 116 Cal.App.4th at p. 641 [CEQA claim not moot because performing initial study could lead to adoption of mitigation measures].) Second, Contract C-94375 itself is still in effect and the case law regarding the mootness of contract-based claims involves the expiration of the entire contract, not just the expiration of a single amendment. (See *Giles v. Horn*, *supra*, 100 Cal.App.4th at pp. 228-229.)

#### 4. OCSD's contract with Yakima

OCSD and Yakima entered into a contract titled "Agreement for the Management of Biosolids and Construction and Operation of Storage/Composting Facility," effective January 10, 2000 (OCSD-Yakima Agreement). Under section 1 of [\*\*\*174] the OCSD-Yakima Agreement, Yakima charged \$ 25 per wet ton "to accept delivery of up to 100 wet tons per day of Class B Biosolids" from OCSD's plants and apply the biosolids to land at specified sites in Kern County. Yakima represented that it had valid permits from the Central Valley Water Board and Kern County Environmental Health Services Department that authorized it to land apply biosolids at the sites.

The OCSD-Yakima Agreement also contained a number of provisions regarding the construction and operation of a storage and composting facility. In July 2000, however, OCSD and Yakima amended the

OCSD-Yakima Agreement to remove any reference to the construction or operation of a storage and composting facility. The trial court ruled County's CEQA challenge to the storage and composting facility was moot. We concur in that ruling.

The remaining part of the OCSD-Yakima Agreement, which concerns the land application of Class B biosolids to sites located in Kern County, was not formally terminated and technically remains in effect. Section 21.1 of the OCSD-Yakima Agreement stated that the term of the agreement would end in January 2012, unless terminated earlier. Section 23.1 of the OCSD-Yakima [\*\*\*175] Agreement stated Yakima could terminate the agreement on 24 hours' notice if it could no longer legally perform the required services. OCSD contends the adoption of the heightened treatment standards had the effect of terminating the agreement by making the land application of Class B biosolids illegal. [\*1631] County asserts the CEQA claim in its thirteenth cause of action is not moot because OCSD and Yakima could resume activities under the OCSD-Yakima Agreement if the heightened treatment standards were invalidated or modified. <sup>88</sup> [\*\*\*93] Even assuming the claim presently is moot, we will exercise our inherent discretion and consider County's CEQA claim regarding the OCSD-Yakima Agreement because of the potential it will be reinstated if the heightened treatment standards are modified. (See *In re William M.* (1970) 3 Cal.3d 16, 23 [89 Cal.Rptr. 33, 473 P.2d 737] [court has discretion to consider issue likely to recur].)

88 For example, in conducting its environmental review, County might consider alternatives to the current heightened treatment standards that would allow the application of Class B biosolids to land only used to grow fiber crops, such as cotton, or land not used for food crops and grazing. If an alternative is adopted that allows some lands to receive Class B biosolids, then deliveries might resume under the OCSD-Yakima Agreement.

#### [\*\*\*176] 5. OCSD's contract with Magan

OCSD and Shaen Magan entered a contract titled "Agreement for the Management of Biosolids," effective January 10, 2000 (OCSD-Magan Biosolids Agreement). Under the agreement, OCSD agreed to pay Magan a base fee of \$ 22.40 per wet ton for biosolids that Magan accepted, transported, and used on land located in Kings



and Kern Counties. The agreement was not expressly limited to Class B biosolids. The OCSD-Magan Biosolids Agreement was scheduled to terminate January 2003 and provided for early termination in the event that Magan could no longer legally perform the services required.

In its supplemental letter brief, OCSD has represented that OCSD and Magan agreed to extend the OCSD-Magan Biosolids Agreement through December 31, 2004, and it was likely that OCSD would exercise an option to extend the agreement an additional year. Because the agreement may have been extended through 2005, we will address the merits of County's challenge to OCSD's failure to perform any environmental assessment concerning the OCSD-Magan Biosolids Agreement and leave it to the superior court to determine the question of mootness on remand.

#### 6. OCSD's option [\*\*\*177] contracts

On January 10, 2000, OCSD entered three contracts involving the option to purchase real estate. One option contract was entered with Shaen Magan involving 1,360 acres and another option contract was entered with Shaen Magan, Inc., involving 2,666 acres. Also, OCSD entered an option and right of first refusal with Yakima, which had a 12-year total term and involved 320 acres.

[\*1632] The appellate record does not show whether OCSD's option agreements with Shaen Magan and Shaen Magan, Inc., which were to expire after three years, have been exercised, extended or allowed to expire. Similarly, the appellate record does not show the current status of OCSD's option and right of first refusal with Yakima. The option was to expire after three years and the right of first refusal was to remain in effect for nine years thereafter, but OCSD and Yakima may have rescinded it like the portion of the OCSD-Yakima Agreement. We will consider the merits of County's CEQA claims concerning these contracts and, on remand, the superior court can determine whether those claims are moot.

#### B. Program EIR and Subsequent Environmental Assessment

Both CLABS and OCSD have adopted program EIR's [\*\*\*178] that cover the management of biosolids generated at the treatment plants they operate.

##### 1. EIR's of CLABS

In connection with CLABS's wastewater treatment operations, the City of Los Angeles prepared a CEQA document titled "Offsite Sludge Transportation and Disposal Program Final EIR" dated March 1989 (CLABS 1989 FEIR). Section 3 of the CLABS 1989 FEIR is titled "Setting, Impacts, and Mitigation Measures" and excerpts are part of the appellate record.

The CLABS 1989 FEIR states that (1) the hauling and disposal of sewage sludge [\*\*94] from the treatment plants is not one specific action, but consists of potential combinations of actions involving different disposal technologies and transportation modes; (2) a detailed discussion of current or proposed projects is not provided because site-specific issues will be dealt with on a case-by-case basis; (3) future or ongoing specific projects may require additional CEQA documentation; and (4) such additional CEQA documentation would tier off the CLABS 1989 FEIR.

More recently, the City of Los Angeles also prepared a CEQA document titled "Biosolids Management Program Final [EIR]" dated July 1996 (CLABS 1996 FEIR). The first page [\*\*\*179] of its executive summary is part of the appellate record. The CLABS 1996 FEIR was designed to "serve as the basis for examining subsequent implementation actions to determine if additional environmental documentation is required." The CLABS 1996 FEIR stated that (1) under the concept of tiering, the site-specific environmental documents would incorporate by reference the analysis of environmental effects contained in the CLABS 1996 FEIR and (2) if additional effects are created or further mitigation measures are required, supplemental environmental documents would be required.

##### [\*1633] 2. OCSD's program EIR

OCSD adopted a 1999 Strategic Plan that covered all aspects of its operations and assessed its wastewater systems needs and options to the year 2020. Volume 8 of OCSD's 1999 Strategic Plan addressed biosolids management. OCSD acted as the lead agency for purposes of preparing and considering the environmental documents that CEQA required for the adoption of the 1999 Strategic Plan. As a result, OCSD caused a draft program EIR, dated June 1999, to be prepared covering the 1999 Strategic Plan (OCSD 1999 DEIR). Chapter 8.0 of the OCSD 1999 DEIR was titled "Residual Solids/Biosolids [\*\*\*180] Management Setting, Impacts, and Mitigations." In October 1999, after receipt of

comments, the "Orange County Sanitation District 1999 Strategic Plan Final Program [EIR]" was prepared. Both the draft and final EIR are part of the administrative record.

OCS D used a program EIR to allow for more streamlined and focused environmental reviews in the future, including the use of tiering. In addition, the OCS D 1999 DEIR states that "[s]hould the design or project description as identified in this document change substantially for any of the near-term projects, subsequent project-level impact evaluation will be necessary."

### 3. Lead agencies under the program EIR's

(50) CEQA defines "lead agency" as "the public agency [that] has the principal responsibility for carrying out or approving a project [that] may have a significant effect upon the environment." (§ 21067.) If more than one public agency is involved in a project but only one public agency carries out the project, then "that agency shall be the lead agency even if the project would be located within the jurisdiction of another public agency." (Guidelines, § 15051, subd. (a); see § 21165.)

CLABS and OCS D are the [\*\*\*181] agencies that actually carry out the construction and operation of wastewater treatment facilities. Thus, under the ordinary meaning of the language contained in the statutory definition of "lead agency," both CLABS and OCS D are lead agencies. This conclusion is not controversial in that CLABS and OCS D have recognized in their program EIR's that they are each the lead agency for purposes of their wastewater treatment operations.

[\*\*95] Because the operation of a wastewater treatment facility includes managing the biosolids that the facility produces, CLABS and OCS D are also each the lead agency for their activities concerning the management of biosolids. Again, this conclusion is based on (1) a straightforward application of the statutory definition of "lead agency" and the criteria contained in the Guidelines (see [\*1634] § 21067; Guidelines, §§ 15050, 15051), and (2) the program EIR's of CLABS and OCS D, both of which cover the activity of biosolids management. Thus, the program EIR's effectively acknowledge that biosolids management is the responsibility of CLABS and OCS D, even though they carry out that responsibility by contracting with other entities to handle the physical aspects of hauling and disposing [\*\*\*182] of the biosolids generated. (See §

21065, subd. (b) [definition of "project" includes activity undertaken in whole or in part through a contract with a public agency].)

### 4. Assessment of later actions related to the program

Having determined that CLABS and OCS D are lead agencies with program EIR's that address biosolids management, the question becomes what procedural steps those lead agencies should have performed to comply with CEQA when entering contracts or extensions concerning the use or disposal of biosolids generated at their facilities.

The program EIR's of CLABS and OCS D expressly state that activity undertaken after the adoption of the program EIR's might result in the use of a tiered EIR to achieve future CEQA compliance. Therefore, one possible answer to the question is that the lead agencies must follow the steps of performing a preliminary review, completing an initial study, and preparing a tiered EIR. (See § 21094.)

(51) Alternatively, section 21166 sets forth the conditions where a subsequent or supplemental EIR is required to cover a new activity that is regarded as a change in a project already covered by an existing EIR. In particular, a subsequent [\*\*\*183] or supplemental EIR is required where "[s]ubstantial changes are proposed in the project [that] will require major revisions of the [EIR]." (§ 21166, subd. (a); see Guidelines, §§ 15162 [subsequent EIR], 15163 [supplement to EIR] & 15164 [addendum to EIR].)

To identify the initial procedural steps that CLABS and OCS D should have taken, we turn to the provisions in the Guidelines that explicitly address how subsequent activity that is related to the program covered by a program EIR must be handled to comply with the documentation requirements of CEQA. Section 15168 of the Guidelines provides:

"(c) Use With Later Activities. Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared.

"(1) If a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration.

[\*1635] "(2) If the agency finds that pursuant to Section 15162 [regarding subsequent EIR's], no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as [\*\*\*184] being within the scope of the project covered by the program EIR, and no new environmental document would be required.

"(3) An agency shall incorporate feasible mitigation measures and alternatives developed in the program EIR into subsequent actions in the program.

[\*\*96] "(4) Where the subsequent activities involve site specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the program EIR."

The Discussion that follows section 15168 of the Guidelines states: "Use of the program EIR also enables the Lead Agency to characterize the overall program as the project being approved at that time. Following this approach when individual activities within the program are proposed, the agency would be required to examine the individual activities to determine whether their effects were fully analyzed in the program EIR. If the activities would have no effects beyond those analyzed in the program EIR, the agency could assert that the activities are merely part of the program which had been approved earlier, and no further CEQA [\*\*\*185] compliance would be required. This approach offers many possibilities for agencies to reduce their costs of CEQA compliance and still achieve high levels of environmental protection." <sup>89</sup>

<sup>89</sup> The Discussion is available at <[http://ceres.ca.gov/topic/env\\_law/ceqa/guidelines/art11.html](http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art11.html)> (as of Apr. 1, 2005).

Based on the requirements of subdivision (c) of section 15168 of the Guidelines, County argues that if CLABS's and OCSD's sludge disposal contracts are viewed as "subsequent activities" in their wastewater collection, treatment and disposal program, then CLABS and OCSD are required to conduct an examination to determine if additional environmental documents must be prepared and, with respect to site-specific activities, prepare a written checklist or similar device to determine whether the environmental effects of the contracts were covered by the program EIR.

There is little doubt that the contracts and extensions entered by CLABS and OCSD concern the management of biosolids and that CLABS and OCSD [\*\*\*186] have characterized the management of biosolids as part of the overall program covered by their program EIR's. Therefore, the contracts and extensions are "[s]ubsequent activities in the program" for purposes of Guidelines section 15168, subdivision (c). Consequently, CLABS and OCSD [\*1636] were required to conduct the examination and make the determinations required by that subdivision. <sup>90</sup>

<sup>90</sup> We do not address what impact, if any, the provisions of section 15004 of the Guidelines might have on the steps taken to comply with CEQA after the examination and determinations required by subdivision (c) of section 15168 of the Guidelines have been made.

The required examination and determinations were not made. Neither CLABS nor OCSD has cited to any evidence in the administrative record showing it completed these requirements. With respect to some of OCSD's contracts, the administrative record affirmatively shows such an examination was overlooked. One staff report sent to the board of directors of the OCSD on November 17, 1999, concerning [\*\*\*187] the OCSD's consideration of the OCSD-Yakima Agreement and the OCSD-Magan Biosolids Agreement, contained no entries under the heading "CEQA FINDINGS." Similarly, another staff report that recommended authorizing the staff to negotiate with Magan for the purchase of a site for the long-term management of OCSD's biosolids contained only the notation "N/A" under the heading "CEQA FINDINGS."

[\*\*97] As a result of their failure to conduct an examination and document the determinations required to be made after the examination, CLABS and OCSD violated section 15168, subdivision (c) of the Guidelines. Accordingly, they have "not proceeded in a manner required by law" and have abused their discretion for purposes of section 21168.5. <sup>91</sup>

<sup>91</sup> We will not go so far as to rule what determinations should have been made, but remand to allow CLABS and OCSD to make those determinations in the first instance.

### *C. Remand and Remedy*

To remedy the foregoing violations of CEQA and appropriately dispose of the moot causes of action [\*\*\*188] in County's cross-action, the judgment on the cross-action will be reversed and the superior court directed to dismiss the moot causes of action (see *Giles v. Horn, supra*, 100 Cal.App.4th at p. 229 [when an appeal is moot, the preferable procedure is to reverse the judgment and direct the trial court to dismiss the action for having become moot prior to its final determination on appeal]), and issue a writ of mandate under the remaining causes of action.

We have determined that dismissals of the second cause of action concerning Contract C-87685 between CLABS and Gardner-Arciero, and the seventh cause of action concerning the CSDLAC-Yakima Agreement are appropriate because of mootness. Additional causes of action in the cross-action may be moot at the time the superior court issues a writ of mandate. For instance, if Yakima and OCS D formally terminate the OCS D-Yakima Agreement, then the thirteenth cause of action would be moot and should be dismissed rather [\*1637] than included in the writ. Similarly, if any option agreement has expired unexercised or has been formally terminated, then the related cause of action would be moot. Consequently, immediately prior to issuing [\*\*\*189] a writ of mandate, the superior court should determine which causes of action are moot and exclude them from the writ or writs issued.

If all of the remaining causes of action are justiciable, the superior court should issue a writ of mandate under the first and fourth causes of action of the cross-action <sup>92</sup> directing CLABS to undertake the examination required by section 15168, subdivision (c) of the Guidelines as well as the other steps necessary to comply with that provision and any other provisions of CEQA or the Guidelines that become applicable as a result of the determinations made under section 15168, subdivision (c) of the Guidelines. A similar writ of mandate should be issued under the remaining causes of action that concern OCS D <sup>93</sup> and are justiciable. The superior court also shall require a return be filed to notify it of (1) the determinations made under Guidelines section 15168, subdivision (c), and (2) the other actions taken by the [\*\*98] sanitation agency in response to the writ of mandate. (See § 21168.9, subd. (b) [trial court shall retain jurisdiction by way of a return]; Cal. Civil Writ Practice (Cont.Ed.Bar 3d ed. 2004) § 11.1 & appen. A-15, pp. 473-474, 581-582.) [\*\*\*190]

92 The first cause of action concerns Contract C-94375 and the fourth cause of action concerns the "Contract to Purchase Real Property" that the City of Los Angeles entered with Valley Communities, Inc., and Buena Vista Lake Properties regarding 4,688 acres of land located in Kern County at a purchase price of approximately \$ 9.6 million. The contract to purchase real property was not discussed in part VII.A., *ante*, because it was performed and did not expire. Accordingly, the CEQA cause of action relating to that contract is not moot.

93 These causes of action are the tenth (OCS D-Magan Biosolids Agreement), eleventh (option agreement to purchase real estate from Magan), twelfth (option agreement to purchase real estate from Shaen Magan, Inc.), thirteenth (OCS D-Yakima Agreement) and fourteenth (option agreement to purchase real estate from Yakima) contained in County's cross-action.

The question of whether any acts taken in performance of the contracts should be enjoined should, if raised by the parties [\*\*\*191] on remand, be determined by the superior court in accordance with section 21168.9 and any other applicable provisions of law.

#### VIII. Evidentiary Objections

In connection with the non-CEQA causes of action, plaintiffs contend the superior court erred in failing to permit them to conduct discovery or submit extra-record evidence at the time of trial. Because plaintiffs' cause of action concerning the biosolids impact fee will be remanded for further proceedings, the assertions of reversible error based on the evidentiary rulings related to that cause of action need not be addressed.

[\*1638] To the extent that the evidentiary issues relate to plaintiffs' allegations that counsel for County advised the Kern County Board of Supervisors that it only had to consider the proposed ordinance's impacts within Kern County and had no duty to consider the impacts to the surrounding communities, those evidentiary issues are no longer relevant because of the broader environmental review that will be conducted in connection with the preparation of an EIR. For the same reason that we did not address the issues concerning the claim based on California's constitutional limits on exercises of the police [\*\*\*192] power (see part V., *ante*

), we need not address the related evidentiary issues.

Insofar as the evidentiary issues might relate to the other alleged constitutional violations, such as the claims based on the commerce clause and equal protection, or the affirmative defenses of laches, unclean hands and estoppel, we conclude the evidentiary rulings of the superior court did not affect the outcome on those claims and defenses, and thus were not reversible error.

## DISPOSITION

### *Appeal*

The judgment entered on plaintiffs' petition and complaint is reversed and the matter is remanded to the superior court. The orders underlying the judgment are reversed in part and affirmed in part as set forth *post*.

As to plaintiffs' first cause of action, the superior court is directed to vacate its November 22, 2000, order denying that cause of action under CEQA. The superior court is further directed to issue a writ of mandate ordering County to void its negative declaration relating to Ordinance G-6638 and to prepare an EIR that covers the adoption of an ordinance regulating the land application of treated sewage sludge within its jurisdiction. The heightened treatment standards [\*\*\*193] once reflected in Kern County Ordinance Code provision 8.05.040(A), Ordinance G-6638, and now set forth in Ordinance No. G-6931, may remain operative, provided that County prepares, in good faith without unnecessary delay, an EIR that complies with CEQA.

As to plaintiffs' second cause of action, the November 25, 2002, order denying relief is affirmed.

As to plaintiffs' third cause of action regarding the validity of the biosolids impact fee, the superior court is

directed to vacate its November 25, 2002, order denying relief under that cause of action. On remand, the superior court is directed to uphold the biosolids impact fee to the extent that the funds generated are, or will [\*\*99] be, applied to valid purposes and those purposes are [\*1639] otherwise severable from the invalid ones. The superior court also is directed to hold such further proceedings as it deems appropriate for the purpose of determining how the funds generated by the biosolids impact fee were spent, or will be spent, and how to separate the valid applications of funds, if any, from the invalid applications.

### *Cross-action*

The judgment on County's cross-action is reversed and the matter remanded to the superior court with directions to (1) [\*\*\*194] enter an order dismissing the second and seventh causes of action as moot; (2) determine which of the remaining causes of action in the cross-action (first, fourth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action) have become moot and dismiss those causes of action; (3) issue a writ of mandate under the causes of action that are not moot directing CLABS or OCSD to undertake (a) the examination and make the determinations necessary to comply with section 15168, subdivision (c) of the Guidelines and (b) the steps necessary to comply with any other provisions of CEQA or the Guidelines that become applicable as a result of the determinations made under Guidelines section 15168; and (4) require the party subject to the writ of mandate to file a return.

The parties shall bear their own costs on the appeals.

Dibiaso, Acting P. J., and Vartabedian, J., concurred.

A petition for a rehearing was denied April 25, 2005.

**Citation #2**  
**35 c4th 613**

LEXSEE

**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.**

S119248

**SUPREME COURT OF CALIFORNIA**

**35 Cal. 4th 613; 108 P.3d 862; 26 Cal. Rptr. 3d 304; 2005 Cal. LEXIS 3486; 60 ERC (BNA) 1470; 2005 Cal. Daily Op. Service 2861; 2005 Daily Journal DAR 3870; 35 ELR 20071**

**April 4, 2005, Filed**

**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:** 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..

**COUNSEL:** Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Richard M. Frank and Tom Greene, Chief Assistant Attorneys General, Mary E. Hackenbracht, Assistant Attorney General, Marilyn H. Levin and Gregory J. Newmark, Deputy Attorneys General, for Defendants and Appellants.

David S. Beckman and Dan L. Gildor for Natural Resources Defense Counsel, Butte Environmental Council, California Coastkeeper Alliance, CalTrout, Clean Water Action, Clean Water Fund, Coalition on the Environment and Jewish Life of Southern California,

Coast Action Group, Defend the Bay, Ecological Rights Foundation, Environment in the Public Interest, Environmental Defense Center, Heal the Bay, Los Angeles Interfaith Environment Council, Ocean Conservancy, Orange County Coastkeeper, San Diego Baykeeper, Santa Barbara Channelkeeper, Santa Monica Baykeeper, Southern California Watershed Alliance, Ventura Coastkeeper, Waterkeeper Alliance, Waterkeepers Northern California, Westside Aquatics, Inc., and Wishtoyo Foundation as Amici Curiae on behalf of Defendants and Appellants.

Downey, Brand, Seymour & Rohwer, Downey Brand, Melissa A. Thorme, Jeffrey S. Galvin, Nicole E. Granquist and Cassandra M. Ferrannini for Plaintiffs and Appellants.

Dennis A. Barlow, City Attorney, and Carolyn A. Barnes, Assistant City Attorney, for Defendant and Appellant City of Burbank.

Rockard J. Delgadillo, City Attorney, and Christopher M. Westhoff, Assistant City Attorney, for Plaintiff and Appellant City of Los Angeles.

Rutan & Tucker and Richard Montevideo for Cities of Baldwin Park, Bell, Cerritos, Diamond Bar, Downey, Gardena, Montebello, Monterey Park, Paramount, Pico Rivera, Rosemead, San Gabriel, San Marino, Santa Fe Springs, Sierra Madre, Signal Hill, Temple City and West Covina, the California Building Industry Association and the Building Industry Legal Defense Foundation as

Amici Curiae on behalf of Plaintiffs and Appellants.

Stoel Rives and Lawrence S. Bazel for Western Coalition of Arid States as Amicus Curiae on behalf of Plaintiffs and Appellants.

Richards, Watson & Gershon and John J. Harris for the League of California Cities as Amicus Curiae on behalf of Plaintiffs and Appellants.

[\*618] Squire, Sanders & Dempsey, Joseph A. Meckes; David W. Burchmore; and Alexandra Dapolito Dunn for Association of Metropolitan Sewerage Agencies as Amicus Curiae on behalf of Plaintiffs and Appellants.

Lewis, Brisbois, Bisgaard & Smith and B. Richard Marsh for County Sanitation Districts of Los Angeles County as Amicus Curiae on behalf of Plaintiffs and Appellants.

Fulbright & Jaworski, Colin Lennard, Patricia Chen; Archer Norris and Peter W. McGaw for California Association of Sanitation Agencies as Amicus Curiae on behalf of Plaintiffs and Appellants. [\*\*\*306]

**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 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 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.)<sup>1</sup> 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 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).<sup>2</sup>

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 drainages." (§ 13200, subd. (d).)

(1) 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 "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).)

(2) 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] (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 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, [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.[<sup>3</sup>] 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).

3 A "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).)

[\*621] (4) "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 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.)

(5) 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 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 Act.

The third plant, the Burbank Water Reclamation Plant (Burbank Plant), is owned and operated by the City of Burbank [\*\*\*309], 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.<sup>4</sup> The narrative criteria included municipal and domestic water supply, swimming and other recreational water uses, and fresh water habitat. The plan further provided: "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 the treated wastewater, measured in milligrams or micrograms per liter of effluent.<sup>5</sup>

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.

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 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 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.

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 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.<sup>6</sup>

<sup>6</sup> 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.

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 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

#### 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: "*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: "Each regional board shall establish such water quality objectives in water quality control 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 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

(6) 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 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.)

(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. 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 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.

(8) 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 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)). (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.<sup>7</sup> 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.<sup>8</sup> 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 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 into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

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.

[\*\*\*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 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.

(10) At oral argument, counsel for amicus curiae National Resources Defense Council, which argued on 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. 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 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 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. 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. 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 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, 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, 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. Env'tl. 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 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 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 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 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 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 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 (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. <sup>1</sup> 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. <sup>2</sup> In these times of tight fiscal budgets, it is difficult to imagine imposing additional financial burdens on municipalities without at least allowing them to present alternative views.

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.

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 reasonable accommodation of conflicting provisions. However, since the Board's actions "make me wanna holler and throw up both my hands," <sup>3</sup> I write separately to set forth my concerns and concur in the judgment--*dubitante*. <sup>4</sup>

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.).)

The petitions of all appellants and respondent for a rehearing were denied June 29, 2005. Brown, J., did not participate therein.

**Citation #3**  
**145 ca4th 246**

LEXSEE

**DIVERS' ENVIRONMENTAL CONSERVATION ORGANIZATION, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents; UNITED STATES DEPARTMENT OF THE NAVY et al., Real Parties in Interest and Respondents.**

**D046112**

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION ONE**

**145 Cal. App. 4th 246; 51 Cal. Rptr. 3d 497; 2006 Cal. App. LEXIS 1874; 2006 Cal. Daily Op. Service 10951; 36 ELR 20237**

**November 29, 2006, Filed**

**SUBSEQUENT HISTORY:** Rehearing denied by Divers' Environmental Conservation Organization v. State Water Resource Control Board, 2006 Cal. App. LEXIS 2102 (Cal. App. 4th Dist., Dec. 27, 2006)

**PRIOR HISTORY:** [\*\*\*1] Superior Court of San Diego County, No. GIC819689, Ronald S. Prager, Judge.

**COUNSEL:** Briggs Law Corporation, Cory J. Briggs; Environmental Advocates and Suzanne E. Bevasch for Plaintiff and Appellant.

Lawyers for Clean Water, Inc., Daniel Cooper and Layne Friedrich for California Coastkeeper Alliance as Amicus Curiae on behalf of Plaintiff and Appellant.

Bill Lockyer, Attorney General, Mary Hackenbracht and Carol A. Squire, Deputy Attorneys General, for Defendants and Respondents.

No appearance for Real Parties in Interest and Respondents.

**JUDGES:** Benke, Acting P. J., with Nares and Haller, JJ., concurring.

**OPINION BY:** Benke [\*250]

**OPINION**  
[\*\*499]

**BENKE, Acting P. J.**--This is an appeal from an order denying a petition for a writ of mandate. The petition challenged a discharge permit respondent California Regional Water Quality Control Board, San Diego Region (the Regional Board), issued to real parties in interest United States Department of the Navy et al. (Navy). We affirm. Although the Regional Board could have issued a permit that imposed numeric limits on chemicals in the Navy's stormwater discharges into San Diego Bay, under provisions of the Federal Water Pollution Control [\*\*\*2] Act (33 U.S.C. § 1251 et seq.), commonly known as the Clean Water Act (CWA), and applicable regulations, the Regional Board was authorized to instead require that the Navy limit its stormwater chemical discharges by employing so-called "best management practices" (BMP's). Given these circumstances, we reject appellant Divers' Environmental Conservation Organization's (Divers') contention that the permit was defective for its failure to analyze or impose numeric limits on chemicals in the Navy's stormwater discharges.

**SUMMARY**

In November 2002 the Regional Board issued a National Pollutant Discharge Elimination System (NPDES) permit to the Navy governing discharges from the Naval Base San Diego Complex <sup>1</sup> (the base complex) to San Diego Bay. The permit includes regulations governing stormwater discharges from the base complex to the bay. In particular, the permit requires that the Navy develop and adopt a "Storm Water Pollution Prevention

Plan" (the prevention plan), which employs BMP's<sup>2</sup> designed to reduce or eliminate pollutants received into the bay from industrial activities at the base complex. The permit requires that the prevention plan identify [\*\*\*3] and evaluate sources of pollution [\*\*500] that might affect stormwater discharges from the base complex and then implement site-specific BMP's to reduce or prevent pollutants in the base complex's stormwater discharges. Under the permit the Navy is required [\*251] to consider implementing nonstructural BMP's, such as good housekeeping, preventative maintenance, spill response procedures, material handling and storage procedures, employee training programs, recycling procedures, and erosion controls. Where nonstructural BMP's are not effective, the permit requires that the Navy consider structural BMP's, such as structures which cover chemicals and other pollutants, retention ponds, berms and other devices which channel runoff away from pollutant sources and treatment facilities, such as vegetative swales, which reduce pollutants in stormwater discharges.

1 The base complex includes four installations: Naval Station, San Diego; Mission Gorge Recreational Facility; Broadway Complex; and the Naval Medical Center, San Diego.

2 The permit defines BMP's as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. The BMPs also include treatment measures, operating procedures, and practices to control facility site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. The BMPs may include any type of pollution prevention and pollution control measure necessary to achieve compliance with this Order."

[\*\*\*4] In addition to the prevention plan and based on the Regional Board's study of water quality, the permit contains a numeric limit on the amount of toxicity in the Navy's total effluent. This limitation requires that test organisms be able to survive in the effluent. The permit also prohibits the discharge of the first quarter-inch of runoff from "high-risk" areas.

The Regional Board's study of water quality noted that levels of copper and zinc in stormwater runoff were matters of concern. In addition to the BMP's and

limitation on toxicity in the total effluent discharges, the permit set forth "benchmarks" for copper and zinc. The permit requires the Navy to measure the concentration of copper and zinc in its stormwater discharges and if they exceed the benchmark levels, the Navy must commence an iterative process of reviewing and upgrading its BMP's.

The permit requires that the Navy annually review all BMP's to determine "whether the BMP's are properly designed, implemented, and are effective in reducing and preventing pollutants in storm water discharges." In the event the Regional Board finds the prevention plan does meet the requirements of the permit, the permit requires [\*\*\*5] the plan be revised to implement additional BMP's.

Before the permit was finally adopted by the Regional Board, Divers' challenged it administratively. Divers' argued that applicable federal regulations required that instead of regulating the Navy's industrial stormwater discharges by way of a BMP's-based prevention plan, the Regional Board was required to set numeric "water quality based effluent limitations" (WQBEL's) on the Navy's stormwater discharges and that before setting those [\*\*501] numeric WQBEL's the Navy was required to conduct an analysis of particular pollutants for which there was a reasonable potential the stormwater [\*252] discharges would cause or contribute to a violation of any state water quality standard. The Regional Board rejected Divers's argument and adopted the permit without numeric WQBEL's and without performing any analysis of particular pollutants in the Navy's stormwater discharges. Divers' filed an administrative petition with respondent State Water Resources Control Board (State Board). The administrative petition was dismissed on the grounds it failed to raise substantial issues appropriate for review by the State Board.

Divers' filed a petition [\*\*\*6] for a writ of administrative mandate (Code Civ. Proc., § 1094.5) against the State Board and the Regional Board. The trial court dismissed the State Board as a defendant. As against the Regional Board, Divers' alleged the board abused its discretion in failing to conduct an analysis of the reasonable potential impact of particular stormwater pollutants on state water quality standards and in failing to impose numeric WQBEL's on the Navy's stormwater discharges. The trial court denied Divers's petition.

Divers' filed a timely notice of appeal.

## DISCUSSION

### I

#### *Standard of Review*

"[O]ur standard of review must extend appropriate deference to the administrative agencies in this case, and their technical expertise. [Citations.] And while interpretation of a statute or regulation is ultimately a question of law, we must also defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision." (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1103-1104 [1 Cal. Rptr. 3d 76] [\*\*\*7] (*Communities*)).

### II

#### *The Clean Water Act*

(1) "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.] The goal of the CWA is 'to restore and maintain the chemical, [\*253] physical, and biological integrity of the Nation's waters.' (33 U.S.C. § 1251(a); see *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046, 1054] (*Arkansas*)). [¶] Generally, the CWA 'prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.] [Citation.] The most important of those exceptions is pollution discharge under a valid NPDES permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. [Citations.] NPDES permits are valid for five years. [Citation.]" (*Communities, supra*, 109 Cal.App.4th at p. 1092.)

Initially, the CWA regulated permittees by requiring them to adopt technology-based effluent limitations. (33 U.S.C. § 1311(b)(1)(A).) [\*\*\*8] These are limitations based on the best available or practical technology for the reduction of water pollution.

After July 1, 1977, permittees were required to not only adopt technology-based effluent limitations but

more WQBEL's. "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.]" (*Communities, supra*, 109 Cal.App.4th at p. 1093.)

(2) In general terms the CWA and governing regulations require that in addition to determining an applicant's obligations by focusing on what technology can be used on the applicant's discharges, the permitting agency must also focus on the quality of the body of water into which the applicant is discharging pollutants. Thus under 40 Code of Federal Regulations part 122.44(d)(1)(i) (2005), WQBEL's must be imposed on applicants "whenever the permitting agency determines that pollutants 'are or may be discharged [\*\*\*9] at a level which will cause, or *have the reasonable potential to cause, or contribute* to an excursion above any State water quality standard ... .' " (*Communities, supra*, 109 Cal.App.4th at p. 1094.) Under 40 Code of Federal Regulations part 122.44(d)(1)(ii) [\*\*502] in making the determination about whether WQBEL's are required "the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water." [\*254]

(3) When, after employing the procedures and analysis required by 40 Code of Federal Regulations part 122.44(d)(1)(ii), a permitting agency determines that an applicant's discharge "has the reasonable potential to cause ... an in-stream excursion above ... a State water quality standard for an individual pollutant" the permit must contain effluent limits for that pollutant. (40 C.F.R. § 122.44(d)(1)(iii) (2005).)

[\*\*\*10] As we explain more fully below, this appeal rests in large measure on Divers's contention that 40 Code of Federal Regulations part 122.44(d)(1) mandated a numeric analysis of individual pollutants in the Navy's stormwater and numeric WQBEL's for pollutants which would cause the bay to exceed applicable water quality standards. As we explain, we do not adopt this interpretation of the regulations. Briefly, as we read the

regulations, the analysis which is mandatory in all cases is the more general analysis required by part 122.44(d)(1)(ii); only if that analysis results in a finding that discharges are likely to exceed state numeric criteria for a particular pollutant are limits for that pollutant required. However, as we believe is the case here, an analysis of stormwater discharges may satisfy the requirements of part 122.44(d)(1)(ii) without any numeric analysis of individual pollutants and hence without giving rise to any obligation to impose specific pollutant limitations under part 122.44(d)(1)(iii).

### III

#### *Stormwater Discharges*

Before 1987 the CWA did not expressly regulate stormwater discharges.<sup>3</sup> In 1987 Congress added [\*\*\*11] subdivision (p) to section 402 of the CWA [\*255] (33 U.S.C. § 1342(p)),<sup>4</sup> [\*\*503] which expressly requires NPDES permits [\*\*504] for stormwater discharges either associated with industrial activity or from municipal storm sewer systems. Section 402(p)(4)(A) of the CWA gave the administrator of the EPA until 1989 to promulgate regulations governing stormwater discharges from industrial polluters and large municipalities; [\*256] applicants for stormwater permits were given until 1990 to make applications and the EPA or state was given until 1991 to issue or deny the permit.

<sup>3</sup> Shortly after the CWA was enacted in 1972 "the EPA promulgated regulations exempting most municipal storm sewers from the NPDES permit requirements. [Citations.] When environmental groups challenged this exemption in federal court, the Ninth Circuit held a storm sewer is a point source and the EPA did not have the authority to exempt categories of point sources from the Clean Water Act's NPDES permit requirements. [Citation.] The *Costle* court [(*Natural Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977) 568 F.2d 1369)] rejected the EPA's argument that effluent-based storm sewer regulation was administratively infeasible because of the variable nature of storm water pollution and the number of affected storm sewers throughout the country. [Citation.] Although the court acknowledged the practical problems relating to storm sewer regulation, the court found the EPA had the flexibility under the Clean Water Act to design regulations that would overcome

these problems. [Citation.]

"During the next 15 years, the EPA made numerous attempts to reconcile the statutory requirement of point source regulation with the practical problem of regulating possibly millions of diverse point source discharges of storm water. [Citations.]

"Eventually, in 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.]" (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 873-874 [22 Cal. Rptr. 3d 128].)

[\*\*\*12]

4 Section 402(p) of the CWA states:

"(p) Municipal and industrial storm water discharges

"(1) General rule

"Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 1342 of this title) shall not require a permit under this section for discharges composed entirely of storm water.

"(2) Exceptions

"Paragraph (1) shall not apply with respect to the following storm water discharges:

"(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

"(B) A discharge associated with industrial activity.

"(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

"(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

"(E) A discharge for which the Administrator or the State, as the case may be, determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

"(3) Permit requirements

"(A) Industrial discharges

"Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

"(B) Municipal discharge

"Permits for discharges from municipal storm sewers--

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

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

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

"(4) Permit application requirements

"(A) Industrial and large municipal discharges

"Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for storm water discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as

practicable, but in no event later than 3 years after the date of issuance of such permit.

"(B) Other municipal discharges

"Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for storm water discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

"(5) Studies

"The Administrator, in consultation with the States, shall conduct a study for the purposes of--

"(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

"(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

"(C) establishing procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality.

"Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

"(6) Regulations

"Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate storm water discharges,

other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State storm water management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate."

[\*\*\*13] In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by way of BMP's, rather than by way of imposing either technology-based or water quality-based numerical limitations. "Unlike discharges of process wastewater where numeric effluent limitations (technology-based and/or water-quality-based) are typically used to control the discharge of pollutants from industrial facilit[y]s, the primary permit condition used to address discharges of pollutants in a facilities stormwater is a pollution prevention plan. The development and implementation of a site-specific stormwater pollution prevention plan is considered to be the most important requirement of the EPA and State issued stormwater general permits. Site-specific stormwater pollution prevention plans allow permittees to develop and implement 'best management practices', whether structural or non-structural, that are best suited for controlling stormwater discharges from their industrial facility." (U.S. EPA NPDES Permit Writers' Manual (Dec. 1996) pp. 149-150; see also U.S. E.P.A. Interim Permitting Strategy Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43761 [\*\*\*14] (Aug. 26, 1996); and U.S. E.P.A. Questions and Answers, 61 Fed. Reg. 57425 (Nov. 6, 1996).) In addition to the rationale it has expressed, the EPA also adopted 40 Code of Federal Regulations part 122.44(k) (2005) [\*257] so that the regulation reads, in part, as follows: "[E]ach NPDES permit shall include conditions meeting the following requirements when applicable. [¶] ... [¶]

"(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

"(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

"(2) Authorized under section 402(p) of the CWA for

the control of stormwater discharges;

"(3) Numeric effluent limitations are infeasible; or

"(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA."

As we explain more fully below, essentially 40 Code of Federal Regulations part 122.44(k)(2) (2005) allows permitting agencies to treat BMP's as the type of WQBEL's appropriate for control of stormwater discharges.

#### IV

##### [\*\*\*15] *Reasonable Potential Analysis*

In its first argument on appeal Divers' contends that because the Regional Board did not identify and analyze the numeric level of particular pollutants in the Navy's stormwater discharges, it did not perform the reasonable potential analysis required by 40 Code of Federal Regulations part 122.44(d)(1) (2005).

(4) Contrary to Divers's argument, 40 Code of Federal Regulations part 122.44(d)(1) (2005) does not require that in all cases a permitting authority analyze the particular pollutants in an applicant's stormwater discharges. As we have seen, [\*\*505] the procedures a permitting agency must engage in in performing the required reasonable potential analysis are set forth in 40 Code of Federal Regulations part 122.44(d)(1)(ii). By its terms that portion of the regulation does not require any analysis of particular pollutants. Rather, it only requires that the permitting authority use procedures that account for existing controls, the variability of the pollutants in effluent, the sensitivity of [\*258] species to toxicity, and the dilution of effluent in receiving waters. (40 C.F.R. § 122.44(d)(1)(ii).) [\*\*\*16] While, as Divers' points out, a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of 40 Code of Federal Regulations part 122.44(d)(1)(ii), that is not the only means of meeting the requirements of the regulation. As the trial court noted, the Regional Board performed a water quality analysis and made extensive findings with respect to the toxicity of copper and zinc in the Navy's discharge and established benchmarks for concentrations of those chemicals in the Navy's discharges. The fact the studies the Regional Board performed did not produce numeric



analysis of all the potential pollutants in the Navy's stormwater discharges did not prevent the Regional Board from nonetheless concluding, on the basis of the studies it did perform, that the stormwater discharges had a reasonable potential to cause or contribute to pollution in the bay above state water quality standards. As the Regional Board points out and the EPA has repeatedly noted, stormwater consists of a variable stew of pollutants, including toxic pollutants, from a variety of sources which impact a receiving body on a [\*\*\*17] basis which is only as predictable as the weather. Given these circumstances the Regional Board could reasonably conclude that any attempt to provide a numeric analysis of pollutants in stormwater discharges was not the most effective means of determining whether WQBEL's were nonetheless needed for the Navy's stormwater discharges.

(5) Inherent in the flexibility we find in 40 Code of Federal Regulations part 122.44(d)(1)(ii) (2005) is our conclusion the BMP'S authorized by 40 Code of Federal Regulations section 122.44(k)(2) are in fact WQBEL's, which a permitting authority may employ when it has found that stormwater discharges may cause a receiving body to exceed state water quality standards. In reaching this conclusion we are persuaded by the reasoning the court adopted in *Communities*, where the opponent of a permit argued that numeric WQBEL's were required by 40 Code of Federal Regulations part 122.44(d)(1). "Case law is limited. A few cases seem to assume that a WQBEL is always a number, but the cases do not squarely address and decide the issue. [Citations.] But *Natural Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977) 186 U.S. App. D.C. 147 [568 F.2d 1369] [\*\*\*18] (*Costle*), suggests that Congress did not intend numeric effluent limitations to be the only limitation on pollution discharges under the CWA, but intended a flexible approach including alternative effluent control strategies. [Citation.]

"We find instructive a prior decision of the State Board, of which we have taken judicial notice: *In the Matter of the Petition of Citizens for a Better Environment, Save San Francisco Bay Association, and Santa Clara Valley* [\*259] *Audubon Society* (Order No. WQ 91-03, May 16, 1991) 1991 WL 135460 (Cal.St.Wat.Res.Bd.). In that order, the State Board stated: "The petitioners contend that the Clean Water Act, and regulations and court decisions interpreting the Act, require the inclusion of numeric effluent limitations in NPDES permits ... . We have reviewed these authorities,

and also opinions we have received [\*\*506] from EPA, and conclude that numeric effluent limitations are not legally required. Further, we have determined that the program of prohibitions, source control measures and "best management practices" set forth in the permit constitutes effluent limitations as required by law.' [Citation.]

"The State Board noted the EPA's [\*\*\*19] regulatory definition of 'effluent limitation' was broad, and noted that the *Costle* decision supported the conclusion that numeric limitations were not required--especially since CWA ' "gives EPA considerable flexibility in framing the permit to achieve a desired reduction in pollutant discharges. ..." ' [Citation.]

"Specifically referring to section 122.44(d)(1), the State Board noted the regulation did not contain 'the term "numeric" effluent limitation. ... Concededly, in most cases, the easiest and most effective chemical-specific limitation would be numeric. However, there is no legal requirement that effluent limitations be numeric.' [Citation.]" (*Communities, supra*, 109 Cal.App.4th at pp. 1104-1105.)

(6) Where, as in the case of stormwater discharges, BMP's will be the WQBEL's employed, the study performed under 40 Code of Federal Regulations part 122.44(d)(1)(ii) (2005) must at a minimum look to the likely impact of stormwater as a whole on the receiving body; however, as we have seen, the BMP's that may be imposed if there is a determination that state water quality standards will be exceeded are usually systemic procedures [\*\*\*20] tailored to decrease the overall risk toxic pollutants from the discharger will reach stormwater runoff. Because there is no direct correlation between the type and volume of toxic pollutants in stormwater and the BMP's that will be employed to reduce those volumes, a permitting authority can reasonably conclude that in the case of stormwater discharges such a detailed numeric analysis is not a cost-effective means of performing a "reasonable potential" analysis. In sum, contrary to Divers' contention, the Regional Board was not required to perform a numeric analysis of each pollutant in the Navy's stormwater discharges. [\*260]

V

*Feasibility Study*

Divers' does not accept our conclusion the Regional Board was authorized to employ BMP's in lieu of numeric WQBEL's. Instead, Divers' argues that in the case of industrial permits, such as the one the Navy obtained, BMP's are permissible only upon a finding by the permitting authority that numeric WQBEL's are not feasible. We do not read 40 Code of Federal Regulations part 122.44(k)(2) (2005) so narrowly.

As we have noted, 40 Code of Federal Regulations part 122.44(k)(2) (2005) [\*\*\*21] gives permitting authorities the power to impose BMP's when they are "[a]uthorized under section 402(p) of the CWA for the control of storm water discharges." Divers' contends that section 402(p) of the CWA (33 U.S.C. § 1342(p)) does not authorize BMP's to control *industrial* stormwater discharges and that the only authority for use of BMP's in an industrial setting is provided by 40 Code of Federal Regulations part 122.44(k)(3), which permits BMP's when numeric effluent limitations are not feasible.

Divers' fundamentally misinterprets section 402(p) of the CWA. Before enactment of section 402(p) there was considerable controversy over whether and in what manner stormwater discharges were subject to permitting under the CWA. (See *Building Industry Assn. of San Diego County v. State* [\*\*507] *Water Resources Control Bd.*, *supra*, 124 Cal.App.4th at pp. 873-874.) Enactment of section 402(p) made it clear that such discharges were subject to the permitting requirements of the CWA and gave the EPA broad discretion in developing and enforcing rules governing stormwater discharges. In this context BMP's are expressly mentioned in [\*\*\*22] the statute as one of the limitations a permitting authority may impose in municipal stormwater permits. (See 33 U.S.C. § 1342(p)(3)(B)(iii).) However, neither the absence of an express reference to BMP's in industrial settings nor the illustrative reference with respect to municipal stormwater permits, is very persuasive in determining whether, as the Regional Board and the EPA have found, in enacting section 402(p) Congress intended to authorize a wide array of controls over all stormwater discharges, including use of BMP's. In this regard we note the final paragraph of section 402(p) contains a further reference to BMP's and gives the EPA the power to use management practices as a means, among others, of controlling stormwater discharges from sources other than industrial activities and municipalities. This reference to management practices, along with the reference to the use of BMP's in municipal settings, show

that in enacting section 402(p) of the CWA, Congress clearly recognized the role of BMP's as a means of controlling pollutants in stormwater discharges. [\*261]

In sum, there is nothing on the face of the statute that suggests that in making express [\*\*\*23] reference to BMP's in particular instances Congress intended to limit use of BMP's in controlling stormwater discharges in general.<sup>5</sup> Indeed, we can discern no rationale which would permit BMP's in the case of municipalities and other nonindustrial stormwater discharges but bar them in the case of industrial discharges. Thus the EPA, along with the Regional Board, could reasonably conclude that in enacting section 402(p) of the CWA, Congress intended to permit the EPA and permitting authorities wide discretion in regulating stormwater runoff, including the use of BMP's where the agencies believed they were appropriate.

<sup>5</sup> As we noted in *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*, *supra*, 124 Cal.App.4th at page 874, under section 402(p)(3)(B)(iii) of the CWA municipalities are only required to reduce "pollutants to the maximum extent practicable," whereas stormwater from industrial discharges must be governed by WQBEL's. Nothing in our opinion in *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* addressed the specific question raised here: whether a permitting authority may use BMP's as a means of limiting industrial stormwater waste.

[\*\*\*24] Because the Regional Board and EPA's interpretation of section 402(p) of the CWA is not at odds with either the language or overall purposes of the statute, we must accept it. (See *Communities*, *supra*, 109 Cal.App.4th at p. 1104.) Accordingly, read in light of that interpretation of the statute, 40 Code of Federal Regulations part 122.44(k)(2) (2005) fully authorized the Regional Board to use BMP's as the principal means of limiting the Navy's stormwater discharges.

## VI

### *Benchmarks*

As we have noted, under the permit the Navy is required to determine whether levels of zinc and copper in its stormwater discharges reach designated benchmarks, and if they do the Navy is then required to

review and amend its BMP's. The benchmarks for these chemicals is higher than applicable water quality [\*\*508] standards for San Diego Bay as set forth in the EPA's California toxic rule (CTR). (See 65 Fed. Reg. 31682-31719 (May 18, 2000).) Contrary to Divers's argument, the discrepancy between the benchmarks and CTR standards does not invalidate the permit.

The CTR was adopted by the EPA because California failed to adopt final water quality standards [\*\*\*25] as required by the CWA. (See 33 U.S.C. § 1313(c); 40 C.F.R. §§ 131.6, 131.12 (2005).) The standards set forth in the CTR are expressed as numeric criteria for specific toxic pollutants and apply to California's inland waters and enclosed bays and estuaries. Following the holding in *Communities*, it is now clear that in implementing numeric [\*262] water quality standards, such as those set forth in the CTR, permitting agencies are not required to do so solely by way of corresponding numeric WQBEL's. (*Communities*, *supra*, 109 Cal.App.4th at pp. 1095, 1104-1105.) In *Communities* the court stated: "[A] water quality standard can be numeric; the question before us is whether a WQBEL, which implements a ... numeric water quality standard, must itself be numeric." (*Id.* at p. 1095.) The court then went on to answer this question in the negative. (*Id.* at pp. 1104-1105.)

We also note that in adopting the CTR, the EPA took note of the use of BMP's as a means of controlling municipal runoff and stated that the EPA "believes that compliance with water quality standards [\*\*\*26] through the use of Best Management Practices (BMPs) is appropriate." (65 Fed. Reg. 31703 (May 18, 2000).) This reference to BMP's, in the context of adopting the CTR, supports the Regional Board's contention that the CTR does not require it to impose the CTR's numeric water quality standards as numeric limits on toxic substances in the Navy's stormwater discharges.

In sum the Regional Board was empowered to enforce the CTR by way of the BMP's and benchmarks set forth in the permit. Although the CTR governs the entire bay, including the point of any discharge, in employing benchmarks for further action by the Navy, the permit does not in any manner authorize the Navy to violate the CTR. In this context the benchmarks only

serve as a means of ensuring that the Navy will monitor toxicity of its stormwater discharges and take appropriate action in the event it discovers toxicity at designated levels. As the Regional Board points out, it is fully capable of taking enforcement action against the Navy in the event a violation of the CTR occurs.

## VII

### *Delegation of Discretion*

Finally, we note that Divers' contends that in allowing the Navy to develop a prevention [\*\*\*27] plan, including BMP's, the permit delegated too much discretion to the Navy. Our review of the record does not support this contention. The requirements of the prevention plan the Navy must develop are set forth in an 18-page attachment to the permit. The attachment sets forth in some detail what the plan must include in terms of identifying sources of pollution, monitoring, recordkeeping and reporting. In particular, we note the permit provides that "[u]pon notification by the Regional Board and/or local agency that the [prevention plan] does not meet one or more of the minimum requirements of this Section," the Navy must revise the plan and implement [\*263] additional BMP's that are effective in reducing and eliminating pollutants in its discharges. Thus the permit both carefully limits the [\*\*509] Navy's discretion in developing a prevention plan and provides for meaningful regulatory review of the prevention plan. (See *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir. 2003) 344 F.3d 832, 856.)

Judgment affirmed. <sup>6</sup>

<sup>6</sup> Amicus curiae California Coastkeeper Alliance asked that we take judicial notice of data it prepared and filed with the State Board in other proceedings and after the Regional Board issued the Navy's permit. We deny the request for judicial notice. Appellant's objection to respondents' lodgment of exhibits is overruled.

Nares, J., [\*\*\*28] and Haller, J., concurred.

A petition for a rehearing was denied December 27, 2006.

**Citation #4**

**191 f.3d 1159 \*\***

***Defenders of Wildlife v. Browner***

United States Court of Appeals for the Ninth Circuit

August 11, 1999; September 15, 1999, Filed

No. 98-71080

**Reporter**

191 F.3d 1159; 1999 U.S. App. LEXIS 22212; 99 Cal. Daily Op. Service 7618; 99 Daily Journal DAR 9661; 30 ELR 20116

DEFENDERS OF WILDLIFE and THE SIERRA CLUB, Petitioners, v. CAROL M. BROWNER, in her official capacity as Administrator of the United States Environmental Protection Agency, Respondent. CITY OF TEMPE, ARIZONA; CITY OF TUCSON, ARIZONA; CITY OF MESA, ARIZONA; PIMA COUNTY, ARIZONA; and CITY OF PHOENIX, ARIZONA, Intervenors-Respondents.

**Subsequent History:** **[\*\*1]** As Amended December 7, 1999.

**Prior History:** Petition to Review a Decision of the Environmental Protection Agency. EPA No. 97-3.

**Disposition:** PETITION DENIED.

**Core Terms**

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discharges, municipal, storm water, permits, requirements, pollutants, water quality, provisions, water-quality, industrial, limitations, storm-sewer, regulation, strict compliance, storm-water, management practices, controls, water quality standards, practicable, numeric, internal quotation marks, unambiguously, amendments, determines, exempt, sewers

**Case Summary**

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**Procedural Posture**

Petitioners appealed decision of the Environmental Appeals Board denying reconsideration of the Environmental Protection Agency's decision issuing five municipalities National Pollution Discharge System permits, without requiring numeric limitations to ensure compliance with state water-quality standards.

**Overview**

The Environmental Protection Agency (EPA) issued permits to municipalities without requiring limitations on storm-sewer discharges. Petitioners alleged that the Water Quality Act (WQA), *33 U.S.C.S. § 1311(b)(1)(C)*, required municipalities to strictly comply with state water-quality standards. Court concluded that EPA's decision was not arbitrary or capricious. Court determined that WQA unambiguously expressed Congress' intent that municipal storm-sewer discharges did not have to strictly comply with WQA. Congress expressly put in provision for industrial storm-water discharges requiring compliance with WQA, but there was no similar provision in WQA for municipal storm-sewer discharges. The plain language of WQA thus exempted municipal storm-sewer discharges from strict compliance. Court found other provisions in WQA excluded certain discharges from permit altogether. Based on that fact, court concluded exemption of municipal storm-sewer discharges from strict compliance with WQA was not so unusual that the court should not interpret the statute as written.

**Outcome**

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Court denied petition for reconsideration, because Environmental Protection Agency did not act arbitrarily or capriciously in issuing permits. In examining Water Quality Act, court determined that it was Congress' specific intent to exempt municipal storm-sewer discharges from strict compliance with the statute.

## LexisNexis® Headnotes

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Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Public Participation

**HN1** 26 U.S.C.S. § 1342(a)(1) authorizes the Environmental Protection Agency to issue National Pollution Discharge Elimination System permits, thereby allowing entities to discharge some pollutants.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > ... > Enforcement > Discharge Permits > Public Participation

**HN2** 33 U.S.C.S. § 1369(b)(1)(F) authorizes any interested person to seek review in court of an Environmental Protection Agency decision issuing or denying any permit under 26 U.S.C.S. § 1342(a)(1). Any interested person means any person that satisfies the injury-in-fact requirement for U.S. Const. art. III standing.

Environmental Law > Administrative Proceedings & Litigation > Nuisances, Strict Liability, & Trespasses

**HN3** A plaintiff claiming injury from environmental damage must use the area affected by the challenged activity.

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

**HN4** The Administrative Procedures Act, 5 U.S.C.S. § 701, et seq., provides the standard of review for the Environmental Protection Agency's decision to issue a permit. Under the Administrative Procedures Act, the court generally reviews such a decision to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity

Administrative Law > Judicial Review > Standards of Review > General Overview

Governments > Legislation > Interpretation

**HN5** The court has established a two-step process for reviewing an agency's construction of a statute it administers. Under the first step, the court employs traditional tools of statutory construction to determine whether Congress has expressed its intent unambiguously on the question before the court. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, instead, Congress has left a gap for the administrative agency to fill, the court proceeds to step two. At step two, the court must uphold the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute.

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

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Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

**HN6** The Clean Water Act, 33 U.S.C.S. § 1251, et seq., generally prohibits the discharge of any pollutant from a point source into the navigable waters of the United States. An entity can, however, obtain a National Pollution Discharge Elimination System permit that allows for the discharge of some pollutants.

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

**HN7** A National Pollution Discharge Elimination System permit imposes effluent limitations on discharges. First, a permit-holder shall achieve effluent limitations which shall require the application of the best practicable control technology currently available. Second, a permit-holder 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 regulations.

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

**HN8** See 33 U.S.C.S. § 1342(p)(3).

Governments > Legislation > Interpretation

**HN9** Questions of congressional intent that can be answered with traditional tools of statutory construction are still firmly within the province of the courts. Using traditional tools of statutory construction, when interpreting a statute, the court looks first to the words that Congress used. Rather than focusing just on the word or phrase at issue, the court looks to the entire statute to determine congressional intent.

Governments > Legislation > Interpretation

**HN10** Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

Governments > Legislation > Interpretation

**HN11** The court generally refuses to interpret a statute in a way that renders a provision superfluous.

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

Governments > Legislation > Interpretation

Governments > Local Governments > Licenses

**HN12** The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether, and therefore from 33 U.S.C.S. § 1311. For example, the Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture. 33 U.S.C.S. § 1342(l)(1). Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. See 33 U.S.C.S. § 1342(l)(2).

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Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

*HN13* Congress gave the administrator discretion to determine what controls are necessary. Under that discretionary provision, the Environmental Protection Agency (EPA) has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which uses best management practices (BMPs) in first-round storm water permits to provide for the attainment of water quality standards.

**Counsel:** Jennifer Anderson and David Baron, Arizona Center for Law in the Public Interest, Phoenix, Arizona, for the petitioners.

Alan Greenberg, Attorney, U.S. Department of Justice, Environment & Natural Resources Division, Denver, Colorado, for the respondent.

Craig Reece, Phoenix City Attorney's Office, Phoenix, Arizona; Stephen J. Burg, Mesa City Attorney's Office, Mesa, Arizona; Timothy Harrison, Tucson City Attorney's Office, Tucson, Arizona; and Harlan C. Agnew, Deputy County Attorney, Tucson, Arizona, for the intervenors-respondents.

David Burchmore, Squire, Sanders & Dempsey, Cleveland, Ohio, for the amici curiae.

**Judges:** Before: John T. Noonan, David R. Thompson, and Susan P. Graber, Circuit Judges. Opinion by Judge Graber.

**Opinion by:** SUSAN P. GRABER

## Opinion

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[\*1161] AMENDED OPINION

GRABER, Circuit Judge:

Petitioners challenge the Environmental Protection Agency's (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits to five municipalities, for their separate storm sewers, without requiring numeric limitations [\*\*2] to ensure compliance with state water-quality standards. Petitioners sought administrative review of the decision within the EPA, which the Environmental Appeals Board (EAB) denied. This timely petition for review ensued. For the reasons that follow, we deny the petition.

### FACTUAL AND PROCEDURAL BACKGROUND

Title *HNI 26 U.S.C. § 1342(a)(1)* authorizes the EPA to issue NPDES permits, thereby allowing entities to discharge some pollutants. In 1992 and 1993, the cities of Tempe, Tucson, Mesa, and Phoenix, Arizona, and Pima County, Arizona (Intervenors), submitted applications for NPDES permits. The EPA prepared draft permits for public comment; those draft permits did not attempt to ensure compliance with Arizona's water-quality standards.

Petitioner Defenders of Wildlife objected to the permits, arguing that they must contain numeric limitations to ensure strict compliance with state water-quality standards. The State of Arizona also objected.

Thereafter, the EPA added new requirements:

To ensure that the permittee's activities achieve timely compliance with applicable water quality standards (Arizona Administrative Code, Title 18, Chapter 11, Article 1), the [\*\*3] permittee shall implement the [Storm Water Management Program], monitoring, reporting and other requirements of this permit in accordance with the time frames

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established in the [Storm Water Management Program] referenced in Part I.A.2, and elsewhere in the permit. This timely implementation of the requirements of this permit shall constitute a schedule of compliance authorized by Arizona Administrative Code, section R18-11-121(C).

The Storm Water Management Program included a number of structural environmental controls, such as storm-water detention basins, retention basins, and infiltration ponds. It also included programs to remove illegal discharges.

With the inclusion of those "best management practices," the EPA determined that the permits ensured compliance with state water-quality standards. The Arizona Department of Environmental Quality agreed:

The Department has reviewed the referenced municipal NPDES storm-water permit pursuant to Section 401 of the Federal Clean Water Act to ensure compliance with State water quality standards. We have determined that, based on the information provided in the permit, and the fact sheet, adherence to provisions and [\*\*4] requirements set forth in the final municipal permit, will protect the water quality of the receiving water.

On February 14, 1997, the EPA issued final NPDES permits to Intervenor. Within 30 days of that decision, Petitioners requested an evidentiary hearing with the regional administrator. See 40 C.F.R. § 124.74. Although Petitioners requested a hearing, they conceded that they raised only a legal issue and that a hearing was, in fact, unnecessary. Specifically, Petitioners raised only the legal question whether the Clean Water Act (CWA) requires numeric limitations to ensure strict compliance with state water-quality standards; they did not raise the factual question whether the management practices that the EPA chose would be effective.

[\*1162] On June 16, 1997, the regional administrator summarily denied Petitioners' request. Petitioners then filed a petition for review with the EAB. See 40 C.F.R. § 124.91(a). On May 21, 1998, the EAB denied the petition, holding that the permits need not contain numeric limitations to ensure strict compliance with state water-quality standards. Petitioners then moved for reconsideration, see 40 C.F.R. § 124.91(i), which the EAB denied.

#### [\*\*5] JURISDICTION

*HN2* Title 33 U.S.C. § 1369(b)(1)(F) authorizes "any interested person" to seek review in this court of an EPA decision "issuing or denying any permit under section 1342 of this title." "Any interested person" means any person that satisfies the injury-in-fact requirement for Article III standing. See Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 1297 (9th Cir. 1992) [*NRDC II*]. It is undisputed that Petitioners satisfy that requirement. Petitioners allege that "members of Defenders and the Club use and enjoy ecosystems affected by storm water discharges and sources thereof governed by the above-referenced permits," and no other party disputes those facts. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 565-66, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) *HN3* ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity."); see also *NRDC II*, 966 F.2d at 1297 ("NRDC claims, inter alia, that [the] EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water [\*\*6] contaminants. NRDC's allegations . . . satisfy the broad standing requirement applicable here.").

Intervenors argue, however, that they were not parties when this action was filed and that this court cannot redress Petitioners' injury without them. Their real contention appears to be that they are indispensable parties under Federal Rule of Civil Procedure 19. We need not consider that contention, however, because in fact Intervenor have been permitted to intervene in this action and to present their position fully. In the circumstances, Intervenor have suffered no injury.

#### DISCUSSION

##### A. Standard of Review

*HN4* The Administrative Procedures Act (APA), 5 U.S.C. §§ 701-06, provides our standard of review for the EPA's decision to issue a permit. See American Mining Congress v. EPA, 965 F.2d 759, 763 (9th Cir. 1992). Under the APA, we generally review such a decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

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On questions of statutory interpretation, we follow the approach from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), [\*\*7] See *NRDC II*, 966 F.2d at 1297 (so holding). In *Chevron*, 467 U.S. at 842-44, the Supreme Court devised a two-step process for reviewing an administrative agency's interpretation of a statute that it administers. See also *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1452 (9th Cir. 1996) ("The *HN5* Supreme Court has established a two-step process for reviewing an agency's construction of a statute it administers."). Under the first step, we employ "traditional tools of statutory construction" to determine whether Congress has expressed its intent unambiguously on the question before the court. *Chevron*, 467 U.S. at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43 (footnote omitted). If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. See *id.* at 843. At step two, we must uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

[\*\*8] [\*1163] B. Background

*HN6* The CWA generally prohibits the "discharge of any pollutant," 33 U.S.C. § 1311(a), from a "point source" into the navigable waters of the United States. See 33 U.S.C. § 1362(12)(A). An entity can, however, obtain an NPDES permit that allows for the discharge of some pollutants. See 33 U.S.C. § 1342(a)(1).

*HN7* Ordinarily, an NPDES permit imposes effluent limitations on such discharges. See 33 U.S.C. § 1342(a)(1) (incorporating effluent limitations found in 33 U.S.C. § 1311). First, a permit-holder "shall . . . achieve . . . effluent limitations . . . which shall require the application of the best practicable control technology [BPT] currently available." 33 U.S.C. § 1311(b)(1)(A). Second, a permit-holder "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 regulations (under authority preserved by section 1370 of this title)." 33 U.S.C. § 1311 [\*\*9] (b)(1)(C) (emphasis added). Thus, although the BPT requirement takes into account issues of practicability, see *Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990), the EPA also "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability," *Oklahoma v. EPA*, 908 F.2d 595, 613 (10th Cir. 1990) (internal quotation marks omitted), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992). See also *Ackels v. EPA*, 7 F.3d 862, 865-66 (9th Cir. 1993) (similar).

The EPA's treatment of storm-water discharges has been the subject of much debate. Initially, the EPA determined that such discharges generally were exempt from the requirements of the CWA (at least when they were uncontaminated by any industrial or commercial activity). See 40 C.F.R. § 125.4 (1975).

The Court of Appeals for the District of Columbia, however, invalidated that regulation, holding that "the EPA Administrator does not have authority to exempt categories of point sources from [\*\*10] the permit requirements of § 402 [33 U.S.C. § 1342]." *Natural Resources Defense Council, Inc. v. Costle*, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1377 (D.C. Cir. 1977). "Following this decision, [the] EPA issued proposed and final rules covering storm water discharges in 1980, 1982, 1984, 1985 and 1988. These rules were challenged at the administrative level and in the courts." *American Mining Congress*, 965 F.2d at 763.

Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA. See *NRDC II*, 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and [the] EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987 containing amendments to the CWA.") (footnotes omitted). Under the Water Quality Act, from 1987 until 1994,<sup>1</sup> most entities discharging storm water did not need to obtain a permit. See 33 U.S.C. § 1342(p).

[\*\*11] Although the Water Quality Act generally did not require entities discharging storm water to obtain a permit, it did require such a permit for discharges "with respect to which a permit has been issued under this section before February 4,

<sup>1</sup> As enacted, the Water Quality Act extended the exemption to October 1, 1992. Congress later amended the Act to change that date to October 1, 1994. See Pub. L. No. 102-580.

1987," 33 U.S.C. § 1342(p)(2)(A); discharges "associated with industrial activity," 33 U.S.C. § 1342(p)(2)(B); discharges from a "municipal separate sewer system serving a population of [100,000] or more," 33 U.S.C. § 1342(p)(2)(C) & (D); and "[a] discharge for which the Administrator . . . determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," 33 U.S.C. § 1342(p)(2)(E).

**[\*1164]** When a permit is required for the discharge of storm water, the Water Quality Act sets two different standards:

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section *and section 1311* of this title.

(B) Municipal discharge

Permits for discharges from municipal **[\*\*12]** storm sewers -

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

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

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

**HN8** 33 U.S.C. § 1342(p)(3) (emphasis added).

### C. Application of Chevron

The EPA and Petitioners argue that the Water Quality Act is ambiguous regarding whether Congress intended for municipalities to comply strictly with state water-quality standards, under 33 U.S.C. § 1311(b)(1)(C). Accordingly, they argue that we must proceed to step two of *Chevron* and defer to the EPA's interpretation that the statute does require strict compliance. See *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999) ("At step two, we must uphold the administrative regulation unless it is arbitrary, capricious, or **[\*\*13]** manifestly contrary to the statute.") (citation and internal quotation marks omitted), *petition for cert. filed*, No. 99-243 (Aug. 10, 1999).

Intervenors and *amici*, on the other hand, argue that the Water Quality Act expresses Congress' intent unambiguously and, thus, that we must stop at step one of *Chevron*. See, e.g., *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 118 S. Ct. 927, 938-39, 140 L. Ed. 2d 1 (1998) ("Because we conclude that Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union, we hold that the NCUA's contrary interpretation is impermissible under the first step of *Chevron*."). (emphasis in original); *Sierra Club v. EPA*, 118 F.3d 1324, 1327 (9th Cir. 1997) ("Congress has spoken clearly on the subject and the regulation violates the provisions of the statute. Our inquiry ends at the first prong of *Chevron*."). We agree with Intervenors and *amici*: For the reasons discussed below, the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply **[\*\*14]** strictly with 33 U.S.C. § 1311(b)(1)(C). That being so, we end our inquiry at the first step of the *Chevron* analysis.

"Questions **HN9** of congressional intent that can be answered with 'traditional tools of statutory construction' are still firmly within the province of the courts" under *Chevron*, *NRDC II*, 966 F.2d at 1297 (citation omitted). "Using our 'traditional tools of statutory construction,' *Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. 2778, when interpreting a statute, we look first to the words that Congress used." *Zimmerman*, 170 F.3d at 1173 (alterations, citations, and internal quotation marks omitted). "Rather than focusing just on the word or phrase at issue, we look to the entire statute to determine Congressional intent." *Id.* (alterations, citations, and internal quotation marks omitted).

As is apparent, Congress expressly required *industrial* storm-water discharges to comply with the requirements of 33 U.S.C. § 1311. See 33 U.S.C. § 1342(p)(3)(A) ("Permits for discharges associated with industrial activity *shall meet all*

applicable [\*\*15] provisions of this section and section 1311 of this title.”) (emphasis added). By incorporation, then, industrial [\*1165] storm-water 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).” 33 U.S.C. § 1311(b)(1)(C) (emphasis added); see also Sally A. Longroy, *The Regulation of Storm Water Runoff and its Impact on Aviation*, 58 J. Air. L. & Com. 555, 565-66 (1993) (“Congress further singled out industrial storm water dischargers, all of which are on the high-priority schedule, and requires them to satisfy all provisions of section 301 of the CWA [33 U.S.C. § 1311]. . . . Section 301 further mandates that NPDES permits include requirements that receiving waters meet water quality based standards.”) (emphasis added). In other words, industrial discharges must comply strictly with state water-quality standards.

Congress chose not to include a similar provision for municipal [\*\*16] storm-sewer discharges. Instead, Congress required municipal storm-sewer discharges “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.” 33 U.S.C. § 1342(p)(3)(B)(iii).

The EPA and Petitioners argue that the difference in wording between the two provisions demonstrates ambiguity. That argument ignores precedent respecting the reading of statutes. Ordinarily, “where *HN10* Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) (citation and internal quotation marks omitted); see also *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999) (stating the same principle), petition for cert. filed, No. 98-323 (Aug. 23, 1999). Applying that familiar [\*\*17] and logical principle, we conclude that Congress’ choice to require industrial storm-water discharges to comply with 33 U.S.C. § 1311, but not to include the same requirement for municipal discharges, must be given effect. When we read the two related sections together, we conclude that 33 U.S.C. § 1342(p)(3)(B)(iii) does not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Application of that principle is significantly strengthened here, because 33 U.S.C. § 1342(p)(3)(B) is not merely silent regarding whether municipal discharges must comply with 33 U.S.C. § 1311. Instead, § 1342(p)(3)(B)(iii) replaces the requirements of § 1311 with the requirement that municipal storm-sewer dischargers “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.” 33 U.S.C. § 1342(p)(3)(B)(iii). [\*\*18] In the circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Indeed, the EPA’s and Petitioners’ interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) would render that provision superfluous, a result that we prefer to avoid so as to give effect to all provisions that Congress has enacted. See *Government of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 634 (9th Cir. 1999) (“This *HN11* court generally refuses to interpret a statute in a way that renders a provision superfluous.”), as amended, 1999 U.S. App. LEXIS 18691, 1999 WL 604218 (9th Cir. Aug. 12, 1999). Section 1342(p)(3)(B)(iii) creates a lesser standard than § 1311. Thus, if § 1311 continues to apply to municipal storm-sewer discharges, [\*\*1166] the more stringent requirements of that section always would control.

Contextual clues support the plain meaning of § 1342(p)(3)(B)(iii), which we have described above. *HN12* The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether (and therefore from [\*\*19] § 1311). For example, “the Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture.” 33 U.S.C. § 1342(l)(1). Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. See 33 U.S.C. § 1342(l)(2). Read in the light of those provisions, Congress’ choice to exempt municipal storm-sewer discharges from strict compliance with § 1311 is not so unusual that we should hesitate to give effect to the statutory text, as written.

Finally, our interpretation of § 1342(p)(3)(B)(iii) is supported by this court’s decision in *NRDC II*. There, the petitioner had argued that “the EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments.” *NRDC II*, 966 F.2d at 1308. This court disagreed with the petitioner’s interpretation of the amendments:

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Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, *Congress retained the [\*\*20] existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge.*

*Id.* (emphasis added). The court concluded that, under 33 U.S.C. § 1342(p)(3)(B)(iii), "*Congress did not mandate a minimum standards approach.*" *Id.* (emphasis added). The question in *NRDC II* was not whether § 1342(p)(3)(B)(iii) required strict compliance with state water-quality standards, *see* 33 U.S.C. § 1311(b)(1)(C). Nonetheless, the court's holding applies equally in this action and further supports our reading of 33 U.S.C. § 1342(p).

In conclusion, the text of 33 U.S.C. § 1342(p)(3)(B), the structure of the Water Quality Act as a whole, and this court's precedent all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

*D. Required Compliance with 33 U.S.C. § 1311(b)(1)(C)*

We are left with Intervenor's contention that the EPA may not, under the CWA, require strict compliance with state water-quality [\*\*21] standards, through numerical limits or otherwise. We disagree.

Although Congress did not require municipal storm-sewer discharges to comply strictly with § 1311(b)(1)(C), § 1342(p)(3)(B)(iii) states that "permits for discharges from municipal storm sewers . . . shall require . . . *such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.*" (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. As this court stated in *NRDC II*, "Congress *HNI3* gave the administrator discretion to determine what controls are necessary. . . . *NRDC's* argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language." 966 F.2d at 1308.

Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits . . . to provide [\*\*22] for the attainment of water quality standards." The EPA applied that approach to the permits at issue here. Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include [\*1167] either management practices or numeric limitations in the permits was within its discretion. *See NRDC II*, 966 F.2d at 1308 ("Congress did not mandate a minimum standards approach or specify that [the] EPA develop minimal performance requirements."). In the circumstances, the EPA did not act arbitrarily or capriciously by issuing permits to Intervenor's.

PETITION DENIED.

**Citation #5**  
**725 f.3d 1194**

LEXSEE

**NATURAL RESOURCES DEFENSE COUNCIL, INC.; SANTA MONICA BAYKEEPER, Plaintiffs-Appellants, v. COUNTY OF LOS ANGELES; LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; MICHAEL ANTONOVICH, in his official capacity as Supervisor; YVONNE BURKE, in her official capacity as Supervisor; GLORIA MOLINA, in her official capacity as Supervisor; ZEV YAROSLAVSKY, in his official capacity as Supervisor; DEAN D. EFSTATHIOU, in his official capacity as Acting Director of Los Angeles County Department of Public Works; DON KNABE, in his official capacity as Supervisor, Defendants-Appellees.**

**No. 10-56017**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**725 F.3d 1194; 2013 U.S. App. LEXIS 16416; 43 ELR 20180**

**August 8, 2013, Filed**

**SUBSEQUENT HISTORY:** US Supreme Court certiorari denied by L.A. County Flood Control Dist. v. NRDC, 134 S. Ct. 2135, 188 L. Ed. 2d 1124, 2014 U.S. LEXIS 3212 (U.S., 2014)

On remand at, Motion denied by, Motion granted by, in part, Motion denied by, in part, Partial summary judgment granted by, in part, Partial summary judgment denied by, in part NRDC v. County of L.A., 2015 U.S. Dist. LEXIS 40761 (C.D. Cal., Mar. 30, 2015)

**PRIOR HISTORY:** [\*\*1]

On Remand From The United States Supreme Court. D.C. No. 2:08-cv-01467-AHM-PLA. L.A. County Flood Control Dist. v. NRDC, Inc., 133 S. Ct. 710, 184 L. Ed. 2d 547, 2013 U.S. LEXIS 597 (U.S., 2013) NRDC v. County of L.A., 2010 U.S. Dist. LEXIS 25083 (C.D. Cal., Mar. 2, 2010)

**DISPOSITION:** REVERSED and REMANDED.

**COUNSEL:** Aaron Colangelo, Natural Resources Defense Council, Washington, D.C.; Daniel Cooper, Lawyers for Clean Water, San Francisco, California, for Plaintiffs-Appellants.

Andrea Sheridan Ordin, Judith A. Fries, Laurie Dods, Los Angeles County Department of County Counsel, Los

Angeles, California; Howard Gest and David W. Burhenn, Burhenn & Gest LLP, Los Angeles, California, for Defendants-Appellees.

**JUDGES:** Before: Harry Pregerson and Milan D. Smith, Jr., Circuit Judges, and H. Russel Holland, Senior District Judge.\* Opinion by Judge Milan D. Smith, Jr.

\* The Honorable H. Russel Holland, Senior District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

**OPINION BY:** Milan D. Smith, Jr.

**OPINION**

[\*1196] **SUMMARY\*\***

\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

**Environmental Law**

On remand from the United States Supreme Court, the panel reversed the district court's grant of summary judgment and held that pollution exceedances detected at monitoring stations of the County of Los Angeles and the

Los Angeles County Flood [\*\*2] Control District were sufficient to establish the County defendants' liability as a matter of law for violations of the terms of their National Pollutant Discharge Elimination System permit issued pursuant to the Clean Water Act.

In *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 184 L. Ed. 2d 547 (2013), the Supreme Court held that a discharge of pollutants does not occur when polluted water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river, and then into a lower portion of the same river. The Supreme Court declined to address the plaintiffs' argument that the County defendants' monitoring data established their liability for permit violations as a matter of law. On remand, the panel held that this court's previous rejection of the plaintiffs' argument was not a final decision, nor was it law of the case.

The panel held that, under the plain language of the NPDES permit, the data collected at the monitoring stations was intended to determine whether the permittees were in compliance with the permit. Accordingly, if the District's monitoring data showed that the [\*\*3] level of pollutants in federally protected water bodies exceeded those allowed under the permit, then, as a matter of permit construction, the monitoring data conclusively demonstrated that the defendants were not in compliance with the permit conditions and were liable for permit violations. The panel held that extrinsic considerations, including the Clean Water Act's monitoring requirements, also supported its holding. The panel remanded the case to the district court for further proceedings, including a determination of the proper remedy for the County defendants' violations.

## OPINION

M. SMITH, Circuit Judge:

Plaintiffs-Appellants Natural Resources Defense Council and Santa Monica Baykeeper (collectively, the Plaintiffs) filed suit against the County of Los Angeles and the Los Angeles County Flood Control District (collectively, the County Defendants) alleging that the County Defendants are discharging polluted stormwater in violation of the terms of their National Pollutant Discharge Elimination System (NPDES) permit, issued pursuant to the Federal Water Pollution Control Act (the

Clean Water Act, Act, or CWA), 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251, *et seq.* The district [\*\*4] court granted the County Defendants' motion for summary judgment, reasoning that Plaintiffs failed to prove that any *individual* defendant had discharged pollutants in violation of the Clean Water Act, where Plaintiffs' only evidence of violations was monitoring data taken downstream of the County Defendants' (and others') discharge points, as opposed to data sampled at the relevant discharge points themselves. On appeal, we affirmed the district court's judgment in part and reversed in part. *Natural Res. Def. Council, Inc. v. Cnty. of L.A.*, 673 F.3d 880 (9th Cir. 2011). On January 8, 2013, the Supreme Court reversed our judgment and remanded this case to us for further proceedings. *L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 184 L. Ed. 2d 547 (2013). On February 19, 2013, we ordered the parties to file supplemental briefs addressing the implications of the Supreme Court's ruling. Having considered the Supreme Court's ruling, the responses of the parties in their supplemental briefs, and other matters noted [\*1197] herein, we now conclude that the pollution exceedances detected at the County Defendants' monitoring stations are sufficient to establish the County Defendants' [\*\*5] liability for NPDES permit violations as a matter of law. Accordingly, we once again reverse the district court's grant of summary judgment in favor of the County Defendants, and remand to the district court for a determination of the appropriate remedy for the County Defendants' violations.

## FACTUAL BACKGROUND

### I. Stormwater Runoff in Los Angeles County

Stormwater runoff is surface water generated by precipitation events, such as rainstorms, which flows over streets, parking lots, commercial sites, and other developed parcels of land. When stormwater courses over urban environs, it frequently becomes polluted with contaminants, such as "suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, [and] pesticides[.]"<sup>1</sup> *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 840 (9th Cir. 2003). This polluted stormwater often makes its way into storm drains and sewers, which "generally channel collected runoff into federally protected water bodies," *id.*, such as rivers and oceans. Consequently, stormwater runoff has been recognized as "one of the most significant sources of water pollution in



the nation, at times comparable to, if not [\*\*6] greater than, contamination from industrial and sewage sources." *Id.* (citation omitted).

1 Whereas natural, vegetated soil can absorb rainwater and capture pollutants, paved surfaces and developed land can do neither. Paved facilities with particularly high volumes of motor vehicle traffic--such as parking lots, retail gasoline outlets, and fast food restaurants--are typically responsible for producing higher concentrations of pollutants in storm water runoff.

Los Angeles County (the County) is home to more than 10 million people and covers a sprawling amalgam of populous incorporated cities and significant swaths of unincorporated land. The Los Angeles County Flood Control District (the District) is a public entity governed by the Los Angeles County Board of Supervisors and the Los Angeles County Department of Public Works. The District comprises 84 cities and some unincorporated areas of the County. The County and the District are separate legal entities.

Each city in the District operates a municipal separate storm sewer system (ms4)<sup>2</sup> that is composed of gutters, catch basins, storm drains, and pipes that collect and convey stormwater. The County also operates its own ms4 that primarily [\*\*7] collects and conveys stormwater runoff in the unincorporated areas of the County. Each of these ms4s connects to the District's substantially larger ms4, an extensive flood-control and storm-sewer infrastructure [\*1198] consisting of approximately 500 miles of open channels and 2,800 miles of storm drains. Because a comprehensive map of the County Defendants' storm sewer system does not exist, no one knows the exact size of the LA MS4<sup>3</sup> or the locations of all of its storm drain connections and outfalls.<sup>4</sup> But while the number and location of storm drains and outfalls are too numerous to catalog, it is undisputed that the LA MS4 collects and channels stormwater runoff from across the County. It is similarly undisputed that untreated stormwater is discharged from LA MS4 outfalls into various watercourses, including the Los Angeles and San Gabriel Rivers.<sup>5</sup> These rivers, in turn, drain into several coastal waters, including, among others, the Santa Monica Bay and the Pacific Ocean.

2 Federal Regulations define an ms4 as:

a conveyance or system of

conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned [\*\*8] or operated by a State, city, town, borough, county, parish, district, association, or other public body . . . having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity . . . ;

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

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works . . . .

40 C.F.R. § 122.26(b)(8). Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, an ms4 conveys only untreated stormwater. *See* 40 C.F.R. § 122.26(a)(7), (b)(8).

3 Throughout this Opinion, reference is made to both "ms4" and the "LA MS4." The former is a generic reference to an individual municipal separate storm sewer system without regard to its particular location, while the latter specifically refers to the entire flood control and storm-sewer infrastructure described *supra* that exists in Los Angeles County, and which is made up of the various interconnected [\*\*9] ms4s that are controlled by the County, the District, and the incorporated cities within the District.

4 An "outfall" is defined as a "point source . . . at the point where a municipal separate storm sewer discharges to waters of the United States. . . ." 40 C.F.R. § 122.26(b)(9). It is estimated that the LA

MS4 contains tens of thousands of outfalls where stormwater runoff is discharged into federally protected water bodies.

5 Plaintiffs originally complained about the County Defendants' discharges into four water bodies: the Los Angeles River, the San Gabriel River, the Santa Clara River, and Malibu Creek. *See Natural Res. Def. Council*, 673 F.3d at 883. On remand to this court, however, Plaintiffs only seek review of the district court's summary judgment ruling regarding the County Defendants' discharges into the Los Angeles and San Gabriel Rivers.

## II. The County Defendants' NPDES Permit

Section 301(a) of the CWA prohibits the "discharge of any pollutant" from any "point source" into "navigable waters" unless the discharge complies with certain other sections of the CWA.<sup>6</sup> *See* 33 U.S.C. § 1311(a). One of those sections is section 402, which provides for the issuance of NPDES permits. 33 U.S.C. § 1342. [\*\*10] In nearly all cases, an NPDES permit is required before anyone may lawfully discharge a pollutant from a point source into the navigable waters of the United States. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101-02, 112 S. Ct. 1046, 117 L. Ed. 2d 239 (1992); *Environmental Law Handbook* 323 (Thomas F. P. Sullivan ed., 21st ed. 2011).

6 A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Throughout this litigation, there has been confusion regarding whether the LA MS4 is a "point source" under the CWA. *See Natural Res. Def. Council*, 673 F.3d at 898 (accepting Plaintiffs' argument that "[u]nder the Clean Water Act, the [LA] MS4 is a 'Point Source.'"). The LA MS4 is *not* a single point source. Rather, the LA MS4 is a collection of point sources, including outfalls, that discharge into the navigable waters of the United States.

Congress has empowered the EPA Administrator to delegate NPDES permitting authority to state agencies. 33 U.S.C. § 1342(b). [\*\*11] Pursuant to this authority,

the EPA has authorized the State of California to develop water quality standards and issue NPDES permits. Pursuant to the Porter-Cologne Water Quality Control Act, California state law designates the State Water Resources Control Board and [\*1199] nine regional boards as the principal state agencies charged with enforcing federal and state water pollution laws and issuing NPDES permits. *See* Cal. Water Code §§ 13000 *et seq.* The entity responsible for issuing permits in the Los Angeles area is the California State Water Resources Control Board for the Los Angeles Region (the Regional Board).

On June 18, 1990, the Regional Board first issued an NPDES permit (the Permit) regulating stormwater discharges by the County, the District, and the 84 incorporated municipalities in the District (collectively, the Permittees). The Permit has subsequently been renewed or amended several times, and the version of the Permit at issue in this litigation came into force on December 13, 2001.<sup>7</sup> The Permit covers all relevant discharges that occur "within the boundaries of the Permittee municipalities . . . over which [the municipalities have] regulatory jurisdiction as well as unincorporated [\*\*12] areas in Los Angeles County within the jurisdiction of the Regional Board."

7 On November 8, 2012, the Regional Board issued a new NPDES permit to the County Defendants and various other permittees.

The Permit runs to 99 pages and contains a myriad of rules, regulations, and conditions regarding the Permittees' operation of the LA MS4. However, only two sets of the Permit's provisions are particularly relevant to this appeal; those contained in Part 2, titled "Receiving Water Limitations," and those contained in the section titled "Monitoring and Reporting Program."

Part 2 places limits on the type and amount of pollutants the Permittees may lawfully discharge from the LA MS4. Specifically, Part 2 prohibits "discharges from the [LA] MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives."<sup>8</sup> The Permit defines "Water Quality Standards and Water Quality Objectives" as "water quality criteria contained in the Basin Plan, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federal approved surface water quality plans."<sup>9</sup> Succinctly put, the Permit incorporates the pollution standards promulgated [\*\*13]

in other agency documents such as the Basin Plan, and prohibits stormwater discharges that "cause or contribute to the violation" of those incorporated standards. The Permit further provides that the Permittees "shall comply" with the LA MS4 discharge prohibitions outlined in Part 2 "through timely implementation of control measures and other actions to reduce pollutants in the[ir LA MS4] discharges . . . ."

8 Part 2 also mandates that "[d]ischarges from the [LA] MS4 of storm water, or non-storm water, for which a Permittee is responsible for [sic], shall not cause or contribute to a condition of nuisance."

9 Under California law, regional boards are required to formulate water quality plans, called "basin plans," which designate the beneficial uses of protected water bodies within the boards' jurisdiction, establish water quality objectives for those water bodies, and establish a program for implementing the basin plan. *See City of Burbank v. State Water Res. Control Bd.*, 35 Cal. 4th 613, 26 Cal. Rptr. 3d 304, 108 P.3d 862, 865 (Cal. 2005) (citing Cal. Water Code § 13050(j)).

The Monitoring and Reporting Program complements Part 2. Under that program, the Permittees are required to monitor the impacts of their LA MS4 discharges [\*\*14] on water quality and to publish the results of all pollution monitoring at least annually. The primary objectives of the monitoring program include "assessing compliance" with the Permit, "measuring and improving the effectiveness" of the Los Angeles Countywide Stormwater Quality Management Program (SQMP),<sup>10</sup> and assessing [\*1200] the environmental impact of urban runoff on the receiving waters in the County.

10 The Permit defines the SQMP as "the Los Angeles Countywide Stormwater Quality Management Program, which includes descriptions of programs, collectively developed by the Permittees in accordance with the provisions of the NPDES permit, to comply with applicable federal and state law. . . ."

One of the principal ways the Permittees are required to monitor their LA MS4 discharges is through mass-emissions monitoring. Mass-emissions monitoring measures all constituents present in water, and the readings give a cumulative picture of the pollutant load in

a waterbody. The Permit requires the District, as Principal Permittee, to conduct mass-emissions monitoring at seven enumerated monitoring stations located throughout the County. The District is also responsible for analyzing the resulting [\*\*15] data and submitting a comprehensive report of its findings.<sup>11</sup> According to the Permit, the purpose of mass-emissions monitoring is to: (1) estimate the mass emissions from the LA MS4; (2) assess trends in the mass emissions over time; and (3) determine if the LA MS4 is contributing to exceedances of Water Quality Standards by comparing the monitoring results to the applicable pollution standards promulgated in the Basin Plan and similar documents.

11 The District publishes these "Stormwater Monitoring Reports" on the internet at: [http://ladpw.org/wmd/NPDES/report\\_directory.cfm](http://ladpw.org/wmd/NPDES/report_directory.cfm). (last accessed August 1, 2013).

The Permittees sited a mass-emissions monitoring station in both the Los Angeles and San Gabriel Rivers (collectively, the Monitoring Stations). The Los Angeles River monitoring station is located in a channelized portion of the Los Angeles River that runs through the City of Long Beach.<sup>12</sup> The San Gabriel River monitoring station is located in a channelized portion of the San Gabriel River that runs through the City of Pico Rivera. The Monitoring Stations are located downstream of numerous LA MS4 outfalls controlled by the County Defendants and various other non-party Permittees.

12 In [\*\*16] a declaration submitted to the district court, the County Defendants described both Monitoring Stations as being located "in a portion of the District's flood control channel." *See also* "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* [http://dpw.lacounty.gov/wmd/npdes/9899\\_report/SiteDesc.pdf](http://dpw.lacounty.gov/wmd/npdes/9899_report/SiteDesc.pdf) (last accessed August 1, 2013). Thus, it appears that the pertinent river segments are part of *both* the LA MS4 itself *and* "the waters of the United States" that the CWA protects. But regardless of whether the mass-emissions monitoring stations are *also* part of the LA MS4, there is no dispute that the mass-emissions monitoring stations are located *within* the Los Angeles and San Gabriel Rivers, downstream of a significant number of the County Defendants' LA MS4 outfalls. We misconstrued some of the data

before us when we previously held otherwise. *See Natural Res. Def. Council*, 673 F.3d at 899 ("As a matter of law and fact, the [LA] MS4 is distinct from the two navigable rivers; the [LA] MS4 is an intra-state man-made construction--not a naturally occurring Watershed River"); *see also* 53 Fed. Reg. 49,416, 49,453 (Dec. 7, 1988) (EPA observes that "[i]n many situations, [\*17] waters of the United States that receive discharges from municipal storm sewers can be mistakenly considered to be part of the storm sewer system.").

Between 2002 and 2008, when this case was filed, the District published annual monitoring reports that contain the data that the District collected at the Monitoring Stations. According to those reports, the Monitoring Stations identified 140 separate exceedances of the Permit's water quality standards, including excessive levels of aluminum, copper, cyanide, zinc, and fecal coliform bacteria in both the Los Angeles and San Gabriel Rivers. The County Defendants do not dispute the accuracy of the monitoring data.

## PROCEDURAL BACKGROUND

Using the monitoring data self-reported by the District, Plaintiffs cataloged the [\*1201] water quality exceedances measured in various receiving waters in the County. Beginning on May 31, 2007, Plaintiffs sent a series of notice letters to the County Defendants informing them that Plaintiffs believed that they were violating the terms of the Permit.<sup>13</sup> Specifically, Plaintiffs contended that the water quality exceedances documented in the District's monitoring reports demonstrated liability under the CWA. Dissatisfied [\*18] with the County Defendants' response to these letters, Plaintiffs brought this citizen-enforcement action on March 3, 2008. After the district court dismissed certain elements of the Plaintiffs' initial complaint because notice of the Permit violations was defective, Plaintiffs sent the County Defendants an adequate notice letter on July 3, 2008.

13 The CWA requires plaintiffs to provide 60 days notice to an alleged violator, the State in which the violation is alleged to be occurring, and the EPA, before filing suit. 33 U.S.C. § 1365(b)(1)(A).

Plaintiffs filed their First Amended Complaint on September 18, 2008. In the complaint, Plaintiffs asserted

six causes of action under the CWA. Four of the Plaintiffs' claims, which the district court designated the "Watershed Claims," were initially before us on appeal. The first three Watershed Claims allege that, beginning in 2002 or 2003, the County Defendants caused or contributed to exceedances of water quality standards in the Santa Clara River (Claim 1), the Los Angeles River (Claim 2), and the San Gabriel River (Claim 3), in violation of 33 U.S.C. §§ 1311(a), 1342(p). The fourth Watershed Claim alleges that, beginning in 2002, County Defendants [\*19] caused or contributed to exceedances of the water quality standards and violated the total maximum daily load limits in Malibu Creek. All of the Watershed Claims rest on the same premise: (1) the Permit incorporates water-quality limits for each receiving water body; (2) mass-emissions monitoring stations have recorded pollutant loads in the receiving water bodies that exceed those permitted under the relevant standards; (3) an exceedance constitutes non-compliance with the Permit and, thereby, the Clean Water Act; and (4) County Defendants, as holders of the Permit and joint operators of the LA MS4, are liable for these exceedances under the Act.

Early in the litigation, the district court bifurcated liability and remedy, and all proceedings related to remedy were stayed until liability was determined. On March 2, 2010, the district court denied all parties' cross-motions for summary judgment with regard to liability. *NRDC v. Cnty. of L.A.*, No. CV 08-1467-AHM, 2010 U.S. Dist. LEXIS 25083, 2010 WL 761287 (C.D. Cal. Mar. 2, 2010), *amended on other grounds*, 2011 U.S. Dist. LEXIS 11665, 2011 WL 666875 (C.D. Cal. Jan. 27, 2011). Although the district court accepted Plaintiffs' arguments that the Permit "clearly prohibits 'discharges from the [LA] [\*20] MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives,'" 2010 U.S. Dist. LEXIS 25083, 2010 WL 761287, at \*6, and that mass-monitoring stations "are the proper monitoring locations to determine if the [LA] MS4 is contributing to exceedances" of the Water Quality Standards or water quality objectives, *id.*, the district court held that Plaintiffs were improperly attempting to use the District's self-reported monitoring data to establish liability without presenting evidence that any individual defendant was discharging pollutants that "cause[d] or contribute[d] to the violation" of the water quality standards. *Id.* The district court observed that although "the District is responsible for the pollutants in the [LA] MS4" at the time they pass the Monitoring

Stations, "that does not necessarily determine the question of whether the water passing by these points is [\*1202] 'discharge' within the meaning of the Permit and the Clean Water Act." 2010 U.S. Dist. LEXIS 25083, [WL] at \*7. Unable to determine whether any of the County Defendants' upstream LA MS4 outflows were contributing polluted stormwater to navigable waters, the district court stated that "Plaintiffs would need to present some evidence (monitoring [\*\*21] data or an admission) that some amount of a standards-exceeding pollutant is being discharged through at least one District outlet." 2010 U.S. Dist. LEXIS 25083, [WL] at \*8.

Following supplemental briefing, the district court again determined that "Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' [LA] MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow." The district court thus entered summary judgment for the County Defendants on the Watershed Claims.

On June 9, 2010, the district court entered a partial final judgment on the Watershed Claims under Fed. R. Civ. P. 54(b). The court reasoned that an interlocutory appeal was appropriate because the Watershed Claims are "factually and legally severable" from the Plaintiffs' other claims and "[t]he parties and the Court would benefit from appellate resolution of the central legal question underlying the watershed claims: what level of proof is necessary to establish defendants' liability." The Plaintiffs timely appealed.

On appeal, the Plaintiffs pressed the same legal argument [\*\*22] they advanced in the district court: that the data published in the County Defendants' annual monitoring reports--data which shows undisputed pollution exceedances at the mass-emissions monitoring stations--conclusively establishes the County Defendants' liability for Permit violations as a matter of law. Like the district court, we rejected this contention and held that the Plaintiffs must submit at least some additional proof of the County Defendants' *individual* contributions to the measured Permit violations. See *Natural Res. Def. Council*, 673 F.3d at 898 (noting that "the Clean Water Act does not prohibit 'undisputed' exceedances; it prohibits 'discharges' that are *not* in compliance with the Act. . . . While it may be undisputed that exceedances have been detected, responsibility for those exceedances

requires proof that some entity discharged a pollutant.").

Nonetheless, we held the District liable for CWA violations in the Los Angeles and San Gabriel Rivers because we concluded that the mass-emissions monitoring stations for each river are "located in a section of the [LA] MS4 owned and operated by the District" and that "when pollutants were detected, they had not yet exited the [\*\*23] point source into navigable waters." *Id.* at 899. We further clarified that "[t]he [relevant] discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that [the LA] MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations." *Id.* at 900.

On October 11, 2011, the District filed a petition for writ of certiorari, 673 F.3d 880, 2011 WL 4874090, which was granted in part on June 25, 2012. *L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 23, 183 L. Ed. 2d 673 (2012). The Supreme Court granted review in order to answer a single question: "Under the CWA, does a discharge of pollutants occur when polluted water [\*1203] flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river, and then into a lower portion of the same river?" *L.A. Cnty. Flood Control Dist.*, 133 S. Ct. at 712-13 (internal quotation [\*\*24] marks omitted). The Court answered in the negative, and re-affirmed its holding in *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004), that "pumping polluted water from one part of a water body into another part of the same body is not a discharge of pollutants under the CWA." *L.A. Cnty. Flood Control Dist.*, 133 S. Ct. at 711. The Court did not address any other basis for the District's potential liability for Permit violations and instead reversed our prior judgment and remanded this case to us for additional proceedings. *Id.* at 713-14.

## JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review the district court's grant of summary judgment *de novo*. *Assoc. to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002).

## DISCUSSION

### I.

Plaintiffs return from the Supreme Court with the same argument they have consistently advanced throughout this litigation--that the County Defendants' monitoring data establishes their liability for Permit violations as a matter of law. We previously rejected this argument, *see Natural Res. Def. Council*, 673 F.3d at 898, and the Supreme Court explicitly declined [\*\*25] to address it.<sup>14</sup>

14 *See L.A. Cnty. Flood Control Dist.*, 133 S. Ct. at 713-14 ("Under the permit's terms, the NRDC and Baykeeper maintain, the exceedances detected at instream monitoring stations are by themselves sufficient to establish the District's liability under the CWA for its upstream discharges. This argument failed below. It is not embraced within, or even touched by, the narrow question on which we granted certiorari. We therefore do not address, and indicate no opinion on, the issue NRDC and Baykeeper seek to substitute for the question we took up for review.").

On remand, the County Defendants argue that we may not reconsider our earlier decision because it has become "final," and because "reconsideration of Appellants' monitoring argument would fly in the face of the finality given to decisions of this Court after denial of rehearing or expiration of the time in which to seek such further review." Alternatively, the County Defendants argue that our earlier disposition should be left undisturbed because it has become the law of the case. The County Defendants are mistaken on both counts.

"No opinion of this circuit becomes final until the mandate issues[.]" *Carver v. Lehman*, 558 F.3d 869, 878 (9th Cir. 2009); [\*\*26] *see also* Fed R. App. P. 41(c), 1998 Adv. Comm. Note ("A court of appeals' judgment or order is not final until issuance of the mandate[.]"). Thus, we have explained that a "court of appeals may modify or revoke its judgment at any time prior to issuance of the mandate, sua sponte or by motion of the parties." *United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990). The mandate in this case has not issued. Consequently, our earlier judgment is not final. *Carver*, 558 F.3d at 878. Nor can it be considered the law of the case. *See id.* at 878 n.16 ("[U]ntil the mandate issues, an

opinion is not fixed as settled Ninth Circuit law, and reliance on the opinion is a gamble." (citation omitted)); *see also Key Enters. of Del., Inc. v. Venice Hosp.*, 9 F.3d 893, 898 (11th Cir. [\*1204] 1993) ("[B]ecause the panel's mandate had not issued, the panel's decision was never the 'law of the case.'"). Put simply, we are free to reconsider the merits of Plaintiffs' argument, and we now do so.

### II.

Where a permittee discharges pollutants in compliance with the terms of its NPDES permit, the permit acts to "shield" the permittee from liability under the CWA. 33 U.S.C. § 1342(k). The permit shield is a major benefit [\*\*27] to a permittee because it protects the permittee from any obligation to meet more stringent limitations promulgated by the EPA unless and until the permit expires. *See Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 266-69 (4th Cir. 2001); *see also The Clean Water Act Handbook* 67 (Mark A. Ryan ed., 3rd ed. 2011). Of course, with every benefit comes a cost: a permittee violates the CWA when it discharges pollutants in excess of the levels specified in the permit, or where the permittee otherwise violates the permit's terms. *See Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1138 (9th Cir. 1998); *see also* 40 C.F.R. § 122.41(a) ("Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for [an] enforcement action"); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) (noting that "[t]he plain language of [the CWA citizen suit provision] authorizes citizens to enforce all permit conditions"); *Environmental Law Handbook* 327 ("The primary purpose of NPDES permits is to establish enforceable effluent limitations.").

Plaintiffs allege that the County Defendants are violating the terms of the [\*\*28] Permit by discharging pollutants into the Los Angeles and San Gabriel Rivers in excess of the permitted levels. County Defendants do not dispute that they are discharging pollutants from the LA MS4 into these rivers. Nor can the County Defendants dispute that their own monitoring reports demonstrate that pollution levels recorded at the Monitoring Stations are in excess of those allowed under the Permit. Rather, the County Defendants focus on their perception of the evidentiary burden Plaintiffs must satisfy in order to hold any individual defendant liable for these pollution exceedances. Plaintiffs contend that they may rely

exclusively on the District's monitoring reports to establish liability. County Defendants, however, argue that they cannot be held liable for Permit violations based solely on the data published in the District's monitoring reports because: (1) the mass-emissions monitoring required under the Permit was "neither designed nor intended" to measure the compliance of any Permittee; and (2) the monitoring data cannot parse out precisely *whose* discharge(s) contributed to any given exceedance because the Monitoring Stations sample pollution levels downstream from a [\*\*29] legion of discharge points (e.g., LA MS4 outfalls) controlled by various Permittees and other non-party entities, as opposed to at the discharge points themselves.

To resolve the parties' contentions, we must interpret the language of the Permit. Although the NPDES permitting scheme can be complex, a court's task in interpreting and enforcing an NPDES permit is not--NPDES permits are treated like any other contract. *See Nw. Envtl. Advocates*, 56 F.3d at 982 ("We review the district court's interpretation of the 1984 permit as we would the interpretation of a contract or other legal document.").<sup>15</sup> If the language of the permit, considered in light of the structure of the permit as a [\*1205] whole, "is plain and capable of legal construction, the language alone must determine the permit's meaning." *Piney Run Pres. Ass'n*, 268 F.3d at 270 (citation omitted). If, however, the permit's language is ambiguous, we may turn to extrinsic evidence to interpret its terms. *Id.* Our sole task at this point of the case is to determine what Plaintiffs are required to show in order to establish *liability* under the terms of *this particular* NPDES permit.<sup>16</sup>

<sup>15</sup> *See also Piney Run Pres. Ass'n*, 268 F.3d at 269-70; *Am. Canoe Ass'n, Inc. v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 42 (D.D.C. 2004).

<sup>16</sup> The [\*\*30] question before us is not whether the Clean Water Act mandates any particular result. An NPDES permitting authority has wide discretion concerning the terms of a permit. It could, for example, lawfully write an ms4 permit that provides that all permittees will share liability in some ratio for any measured exceedance of applicable pollutant limits. Or, as a further example, a permitting authority could lawfully write a permit providing that only the co-permittee(s) whose specific discharges are

connected to a particular pollutant exceedance may be held liable for the permit violation. *See* 33 U.S.C. § 1342(a)(2) ("The Administrator shall prescribe conditions for [NPDES] permits to assure compliance with the requirements of [33 U.S.C. § 1342(a)(1)], including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.").

#### A. The Plain Language of the Permit

"[NPDES permit] terms are to be given their ordinary meaning, and when the terms of a [permit] are clear, the intent of the parties must be ascertained from the [permit] itself." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999). Plaintiffs argue [\*\*31] that the text of the County Defendants' Permit is clear, and provides that the District's mass-emissions monitoring data will be used to assess the County Defendants' compliance with the Permit, and particularly Part 2, which prohibits "discharges from the [LA] MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." The County Defendants dispute this notion, and first claim that the District's mass-emissions monitoring is intended to serve only a hortatory purpose. As County Defendants state, "the mass emission monitoring program . . . neither measures nor was designed to measure any individual permittee's compliance with the Permit." This argument is clearly belied by the text of the Permit and is rejected.

The Permit establishes a "Monitoring and Reporting Program" with the stated objectives of *both* characterizing stormwater discharges *and* assessing compliance with water-quality standards. The Permit language could not be more explicit in this regard, stating that "[a]ssessing compliance with this [Permit]" is one of the "primary objectives of the Monitoring Program." "The fact that the parties dispute a [permit's] meaning does not establish [\*\*32] that the [permit] is ambiguous; it is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation." *Klamath Water Users Protective Ass'n*, 204 F.3d at 1210. No reasonable person could find even the slightest ambiguity in the phrase "[t]he primary objectives of the Monitoring Program include, but are not limited to: Assessing compliance with this [Permit]." Consequently, we decline to embrace the County Defendants' initial argument that "the mass-emission monitoring stations, as

a matter of fact, do not assess the compliance of any permittee with the Permit . . . ."

County Defendants' alternative argument, while more facially appealing, fares no better. Specifically, the County Defendants point to certain Permit language they claim shows that the Regional Board did not intend for the mass--emissions monitoring data to be used to establish liability for Permit violations. For instance, [\*1206] the County Defendants note that the Permit provides that "[e]ach permittee is responsible only for a discharge for which it is the operator." County Defendants also cite language in Part 2 that reads: "Discharges from the [LA] MS4 of storm water, or non-storm water, [\*\*33] for which a Permittee is responsible for [sic], shall not cause or contribute to a condition of nuisance." The County Defendants read this language as precluding a finding of liability against them--or any other Permittee--without independent monitoring data establishing that discharges from a particular entity's ms4 outfalls exceeded standards.

"[A] court must give effect to every word or term" in an NPDES permit "and reject none as meaningless or surplusage. . . ." *In re Crystal Props., Ltd., L.P.*, 268 F.3d 743, 748 (9th Cir. 2001) (quotations omitted); see also Restatement (Second) of Contracts § 203(a) (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."). "Therefore, we must interpret the [Permit] in a manner that gives full meaning and effect to all of the [Permit's] provisions and avoid a construction of the [Permit] that focuses only on" a few isolated provisions. *In re Crystal Props.*, 268 F.3d at 748.

The County Defendants' interpretation of the Permit ultimately must be rejected because it would create an unreasonable result. Reading [\*\*34] the clause that "[e]ach permittee is responsible only for a discharge for which it is the operator" to preclude use of the mass--emission monitoring data to "assess[] compliance with this [Permit]" would render the monitoring provisions of the Permit largely meaningless. Under the County Defendants' reading of the Permit, individual Permittees could discharge an unlimited amount of pollutants from the LA MS4 but never be held liable for those discharges based on the results of the mass--emissions monitoring, even though that monitoring is explicitly intended to assess whether Permittees are in

compliance with Part 2's discharge limitations. We are unwilling to accept such a strained interpretation. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) (holding that courts should be guided by the "cardinal principle of contract construction: that a document should be read to give effect to all of its provisions and to render them consistent with each other"). A better reading of the Permit's putatively conflicting provisions, therefore, is the one proposed by Plaintiffs. Limiting a Permittee's responsibility to "discharge[s] for which it is the operator" applies to the [\*\*35] appropriate *remedy* for Permit violations, not to *liability* for those violations. Indeed, Plaintiffs' reading is consistent with the remedial scheme of the Permit itself. If the LA MS4 is found to be contributing to water quality violations, each Permittee must take appropriate remedial measures with respect to its *own* discharges.<sup>17</sup> Thus, a finding of *liability* against the County Defendants would not, as defendants argue, hold any County Defendant responsible for discharges for which they are not "the operator."

17 The relevant Permit provision states: "Each Permittee is required to comply with the requirements of this Order applicable to discharges within its boundaries . . . and not for the implementation of the provisions applicable to the Principal Permittee or other Permittees."

In sum, and contrary to the County Defendants' contentions, the language of the Permit is clear--the data collected at the Monitoring Stations is intended to determine whether the Permittees are in compliance with the Permit. If the District's [\*1207] monitoring data shows that the level of pollutants in federally protected water bodies exceeds those allowed under the Permit, then, as a matter of permit construction, [\*\*36] the monitoring data conclusively demonstrate that the County Defendants are not "in compliance" with the Permit conditions. Thus, the County Defendants are liable for Permit violations.

## B. Extrinsic Considerations

Although we believe the plain language of the Permit clearly contemplates that the County Defendants' monitoring data will be used to assess Permit compliance (*i.e.*, establish liability for CWA violations), we note that numerous extrinsic considerations also undercut the County Defendants' position.



First and foremost, the Clean Water Act *requires* every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) ("[E]ach NPDES permit shall include conditions meeting the following . . . monitoring requirements . . . to assure compliance with permit limitations."). That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance. *See* 40 C.F.R. § 122.26(d)(2)(i)(F) ("Permit applications for discharges from large and medium municipal storm sewers . . . shall include [\*\*37] . . . monitoring procedures necessary to determine compliance and noncompliance with permit conditions . . ."). As previously noted, the County Defendants contend that the mass--emissions monitoring program "neither measures nor was designed to measure any individual permittee's compliance with the Permit." But if the County Defendants are correct, the Permit would be unlawful under the CWA. We must interpret the provisions of the Permit like any other contract and reject an interpretation that would render the Permit unenforceable. *See Walsh v. Schlecht*, 429 U.S. 401, 408, 97 S. Ct. 679, 50 L. Ed. 2d 641 (1977) (noting that "contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable"); *see also Nw. Env'tl. Advocates*, 56 F.3d at 984; Restatement (Second) of Contracts § 203.

Second, the County Defendants' position has been explicitly rejected by the Regional Board, the entity that issued the Permit. This is important because one of our obligations in interpreting an NPDES permit is "to determine the intent of the permitting authority. . . ." *Piney Run Pres. Ass'n*, 268 F.3d at 270. Thus, we [\*\*38] give significant weight to any extrinsic evidence that evinces the permitting authority's interpretation of the relevant permit. *See Nw. Env'tl. Advocates*, 56 F.3d at 985 (relying on "significant evidence from [the state permitting agency], the permit author," to determine the proper scope of an NPDES permit).

Here, the record contains an amicus brief filed by the Regional Board in a lawsuit nearly identical to this one.<sup>18</sup> In that suit, these same Plaintiffs sued the City of Malibu, one of the County Defendants' co-permittees, for violating the NPDES Permit at issue in this case. In its brief, the Regional Board stated its position that:

The Permit recognizes that the inter-connected nature of the system means that it may be difficult to determine exactly where [pollutants] originated [\*\*1208] within the [LA] MS4. This does not mean, however, that the Permit assumes only one permittee may be responsible. Instead, it recognizes that in such an integrated storm sewer system, one or more Permittees may have caused or contributed to violations. . . . Having constructed a joint sewer system that, by design, co-mingles the [Permittees'] discharges, they cannot avoid enforcement because one cannot determine [\*\*39] the original source of pollutants in the waste stream.

18 *Santa Monica Baykeeper, et al. v. City of Malibu*, No. CV-08-01465 (AHM) (C.D. Cal. Mar. 3, 2008).

The Regional Board also noted that "the monitoring program that the permittees requested (and were granted) does not readily generate the permittee--by--permittee outfall data that the [County Defendants] would require as a precondition to enforcement." As a result, the Regional Board disagreed with any construction of the Permit that would require individualized proof of a Permittees' discharges in order to establish liability. Simply put, the Regional Board indicated that it "does not agree" that the "burden [of proving Permit violations] rests upon the enforcing entity." Although we do not defer to the Regional Board's interpretation of the Permit, *see Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997), its rejection of the County Defendants' position is clearly instructive.

Finally, the County Defendants' arguments run counter to the purposes of the CWA, and ignore the inherent complexity of ensuring an ms4's compliance with an NPDES permit that covers thousands of different point sources and outfalls. As we have previously [\*\*40] recognized, "[t]he NPDES program fundamentally relies on self-monitoring." *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated and remanded on other grounds*, 485 U.S. 931, 108 S. Ct. 1102, 99 L. Ed. 2d 264 (1988), *and reinstated and*

amended by 853 F.2d 667 (9th Cir. 1988). Congress' purpose in adopting this self-monitoring mechanism was to promote straightforward enforcement of the Act. *See id.* at 1492 (noting that Congress wished to "avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay") (quoting S. Rep. No. 92-414, 92nd Cong., 1st Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3730)).<sup>19</sup> Or, as one treatise writer has described enforcement of the Act:

The CWA is viewed by many as the easiest of the federal environmental statutes to enforce. This is because persons regulated under the act normally must report their own compliance and noncompliance to the regulating agency. For example, holders of NPDES permits must file periodic discharge monitoring reports [\*\*41] (or DMRs), which must contain the results of all monitoring of discharges, and must indicate where those discharges exceed permit limitations. . . . Thus, enforcement actions may be brought based on little, if anything, more than the DMRs and other reports submitted by the permittee itself.

*Environmental Law Handbook* at 357-58.

<sup>19</sup> *See also* 44 Fed. Reg. 32,854, 32,863 (June 7, 1979) ("Congress intended that prosecution for permit violations be swift and simple.").

Admittedly, regulating pollution from ms4s is substantially more complicated than regulating pollution from a few defined point sources. Like the LA MS4 at issue here, municipal separate storm sewer systems often cover many square miles and comprise numerous, geographically [\*\*1209] scattered, and sometimes uncharted sources of pollution, including streets, catch basins, gutters, man-made channels, and storm drains. Faced with the difficult task of regulating millions of storm-sewer point sources, Congress amended the CWA in 1987 to grant the EPA the express authority to create a separate permitting program for ms4s. 33 U.S.C. § 1342(p)(2), (3). In enacting these amendments, Congress

recognized that for large urban areas like Los Angeles, [\*\*42] ms4 permitting cannot be accomplished on a source-by-source basis. The amendments therefore give the EPA, or a state like California to which the EPA has delegated permitting authority, broad discretion to issue permits "on a system-wide or jurisdiction-wide basis," 40 C.F.R. § 122.26(a)(1)(v), rather than requiring cities and counties to obtain separate permits for millions of individual stormwater discharge points. This increased flexibility is crucial in easing the burden of issuing stormwater permits for both permitting authorities and permittees.<sup>20</sup>

<sup>20</sup> *See* 55 Fed. Reg. 47,990, 48,046 (Nov. 16, 1990) (noting that issuing individual permits to cover all ms4 discharges to the waters of the United States is "unmanageable"); *id.* at 48,049-48,050 ("Given the complex, variable nature of storm water discharges from municipal systems, EPA favors a permit scheme where the . . . [p]ermit writers have the necessary flexibility to develop monitoring requirements that more accurately reflect the true nature of highly variable and complex discharges.").

But while otherwise more flexible than the traditional NPDES permitting system, nothing in the ms4 permitting scheme relieves permittees of the [\*\*43] obligation to monitor their compliance with their NPDES permit in some fashion. *See* 33 U.S.C. § 1342(a)(2) ("The Administrator shall prescribe conditions for [NPDES] permits to assure compliance with the requirements of [the permit], including conditions on data and information collection, reporting, and such other requirements as he deems appropriate."); 40 C.F.R. § 122.44(i)(1) (establishing that every permit "shall include" monitoring "[t]o assure compliance with the permit limitations"). Rather, EPA regulations make clear that while ms4 NPDES permits need not require monitoring of each stormwater source at the precise point of discharge, they may instead establish a monitoring scheme "sufficient to yield data which are *representative of the monitored activity*. . . ." 40 C.F.R. § 122.48(b) (emphasis added). In fact, EPA regulations require permittees, like the County Defendants here, to propose a "monitoring program for *representative data collection* for the term of the permit that describes the location of outfalls or field screening points to be sampled (*or the location of instream stations*)" and explain "why the [chosen] location is *representative*. . . ." 40 C.F.R. §

122.26(d)(2)(iii)(D) [\*\*44] (emphases added). Here, the County Defendants did just that. County Defendants themselves chose the locations of the Monitoring Stations, locations that are downstream from a significant number of their outfalls.<sup>21</sup> And, as required by law, the County Defendants chose locations that they certified were necessarily "representative" of the monitored activity (*i.e.*, the Permittees' discharges of stormwater runoff into the navigable waters of the United States).<sup>22</sup> Now, however, County Defendants claim [\*1210] that their compliance with the Permit cannot be measured using the results of the representative monitoring they themselves agreed to, that the Regional Board approved, and that the Permit itself contemplates is to be used to assess compliance with its terms. We take this opportunity to reevaluate and reject County Defendants' arguments.

21 "Q: Does the County's ms4 outlet to any tributaries of the Los Angeles River? A: Yes. Q: Does it outlet to tributaries of the Los Angeles River upstream of the mass emissions station? A: Yes. . . . Q: Does [the County's ms4] outlet to the San Gabriel River upstream of the mass emissions station? A: Yes." Pestrella Dep. 697:7-698:6, June 2, 2009.

22 "Q: Who [\*\*45] selected the location of those stations, do you know? A: The County selected those locations for a particular purpose.

And the purpose was [to be] far enough away from tidal influence *so that you would be characterizing the stormwater runoff as opposed to ocean waters*. Q: And the locations were then approved by Regional Board staff; is that correct? A: Correct." Wamikannu Dep. 130:13-130:19, July 1, 2009 (emphasis added).

## CONCLUSION

Because the results of County Defendants' pollution monitoring conclusively demonstrate that pollution levels in the Los Angeles and San Gabriel Rivers are in excess of those allowed under the Permit, the County Defendants are *liable* for Permit violations as a matter of law. This case is remanded to the district court for further proceedings consistent with this opinion, including a determination of the appropriate *remedy* for the County Defendants' violations.

## REVERSED and REMANDED.

### [\*1211] APPENDICES

Appendix A

[\*1212] Appendix B

**Citation #6**  
**511 us 700**

LEXSEE

**PUD NO. 1 OF JEFFERSON COUNTY AND CITY OF TACOMA, PETITIONERS  
v. WASHINGTON DEPARTMENT OF ECOLOGY, ET AL.**

**No. 92-1911**

**SUPREME COURT OF THE UNITED STATES**

**511 U.S. 700; 114 S. Ct. 1900; 128 L. Ed. 2d 716; 1994 U.S. LEXIS 4271; 62 U.S.L.W.  
4408; 38 ERC (BNA) 1593; 94 Cal. Daily Op. Service 3843; 94 Daily Journal DAR  
7236; 24 ELR 20945; 8 Fla. L. Weekly Fed. S 172**

**February 23, 1994, Argued**

**May 31, 1994, Decided**

**PRIOR HISTORY:** ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF WASHINGTON.

**DISPOSITION:** 121 Wash. 2d 179, 849 P.2d 646,  
affirmed.

**COUNSEL:** Howard E. Shapiro argued the cause for  
petitioners. With him on the briefs were Michael A.  
Swiger, Gary D. Bachman, Albert R. Malanca, and  
Kenneth G. Kieffer.

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**JUDGES:** O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, post, p. 723. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, post, p. 724.

**OPINION BY:** O'CONNOR

**OPINION**

[\*703] [\*\*\*723] [\*\*1905] JUSTICE O'CONNOR delivered the opinion of the Court.

[\*\*\*LEdHR1A] [1A]Petitioners, a city and a local utility district, want to build a hydroelectric project on the Dosewallips River in Washington State. We must decide whether respondent state environmental agency (hereinafter respondent) properly conditioned a permit for the project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs.

[\*704] I

This case involves the complex statutory and

regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities. The Federal Water Pollution Control Act, commonly known as the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.*, is a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 1251(a). The Act also seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." § 1251(a)(2).

To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments. Under the Act, the Administrator of the Environmental Protection Agency (EPA) is required, among other things, to establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources. See §§ 1311, 1314. Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. §§ 1311(b) (1)(C), 1313. These state water quality standards provide "a supplementary basis . . . 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 (1976).

A state water quality standard "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). In setting standards, the State must comply with the following broad requirements:

"Such standards shall be such as to protect the public health or welfare, enhance the quality of water and [\*705] serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational [and other purposes.]" *Ibid.*

See also § 1251(a)(2).

A 1987 amendment to the Clean Water Act makes clear that § 303 also contains an "antidegradation policy" -- that is, a policy requiring [\*\*1906] that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation. Specifically, the Act permits the revision of certain effluent limitations or water quality [\*\*\*724] standards "only if such revision is subject to and consistent with the antidegradation policy established under this section." § 1313(d)(4)(B). Accordingly, EPA's regulations implementing the Act require that state water quality standards include "a statewide antidegradation policy" to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 CFR § 131.12 (1993). At a minimum, state water quality standards must satisfy these conditions. The Act also allows States to impose more stringent water quality controls. See 33 U.S.C. §§ 1311(b)(1)(C), 1370. See also 40 CFR § 131.4(a) (1993) ("As recognized by section 510 of the Clean Water Act[, 33 U.S.C. § 1370], States may develop water quality standards more stringent than required by this regulation").

The State of Washington has adopted comprehensive water quality standards intended to regulate all of the State's navigable waters. See Washington Administrative Code (WAC) 173-201-010 to 173-201-120 (1986). The State created an inventory of all the State's waters, and divided the waters into five classes. 173-201-045. Each individual fresh surface water of the State is placed into one of these classes. 173-201-080. The Dosewallips River is classified AA, extraordinary. 173-201-080(32). The water quality [\*706] standard for Class AA waters is set forth at 173-201-045(1). The standard identifies the designated uses of Class AA waters as well as the criteria applicable to such waters.<sup>1</sup>

<sup>1</sup> WAC 173-201-045(1) (1986) provides in pertinent part:

"(1) Class AA (extraordinary).

"(a) General characteristic. Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses.

"(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

"(i) Water supply (domestic, industrial,

agricultural).

"(ii) Stock watering.

"(iii) Fish and shellfish:

"Salmonid migration, rearing, spawning, and harvesting.

"Other fish migration, rearing, spawning, and harvesting.

...

"(iv) Wildlife habitat.

"(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

"(vi) Commerce and navigation.

"(c) Water quality criteria

"(i) Fecal coliform organisms.

"(A) Freshwater -- fecal coliform organisms shall not exceed a geometric mean value of 50 organisms/100 mL, with not more than 10 percent of samples exceeding 100 organisms/100 mL.

"(B) Marine water -- fecal coliform organisms shall not exceed a geometric mean value of 14 organisms/100 mL, with not more than 10 percent of samples exceeding 43 organisms/100 mL.

"(ii) Dissolved oxygen [shall exceed specific amounts].

...

"(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

"(iv) Temperature shall not exceed [certain levels].

...

"(v) pH shall be within [a specified range].

"(vi) Turbidity shall not exceed [specific levels].

"(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

"(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste."

[\*707] In addition to these specific standards applicable to Class AA waters, the State has adopted a statewide [\*\*\*725] antidegradation policy. That policy provides:

"(a) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

"(b) No degradation will be allowed of waters lying in national parks, national recreation areas, national wildlife refuges, national scenic rivers, and other areas of national ecological importance.

...

"(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term [\*\*1907] and irreparable harm to the environment." 173-201-035(8).

As required by the Act, EPA reviewed and approved the State's water quality standards. See 33 U.S.C. § 1313(c)(3); 42 Fed. Reg. 56792 (1977). Upon approval by EPA, the state standard became "the water quality standard for the applicable waters of that State." 33 U.S.C. § 1313(c)(3).

States are responsible for enforcing water quality standards on intrastate waters. § 1319(a). In addition to these primary enforcement responsibilities, § 401 of the Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. 33 U.S.C. § 1341. Specifically, § 401

requires an applicant for a federal license or permit to conduct any activity "which may result in any discharge into the navigable waters" to obtain from the State a certification "that any such discharge will comply with the applicable provisions of sections [1311, 1312, 1313, 1316, and 1317 of this title]." 33 U.S.C. § 1341(a). Section 401(d) further provides that "any certification [\*708] . . . shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations and other limitations, under section [1311 or 1312 of this title] . . . and with any other appropriate requirement of State law set forth in such certification." 33 U.S.C. § 1341(d). The limitations included in the certification become a condition on any federal license. *Ibid.* <sup>2</sup>

<sup>2</sup> Section 401, as set forth in 33 U.S.C. § 1341, provides in relevant part:

"(a) Compliance with applicable requirements; application; procedures; license suspension

"(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

...

"(d) Limitations and monitoring requirements of certification

"Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and



shall become a condition on any Federal license or permit subject to the provisions of this section."

[\*\*\*726] II

Petitioners propose to build the Elkhorn Hydroelectric Project on the Dosewallips River. If constructed as presently planned, the facility would be located just outside the Olympic National Park on federally owned land within the Olympic National Forest. The project would divert water from a 1.2-mile reach of the river (the bypass reach), run the [\*709] water through turbines to generate electricity and then return the water to the river below the bypass reach. Under the Federal Power Act (FPA), 41 Stat. 1063, as amended, 16 U.S.C. § 791a *et seq.*, the Federal Energy Regulatory Commission (FERC) has authority to license new hydroelectric facilities. As a result, petitioners must get a FERC license to build or operate the Elkhorn Project. Because a federal license is required, and because the project may result in discharges into the Dosewallips River, petitioners are also required to obtain state certification of the project pursuant to § 401 of the Clean Water Act, 33 U.S.C. § 1341.

The water flow in the bypass reach, which is currently undiminished by appropriation, ranges seasonally between 149 and 738 cubic feet per second (cfs). The Dosewallips supports two species of salmon, coho and chinook, as well as steelhead trout. As originally proposed, the project was to include a diversion dam which would completely block [\*\*1908] the river and channel approximately 75% of the river's water into a tunnel alongside the streambed. About 25% of the water would remain in the bypass reach, but would be returned to the original riverbed through sluice gates or a fish ladder. Depending on the season, this would leave a residual minimum flow of between 65 and 155 cfs in the river. Respondent undertook a study to determine the minimum stream flows necessary to protect the salmon and steelhead fishery in the bypass reach. On June 11, 1986, respondent issued a § 401 water quality certification imposing a variety of conditions on the project, including a minimum stream flow requirement of between 100 and 200 cfs depending on the season.

A state administrative appeals board determined that the minimum flow requirement was intended to enhance, not merely maintain, the fishery, and that the certification condition therefore exceeded respondent's authority under state law. App. to Pet. for Cert. 55a-57a. On appeal, the

[\*710] State Superior Court concluded that respondent could require compliance with the minimum flow conditions. *Id.*, at 29a-45a. The Superior Court also found that respondent had imposed the minimum flow requirement to protect and preserve the fishery, not to improve it, and that this requirement was authorized by state law. *Id.*, at 34a.

The Washington Supreme Court held that the antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows. 121 Wash. 2d 179, 186-187, 849 P.2d 646, 650 (1993). [\*\*\*727] The court also found that § 401(d), which allows States to impose conditions based upon several enumerated sections of the Clean Water Act and "any other appropriate requirement of State law," 33 U.S.C. § 1341(d), authorized the stream flow condition. Relying on this language and the broad purposes of the Clean Water Act, the court concluded that § 401(d) confers on States power to "consider all state action related to water quality in imposing conditions on section 401 certificates." 121 Wash. 2d at 192, 849 P.2d at 652. We granted certiorari, 510 U.S. 810 (1993), to resolve a conflict among the state courts of last resort. See 121 Wash. 2d 179, 849 P.2d 646 (1993); *Georgia Pacific Corp. v. Dept. of Environmental Conservation*, 159 Vt. 639, 628 A.2d 944 (1992) (table); *Power Authority of New York v. Williams*, 60 N.Y.2d 315, 457 N.E.2d 726, 469 N.Y.S.2d 620 (1983). We now affirm.

### III

[\*\*\*LEdHR1A] [1B]The principal dispute in this case concerns whether the minimum stream flow requirement that the State imposed on the Elkhorn Project is a permissible condition of a § 401 certification under the Clean Water Act. To resolve this dispute we must first determine the scope of the State's authority under § 401. We must then determine whether the limitation at issue here, the requirement that petitioners maintain minimum stream flows, falls within the scope of that authority.

[\*711] A

There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the project will result in two possible discharges -- the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after

the water has been used to generate electricity. Brief for Petitioners 27-28. Petitioners contend, however, that the minimum stream flow requirement imposed by the State was unrelated to these specific discharges, and that as a consequence, the State lacked the authority under § 401 to condition its certification on maintenance of stream flows sufficient to protect the Dosewallips fishery.

[\*\*\*LEdHR2A] [2A] If § 401 consisted solely of subsection (a), which refers to a state certification that a "discharge" will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force. Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a [\*\*1909] project. Section 401(d) provides that any certification shall set forth "any effluent limitations and other limitations . . . necessary to assure that *any applicant*" will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. § 1341(d) (emphasis added). The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge." The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose "other limitations" on the project in general to assure compliance with various provisions of the Clean Water Act and with "any other appropriate [\*\*\*728] requirement of State law." Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, *post*, at 726, we see no such anomaly. Section 401(a)(1) identifies the category of activities [\*712] subject to certification -- namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.

Our view of the statute is consistent with EPA's regulations implementing § 401. The regulations expressly interpret § 401 as requiring the State to find that "there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards." 40 CFR § 121.2(a)(3) (1993) (emphasis added). See also EPA, Wetlands and 401 Certification 23 (Apr. 1989) ("In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, . . . and with

'any other appropriate requirement of State law"). EPA's conclusion that *activities* -- not merely discharges -- must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference. See, e. g., *Arkansas v. Oklahoma*, 503 U.S. 91, 110, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992); *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

[\*\*\*LEdHR3A] [3A] Although § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded. The State can only ensure that the project complies with "any applicable effluent limitations and other limitations, under [33 U.S.C. §§ 1311, 1312]" or certain other provisions of the Act, "and with any other appropriate requirement of State law." 33 U.S.C. § 1341(d). The State asserts that the minimum stream flow requirement was imposed to ensure compliance with the state water quality standards adopted pursuant to § 303 of the Clean Water Act, 33 U.S.C. § 1313.

[\*\*\*LEdHR2A] [2B] [\*\*\*LEdHR3A] [3B] We agree with the State that ensuring compliance with § 303 is a proper function of the § 401 certification. Although § 303 is not one of the statutory provisions listed in § 401(d), [\*713] the statute allows States to impose limitations to ensure compliance with § 301 of the Act, 33 U.S.C. § 1311. Section 301 in turn incorporates § 303 by reference. See 33 U.S.C. § 1311(b)(1)(C); see also H. R. Conf. Rep. No. 95-830, p. 96 (1977) ("Section 303 is always included by reference where section 301 is listed"). As a consequence, state water quality standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. This interpretation is consistent with EPA's view of the statute. See 40 CFR § 121.2(a)(3) (1992); EPA, Wetlands and 401 Certification, *supra*. Moreover, limitations to assure compliance with state water quality standards are also permitted by § 401(d)'s reference to "any other appropriate requirement of State law." We do not speculate on what additional state laws, if any, might be incorporated by this language.<sup>3</sup> [\*\*\*729] [\*\*1910] But at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are "appropriate" requirements of state law. Indeed, petitioners appear to agree that the State's authority under § 401 includes limitations designed to ensure compliance with state water quality standards. Brief for Petitioners 9,

21.

3 The dissent asserts that § 301 is concerned solely with discharges, not broader water quality standards. *Post*, at 730, n. 2. Although § 301 does make certain discharges unlawful, see 33 U.S.C. § 1311(a), it also contains a broad enabling provision which requires States to take certain actions, to wit: "In order to carry out the objective of this chapter [viz. the chemical, physical, and biological integrity of the Nation's water] there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, . . . established pursuant to any State law or regulations . . ." 33 U.S.C. § 1311(b)(1)(C). This provision of § 301 expressly refers to state water quality standards, and is not limited to discharges.

B

[\*\*LEdHR1A] [1C] [\*\*LEdHR4A] [4A] Having concluded that, pursuant to § 401, States may condition certification upon any limitations necessary to ensure [\*714] compliance with state water quality standards or any other "appropriate requirement of State law," we consider whether the minimum flow condition is such a limitation. Under § 303, state water quality standards must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). In imposing the minimum stream flow requirement, the State determined that construction and operation of the project as planned would be inconsistent with one of the designated uses of Class AA water, namely "salmonid [and other fish] migration, rearing, spawning, and harvesting." App. to Pet. for Cert. 83a-84a. The designated use of the river as a fish habitat directly reflects the Clean Water Act's goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Indeed, the Act defines pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water." § 1362(19). Moreover, the Act expressly requires that, in adopting water quality standards, the State must take into consideration the use of waters for "propagation of fish and wildlife." § 1313(c)(2)(A).

Petitioners assert, however, that § 303 requires the State to protect designated uses solely through

implementation of specific "criteria." According to petitioners, the State may not require them to operate their dam in a manner consistent with a designated "use"; instead, say petitioners, under § 303 the State may only require that the project comply with specific numerical "criteria."

[\*\*LEdHR4A] [4B] We disagree with petitioners' interpretation of the language of § 303(c)(2)(A). Under the statute, a water quality standard must "consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A) (emphasis added). The text makes it plain that water quality standards contain two components. We think the language [\*715] of § 303 is most naturally read to require [\*\*\*730] that a project be consistent with *both* components, namely, the designated use *and* the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.

Consequently, pursuant to § 401(d) the State may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards. In granting certification pursuant to § 401(d), the State "shall set forth any . . . limitations . . . necessary to assure that [the applicant] will comply with any . . . limitations under [§ 303] . . . and with any other appropriate requirement of State law." A certification requirement that an applicant operate the project consistently with state water quality standards -- *i. e.*, consistently with the designated uses of the water body and the water quality criteria -- is both a "limitation" to assure "compl[iance] with . . . [\*\*1911] limitations" imposed under § 303, and an "appropriate" requirement of state law.

EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria. In its regulations governing state water quality standards, EPA defines criteria as "*elements* of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 CFR § 131.3(b) (1993) (emphasis added). The regulations further provide that "when criteria are met, water quality will *generally* protect the designated use." *Ibid.* (emphasis added). Thus, the EPA regulations

implicitly recognize that in some circumstances, criteria alone are insufficient to protect a designated use.

Petitioners also appear to argue that use requirements are too open ended, and that the Act only contemplates enforcement of the more specific and objective "criteria." But this argument is belied by the open-ended nature of the criteria [\*716] themselves. As the Solicitor General points out, even "criteria" are often expressed in broad, narrative terms, such as "there shall be no discharge of toxic pollutants in toxic amounts." Brief for United States as *Amicus Curiae* 18. See *American Paper Institute, Inc. v. EPA*, 302 U.S. App. D.C. 80, 996 F.2d 346, 349 (CADC 1993). In fact, under the Clean Water Act, only one class of criteria, those governing "toxic pollutants listed pursuant to section 1317(a)(1)," need be rendered in numerical form. See 33 U.S.C. § 1313(c)(2)(B); 40 CFR § 131.11(b)(2) (1993).

Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the river as a fishery, must be translated into specific limitations for individual projects. For example, the standards state that "toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use." WAC 173-201-045(1)(c)(vii) (1986). Similarly, the state standards specify that "aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste." 173-201-045(1)(c)(viii). We think petitioners' [\*\*\*731] attempt to distinguish between uses and criteria loses much of its force in light of the fact that the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics."

Petitioners further argue that enforcement of water quality standards through use designations renders the water quality criteria component of the standards irrelevant. We see no anomaly, however, in the State's reliance on both use designations and criteria to protect water quality. The specific numerical limitations embodied in the criteria are a convenient enforcement mechanism for identifying minimum water conditions which will generally achieve the requisite water quality. And, in most circumstances, satisfying the criteria will, as EPA recognizes, be sufficient to maintain the [\*717] designated use. See 40 CFR § 131.3(b) (1993). Water

quality standards, however, apply to an entire class of water, a class which contains numerous individual water bodies. For example, in the State of Washington, the Class AA water quality standard applies to 81 specified fresh surface waters, as well as to all "surface waters lying within the mountainous regions of the state assigned to national parks, national forests, and/or wilderness areas," all "lakes and their feeder streams within the state," and all "unclassified surface waters that are tributaries to Class AA waters." WAC 173-201-070 (1986). While enforcement of criteria will in general protect the uses of these diverse waters, a complementary requirement that activities also comport with designated uses enables the States to ensure that each activity -- even if not foreseen by the criteria -- will be consistent with the specific uses and attributes of a particular body of water.

Under petitioners' interpretation of the statute, however, if a particular criterion, such as turbidity, were missing from the list [\*\*1912] contained in an individual state water quality standard, or even if an existing turbidity criterion were insufficient to protect a particular species of fish in a particular river, the State would nonetheless be forced to allow activities inconsistent with the existing or designated uses. We think petitioners' reading leads to an unreasonable interpretation of the Act. The criteria components of state water quality standards attempt to identify, for all the water bodies in a given class, water quality requirements generally sufficient to protect designated uses. These criteria, however, cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect the State's hundreds of individual water bodies. Requiring the States to enforce only the criteria component of their water quality standards would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the [\*718] water's designated uses. Given that there is no textual support for imposing this requirement, we are loath to attribute to Congress an intent to impose this heavy regulatory burden on the States.

The State also justified its minimum stream flow as necessary to implement the "antidegradation policy" of § 303, 33 U.S.C. § 1313(d)(4)(B). When the Clean Water Act was enacted in 1972, the water quality standards of [\*\*\*732] all 50 States had antidegradation provisions.

These provisions were required by federal law. See U.S. Dept. of Interior, Federal Water Pollution Control Administration, Compendium of Department of Interior Statements on Non-degradation of Interstate Waters 1-2 (Aug. 1968); see also Hines, A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water, 62 Iowa L. Rev. 643, 658-660 (1977). By providing in 1972 that existing state water quality standards would remain in force until revised, the Clean Water Act ensured that the States would continue their antidegradation programs. See 33 U.S.C. § 1313(a). EPA has consistently required that revised state standards incorporate an antidegradation policy. And, in 1987, Congress explicitly recognized the existence of an "antidegradation policy established under [§ 303]." § 1313(d)(4)(B).

EPA has promulgated regulations implementing § 303's antidegradation policy, a phrase that is not defined elsewhere in the Act. These regulations require States to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy." 40 CFR § 131.12 (1993). These "implementation methods shall, at a minimum, be consistent with the . . . existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *Ibid.* EPA has explained that under its antidegradation regulation, "no activity is allowable . . . which could partially or completely eliminate any existing use." EPA, Questions and [\*719] Answers on Antidegradation 3 (Aug. 1985). Thus, States must implement their antidegradation policy in a manner "consistent" with existing uses of the stream. The State of Washington's antidegradation policy in turn provides that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." WAC 173-201-035(8)(a) (1986). The State concluded that the reduced stream flows would have just the effect prohibited by this policy. The Solicitor General, representing EPA, asserts, Brief for United States as *Amicus Curiae* 18-21, and we agree, that the State's minimum stream flow condition is a proper application of the state and federal antidegradation regulations, as it ensures that an "existing instream water use" will be "maintained and protected." 40 CFR § 131.12(a)(1) (1993).

Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality," and

does not allow the regulation of water "quantity." This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the [\*\*1913] water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, *i. e.*, diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. 33 U.S.C. § 1362(19). This broad conception of pollution -- one which [\*\*\*733] expressly evinces Congress' concern with the physical and biological integrity of water -- refutes petitioners' assertion that the Act draws a sharp distinction between the regulation of water "quantity" and water "quality." Moreover, § 304 of the Act expressly recognizes that water "pollution" may result from "changes [\*720] in the movement, flow, or circulation of any navigable waters . . ., including changes caused by the construction of dams." 33 U.S.C. § 1314(f). This concern with the flowage effects of dams and other diversions is also embodied in the EPA regulations, which expressly require existing dams to be operated to attain designated uses. 40 CFR § 131.10(g)(4) (1992).

Petitioners assert that two other provisions of the Clean Water Act, §§ 101(g) and 510(2), 33 U.S.C. §§ 1251(g) and 1370(2), exclude the regulation of water quantity from the coverage of the Act. Section 101(g) provides "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). Similarly, § 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. § 1370. In petitioners' view, these provisions exclude "water quantity issues from direct regulation under the federally controlled water quality standards authorized in § 303." Brief for Petitioners 39 (emphasis deleted).

This language gives the States authority to allocate water rights; we therefore find it peculiar that petitioners argue that it prevents the State from regulating stream flow. In any event, we read these provisions more narrowly than petitioners. Sections 101(g) and 510(2)

preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. In *California v. FERC*, 495 U.S. 490, 498, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990), construing an analogous provision of the Federal Power Act, <sup>4</sup> we explained that "minimum stream [\*721] flow requirements neither reflect nor establish 'proprietary rights' to water. Cf. *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 176, 90 L. Ed. 1143, 66 S. Ct. 906, and n. 20 (1946). Moreover, the certification itself does not purport to determine petitioners' proprietary right to the water of the Dosewallips. In fact, the certification expressly states that a "State Water Right Permit (Chapters 90.03.250 RCW and 508-12 WAC) must be obtained prior to commencing construction of the project." App. to Pet. for Cert. 83a. The certification merely determines the nature of the use to which that proprietary right may be put under the Clean Water Act, if and when it is obtained from the State. Our view is reinforced by the legislative history of the 1977 [\*\*\*734] amendment to the Clean Water Act adding § 101(g). See 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978) ("The requirements [of the Act] may incidentally affect individual water rights. . . . [\*\*1914] It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations").

4 The relevant text of the Federal Power Act provides: "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077, 16 U.S.C. § 821.

#### IV

Petitioners contend that we should limit the State's authority to impose minimum flow requirements because FERC has comprehensive authority to license

hydroelectric projects pursuant to the FPA, 16 U.S.C. § 791a *et seq.* In petitioners' view, the minimum flow requirement imposed here interferes with FERC's authority under the FPA.

[\*722] The FPA empowers FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." § 797(e). The FPA also requires FERC to consider a project's effect on fish and wildlife. §§ 797(e), 803(a)(1). In *California v. FERC*, *supra*, we held that the California Water Resources Control Board, acting pursuant to state law, could not impose a minimum stream flow which conflicted with minimum stream flows contained in a FERC license. We concluded that the FPA did not "save" to the States this authority. *Id.*, 495 U.S. at 498.

[\*\*\*LEdHR1A] [1D]No such conflict with any FERC licensing activity is presented here. FERC has not yet acted on petitioners' license application, and it is possible that FERC will eventually deny petitioners' application altogether. Alternatively, it is quite possible, given that FERC is required to give equal consideration to the protection of fish habitat when deciding whether to issue a license, that any FERC license would contain the same conditions as the state § 401 certification. Indeed, at oral argument the Deputy Solicitor General stated that both EPA and FERC were represented in this proceeding, and that the Government has no objection to the stream flow condition contained in the § 401 certification. Tr. of Oral Arg. 43-44.

Finally, the requirement for a state certification applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters. For example, a permit from the Army Corps of Engineers is required for the installation of any structure in the navigable waters which may interfere with navigation, including piers, docks, and ramps. Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1151, § 10, 33 U.S.C. § 403. Similarly, a permit must be obtained from the Army Corps of Engineers [\*723] for the discharge of dredged or fill material, and from the Secretary of the Interior or Agriculture for the construction of reservoirs, canals, and other water storage systems on federal land. See 33 U.S.C. §§ 1344(a), (e); 43 U.S.C. § 1761 (1988 ed. and Supp. IV). [\*\*\*735] We

assume that a § 401 certification would also be required for some licenses obtained pursuant to these statutes. Because § 401's certification requirement applies to other statutes and regulatory schemes, and because any conflict with FERC's authority under the FPA is hypothetical, we are unwilling to read implied limitations into § 401. If FERC issues a license containing a stream flow condition with which petitioners disagree, they may pursue judicial remedies at that time. Cf. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 778, n. 20, 80 L. Ed. 2d 753, 104 S. Ct. 2105 (1984).

In summary, we hold that the State may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard. The judgment of the Supreme Court of Washington, accordingly, is affirmed.

*So ordered.*

**CONCUR BY: STEVENS**

**CONCUR**

JUSTICE STEVENS, concurring.

While I agree fully with the thorough analysis in the Court's opinion, I add this comment [\*\*1915] for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards. See, e. g., § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

**DISSENT BY: THOMAS**

**DISSENT**

[\*724] JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court today holds that a State, pursuant to § 401 of the Clean Water Act, may condition the certification necessary to obtain a federal license for a proposed hydroelectric project upon the maintenance of a minimum flow rate in the river to be utilized by the

project. In my view, the Court makes three fundamental errors. First, it adopts an interpretation that fails adequately to harmonize the subsections of § 401. Second, it places no meaningful limitation on a State's authority under § 401 to impose conditions on certification. Third, it gives little or no consideration to the fact that its interpretation of § 401 will significantly disrupt the carefully crafted federal-state balance embodied in the Federal Power Act. Accordingly, I dissent.

I

A

Section 401(a)(1) of the Federal Water Pollution Control Act, otherwise known as the Clean Water Act (CWA or Act), 33 U.S.C. § 1251 *et seq.*, provides that "any applicant for a Federal license or permit to conduct any activity . . ., which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such [\*\*\*736] discharge will comply with . . . applicable provisions of [the CWA]." 33 U.S.C. § 1341(a)(1). The terms of § 401(a)(1) make clear that the purpose of the certification process is to ensure that discharges from a project will meet the requirements of the CWA. Indeed, a State's authority under § 401(a)(1) is limited to certifying that "any discharge" that "may result" from "any activity," such as petitioners' proposed hydroelectric project, will "comply" with the enumerated provisions of the CWA; if the discharge will fail to comply, the State may "deny" the certification. *Ibid.* In addition, under § 401(d), a State may place conditions on a [\*725] § 401 certification, including "effluent limitations and other limitations, and monitoring requirements," that may be necessary to ensure compliance with various provisions of the CWA and with "any other appropriate requirement of State law." § 1341(d).

The minimum stream flow condition imposed by respondents in this case has no relation to any possible "discharge" that might "result" from petitioners' proposed project. The term "discharge" is not defined in the CWA, but its plain and ordinary meaning suggests "a flowing or issuing out," or "something that is emitted." Webster's Ninth New Collegiate Dictionary 360 (1991). Cf. 33 U.S.C. § 1362(16) ("The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants"). A minimum stream flow

requirement, by contrast, is a limitation on the amount of water the project can take in or divert from the river. See *ante*, at 709. That is, a minimum stream flow requirement is a limitation on intake -- the opposite of discharge. Imposition of such a requirement would thus appear to be beyond a State's authority as it is defined by § 401(a)(1).

The Court remarks that this reading of § 401(a)(1) would have "considerable force," *ante*, at 711, were it not for what the Court understands to be the expansive terms of § 401(d). That subsection, as set forth in 33 U.S.C. § 1341(d), provides:

"Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that *any applicant* for a Federal license or permit [\*1916] will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal [\*726] license or permit subject to the provisions of this section." (Emphasis added.)

According to the Court, the fact that § 401(d) refers to an "applicant," rather than a "discharge," complying with various provisions of the Act "contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge.'" *Ante*, at 711. In the Court's view, § 401(d)'s reference to an applicant's compliance "expands" a State's authority beyond the limits set out in § 401(a)(1), *ibid.*, [\*\*\*737] thereby permitting the State in its certification process to scrutinize the applicant's proposed "activity as a whole," not just the discharges that may result from the activity, *ante*, at 712. The Court concludes that this broader authority allows a State to impose conditions on a § 401 certification that are unrelated to discharges. *Ante*, at 711-712.

While the Court's interpretation seems plausible at first glance, it ultimately must fail. If, as the Court

asserts, § 401(d) permits States to impose conditions unrelated to discharges in § 401 certifications, Congress' careful focus on discharges in § 401(a)(1) -- the provision that describes the scope and function of the certification process -- was wasted effort. The power to set conditions that are unrelated to discharges is, of course, nothing but a conditional power to deny certification for reasons unrelated to discharges. Permitting States to impose conditions unrelated to discharges, then, effectively eliminates the constraints of § 401(a)(1).

Subsections 401(a)(1) and (d) can easily be reconciled to avoid this problem. To ascertain the nature of the conditions permissible under § 401(d), § 401 must be read as a whole. See *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988) (statutory interpretation is a "holistic endeavor"). As noted above, § 401(a)(1) limits a State's authority in the certification process to addressing concerns related to discharges and to ensuring that any discharge resulting from a project will comply with specified provisions of the Act. It is reasonable [\*727] to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while § 401(d) permits a State to place conditions on a certification to ensure compliance of the "applicant," those conditions must still be related to discharges. In my view, this interpretation best harmonizes the subsections of § 401. Indeed, any broader interpretation of § 401(d) would permit that subsection to swallow § 401(a)(1).

The text of § 401(d) similarly suggests that the conditions it authorizes must be related to discharges. The Court attaches critical weight to the fact that § 401(d) speaks of the compliance of an "applicant," but that reference, in and of itself, says little about the nature of the conditions that may be imposed under § 401(d). Rather, because § 401(d) conditions can be imposed only to ensure compliance with specified provisions of law -- that is, with "applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard[s] of performance under section 1316 of this title, . . . prohibition[s], effluent standard[s], or pretreatment standard[s] under section 1317 of this title, [or] . . . any other appropriate requirement[s] of State law" -- one should logically turn to those provisions for guidance in determining the nature, scope, and purpose of § 401(d) conditions. Each of the four identified CWA



provisions describes discharge-related limitations. See § 1311 (making it unlawful to discharge any pollutant except in compliance with enumerated provisions of the Act); § 1312 (establishing effluent limitations on point source discharges); [\*\*\*738] § 1316 (setting national standards of performance [\*\*1917] for the control of discharges); and § 1317 (setting pretreatment effluent standards and prohibiting the discharge of certain effluents except in compliance with standards).

The final term on the list -- "appropriate requirement[s] of State law" -- appears to be more general in scope. Because [\*728] this reference follows a list of more limited provisions that specifically address discharges, however, the principle *eiusdem generis* would suggest that the general reference to "appropriate" requirements of state law is most reasonably construed to extend only to provisions that, like the other provisions in the list, impose discharge-related restrictions. Cf. *Cleveland v. United States*, 329 U.S. 14, 18, 91 L. Ed. 12, 67 S. Ct. 13 (1946) ("Under the *eiusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it"); *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84, 112 L. Ed. 2d 374, 111 S. Ct. 415 (1990). In sum, the text and structure of § 401 indicate that a State may impose under § 401(d) only those conditions that are related to discharges.

## B

The Court adopts its expansive reading of § 401(d) based at least in part upon deference to the "conclusion" of the Environmental Protection Agency (EPA) that § 401(d) is not limited to requirements relating to discharges. *Ante*, at 712. The agency regulation to which the Court defers is 40 CFR § 121.2(a)(3) (1993), which provides that the certification shall contain "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." *Ante*, at 712. According to the Court, "EPA's conclusion that *activities* -- not merely discharges -- must comply with state water quality standards . . . is entitled to deference" under *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). *Ante*, at 712.

As a preliminary matter, the Court appears to resort to deference under *Chevron* without establishing through an initial examination of the statute that the text of the section is ambiguous. See *Chevron, supra*, 467 U.S. at

842-843. More importantly, the Court invokes *Chevron* deference to support its interpretation even though the Government does not seek [\*729] deference for the EPA's regulation in this case.<sup>1</sup> That the Government itself has not contended that an agency interpretation exists reconciling the scope of the conditioning authority under § 401(d) with the terms of § 401(a)(1) should suggest to the Court that there is no "agency construction" directly addressing the question. *Chevron, supra*, at 842.

1 The Government, appearing as *amicus curiae* "supporting affirmance," instead approaches the question presented by assuming, *arguendo*, that petitioners' construction of § 401 is correct: "Even if a condition imposed under Section 401(d) were valid only if it assured that a 'discharge' will comply with the State's water quality standards, the [minimum flow condition set by respondents] satisfies that test." Brief for United States as *Amicus Curiae* 11.

In fact, the regulation to which the [\*\*\*739] Court defers is hardly a definitive construction of the scope of § 401(d). On the contrary, the EPA's position on the question whether conditions under § 401(d) must be related to discharges is far from clear. Indeed, the only EPA regulation that specifically addresses the "conditions" that may appear in § 401 certifications speaks exclusively in terms of limiting discharges. According to the EPA, a § 401 certification shall contain "[a] statement of *any conditions* which the certifying agency deems necessary or desirable *with respect to the discharge of the activity*." 40 CFR § 121.2(a)(4) (1993) (emphases added). In my view, § 121.2(a)(4) should, at the very least, give the Court pause before it resorts to *Chevron* deference in this case.

## II

The Washington Supreme Court held that the State's water quality standards, promulgated [\*\*1918] pursuant to § 303 of the Act, 33 U.S.C. § 1313, were "appropriate" requirements of state law under § 401(d), and sustained the stream flow condition imposed by respondents as necessary to ensure compliance with a "use" of the river as specified in those standards. As an alternative to their argument that § 401(d) conditions must be discharge related, petitioners assert that [\*730] the state court erred when it sustained the stream flow condition under the "use" component of the State's water quality standards

without reference to the corresponding "water quality criteria" contained in those standards. As explained above, petitioners' argument with regard to the scope of a State's authority to impose conditions under § 401(d) is correct. I also find petitioners' alternative argument persuasive. Not only does the Court err in rejecting that § 303 argument, in the process of doing so it essentially removes all limitations on a State's conditioning authority under § 401.

The Court states that, "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are 'appropriate' requirements of state law" under § 401(d). *Ante*, at 713. <sup>2</sup> A water quality standard promulgated pursuant to § 303 must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). The Court asserts that this language "is most naturally read to require that a project be consistent with *both* components, namely, the designated use *and* the water quality criteria." *Ante*, at 715. In the Court's view, then, the "use" of a body of water is independently enforceable through § 401(d) without reference to the corresponding criteria. *Ibid*.

2 In the Court's view, § 303 water quality standards come into play under § 401(d) either as "appropriate" requirements of state law or through § 301 of the Act, which, according to the Court, "incorporates § 303 by reference." *Ante*, at 713 (citations omitted). The Court notes that through § 303, "the statute allows States to impose limitations to ensure compliance with § 301 of the Act." *Ibid*. Yet § 301 makes unlawful only "the [unauthorized] *discharge* of any pollutant by any person." 33 U.S.C. § 1311(a) (emphasis added); cf. *supra*, 511 U.S. at 727. Thus, the Court's reliance on § 301 as a source of authority to impose conditions unrelated to discharges is misplaced.

[\*\*740] The Court's reading strikes me as contrary to common sense. It is difficult to see how compliance with a "use" of a body of water could be enforced without reference to the [\*731] corresponding criteria. In this case, for example, the applicable "use" is contained in the following regulation: "Characteristic uses shall include, but not be limited to, . . . salmonid migration, rearing, spawning, and harvesting." Wash. Admin. Code (WAC) 173-201-045(1)(b)(iii) (1986). The corresponding

criteria, by contrast, include measurable factors such as quantities of fecal coliform organisms and dissolved gases in the water. 173-201-045(1)(c)(i) and (ii). <sup>3</sup> Although the Act does not further address (at least not expressly) the link between "uses" and "criteria," the regulations promulgated under § 303 make clear that a "use" is an aspirational goal to be attained through compliance with corresponding "criteria." Those regulations suggest that "uses" are to be "achieved and protected," and that "water quality criteria" are to be adopted to "protect the designated use[s]." 40 CFR §§ 131.10(a), 131.11(a)(1) (1993).

3 Respondents concede that petitioners' project "will likely not violate any of Washington's water quality criteria." Brief for Respondents 24.

The problematic consequences of decoupling "uses" and "criteria" become clear once the Court's interpretation of § 303 is read in the context of § 401. In the Court's view, a State may condition the § 401 certification "upon *any limitations* necessary to ensure compliance" with the "uses of the water body." *Ante*, at 713-714, 715 (emphasis added). Under the Court's interpretation, then, state environmental agencies may pursue, through § 401, their water goals in any way they choose; the conditions imposed on certifications need not relate to discharges, nor to water quality criteria, nor to any objective or quantifiable standard, so long as they tend to [\*\*1919] make the water more suitable for the uses the State has chosen. In short, once a State is allowed to impose conditions on § 401 certifications to protect "uses" in the abstract, § 401(d) is limitless.

To illustrate, while respondents in this case focused only on the "use" of the Dosewallips River as a fish habitat, this particular river has a number of other "characteristic uses," [\*732] including "recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment)." WAC 173-201-045(1)(b)(v) (1986). Under the Court's interpretation, respondents could have imposed any number of conditions related to recreation, including conditions that have little relation to water quality. In *Town of Summersville*, 60 F.E.R.C. P61,291, p. 61,990 (1992), for instance, the state agency required the applicant to "construct . . . access roads and paths, low water stepping stone bridges, . . . a boat launching facility . . ., and a residence and storage building." These conditions presumably would be sustained under the approach the Court adopts today. <sup>4</sup> In

the end, it is difficult to conceive of a condition that would fall outside a [\*\*\*741] State's § 401(d) authority under the Court's approach.

4 Indeed, as the § 401 certification stated in this case, the flow levels imposed by respondents are "in excess of those required to maintain water quality in the bypass region," App. to Pet. for Cert. 83a, and therefore conditions not related to water quality must, in the Court's view, be permitted.

### III

The Court's interpretation of § 401 significantly disrupts the careful balance between state and federal interests that Congress struck in the Federal Power Act (FPA), 16 U.S.C. § 791 *et seq.* Section 4(e) of the FPA authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." 16 U.S.C. § 797(e). In the licensing process, FERC must balance a number of considerations: "In addition to the power and development purposes for which licenses are issued, [FERC] shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational [\*733] opportunities, and the preservation of other aspects of environmental quality." *Ibid.* Section 10(a) empowers FERC to impose on a license such conditions, including minimum stream flow requirements, as it deems best suited for power development and other public uses of the waters. See 16 U.S.C. § 803(a); *California v. FERC*, 495 U.S. 490, 494-495, 506, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990).

In *California v. FERC*, the Court emphasized FERC's exclusive authority to set the stream flow levels to be maintained by federally licensed hydroelectric projects. California, in order "to protect [a] stream's fish," had imposed flow rates on a federally licensed project that were significantly higher than the flow rates established by FERC. *Id.*, at 493. In concluding that California lacked authority to impose such flow rates, we stated:

"As Congress directed in FPA § 10(a),

FERC set the conditions of the [project] license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would constitute a veto of the project that was approved and licensed by [\*\*1920] FERC." *Id.*, 495 U.S. at 506-507 (citations and internal quotation marks omitted).

*California v. FERC* reaffirmed our decision in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 164, 90 L. Ed. 1143, 66 S. Ct. 906 (1946), in which we warned against "vesting in [state authorities] [\*734] a veto power" over federal hydroelectric projects. Such authority, we concluded, could "destroy the effectiveness" of the FPA and "subordinate to the control of the State the 'comprehensive' [\*\*\*742] planning" with which the administering federal agency (at that time the Federal Power Commission) was charged. *Ibid.*

Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in *California v. FERC* and *First Iowa* they did not possess. As the language of § 401(d) expressly states, any condition placed in a § 401 certification, including, in the Court's view, a stream flow requirement, "shall become a condition on any Federal license or permit." 33 U.S.C. § 1341(d) (emphasis added). Any condition imposed by a State under § 401(d) thus becomes a "term . . . of the license as a matter of law," *Department of Interior v. FERC*, 293 U.S. App. D.C. 182, 952 F.2d 538, 548 (CADC 1992) (citation and internal quotation marks omitted), regardless of whether FERC favors the limitation. Because of § 401(d)'s mandatory language, federal courts have uniformly held that FERC has no

power to alter or review § 401 conditions, and that the proper forum for review of those conditions is state court. Section 401(d) conditions imposed by States are [\*735] therefore binding on FERC. Under the Court's interpretation, then, it appears that the mistake of the State in *California v. FERC* was not that it had trespassed into territory exclusively reserved to FERC; rather, it simply had not hit upon the proper device -- that is, the § 401 certification -- through which to achieve its objectives.

5 See, e. g., *Keating v. FERC*, 288 U.S. App. D.C. 344, 927 F.2d 616, 622 (CADC 1991) (federal review inappropriate because a decision to grant or deny § 401 certification "presumably turns on questions of substantive state environmental law -- an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence"); *Department of Interior v. FERC*, 952 F.2d at 548; *United States v. Marathon Development Corp.*, 867 F.2d 96, 102 (CA1 1989); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (CA3 1988). FERC has taken a similar position. See *Town of Summersville*, 60 F.E.R.C. P61,291, p. 61,990 (1992) ("Since pursuant to Section 401(d) . . . all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission. The only alternatives available to the Commission are either to issue a license with the conditions included or to deny" the application altogether); accord, *Central Maine Power Co.*, 52 F.E.R.C. P61,033, pp. 61,172-61,173 (1990).

Although the Court notes in passing that "the limitations included in the certification become a condition on any federal license," *ante*, at 708, it does not acknowledge or discuss the shift of power from FERC to the States that is accomplished by its decision. Indeed, the Court merely notes that "any conflict with FERC's authority under the FPA" in this case is "hypothetical" at this stage, *ante*, at 723, because "FERC has not yet acted on petitioners' license application," *ante*, at 722. We are assured that "it is quite possible . . . that any FERC license would contain the same conditions as the state § 401 certification." *Ibid*.

The Court's observations simply miss the point. Even if FERC might have no objection to the stream flow condition established by respondents *in this case*, such a happy coincidence will likely prove to be the exception, rather than the rule. In issuing licenses, FERC must balance the Nation's power needs together with the need for energy conservation, [\*\*\*743] irrigation, flood control, fish and wildlife protection, and recreation. 16 U.S.C. § 797(e). State environmental agencies, by contrast, need only consider parochial environmental interests. Cf., e. g., Wash. Rev. Code § 90.54.010(2) (1992) (goal of State's water policy is to "insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington"). As a result, it is likely that conflicts will arise between a [\*\*1921] FERC-established stream flow level and a state-imposed level.

Moreover, the Court ignores the fact that its decision nullifies the congressionally mandated process for resolving such state-federal disputes when they develop. Section 10(j)(1) of the FPA, 16 U.S.C. § 803(j)(1), which was added as part [\*736] of the Electric Consumers Protection Act of 1986 (ECPA), 100 Stat. 1244, provides that every FERC license must include conditions to "protect, mitigate damage to, and enhance" fish and wildlife, including "related spawning grounds and habitat," and that such conditions "shall be based on recommendations" received from various agencies, including state fish and wildlife agencies. If FERC believes that a recommendation from a state agency is inconsistent with the FPA -- that is, inconsistent with what FERC views as the proper balance between the Nation's power needs and environmental concerns -- it must "attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities" of the state agency. § 803(j)(2). If, after such an attempt, FERC "does not adopt in whole or in part a recommendation of any [state] agency," it must publish its reasons for rejecting that recommendation. *Ibid*. After today's decision, these procedures are a dead letter with regard to stream flow levels, because a State's "recommendation" concerning stream flow "shall" be included in the license when it is imposed as a condition under § 401(d).

More fundamentally, the 1986 amendments to the FPA simply make no sense in the stream flow context if, in fact, the States already possessed the authority to establish minimum stream flow levels under § 401(d) of

the CWA, which was enacted years before those amendments. Through the ECPA, Congress strengthened the role of the States in establishing FERC conditions, but it did not make that authority paramount. Indeed, although Congress could have vested in the States the final authority to set stream flow conditions, it instead left that authority with FERC. See *California v. FERC*, 495 U.S. at 499. As the Ninth Circuit observed in the course of rejecting California's effort to give *California v. FERC* a narrow reading, "there would be no point in Congress requiring [FERC] to consider the state agency recommendations on environmental matters and [\*737] make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." *Sayles Hydro Associates v. Maughan*, 985 F.2d 451, 456 (1993).

Given the connection between § 401 and federal hydroelectric licensing, it is remarkable that the Court does not at least attempt to fit its interpretation of § 401 into the larger statutory framework governing the licensing process. At the very least, the significant impact the [\*\*\*744] Court's ruling is likely to have on that process should compel the Court to undertake a closer examination of § 401 to ensure that the result it reaches was mandated by Congress.

#### IV

Because the Court today fundamentally alters the federal-state balance Congress carefully crafted in the FPA, and because such a result is neither mandated nor

supported by the text of § 401, I respectfully dissent.

#### REFERENCES

To Full Text Opinion

61A Am Jur 2d, Pollution Control 133, 142, 144, 151, 158; 78 Am Jur 2d, Waters 292

11 Federal Procedure, L Ed, Environmental Protection 32:262; 24 Federal Procedure, L Ed, Natural and Marine Resources 56:313, 56:315

9 Federal Procedural Forms, L Ed, Environmental Protection 29:91

20 Am Jur Pl & Pr Forms (Rev), Pollution Control, Form 81

33 USCS 1341

L Ed Digest, Energy 30; Environmental Law 32, 40; Waters 20

L Ed Index, Hydroelectric Power; Water Pollution

ALR Index, Federal Water Pollution Control Act; Hydroelectric Power; Water Pollution

#### Annotation References:

Supreme Court's views as to construction and application of Federal Water Pollution Control (Clean Water) Act (33 USCS 1251-1376). 84 L Ed 2d 895.

Citation #7  
135 ca4th 1392

LEXSEE

**CITY OF ARCADIA et al., Plaintiffs and Appellants, v. STATE WATER  
RESOURCES CONTROL BOARD et al., Defendants and Appellants.**

**D043877**

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION ONE**

**135 Cal. App. 4th 1392; 38 Cal. Rptr. 3d 373; 2006 Cal. App. LEXIS 92; 2006 Cal.  
Daily Op. Service 797; 2006 Daily Journal DAR 1145; 36 ELR 20025**

**January 26, 2006, Filed**

**SUBSEQUENT HISTORY:** Rehearing denied by City of Arcadia v. State Water Resources Control Board, 2006 Cal. App. LEXIS 221 (Cal. App. 4th Dist., Feb. 17, 2006) Review denied by Arcadia, City of v. State Water Resources Control Board, 2006 Cal. LEXIS 4781 (Cal., Apr. 19, 2006)  
Related proceeding at County of Los Angeles v. State Water Resources Control Bd., 143 Cal. App. 4th 985, 50 Cal. Rptr. 3d 619, 2006 Cal. App. LEXIS 1546 (Cal. App. 2d Dist., 2006)  
Related proceeding at City of Arcadia v. State Water Resources Control Bd., 2010 Cal. App. LEXIS 2150 (Cal. App. 4th Dist., Dec. 14, 2010)

**PRIOR HISTORY:** [\*\*\*1] Superior Court of San Diego County, No. GIC803631, Wayne L. Peterson and Linda B. Quinn, Judges.  
City of Arcadia v. United States EPA, 265 F. Supp. 2d 1142, 2003 U.S. Dist. LEXIS 9044 (N.D. Cal., 2003)

**COUNSEL:** Rutan & Tucker, Richard Montevideo and Terence J. Gallagher for Plaintiffs and Appellants.

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Bill Lockyer, Attorney General, Tom Greene, Chief Assistant Attorney General, Mary E. Hackenbracht, Assistant Attorney General, Marilyn H. Levin and Gregory J. Newmark, Deputy Attorneys General, for Defendants and Appellants.

Law Office of Michael R. Lozeau, Michael R. Lozeau; and Dana P. Palmer for Santa Monica Baykeeper, Inc., Heal the Bay, Inc., [\*\*\*2] and Natural Resources Defense Council, Inc., as Amici Curiae on behalf of Defendants and Appellants.

**JUDGES:** McConnell, P. J., with McIntyre and Irion, JJ., concurring.

**OPINION BY:** McConnell

**OPINION**

[\*\*378] **McCONNELL, P. J.**--This case concerns the serious environmental problem of litter discharged from municipal storm drains into the Los Angeles River, and efforts of the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) and the State Water Resources Control Board (State Board) <sup>1</sup> to ameliorate the problem through the adoption and approval of a planning document setting a target of zero trash discharge within a multi-year implementation period.

1 We refer to these entities together as the Water Boards.

The Water Boards appeal a judgment partially granting a petition for writ of mandate brought by the City of Arcadia and 21 other cities (Cities),<sup>2</sup> who [\*1402] agree trash pollution must be remedied but oppose the target of zero trash as unattainable and inordinately expensive. The Water Boards challenge [\*\*\*3] the court's findings that an assimilative capacity study is a required element of its action; a cost-benefit analysis and consideration of economic factors are required under state law and are not met; the zero trash target is inapplicable to the Los Angeles River Estuary (Estuary) because it does not appear on the state's list of impaired waters; and, the Water Boards failed to comply with the California Environmental Quality Act (CEQA) by not preparing an environmental impact report (EIR) or its functional equivalent.

2 In addition to Arcadia the Cities include Baldwin Park, Bellflower, Cerritos, Commerce, Diamond Bar, Downey, Irwindale, Lawndale, Monrovia, Montebello, Monterey Park, Pico Rivera, Rosemead, San Gabriel, Santa Fe Springs, Sierra Madre, Signal Hill, South Pasadena, Vernon, West Covina and Whittier.

The Water Boards also contend the court erred by granting the Cities declaratory relief on their claim the trash total maximum daily load (TMDL) does not apply to "nonwaters," meaning areas that do [\*\*\*4] not drain into navigable waters such as the Los Angeles River or tributaries, as the parties agreed during this proceeding that the trash TMDL applies only to navigable waters.

The Cities also appeal, contending the trial court erred by not invalidating the trash TMDL on the additional grounds the Water Boards failed to provide for deemed compliance with the target of zero trash through certain methods; failed to implement load allocations for nonpoint sources of trash pollution; failed to adhere to the data collection and analysis required by federal and state law; relied on nonexistent, illegal and irrational uses to be made of the Los Angeles River; and, violated the Administrative Procedures Act (APA).

We conclude the Cities' appeal lacks merit. As to the Water Boards' appeal, we conclude the court properly invalidated the planning document on the ground of noncompliance with CEQA, and we affirm the judgment

insofar as it is based on that ground. We reverse the judgment to the extent it is based on other grounds. Further, we hold the court erred by granting declaratory relief on the nonwaters issue as there was no controversy when the court ruled.

#### [\*\*379] BACKGROUND INFORMATION

#### I

##### [\*\*\*5] *Statutory and Regulatory Scheme*

The "quality of our nation's waters is governed by a 'complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities.' " (*City of Burbank v. State Water Resources Control Bd.* [\*1403] (2005) 35 Cal.4th 613, 619 [26 Cal. Rptr. 3d 304, 108 P.3d 862] (*City of Burbank*)). An overview of applicable law is required to place the facts here in context.

#### A

##### *Federal Law*

In 1972 Congress enacted amendments to the Federal Water Pollution Control Act (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 816; 33 U.S.C. § 1251 et seq.), which, as amended in 1977, is commonly known as the Clean Water Act. (*City of Burbank, supra*, 35 Cal.4th at pp. 619-620.) Its stated goal is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants into navigable waters. (33 U.S.C. § 1251(a).)

(1) The Clean Water Act places "primary reliance for developing water quality standards on the states." (*Scott v. Hammond* (7th Cir. 1984) 741 F.2d 992, 994.) It requires each state to develop such standards [\*\*\*6] and review them at least once every three years for required modifications. (33 U.S.C. § 1313(a), (c)(1).) The standards must include designated uses such as recreation, navigation or the propagation of fish, shellfish and wildlife; water quality criteria sufficient to protect the designated uses; and an antidegradation policy. (40 C.F.R. §§ 131.6, 131.10-131.12 (2003).) The water quality criteria "can be expressed in narrative form or in a numeric form, e.g., specific pollutant concentrations." (*Florida Public Interest Research Group v. E.P.A.* (11th Cir. 2004) 386 F.3d 1070, 1073.) "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." (*City of Burbank, supra*, 35 Cal.4th at p. 622, fn. 4.)

The Clean Water Act focuses on two possible sources of pollution: point sources and nonpoint sources. "Point source" means "any discernable, confined and discrete conveyance" such as a pipe, ditch, channel, tunnel, or [\*\*\*7] conduit. (33 U.S.C. § 1362(14).) The Clean Water Act does not define nonpoint source pollution, but it has been described as " 'nothing more [than] a [water] pollution problem not involving a discharge from a point source.' " (*Defenders of Wildlife v. U.S. Environ. Protec.* (10th Cir. 2005) 415 F.3d 1121, 1124.)<sup>3</sup>

3 According to the Environmental Protection Act (EPA), nonpoint source pollution is caused by rainfall or snowmelt moving over and through the ground, and includes excess fertilizers, herbicides, and insecticides from agricultural lands and residential areas; oil, grease and toxic chemicals from urban runoff and energy production; sediment from improperly managed construction sites, crop and forest land, and eroding stream banks; salt from irrigation practices and acid drainage from abandoned mines; and bacteria and nutrients from livestock, pet wastes and faulty septic systems. (<<http://www.epa.gov/owow/nps/qa.html>> [as of Jan. 26, 2006].)

[\*1404] (2) "Congress dealt with the problem of point source [\*\*\*8] pollution using the National Pollution Discharge Elimination System [NPDES] permit process. Under this approach, compliance rests on technology- [\*\*\*380] based controls that limit the discharge of pollution from any point source into certain waters unless that discharge complies with the [Clean Water] Act's specific requirements." (*San Francisco BayKeeper v. Whitman* (2002) 297 F.3d 877, 880; see 33 U.S.C. § 1311(b)(1)(A).) "Nonpoint sources, because of their very nature, are not regulated under the NPDES [program]. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the [Clean Water] Act which encourages states to develop areawide waste treatment management plans." (*Pronsolino v. Marcus* (N.D.Cal. 2000) 91 F. Supp. 2d 1337, 1348, citing 33 U.S.C. § 1288; see also 33 U.S.C. § 1329.)

"When the NPDES system fails to adequately clean

up certain rivers, streams or smaller water segments, the [Clean Water] Act requires use of a water-quality based approach. States are required to identify such waters ... [and] rank [them] in order of priority, and [\*\*\*9] based on that ranking, calculate levels of permissible pollution called 'total maximum daily loads' or 'TMDLs.' " (*San Francisco BayKeeper v. Whitman, supra*, 297 F.3d at p. 880; see 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b) (2003).) "This list of substandard waters is known as the '303(d) list' (section 303 of the Clean Water Act having been codified as [title 33 United States Code] section 1313)." (*City of Arcadia v. U.S. Environmental* (9th Cir. 2005) 411 F.3d 1103, 1105 (*City of Arcadia II*).)

"A TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue from all combined sources." (*Dioxin/Organochlorine Center v. Clarke* (9th Cir. 1995) 57 F.3d 1517, 1520.) "A TMDL must be 'established at a level necessary to implement the applicable water quality standards ... .' [Citation.] A TMDL assigns a *waste load allocation* ... to each point source, which is that portion of the TMDL's total pollutant load, which is allocated to a point source for which an NPDES permit is required. [Citation.] Once a TMDL is developed, effluent limitations [\*\*\*10] in NPDES permits must be consistent with the [waste load allocations] in the TMDL." (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1095-1096 [1 Cal. Rptr. 3d 76]; see *Dioxin/Organochlorine Center v. Clarke*, at p. 1520.)<sup>4</sup> A TMDL requires a [\*1405] "margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." (33 U.S.C. § 1313(d)(1)(C).)

4 The Clean Water Act "does not define total maximum daily load. EPA's regulations break it into a 'waste[]load allocation' for point sources and a 'load allocation' for nonpoint sources." (*Pronsolino v. Marcus, supra*, 91 F. Supp. 2d at p. 1344, fn. 8; see 40 C.F.R. § 130.2(g)-(i) (2005).)

The EPA may allow states to adopt and administer NPDES permit programs (*Pronsolino v. Marcus, supra*, 91 F. Supp. 2d at p. 1347, fn. 10), and it has authorized California to administer [\*\*\*11] such a program. (54 Fed.Reg. 40664 (Oct. 3, 1989).)

B

*State Law*

(3) California implements the Clean Water Act through the Porter-Cologne Act (Wat. Code, § 13000 et seq.), which was promulgated in 1969. Under the Porter-Cologne Act, nine regional boards regulate the quality of waters within their regions under the purview of the State Board. (Wat. Code, §§ 13000, 13100, 13200, 13241, 13242.)

[\*\*381] Regional boards must formulate and adopt water quality control plans, commonly called basin plans, which designate the beneficial uses to be protected, water quality objectives and a program to meet the objectives. (Wat. Code, §§ 13050, subd. (j), 13240.) " '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." (*Id.*, § 13050, subd. (h).)

The EPA must approve or disapprove a state's TMDL within 30 days of its submission. [\*\*\*12] (33 U.S.C. § 1313(d)(2).) If the EPA disapproves a state's submission, it must establish its own TMDL within 30 days of the disapproval. (*Ibid.*)

II

*Trash TMDL*

The Los Angeles River is a 51-mile flood control channel, largely concrete-lined, which runs through the City of Los Angeles and surrounding municipalities in Los Angeles County and terminates at the Pacific Ocean. In 1990 the Regional Board issued an NPDES storm water permit to the Los Angeles County Department of Public Works as the principal permittee and 84 cities as copermittees, to address various chemical pollutants discharged into the region's water bodies (Municipal NPDES Permit).

[\*1406] In 1994 the Regional Board adopted a revised water quality control plan, or basin plan (1994 Basin Plan), which includes narrative water quality objectives. It provides that "[w]aters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses," and "[w]aters shall not contain suspended or settleable material in concentrations that cause nuisance or adversely affect beneficial uses."

(Italics [\*\*\*13] omitted.) Beneficial uses of the Los Angeles River and surrounds include wildlife and marine habitat, including habitat for endangered species, and recreational activities such as fishing, walking, hiking, jogging, bicycling, horseback riding, bird watching and photography.

In 1996 and 1998 the Regional Board identified certain reaches of the Los Angeles River on the state's "303(d) list" as being impaired by trash, primarily through storm water runoff in thousands of municipal storm drains. <sup>5</sup> On September 19, 2001, the Regional Board adopted a resolution to amend its 1994 Basin Plan to incorporate a TMDL for trash in the Los Angeles River (Trash TMDL). Despite many objections from affected municipalities, the Trash TMDL sets a numeric target of zero trash as "even a single piece of trash can be detrimental, and no level of trash is acceptable in waters of the state." <sup>6</sup> "The numeric target is staff's interpretation of the narrative water quality objective [in [\*\*382] the 1994 Basin Plan], including an implicit margin of safety."

5 The Regional Board defines "trash" as "man-made litter" within the meaning of Government Code section 68055.1, subdivision (g), which provides: " 'Litter' means all improperly discarded waste material, including, but not limited to, convenience food, beverage, and other produce packages or containers constructed of steel, aluminum, glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on the lands and waters of the state, but not including the properly discarded waste of the primary processing of agriculture, mining, logging, sawmilling, or manufacturing."

[\*\*\*14]

6 The Regional Board adopted a Trash TMDL in January 2001, which also had a target of zero trash. It reconsidered the matter on September 19, 2001, "to provide clarifying language and greater flexibility in implementing the [Trash] TMDL."

The reduction of trash is to be phased over a 14-year period, including an optional two-year baseline monitoring period. In lieu of baseline monitoring, cities may accept a default baseline allocation of "640 gallons of uncompressed trash per square mile per year," a value based on data the City of Calabasas provided. The Trash TMDL provides for a "review of the current target [of zero trash] ... once a reduction of 50% has been achieved

and sustained," "based on the findings of future studies regarding the threshold levels needed for protecting beneficial uses."

Under the Trash TMDL, cities may use a variety of compliance methods, including "[e]nd-of-pipe full capture structural controls," "partial capture [\*1407] control systems" and "[i]nstitutional controls." Cities using a full-capture system meeting certain criteria will be deemed in compliance with [\*\*\*15] the zero target if the systems are properly maintained and maintenance records are available for the Regional Board's inspection.

On December 21, 2001, the Regional Board issued an order under Water Code section 13267 to the County of Los Angeles and copermittees under the Municipal NPDES Permit to submit baseline monitoring plans by February 1, 2002, and to monitor trash in the Los Angeles River between January 2002 and December 2003, with a final report due February 2004. <sup>7</sup> The Regional Board intends to use resulting data to "refine" the default baseline waste load allocations in the Trash TMDL.

<sup>7</sup> In *City of Arcadia v. U.S. Environ. Protection Agency* (N.D.Cal. 2003) 265 F. Supp. 2d 1142, 1156 (*City of Arcadia I*), the court noted the Los Angeles County Department of Public Works has assumed responsibility for the baseline monitoring burden for all municipalities to which the Trash TMDL applies. The Trash TMDL states that "[e]ach of the permittees and copermittees are responsible for monitoring land uses within their jurisdiction," but "monitoring responsibilities may be delegated to a third-party monitoring entity such as the [Department of Public Works]."

[\*\*\*16] In February and July 2002, the State Board and the Office of Administrative Law, respectively, approved the Trash TMDL. In August 2002 the EPA approved it and announced it supersedes an interim TMDL for trash the EPA adopted in March 2002 as a result of a consent decree in litigation between environmental groups and the EPA. (*City of Arcadia I, supra*, 265 F. Supp. 2d 1142, 1147.) <sup>8</sup>

<sup>8</sup> In *City of Arcadia I, supra*, 265 F. Supp. 2d at page 1153, the City of Arcadia and other cities unsuccessfully challenged the EPA's approval of the Trash TMDL on the ground it was unauthorized to do so after adopting its own TMDL. In *City of Arcadia II, supra*, 411 F.3d at

pages 1106-1107, the court affirmed the lower court's dismissal of the case.

### III

#### *Procedural History*

The Cities are within the Regional Board's jurisdiction and are permittees under the 2001 Municipal NPDES Permit. In July 2002 the Cities filed a petition for writ of mandate and complaint for declaratory [\*\*\*17] and injunctive relief against the Water Boards. They filed the action in the Los Angeles County Superior Court, but the parties stipulated to its transfer to the San Diego County Superior Court.

The second amended petition alleges numerous grounds on which the Trash TMDL violates the Clean Water Act or the Porter-Cologne Act, and the court adjudicated some issues in favor of each party. It found the [\*1408] Water Boards improperly (1) failed to conduct an analysis of the Los Angeles River's assimilative capacity; (2) failed to conduct a cost-benefit analysis or [\*\*383] consider economic factors under Water Code sections 13267 and 13241; (3) purported to apply the Trash TMDL to the Estuary even though it is not listed on the state's 1998 303(d) list as impaired; and (4) failed to prepare a required EIR or its functional equivalent under CEQA. The court issued a writ of mandate commanding the Water Boards to set aside the amendment to the 1994 Basin Plan and the Trash TMDL to the extent it was based on the above findings and to not take any further steps to implement it. The court denied the Water Boards' motion to vacate the judgment or grant [\*\*\*18] a new trial, and judgment was entered on December 24, 2003.

The Cities later moved for an order that the prohibitory terms of the writ of mandate and judgment not be stayed on appeal. (Code Civ. Proc., § 1110b.) The court granted the motion, and further ordered that "to preserve the status quo and prevent injustice to [the Cities], the ... implementation schedule and compliance dates, and all milestones contained in the [Trash TMDL] shall be tolled effective December 24, 2003, through and until a final determination has been rendered on the pending appeal." The Water Boards appealed that order, and in accordance with the parties' stipulation we consolidated it with the other appeals.

#### DISCUSSION

## WATER BOARDS' APPEAL

### I

#### *Standard of Review*

(4) The Water Boards contend a deferential standard of review applies to our review of their action under Code of Civil Procedure section 1085, and the Cities claim an independent standard applies under Code of Civil Procedure section 1094.5. Code of Civil Procedure section 1094.5, the administrative mandamus [\*\*\*19] statute, applies when "the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal." (Code Civ. Proc., § 1094.5, subd. (a).) "Acts of an administrative agency that are quasi-legislative in nature, e.g., establishment of regulations to carry out a statutory policy or direction, are not reviewable by administrative mandamus." (8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 268, pp. 1067-1068.) Rather, review of a quasi-legislative action is limited to traditional mandamus. (*Id.* at p. 1068.)

[\*1409] (5) The trial court correctly found this proceeding is for traditional mandamus because the Regional Board's adoption and the State Water Board's approval of the Trash TMDL was quasi-legislative. Under Code of Civil Procedure section 1085, " ' 'review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking [\*\*\*20] in evidentiary support, ... ' '... [and] [t]he petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law. [Citation.] We review the record de novo except where the trial court made foundational factual findings, which are binding on appeal if supported by substantial evidence." (*Citizens for Improved Sorrento Access, Inc. v. City of San Diego* (2004) 118 Cal.App.4th 808, 814 [13 Cal. Rptr. 3d 259], citations omitted.)

The Cities' reliance on Water Code section 13330 is misplaced. It provides that "[a]ny party aggrieved by a final decision or order of a regional board for which the state board denies review may obtain review of the decision or order of the regional [\*\*\*384] board in the superior court" (*id.*, § 13330, subd. (b), italics added), and "[e]xcept as otherwise provided herein, Section 1094.5 of

the Code of Civil Procedure shall govern proceedings for which petitions are filed pursuant to this section" (*id.*, § 13330, subd. (d)). Given the language italicized *ante*, Water Code section 13330 necessarily applies to an administrative appeal of a quasi-judicial action [\*\*\*21] under Code of Civil Procedure section 1094.5. Here, an appeal to the State Board was unnecessary because the Trash TMDL was ineffective without its approval. (Wat. Code, § 13245.) Indeed, the State Board notified the Cities in March 2001 that it "lacks statutory authority to accept petitions for review of water quality control plan (basin plan) amendments adopted" by regional boards.

As to CEQA issues, the parties agree an abuse of discretion standard applies. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1199 [24 Cal. Rptr. 3d 543].) Abuse of discretion "is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.) "Our task on appeal is 'the same as the trial court's.' [Citation.] Thus, we conduct our review independent of the trial court's findings." (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602, fn. 3 [35 Cal. Rptr. 2d 470].)

### II

#### *Assimilative Capacity Study*

The trial court [\*\*\*22] invalidated the Trash TMDL based in part on the Cities' argument an "assimilative capacity study" is a required element of a TMDL and none was performed here. In its statement of decision, the court [\*1410] explained "[i]t is unreasonable to conclude that the beneficial uses of the [Los Angeles] River could not be maintained with some 'target' other than zero. Of course, it is possible the River would not support a greater target, however, without a study it is yet undetermined."

The Water Boards contend the trial court erred by substituting its own judgment for that of the Water Boards on the issue of whether the adoption of the Trash TMDL should have been preceded by a scientific study of the assimilative capacity of the Los Angeles River. They assert the matter was best suited for their determination rather than the court's and the evidence adequately supports their decision. We agree with the Water Boards.

During the notice and comment period, the Regional Board received numerous complaints that a zero Trash TMDL is infeasible, or at least unwarranted without a scientific assimilative capacity study, or load capacity study, showing a zero limit is the only means of protecting beneficial [\*\*\*23] uses. For instance, the City of Los Angeles worried that "[i]f there's one gum wrapper in the [Los Angeles] River, you can get sued."

The Regional Board responded to one complaint as follows: "For more typical pollutants, the loading parameters are flow and pollutant concentration. For this pollutant [trash], flow does not serve to dilute the pollutant, but merely serves as a transport mechanism. Therefore, the typical loading calculation does not apply to trash." The Regional Board took the position that since littering is unlawful, a target of zero trash in the Los Angeles River is the only defensible position. It also explained that its staff "found no study to document that there is an acceptable level of trash that will cause no harm to aquatic life," and absent such a study it was compelled to adopt a zero target.

[\*\*385] At a Regional Board hearing, Dr. Mark Gold, executive director of Heal the Bay, testified he was unaware of any assimilative capacity study having been performed anywhere on trash. He explained, "Basically it's a physical object. It's trash. It's not something that breaks down and becomes part of the environment in many, many cases. And so honestly, it probably [\*\*\*24] won't reach any sort of threshold of being a scientific study of any value."

At a State Board hearing Dave Smith, an EPA team leader working with the Regional Board on the trash issue, testified "it would be difficult to design [an assimilative capacity] study and come up with firm answers." He also explained that both the Regional Board and the State Board "have conducted pretty diligent efforts to find research studies, reports, that look at the affects of trash on the aquatic environment," and neither they nor the EPA could find any literature to support a target of more than zero trash.

[\*1411] Alex Helperin, of the Natural Resources Defense Council, testified at a Regional Board hearing that "[e]ven small quantities [of trash] can maim and kill wildlife, [which] becomes entangled in it or ingest[s] it. [Trash] [c]an obstruct and repel boaters and contract recreators and compromise the aesthetic quality that's essential to the recognized aspect of non-contact

recreation beneficial use for the Los Angeles River."

The administrative record includes numerous photographs of copious amounts of trash deposited in the Los Angeles River watershed through storm water drains. Dennis [\*\*\*25] Dickerson, the executive officer of the Regional Board, testified he took photographs of trash in the Long Beach area shortly after storms, and among them are photographs of "water birds foraging among the trash." One photograph is of a bird with a cigarette butt in its mouth and another is of a fish trapped in a plastic six-ring can holder.

In arguing an assimilative capacity study is required *before* adopting a TMDL, the Cities rely principally on an EPA document issued January 7, 2000, entitled "Guidance for Developing TMDLs in California" (2000 EPA Guidance). It states: "The TMDL document must describe the relationship between numeric target(s) and identified pollutant sources, and estimate total assimilative capacity (loading capacity) of the water[body for the pollutant of concern ... . ¶] The loading capacity is the critical quantitative link between the applicable water quality standards (as interpreted through numeric targets) and the TMDL. Thus, a maximum allowable pollutant load must be estimated to address the site-specific nature of the impairment. ... ¶] The loading capacity section must discuss the methods and data used to estimate loading capacity. [\*\*\*26] A range of methods can be used ... ." (Boldface omitted.)

The 2000 EPA Guidance, however, contains the following disclaimer: "[I]t does not impose legally-binding requirements on the EPA, the State of California, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA and State decision makers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate and consistent with the requirements of section 303(d) [of the Clean Water Act] and EPA's regulations."

(6) Smith, of the EPA, testified at a Regional Board hearing that he wrote the 2000 EPA Guidance and the Trash TMDL "fully complies with the Clean Water Act, its regulations and [the 2000 EPA Guidance]." Smith explained the "TMDL process specifically contemplates making decisions under uncertainty," and "[i]t does so by providing that a margin of safety has to be [\*\*386] incorporated in every TMDL to account for the uncertainty in the analysis." Smith said states are required

"to move forward to make TMDL decisions [\*1412] based on available information and data, not to wait again and again for better information to come forward." [\*\*\*27] Generally, " 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.' " (*United States v. Mead Corp.* (2001) 533 U.S. 218, 227-228 [150 L. Ed. 2d 292, 121 S. Ct. 2164].)

In *Natural Resources Defense Council v. Muszynski* (2d Cir. 2001) 268 F.3d 91 (*Muszynski*), the plaintiff asked the court to invalidate a TMDL that the EPA had approved to control phosphorus pollution in drinking water, on the ground a margin of safety of only 10 percent was insufficient to account for uncertainty regarding the effects of phosphorus on water quality. The plaintiff argued "that no scientific or mathematical basis prescribed this percentage as opposed to any other." (*Id.* at p. 102.) The EPA countered that "because 'there is no "standard" or guideline for choosing a specific margin of safety, best professional judgment and the available information are used in setting [it].' " (*Ibid.*) The *Muszynski* court agreed with the EPA, explaining: "While the [margin of safety] may ... be set with an uncomfortable degree of discretion, requiring that EPA [or authorized regional board] show a rigorous [\*\*\*28] scientific methodology *dictates one course of action as opposed to another and would effectively prevent the agency from acting in situations where action is required in the face of a clear public health or environmental danger but the magnitude of that danger cannot be effectively quantified.* '[A]s long as Congress delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence.' [Citation.] ... [S]imply to reject EPA's efforts to implement the [Clean Water Act] because it must respond to real water quality problems without the guidance of a rigorously precise methodology would essentially nullify the exercise of agency discretion in the form of 'best professional judgment.' " (*Muszynski, supra*, 268 F.3d at pp. 102-103, italics added.)

Further, in *Muszynski, supra*, 268 F.3d 91, 103, the court noted "that approval of the Phase I [margin of safety] was based, in part, on the limited information available. The EPA approval contemplates revision of the [margin of safety] as more information becomes available: 'As additional reservoir data and loading [\*\*\*29] data become available, Phase I model

assumptions are being reexamined under Phase II.' "

We conclude federal law does not require the Regional Board to conduct an assimilative capacity study before adopting the Trash TMDL. Moreover, the evidence amply shows that because of the nature of trash, including Styrofoam containers and other materials that are undiluted by water, in contrast to chemical pollutants, and the dangers to wildlife of even small amounts of trash, an assimilative capacity study would be difficult to conduct and of little value at the outset. For instance, given the ill effects of trash in a [\*1413] water body it is unlikely such a study would determine the Los Angeles River may be loaded with a certain percentage of trash without affecting beneficial uses, particularly since a TMDL must include a margin of safety that "takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." (33 U.S.C. § 1313(d)(1)(C).) In any event, the Trash TMDL requires the Regional Board to reconsider the zero trash target after a 50 percent reduction of trash is achieved, and no party suggests a trash reduction of [\*\*\*30] at least 50 percent is unwarranted or unattainable. Because of [\*\*387] this escape hatch, compliance with a zero trash target may never actually be mandated. The Water Boards' decision not to conduct or require an assimilative capacity study is within their expertise, not the court's, and we defer to them on the issue.

### III

#### *Cost-Benefit Analysis and Economic Considerations*

The Water Boards next contend the court erred by finding the Trash TMDL is invalid because they violated state law by not conducting a cost-benefit analysis (Wat. Code, § 13267) or considering economic factors (*id.* at § 13241) before adopting and approving it.

#### A

##### *Water Code Section 13267*

A regional board is authorized to investigate the quality of waters in its region (Wat. Code, § 13267, subd. (a)), and when it requires a polluter to furnish "technical or monitoring program reports," the "burden, including costs, of these reports shall bear a reasonable relationship to the need for the report[s] and the benefits to be obtained from the reports." (Wat. Code, § 13267, subd.

(b)(1.) The court [\*\*\*31] found the Regional Board adopted the Trash TMDL under the authority of Water Code section 13267, as the document mentions the statute several times and "expressly requires monitoring plans and submission of data to establish baselines for trash discharges."

The Water Boards persuasively contend Water Code section 13267 is inapplicable, and references to that statute in the Trash TMDL are to contemplated future orders. For instance, the Trash TMDL states "[b]aseline monitoring will be required via [Water Code] Section 13267," and the submission of baseline monitoring plans will be due 30 days after receipt of the Executive Officer's request as authorized by [Water Code] Section 13267." [\*1414] It also states that "future storm water permits will be modified to incorporate the Waste Load Allocations and to address monitoring and implementation of this [Trash] TMDL."

Further, the Trash TMDL states "the permittee [under the Municipal NPDES permit] will submit a monitoring plan with the proposed monitoring sites and at least two alternative monitoring locations for each site. The plan must [\*\*\*32] include maps of the drainage and storm drain data for each proposed and alternate monitoring location. The monitoring plan(s) will be submitted to the Regional Board within 30 days after receipt of the Executive Officer's letter requesting such a plan. Such a request is authorized pursuant to [Water Code] [s]ection 13267. ... The Regional Board's Executive Officer will have full authority to review the monitoring plan(s), to modify the plan, to select among the alternate monitoring sites, and to approve or disapprove the plan(s)."

Additionally, the Water Boards submit that the December 21, 2001 order the Regional Board issued under Water Code section 13267 to the County of Los Angeles and copermittees under the Municipal NPDES permit regarding baseline monitoring and reporting would have been "useless and unnecessary" had the Trash TMDL itself required monitoring and reporting, and since there was no appeal of the December 21 order to the State Board within 30 days (Wat. Code, § 13320, subd. (a)) the cost-benefit analysis issue is not subject to appellate review. We note that the December 21 order, but not the Trash TMDL, warns [\*\*\*33] that under Water Code section 13268 the "failure to conduct the required monitoring and/or to provide the required information in

a timely manner [\*\*388] may result in civil liability imposed by the Regional Board in an amount not to exceed ... \$ 1000."

(7) "Our primary aim in construing any law is to determine the legislative intent. [Citation.] In doing so we look first to the words of the statute, giving them their usual and ordinary meaning." (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501 [247 Cal. Rptr. 362, 754 P.2d 708].) We agree that by its plain terms Water Code section 13267 is inapplicable at the TMDL stage, and thus the court erred by invalidating the Trash TMDL on this ground. The monitoring and reports are required by the December 21, 2001 order, not the Trash TMDL, and the reduction of trash will be implemented by other NPDES permits. "TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans." (*Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123, 1129.) (8) "A TMDL does not, by itself, [\*\*\*34] prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source [\*1415] controls." (*City of Arcadia I, supra*, 265 F. Supp. 2d at p. 1144.) A "TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and water[bodies]." (*Id.* at p. 1145.)

B

#### *Water Code Section 13241*

Water Code section 13241 provides that "[e]ach regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance." In establishing water quality objectives a regional board is required to consider several factors, including "[e]conomic considerations." (Wat. Code, § 13241, subd. (d).)

The Water Boards contend Water Code section 13241 is inapplicable because the Trash TMDL does not establish water quality objectives, but [\*\*\*35] merely implements, under Water Code section 13242, the existing narrative water quality objectives in the 1994 Basin Plan. It provides that waters shall not contain floating materials, including solids, or suspended or

settleable materials in concentrations that adversely affect beneficial uses. The Cities counter that the Trash TMDL effectively establishes new water quality objectives, because when the 1994 Basin Plan was adopted a TMDL for trash was not contemplated and thus economic considerations of such a TMDL were not considered. Further, the Trash TMDL imposes for the first time a numeric limit for trash and significantly increases the costs of compliance.

We need not, however, decide whether the Trash TMDL adopts new or revised water quality objectives within the meaning of Water Code section 13241, because even if the statute is applicable, the Water Boards sufficiently complied with it.<sup>9</sup> Water Code section 13241, subdivision (d) does not define "economic considerations" or specify a particular manner of compliance, and thus, as the Water Boards assert, the matter is within a regional [\*\*389] board's discretion. [\*\*\*36] It appears there is no reported opinion analyzing the "economic considerations" phrase of this statute. In *City of Burbank, supra*, 35 Cal.4th at page 625, the court, without discussion, concluded that in adopting Water Code section 13241 the Legislature intended "that a regional board consider the *cost of compliance* [with numeric pollutant restrictions] when setting effluent limitations in a wastewater discharge permit." (Italics added.)

9 For the same reason, we are not required to reach the Water Boards' assertion that to any extent the California Supreme Court's recent opinion in *City of Burbank, supra*, 35 Cal.4th 613, applies to a TMDL, it precludes them from considering economic factors in establishing the Trash TMDL.

[\*1416] The Trash TMDL discusses the costs of gathering and disposing of trash at the mouth of the Los Angeles River watershed during the rainy seasons between 1995 and 1999. It also states: "Cleaning up the river, its tributaries and [\*\*\*37] the beaches is a costly endeavor. The Los Angeles County Department of Public Works contracts out the cleaning of over 75,000 catchments (catch basins) for a total cost of slightly over \$ 1 million per year, billed to 42 municipalities. ... [¶] Over 4,000 tons of trash are collected from Los Angeles County beaches annually, at a cost of \$ 3.6 million to Santa Monica Bay communities in fiscal years 1988-1989 alone. In 1994 the annual cost to clean the 31 miles of

beaches (19 beaches) along Los Angeles County was \$ 4,157,388."

The Trash TMDL also discusses the costs of various types of compliance measures, and explains the "cost of implementing this TMDL will range widely, depending on the method that the Permittees select to meet the Waste Load Allocations. Arguably, enforcement of existing litter ordinances could be used to achieve the final Waste Load Allocations at minimal or no additional cost. The most costly approach in the short-term is the installation of full-capture structural treatment devices on all discharges into the river. However, in the long term this approach would result in lower labor costs and may be less expensive than some other approaches."

The Trash TMDL [\*\*\*38] defines catch basin inserts as "the least expensive structural treatment device in the short term," at a cost of approximately \$ 800 each. It cautions, however, that because catch basin inserts "are not a full capture method, they must be monitored frequently and must be used in conjunction with frequent street sweeping." The Trash TMDL estimates that if the approximately 150,000 catch basins throughout the watershed were retrofitted with inserts, capital costs would be \$ 120 million over 10 years, maintenance and operation costs would be \$ 330 million over 10 years, and maintenance and operation costs after full implementation would be \$ 60 million per year.

Further, the Trash TMDL discusses the full capture vortex separation system (VSS), which "diverts the incoming flow of storm[water] and pollutants into a pollutant separation and containment chamber. Solids within the separation chamber are kept in continuous motion, and are prevented from blocking the screen so that water can pass through the screen and flow downstream. This is a permanent device that can be retrofitted for oil separation as well. Studies have shown that VSS [units] remove virtually all of the trash contained [\*\*\*39] in treated water. The cost of installing a VSS is assumed to be high, so limited funds will place a cap on the number of units which can be installed during any single fiscal year."

[\*1417] The Trash TMDL estimates the retrofitting of the entire Los Angeles River watershed with low capacity VSS units would be \$ 945 million in capital costs and \$ 813 million in operation and maintenance costs over 10 years, and \$ 148 million in annual operation and maintenance costs after full implementation. The



installation of large capacity VSS units would run [\*\*390] approximately \$ 332 million in capital costs and \$ 41 million in operation and maintenance costs over 10 years, and \$ 7.4 million per year in operation and maintenance costs after full implementation. The yearly cost of servicing one VSS unit is estimated to be \$ 2,000. The Trash TMDL explains that "outfitting a large drainage with a number of large VSS [units] may be less costly than using a larger number of small VSS [units]. Maintenance costs decrease dramatically as the size of the system increases." The Trash TMDL also contains a cost comparison of catch basin inserts and low capacity and large capacity VSS units.

Additionally, the Trash [\*\*\*40] TMDL estimates the costs for end-of-pipe nets at between \$ 10,000 and \$ 80,000, depending on the length of the pipe network. It explains that " '[r]elease nets' are a relatively economical way to monitor trash loads from municipal drainage systems. However, in general they can only be used to monitor or intercept trash at the end of a pipe and are considered to be partial capture systems, as nets are usually sized at a 1/2&inches; to 1&inches; mesh."

The Cities assert that "a 'consideration' of economics should have included a discussion of the economic *impacts* associated with the vortex separation systems. Alternatively, the Water Boards could have analyzed other methods of compliance, such as a series of [best management practices], including increased street sweeping, catch basin inserts, release nets, or some other combination of [best management practices] that should have been evaluated for purposes of allowing the municipalities to be in deemed compliance with the zero [Trash] TMDL." (Italics added.) As stated, though, the Trash TMDL does include the estimated costs of several types of compliance methods and a cost comparison of capital costs and costs of operation and maintenance. [\*\*\*41] The Cities cite no authority for the proposition that a consideration of economic factors under Water Code section 13241 must include an analysis of every conceivable compliance method or combinations thereof or the fiscal impacts on permittees.

Given the lack of any definition for "economic considerations" as used in Water Code section 13241, and our deference to the Water Boards' expertise, we conclude the Trash TMDL's discussion of compliance costs is adequate [\*1418] and does not fulfill the arbitrary or capricious standard. Accordingly, the Trash

TMDL is not invalid on this ground.<sup>10</sup>

10 The Cities also assert that under federal law an economic analysis is a prerequisite to the adoption of a TMDL. They rely on 40 Code of Federal Regulations, part 130.6(c)(4), but it pertains to nonpoint sources of pollution that need not be addressed in a TMDL, as discussed further *post*. The portion of the regulation covering TMDL's does not mention economics (*id.*, § 130.6(c)(1)). Parts 130.6(5) and (6) of 40 Code of Federal Regulations discuss economics, but in the context of the area wide planning process under section 208(b)(2) of the Clean Water Act (33 U.S.C. § 1288(b)(2)), which is inapplicable here. According to the Water Boards, the Southern California Association of Governments is the designated area-wide planning agency.

[\*\*\*42] IV

#### *Los Angeles River Estuary*

Additionally, the Water Boards challenge the court's finding they abused their discretion by attempting to include the Estuary in the Trash TMDL, as the Estuary is not on the state's 1998 303(d) list of impaired waters. The Water Boards contend a water body's formal listing on the state's 303(d) list is not a prerequisite to formulating a TMDL for it. Rather, an agency may simultaneously submit to the EPA the *identification* of a [\*\*391] water body as impaired and a corresponding TMDL.

The Clean Water Act provides: "Each state shall identify those waters within its boundaries for which the effluent limitations ... are not stringent enough to implement any water quality standards applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters." (33 U.S.C. § 1313(d)(1)(A).) Further, it provides that "[e]ach 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 ... ." (*Id.* at § 1313(d)(1)(C).) [\*\*\*43] These provisions do not prohibit a regional board from identifying a water body and establishing a TMDL for it at essentially the same time, or indicate that formal designation on a state's 303(d) list is a prerequisite to a TMDL.

Further, 33 United States Code section 1313(d)(2)

provides: "Each State shall submit to the [EPA] Administrator from time to time, ... for his [or her] approval the waters identified *and* the loads established under paragraphs (1)(A) [and] ... (1)(C) ... of this subsection. The [EPA] Administrator shall either approve or disapprove such identification *and* load not later than thirty days after the date of submission." (Italics added.) This clarifies that a regional board may simultaneously identify an impaired water body and establish a TMDL for it.

[\*1419] In *San Francisco BayKeeper v. Whitman*, *supra*, 297 F.3d 877, 884-885, the court held an agency has no *duty* to submit a TMDL at the same time it identifies an impaired water body, noting the development of a TMDL "to correct the pollution is obviously a more intensive and time-consuming project than simply identifying the polluted waters, as the [\*\*\*44] EPA has indicated." (*Id.* at p. 885.) The Water Boards assert the case does not deprive an agency from exercising its *discretion* to simultaneously submit to the EPA the identification of an impaired water body and a TMDL for it. Given the plain language of 33 United States Code section 1313(d)(2), we agree. Moreover, "[s]tates remain at the front line in combating pollution" (*City of Arcadia II, supra*, 411 F.3d at p. 1106), and "[s]o long as the [s]tate does not attempt to adopt more *lenient* pollution control measures than those already in place under the [Clean Water] Act, [it] does not prohibit state action." (*Id.* at p. 1107.)

Alternatively, the Cities complain the Regional Board did not sufficiently identify the Estuary as being impaired and included in the Trash TMDL until after its adoption and approval by the State Board and Office of Administrative Law and the completion of all public hearings. On July 29, 2002, the Regional Board sent the EPA a memorandum "to provide clarification on specific aspects" of the Trash TMDL. It stated that a "TMDL was established for the reaches of the Los [\*\*\*45] Angeles River, tributaries and lakes listed on the [state's] 1998 303(d) list," and "[i]n addition, a TMDL was established for the Los Angeles River [E]stuary in the City of Long Beach. As described on page 12, paragraph 2 of the [staff] report, staff found that the impairment in the [E]stuary due to trash is 'even more acute in Long Beach where debris flushed down by the upper reaches collects.' [¶] The impairment in the [E]stuary was well documented during TMDL development," and it "would have been included in the 1998 303(d) list if the attached

photographic evidence had been available at the time of the listing."

The Trash TMDL lists the reaches of the Los Angeles River "that are impaired by trash, and listed on the [state's] 303(d) [\*\*392] list." The list does not include the Estuary. The Water Boards assert that even so, it was always obvious the Estuary is impaired and included in the Trash TMDL. The Trash TMDL states it is "for the Los Angeles River Watershed," and "watershed" is defined as "a region or area bounded peripherally by a divide and draining ultimately to a particular watercourse or body of water." (Merriam-Webster's Collegiate Dict. (10th ed. 1996) p. [\*\*\*46] 1336.) "Estuary" is defined as "a water passage where the tide meets a river current," especially "an arm of the sea at the lower end of a river." (*Id.* at p. 397.)

The Trash TMDL describes the watershed as beginning at the "western end of the San Fernando Valley to the Queensway Bay and Pacific Ocean at Long Beach," and it also states the watershed continues from "Willow Street all [\*1420] the way through the [E]stuary." An amici curiae brief by Santa Monica BayKeeper, Inc., Heal the Bay, Inc., and Natural Resources Defense Council, Inc. (collectively BayKeeper), asserts Queensway Bay is the site of the Estuary, and no party has challenged the assertion. Further, the Trash TMDL lists and discusses the beneficial uses of the Estuary, including habitat for many species of birds, some endangered, and fish. It also states beneficial uses "are impaired by large accumulations of suspended and settled debris throughout the river system," and in particular "estuarine habitat" is impaired. Further, the administrative record contains several pictures of trash deposited in the Estuary during high flows, depicting "the variety of ways through which trash ... becomes an integral part of wildlife, [\*\*\*47] affecting all plant and animal communities in the process."

The Trash TMDL's identification of the Estuary as impaired could have been clearer, but we conclude it was sufficient to put all affected parties on notice, and does not meet the arbitrary-and-capricious standard. Further, although the identification of impaired water bodies requires a priority ranking (33 U.S.C. § 1313(d)(2)), and the Trash TMDL does not prioritize the Estuary's need for a TMDL, we agree with amici curiae BayKeeper that any error in the Water Boards' procedure was not prejudicial because the Trash TMDL shows amelioration

of the trash problem in the entire Los Angeles River watershed is highly important, and it is unlikely the Water Boards would single out the Estuary for lower priority or that inclusion of the Estuary would disturb their existing priorities.

V

#### CEQA

(9) The Water Boards challenge the sufficiency of the evidence to support the trial court's finding that the amendment adding the Trash TMDL to the 1994 Basin Plan does not comport with CEQA. The court found the Regional Board's environmental checklist was deficient and there is sufficient evidence of a fair argument that [\*\*\*48] the project may have a significant effect on the environment, thus necessitating an EIR or its functional equivalent. We conclude the court was correct.

A

#### General Legal Principles

(10) "CEQA compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the [\*1421] imposition of feasible mitigation measures or through the selection of feasible alternatives." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1233 [32 Cal. Rptr. 2d 19, 876 P.2d 505].) CEQA mandates that public agencies refrain from approving projects with significant environmental effects if [\*\*393] there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134 [65 Cal. Rptr. 2d 580, 939 P.2d 1280].)

CEQA is implemented through initial studies, negative declarations and EIR's. (*Sierra Club v. State Bd. of Forestry, supra*, 7 Cal.4th at p. 1229.) "CEQA requires a governmental agency [to] prepare an [EIR] whenever it considers approval of a proposed project that 'may have a significant effect on the environment.' " (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas, supra*, 29 Cal.App.4th at p. 1601.) [\*\*\*49] "If there is no substantial evidence a project 'may have a significant effect on the environment' or the initial study identifies potential significant effects, but provides for mitigation revisions which make such effects insignificant, a public agency must adopt a negative declaration to such effect

and, as a result, no EIR is required. [Citations.] However, the Supreme Court has recognized that CEQA requires the preparation of an EIR 'whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.' [Citations.] Thus, if substantial evidence in the record supports a 'fair argument' significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified." (*Id.* at pp. 1601-1602.)

" 'Significant effect on the environment? means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the [\*\*\*50] environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant." (Cal. Code Regs., tit. 14, § 15382.)

B

#### Certified Regulatory Program

(11) "State regulatory programs that meet certain environmental standards and are certified by the Secretary of the California Resources Agency are exempt from CEQA's requirements for preparation of EIRs, negative declarations, and initial studies. [Citations.] Environmental review documents prepared by certified programs may be used instead of environmental documents that CEQA would otherwise require. [Citations.] Certified regulatory [\*1422] programs remain subject, however, to other CEQA requirements." (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2005) § 21.2, p. 1076; see Pub. Resources Code, § 21080.5.) Documents prepared by certified programs are considered the "functional equivalent" of documents CEQA would otherwise require. (*Mountain Lion Foundation v. Fish & Game Com., supra*, 16 Cal.4th at p. 113; 2 Kostka & Zischke, Practice Under the Cal. Environmental [\*\*\*51] Quality Act, *supra*, § 21.10, p. 1086 ["the documentation required of a certified program essentially duplicates" that required for an EIR or negative declaration].)

An "agency seeking certification must adopt regulations requiring that final action on the proposed activity include written responses to significant

environmental points raised during the decisionmaking process. [Citation.] The agency must also implement guidelines for evaluating the proposed activity consistently with the [\*\*394] environmental protection purposes of the regulatory program. [Citation.] The document generated pursuant to the agency's regulatory program must include alternatives to the proposed project and mitigation measures to minimize significant adverse environmental effects [citation], and be made available for review by other public agencies and the public [citation]." (*Mountain Lion Foundation v. Fish & Game Com.*, *supra*, 16 Cal.4th at p. 127.)

(12) The guidelines for implementation of CEQA (Cal. Code Regs., tit. 14, § 15000 et seq.) do not directly apply to a certified regulatory program's environmental document. (2 Kostka & Zischke, [\*\*\*52] Practice Under the Cal. Environmental Quality Act, *supra*, § 21.10, p. 1086.) However, "[w]hen conducting its environmental review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA." (*Ibid.*)

In a certified program, an environmental document used as a substitute for an EIR must include "[a]lternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment," and a document used as a substitute negative declaration must include a "statement that the agency's review of the project showed that the project would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion." (Cal. Code Regs., tit. 14, § 15252, subd. (a)(2)(A), (B).)

The basin planning process of the State Board and regional boards is [\*\*\*53] a certified regulatory program (Cal. Code Regs., tit. 14, § 15251, subd. (g)), and [\*1423] the regulations implementing the program appear in the California Code of Regulations, title 23, sections 3775 to 3782. A regional board's submission of a plan for State Board approval must be accompanied by a brief description of the proposed activity, a completed environmental checklist prescribed by the State Board, and a written report addressing reasonable alternatives to

the proposed activity and mitigation measures to minimize any significant adverse environmental impacts. (*Id.*, § 3777, subd. (a).)

C

#### *Environmental Documentation*

The Regional Board's environmental documentation in lieu of documents CEQA ordinarily requires consists of a checklist and the Trash TMDL. The checklist asked a series of questions regarding whether implementation of the Trash TMDL would cause environmental impacts, to which the Regional Board responded "yes," "maybe" or "no." "Yes" or "maybe" answers required an explanation. The checklist described beneficial impacts pertaining to plant and animal life, water quality [\*\*\*54] and recreation. The checklist denied the project would have any environmental impact on land, including soil displacement, air, noise, natural resources or traffic, and thus it included no discussion of those factors. The checklist concluded "the proposed Basin Plan amendment [adding the Trash TMDL] could not have a significant effect on the environment."

The Regional Board obviously intended its documentation to be the functional equivalent of a negative declaration. Nonetheless, on appeal the Water Boards claim for the first time that the Regional [\*\*395] Board's environmental review process is tiered, and its documentation meets the requirements of a first tier EIR under Public Resources Code section 21159. They assert the court's criticism of the checklist is baseless "because it ignores the concept of tiered environmental review and specific provisions for pollution control performance standards."

" 'Tiering' refers 'to the coverage of general matters in broader EIRs (such as on general plans or policy statements) with subsequent narrower EIRs or ultimately *site-specific* EIRs incorporating by reference the general discussions and concentrating solely [\*\*\*55] on the issues specific to the EIR subsequently prepared. Tiering is appropriate when the sequence of EIRs is: [¶] ... [f]rom a general plan, policy, or program EIR to a ... site-specific EIR.' " (*Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 285 [126 Cal. Rptr. 2d 615].) "[C]ourts have allowed first tier EIR's to defer detailed analysis to subsequent project EIR's." (*Friends of [\*1424] Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82

Cal.App.4th 511, 532 [98 Cal. Rptr. 2d 334].)

(13) Public Resources Code section 21159, which allows expedited environmental review for mandated projects, provides that an agency "shall perform, at the time of the adoption of a rule or regulation requiring the installation of pollution control equipment, or a performance standard or treatment requirement, an environmental analysis of the reasonably foreseeable methods of compliance. ... The environmental analysis shall, at [a] minimum, include, all of the following: [¶] (1) An analysis of the reasonably foreseeable environmental impacts of the methods of compliance. [¶] (2) An analysis of reasonably foreseeable mitigation measures. [\*\*\*56] [¶] (3) An analysis of reasonably foreseeable alternative means of compliance with the rule or regulation." (Pub. Resources Code, § 21159, subd. (a).) The Water Boards submit they complied with the statute, and the "tier two environmental review is the responsibility of the local agencies who will determine how they intend to comply with the performance standards" of the Trash TMDL.

Issues not presented to the trial court are ordinarily waived on appeal. (*Royster v. Montanez* (1982) 134 Cal. App. 3d 362, 367 [184 Cal. Rptr. 560].) In any event, we conclude the checklist and Trash TMDL are insufficient as either the functional equivalent of a negative declaration<sup>11</sup> or a tiered EIR. Moreover, an EIR is required since the Trash TMDL itself presents substantial evidence of a fair argument that significant environmental impacts may occur. "Because a negative declaration ends environmental review, the fair argument test provides a low threshold for requiring an EIR." (*Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 399 [10 Cal. Rptr. 3d 451].)

<sup>11</sup> A negative declaration may not be based on a "bare bones" approach in a checklist. (*Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 797, fn. 2 [88 Cal. Rptr. 2d 455], and cases cited therein.) A "certified program's statement of no significant impact must be supported by documentation showing the potential environmental impacts that the agency examined in reaching its conclusions," and "[t]his documentation would be similar to an initial study." (2 Kostka & Zischke, Practice Under the

Cal. Environmental Quality Act, *supra*, § 21.11, pp. 1088-1089, italics added.) Because we conclude an EIR is required, we need not expand on how the checklist and Trash TMDL fail to satisfy negative declaration requirements or their functional equivalent.

[\*\*\*57] [\*\*396] The Trash TMDL discusses various compliance methods or combinations thereof that permittees may employ, including the installation of catch basin inserts and VSS units. The Trash TMDL estimates that if the catch basin method is used exclusively, approximately 150,000 catch basins throughout the watershed would require retrofitting at a cost of approximately \$ 120 million. It explains, however, that the "ideal way to capture trash deposited into a storm[]drain system would be to install a VSS unit. This device diverts [\*1425] the incoming flow of storm[]water and pollutants into a pollution separation and containment chamber." Only VSS units or similar full-capture devices will be deemed fully compliant with the zero trash target. The Trash TMDL estimates the cost of installing low capacity VSS units would be \$ 945 million and the cost of installing large capacity VSS units would be \$ 332 million.

The checklist and the Trash TMDL, however, ignore the temporary impacts of the construction of these pollution controls, which logically may result in soils disruptions and displacements, an increase in noise levels and changes in traffic circulation. Further, the Trash TMDL explains that since [\*\*\*58] catch basin inserts "are not a full capture method, they must be monitored frequently and must be used in conjunction with frequent street sweeping." The checklist and the Trash TMDL also ignore the effects of increased street sweeping on air quality, and possible impacts caused by maintenance of catch basin inserts, VSS units and other compliance methods.

Indeed, the County of Los Angeles wrote to the Regional Board that "cleanout of structural controls, such as [catch basin inserts] and VSSs, naturally will increase existing noise levels due to vehicle and vacuuming noises." The City of Los Angeles advised that the Trash TMDL would result in increased maintenance vehicle traffic and "substantial air emissions or deterioration of ambient air quality," increased noise, increased use of natural resources and adverse impacts on existing transportation systems.

The Water Boards contend those comments are merely "unsubstantiated opinion and speculation by biased project opponents." Substantial evidence is not "[a]rgument, speculation, unsubstantiated opinion or narrative [or] evidence which is clearly inaccurate or erroneous." (Pub. Resources Code, § 21082.2, subd. (c).) [\*\*\*59] However, letters and testimony from government officials with personal knowledge of the anticipated effects of a project on their communities "certainly supports a fair argument that the project may have a significant environmental impact." (*City of Livermore v. Local Agency Formation Com.* (1986) 184 Cal. App. 3d 531, 542 [230 Cal. Rptr. 867].) Again, however, the Trash TMDL itself satisfies the fair argument criterion.

Even if the Water Boards had relied on Public Resources Code section 21159 at the trial court, the environmental documents do not meet its minimum requirements. Neither the checklist nor the Trash TMDL includes an analysis of the reasonably foreseeable impacts of construction and maintenance of pollution control devices or mitigation measures, and in fact the Water Boards develop no argument as to how they ostensibly complied with the statute. While we agree a tiered environmental analysis is appropriate here, the Regional Board did not prepare a first-level EIR or its functional equivalent. We reject the Water Boards' argument the Regional Board did all it [\*1426] could because there "is no way to examine project level [\*\*\*60] impacts that are entirely dependent upon the speculative possibilities of how subsequent [\*\*397] decision[.]makers may choose to comply" with the Trash TMDL. Tier two project-specific EIR's would be more detailed under Public Resources Code section 21159.2, but the Trash TMDL sets forth various compliance methods, the general impacts of which are reasonably foreseeable but not discussed.

As a matter of policy, in CEQA cases a public agency must explain the reasons for its actions to afford the public and other agencies a meaningful opportunity to participate in the environmental review process, and to hold it accountable for its actions. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles, supra*, 126 Cal.App.4th 1180, 1198.) The Water Boards' CEQA documentation is inadequate, and remand is necessary for the preparation of an EIR or tiered EIR, or functional equivalent, as substantial evidence raises a fair argument the Trash TMDL may have significant impacts on the

environment. The court correctly invalidated the Trash TMDL on CEQA grounds. <sup>12</sup>

12 The Water Boards also contend the trial court erred by staying the implementation schedule for the Trash TMDL pending this appeal. The matter is moot given our holding on the CEQA issue.

[\*\*\*61] VI

#### *Declaratory Relief*

In its statement of decision, the trial court explained the Cities "contend [the Water Boards] improperly attempted to control the watershed including the 'entire 584 square miles' of incorporated and unincorporated areas of the County [of Los Angeles], and nowhere in the [Trash] TMDL or the [1994] Basin Plan Amendment did [they] assert that the numeric Waste Load Allocations ... are to apply to the entire 584 square miles of watershed." The court, however, explained the Water Boards "concede the [Trash] TMDL only applies to navigable waters by asserting [they] didn't intend to control non-navigable waters," and it found "the parties are in agreement that the trash load allocations apply to the portion of the subject watershed as defined on pages 3575 and 3584 of the Administrative Record [pages of the Trash TMDL] and the Waste Load Allocations do not apply to non-waters."

The statement of decision nonetheless states the court granted the Cities' "relief as requested" as to "regulation of non-waters." In their third cause of action, the Cities sought a judicial declaration that the amendment to the 1994 Basin Plan and the Trash [\*\*\*62] TMDL are invalid because they violate federal and state law. The judgment declared unenforceable a July 29, 2002, letter from [\*1427] the Regional Board to the EPA that stated the "Waste Load Allocations apply to the entire urbanized portion of the watershed ... . The urbanized portion of the watershed was calculated to encompass 584 square miles of the total watershed."

(14) "The fundamental basis of declaratory relief is the existence of an *actual, present controversy*." (5 Witkin, Cal. Procedure, *supra*, Pleadings, § 817, p. 273.) Because the parties agreed during this proceeding there was no *present* controversy, the judgment should not have included declaratory relief on the nonwaters issue.

## CITIES' APPEAL

### I

#### *Concepts of "Maximum Extent Practicable" and "Best Management Practices"*

(15) The Cities contend a zero target for trash in the Los Angeles River is unattainable, [\*\*398] and thus the Trash TMDL violates the law by not deeming compliance through the federal "maximum extent practicable" and "best management practices" standards, which are less stringent than the numeric target of zero. The Cities rely on 33 United States Code section 1342(p)(3)(B)(iii), [\*\*\*63] under which an NPDES permit for a municipal discharge into a storm drain "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 [EPA] Administrator or the State determines appropriate for the control of such pollutants." (Italics added.)<sup>13</sup> "Best management practices" are generally pollution control measures set forth in NPDES permits. (*BIA*, *supra*, 124 Cal.App.4th at p. 877.)

<sup>13</sup> The Clean Water Act and applicable regulations do not define the maximum extent practicable standard. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 889 [22 Cal. Rptr. 3d 128] (*BIA*)). In *BIA*, the NPDES permit at issue defined the standard as "a highly flexible concept that depends on balancing numerous factors." (*Ibid.*)

The Cities assert that "as the [r]ecord [\*\*\*64] reflects, compliance with the 'zero' [Trash] TMDL ... is impossible," and the Water Boards "themselves recognize that 'zero' is an impossible standard to meet." Contrary to the Cities' suggestion, the Water Boards made no implied finding or concession of impossibility. Rather, the record shows that members of the Water Boards questioned whether a zero trash target is actually attainable. A zero limit on [\*1428] trash within the meaning of the Trash TMDL is attainable because there are methods of deemed compliance with the limit. The record does not show the limit is unattainable, and the burden was on the Cities as opponents of the Trash TMDL to establish impossibility. Further, the impossibility issue is not germane at this juncture, as the matter is at the planning stage with an

interim goal of a 50 percent reduction in trash, a goal everyone agrees is necessary and achievable.

In any event, the trial court found 33 United States Code section 1342(p)(3)(B)(iii) inapplicable to the adoption of a TMDL. The court also found state and federal laws authorize regional boards to "use water quality, and not be limited to practicability as the guiding principle for [\*\*\*65] developing limits [in a TMDL] on pollution." Further, the court noted the Cities presented no authority for their proposition the Regional Board is required to adopt a storm water TMDL that is achievable.

(16) We agree with the court's assessment. The statute applicable to establishing a TMDL, 33 United States Code section 1313(d)(1)(C), does not suggest that practicality is a consideration. To the contrary, a regional board is required to establish a TMDL "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety." (33 U.S.C. § 1313(d)(1)(C).) The NPDES permit provision, 33 United States Code 1342(p)(3)(B), is inapplicable because, again, we are only considering the propriety of the Trash TMDL, a precursor to NPDES permits implementing it. Under the Trash TMDL, the numeric target will be reconsidered after several years when a reduction in trash of 50 percent is achieved, and thus it is presently unknown whether compliance with a trash limit of zero will ever actually be mandated.

(17) To bolster their position the Cities rely on 33 United States Code section 1329(a)(1)(C)). [\*\*\*66] [\*\*399] It provides, however, that in a state's assessment report for a *nonpoint* source management program, the state must "describe[] the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source." (*Ibid.*) In *BIA*, *supra*, 124 Cal.App.4th at page 887, we rejected the argument the statute shows Congress intended to apply a maximum extent practicable standard to point source discharges as well as nonpoint discharges. The Cities say they disagree with *BIA*, but they develop no argument revealing any flaw in the opinion. "[P]arties are required [\*1429] to include argument and citation to authority in their briefs, and the absence of these

necessary elements allows this court to treat appellant's ... issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [37 Cal. Rptr. 2d 126].)

The Cities' reliance [\*\*\*67] on *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, for the proposition that municipalities, unlike private companies, may not be required to strictly comply with numeric discharge limits is likewise misplaced. *Defenders of Wildlife v. Browner* involves a challenge to an NPDES permit, not the adoption of a TMDL. Further, the court there rejected the argument that "the EPA [or authorized regional or state board] may not, under the [Clean Water Act], require strict compliance with state water-quality standards, through numerical limits or otherwise." (*Id.* at p. 1166.) The court explained: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], [section] 1342(p)(3)(B)(iii) [of United States Code, title 33] states that '[p]ermits for discharges from municipal storm sewers ... shall require ... such other provisions as the [EPA] Administrator ... determines appropriate for the control of such pollutants.'" (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. ... [¶] Under that [\*\*\*68] discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. ... Under 33 [United States Code section] 1342(p)(3)(B)(iii), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion." (*Id.* at pp. 1166-1167.)

In *BIA*, this court similarly held that 33 United States Code section 1342(p)(3)(B)(iii) does not divest a regional board's discretion to impose an NPDES permit condition requiring compliance with state water quality standards more stringent than the maximum-extent-practicable standard. (*BIA, supra*, 124 Cal.App.4th at pp. 871, 882-885; see also Wat. Code, § 13377 [waste discharge requirements shall meet federal standards and may also include "more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance"].) [\*\*\*69] Thus, even if the analysis in *Defenders of Wildlife v. Browner* or *BIA* arguably has any

application to a TMDL, the opinions do not help the Cities.

(18) Additionally, the Cities' reliance on a November 2002 EPA memorandum on establishing TMDL's and issuing NPDES [\*\*400] permits is misplaced, as it postdates the Regional Board's adoption of the Trash TMDL and its approval by the State Board and the EPA. Further, the memorandum states it [\*1430] is not binding, and "indeed, there may be other approaches that would be appropriate in particular situations. When EPA makes a TMDL or permitting decision, it will make each decision on a case-by-case basis and will be guided by applicable requirements of the [Clean Water Act] and implementing regulations, taking into account comments and information presented at that time by interested persons regarding the appropriateness of applying these recommendations to the particular situation."

## II

### *Nonpoint Sources of Pollution*

The Cities contend the court should have invalidated the Trash TMDL on additional grounds, including the Water Boards' failure to identify load allocations and implementation measures for nonpoint sources of trash discharge. [\*\*\*70] The Cities assert the Water Boards are required to adopt implementation measures "for the homeless and aerial sources of trash, [and] also for the other nonpoint sources of trash consisting of State and federal facilities, and other facilities not yet subject to NPDES Permits." The Cities submit that the Clean Water Act does not allow the Water Boards "to effectively impose the burden of the load allocation from all nonpoint sources solely on municipalities."

The Cities further claim the Water Boards acted arbitrarily and capriciously by imposing a trash target of zero on municipalities, but imposing a " 'de minimus' requirement on non-point source discharges." The Cities cite the July 29, 2002, letter from the Regional Board to the EPA, clarifying that it identified nonpoint sources of trash pollution "as wind blown trash and direct deposit of trash into the water," but "as the non-point sources were determined to be de-minimus, we did not believe it necessary to outline a reduction schedule for non-point sources." Contrary to the Cities' position, the Regional Board did not adopt a "de minimus" load allocation for nonpoint sources. Rather, as the trial court found, the Regional [\*\*\*71] Board found the trash pollution from



nonpoint sources is de minimus compared to trash pollution from point sources. The TMDL states the "major source of trash in the [Los Angeles River] results from litter, which is intentionally or accidentally discarded in the watershed drainage areas."

In arguing the Trash TMDL is required to include a specific load allocation for nonpoint sources of pollution, the Cities rely on the 2000 EPA Guidance, which provides: "Load allocations for nonpoint sources *may* be expressed as specific allocations for specific discharges or as 'gross allotments' to nonpoint source discharger categories. Separate nonpoint source allocations *should* be established for background loadings. Allocations may be based on a variety [\*1431] of technical, economic, and political factors. The methodology used to set allocations *should* be discussed in detail." (Italics added.)

The 2000 EPA Guidance, however, states it does not impose legally binding requirements. Further, the load allocation for nonpoint sources is implicitly zero for trash. Federal regulations define a TMDL as the sum of waste load allocations for point sources, load allocations for nonpoint sources [\*\*\*72] and natural backgrounds. (40 C.F.R. § 130.2(i) (2003).) Since "[a] TMDL defines the specified maximum amount of a pollutant which can be discharged into a body of water from all sources combined" (*American Wildlands v. Browner* (10th Cir. 2001) 260 F.3d 1192, 1194), [\*\*401] and the Trash TMDL specifies a zero numeric target for trash in Los Angeles River, load allocations are necessarily zero as well as waste load allocations.

Additionally, the Cities cite no authority for the proposition the Water Boards are required to identify an implementation program for nonpoint pollution sources. Again, "[w]here a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal. App. 3d 768, 783 [86 Cal. Rptr. 906], disapproved on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3 [98 Cal. Rptr. 217, 490 P.2d 537]; see *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1693, fn. 2 [44 Cal. Rptr. 2d 575].)

(19) In any event, although the Clean Water Act focuses on both point and nonpoint sources of pollution, it is settled that [\*\*\*73] the measure "does not require states to take regulator[y] action to limit the amount of non-point water pollution introduced into its waterways.

While the [Clean Water Act] requires states to designate water standards and identify bodies of water that fail to meet these standards, ' "nothing in the [Clean Water Act] demands that a state adopt a regulatory system for nonpoint sources." ' " (*Defenders of Wildlife v. U.S. Environ. Protec.*, *supra*, 415 F.3d at pp. 1124-1125, citing *American Wildlands v. Browner*, *supra*, 260 F.3d 1192, 1197 ["In the [Clean Water] Act, Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution"]; *Appalachian Power Co. v. Train* (4th Cir. 1976) 545 F.2d 1351, 1373 ["Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [Clean Water] Act to regulate only the former"]; *City of Arcadia I*, *supra*, 265 F. Supp. 2d at p. 1145 ["For nonpoint sources, limitations on loadings are not subject to a federal nonpoint source permitting program, and therefore any nonpoint source reductions can be enforced ... only to [\*\*\*74] the extent that a state institutes such reductions as regulatory requirements pursuant to state [\*1432] authority".]) "Nonpoint sources, because of their very nature, are not regulated under the NPDES [program]. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the [Clean Water] Act which encourages states to develop areawide waste treatment management plans." (*Pronsolino v. Marcus*, *supra*, 91 F. Supp. 2d at p. 1348, citing 33 U.S.C. § 1288; see also 33 U.S.C. § 1329.)

We conclude the court correctly ruled on this issue.

### III

#### *Uses To Be Made of Watershed*

The Cities next contend the Trash TMDL is invalid because the Water Boards "improperly relied on nonexistent, illegal and irrational 'uses to be made' of the [Los Angeles] River." (Boldface and some capitalization omitted.) The Cities complain that the Trash TMDL states a purported beneficial use of one of numerous reaches of the river on the state's 303(d) list is "recreation and bathing, in particular by homeless people who seek shelter there," and the State Board chairman questioned the legality of such uses. The Cities also assert there is no [\*\*\*75] evidence to support the Trash TMDL's finding that swimming is an actual use of the river in any location.

The Cities rely on section 303(d)(1)(A) of the Clean Water Act (33 U.S.C. § 1313(d)(1)(A)), which provides

that in identifying impaired waters for its 303(d) list, states "shall establish a priority ranking for such waters, taking into account the severity of the pollution and the *uses to be made* of such waters." (Italics added.) [\*\*402] The Cities assert "an 'illegal' use cannot be a 'use to be made' for the water body."

Additionally, the Cities cite Water Code section 13241, which requires regional boards to establish water quality objectives in water quality control plans by considering a variety of factors, including "[p]ast, present, and probable future beneficial uses of water." (Wat. Code, § 13241, subd. (a).) They assert the "Water Boards acted contrary to law by basing the [Trash] TMDL on any uses of the [Los Angeles] River other than the actual 'uses to be made' of the River." (Boldface omitted.)

The Cities, however, make no showing of prejudice. Swimming and bathing by the homeless are only [\*\*\*76] two among numerous other beneficial uses that the Cities do not challenge, and there is no suggestion the numeric target of zero trash in the Los Angeles River would have been less stringent without consideration of the factors the Cities raise.

[\*1433] IV

#### *Scientific Methodology*

Further, the Cities contend the Trash TMDL is invalid on the additional ground that before adopting and approving it the Water Boards failed to comply with the requisite data collection and analysis. The Cities rely on a federal regulation providing that "[s]tates must establish appropriate monitoring methods and procedures (including biological monitoring) necessary to compile and analyze data on the quality of waters of the United States and, to the extent practicable, ground-waters." (40 C.F.R. § 130.4(a) (2003).) "The State's water monitoring program shall include collection and analysis of physical, chemical and biological data and quality assurance and control programs to assure scientifically valid data" in developing, among other things, TMDL's. (*Id.*, § 130.4(b).)

The trial court rejected the Cities' position, finding they failed to establish the Water Boards' [\*\*\*77] scientific data is inadequate or scientifically invalid. The court explained the Water Boards "have not failed to conduct ongoing studies, as they say, how else would

[they] know the River is impaired by trash[?] And the Record reveals studies relied upon by the Boards."

This argument is a variation on the assimilative capacity study issue, and we similarly reject it. As the Water Boards point out, "trash is different than other pollutants. ... The complex modeling and analytical effort that may be necessary for typical pollutants that may be present in extremely low concentrations have no relevance to calculating a trash TMDL." Further, the Trash TMDL does discuss sources of trash in the Los Angeles River. It states the "City of Los Angeles conducted an Enhanced Catch Basin Cleaning Project in compliance with a consent decree between the [EPA], the State of California, and the City of Los Angeles. The project goals were to determine debris loading rates, characterize the debris, and find an optimal cleaning schedule through enhancing basin cleaning. The project evaluated trash loading at two drainage basins[.]" It goes on to discuss the amounts and types of trash collected [\*\*\*78] in the drainage basins between March 1992 and December 1994. The Cities cite no authority for the notion the Water Boards may not rely on data collected by another entity.

The Trash TMDL also states "[s]everal studies conclude that urban runoff is the dominant source of trash. The large amounts of trash conveyed by the urban storm water to the Los Angeles River is evidenced by the amount of ... trash that accumulates at the base of storm drains."

[\*1434] [\*\*403] Alternatively, the Cities contend a TMDL is not suitable for trash calculation. They rely on 33 United States Code section 1313(d)(1)(C), which provides: "Each State shall establish for [impaired] waters ... the total maximum daily load, for those pollutants which the [EPA] Administrator identifies ... 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." (Italics added.)

The Cities also cite a 1978 EPA regulation that states a TMDL is "suitable for ... calculation" only under "proper technical conditions." (43 Fed.Reg. 60662, 60665 (Dec. 28, 1978) [\*\*\*79] (italics omitted).) "Proper technical conditions" require "the availability of the analytical methods, modeling techniques and data base necessary to develop a technically defensible TMDL." (*Id.* at p. 60662.) The Cities assert the proper technical

conditions do not exist, referring to the Trash TMDL's comment that "[e]xtensive research has not been done on trash generation or the precise relationship between rainfall and its deposition in waterways."

The Cities ignore the EPA's determination that a TMDL *may* be calculated for trash as a pollutant. It approved the Regional Board's Trash TMDL, and had previously approved a trash TMDL for the East Fork of the San Gabriel River. (See Cal. Code Regs., tit. 23, § 3933.) Thus, the Cities' view that the 1978 EPA regulation prohibits a TMDL for trash is unfounded. TMDL's for trash are relatively new, and there is no evidence that in 1978 the EPA contemplated their establishment.

We find irrelevant the Cities' discussion of the EPA's proposed July 2000 TMDL "rule," as their federal register citation is not a regulation and merely concerns the 2003 withdrawal of a rule that never took effect. [\*\*\*80] (68 Fed.Reg. 13608, 13609 (Mar. 19, 2003) ["The July 2000 rule was controversial from the outset"].) In August 2001 the EPA delayed implementation of the July 2000 rule for further consideration, noting that some local government officials argued "some pollutants are not suitable for TMDL calculation." (66 Fed.Reg. 41817, 41819 (Aug. 9, 2001).) Nothing is said, however, about whether a trash TMDL is unsuitable for calculation, and again, the EPA has approved such TMDL's. The withdrawal of the proposed July 2000 rule left the existing rule regarding the establishment of a TMDL in place. (33 U.S.C. § 1313(d)(1)(C).)

V

#### *APA Requirements*

Lastly, the Cities contend the trial court erred by finding the Water Boards did not violate the APA. They assert the July 29, 2002, "clarification [\*1435] memorandum" from the Regional Board to the EPA makes substantive changes to the Trash TMDL regulation-the inclusion of the Estuary in the Trash TMDL and designating an allocation of zero for nonpoint pollution sources-violates the notice and hearing provisions of the APA. The Cities also contend the Trash TMDL and the clarification memorandum [\*\*\*81] "establish[] a regulation in violation of the APA's elements of 'clarity,' 'consistency,' and 'necessity,' as defined in [Government] Code section 11349."

(20) The APA (Gov. Code, §§ 11340 et seq., 11370) "establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action [citations]; issue a complete text of the proposed regulation with a statement of the reasons for it [citation]; give interested parties an opportunity to comment on [\*\*404] the proposed regulation [citation]; respond in writing to public comments [citations]; and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law [citation], which reviews the regulation for consistency with the law, clarity, and necessity [citations]." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568 [59 Cal. Rptr. 2d 186, 927 P.2d 296].) "One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so [\*\*\*82] that they can conform their conduct accordingly [citation]." (*Id.* at pp. 568-569.)

The APA does not apply to "the adoption or revision of state policy for water quality control" unless the agency adopts a "policy, plan, or guideline, or any revision thereof." (Gov. Code, § 11353, subs. (a), (b)(1).) The Water Boards contend that while the Trash TMDL and amendment adding it to the 1994 Basin Plan are policies or plans covered by the APA, the clarification memorandum is not because it does not revise the terms of the Trash TMDL.

We are not required to reach the issue, because assuming the APA is applicable the Cities' position lacks merit. As to the Estuary, we have determined the Trash TMDL sufficiently notified affected parties of its inclusion in the document as an impaired water body. Further, we have determined the load allocation for nonpoint sources of trash pollution is also necessarily zero, and the Trash TMDL is not required to include implementation measures for nonpoint sources. Accordingly, the clarification memorandum is not germane.<sup>14</sup>

14 We deny the Water Boards' June 16, 2005, request for judicial notice.

[\*\*\*83]

[\*1436] DISPOSITION

The judgment is affirmed insofar as it is based on the

Trash TMDL's violation of CEQA, and on a rejection of each of the issues the Cities raised in their appeal. The judgment is reversed insofar as it is based on the Trash TMDL's lack of an assimilative capacity study, inclusion of the Estuary as an impaired water body, and a cost-benefit analysis under Water Code section 13267 or the consideration of economic factors under Water Code section 13241, and also insofar as it grants declaratory relief regarding the purported inclusion of nonnavigable waters in the Trash TMDL.

The court's postjudgment order staying the Trash TMDL's implementation schedule is affirmed. The parties are to bear their own costs on appeal.

McIntyre, J., and Irion, J., concurred.

A petition for a rehearing was denied January 17, 2006, and the petition of plaintiffs and appellants for review by the Supreme Court was denied April 19, 2006, S141673.

**Citation #8**  
966 f.2d 1292

LEXSEE

**NATURAL RESOURCES DEFENSE COUNCIL, INC. Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent, BATTERY COUNCIL INTERNATIONAL, et al., Respondents-Intervenors.**

**Nos. 90-70671, 91-70200**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**966 F.2d 1292; 1992 U.S. App. LEXIS 12517; 34 ERC (BNA) 2017; 92 Cal. Daily Op. Service 4703; 92 Daily Journal DAR 7542; 22 ELR 20950**

**October 9, 1991, Argued and Submitted, San Francisco, California**

**June 4, 1992, Filed**

**PRIOR HISTORY:** [\*\*1] Petition for Review of a Rule Promulgated by the Environmental Protection Agency.

**COUNSEL:** Robert W. Adler, Natural Resources Defense Council, Washington, D.C., for the petitioner.

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Robert J. Saner, II, White, Fine & Verville, Washington, D.C., for intervenor-respondent National Association of Flood and Stormwater Management Agencies.

**JUDGES:** Before: Harry Pregerson, Warren J. Ferguson, and Diarmuid F. O'Scannlain, Circuit Judges. Opinion by Judge Ferguson; Partial Concurrence, Partial Dissent by Judge O'Scannlain.

**OPINION BY: FERGUSON**

**OPINION**

[\*1295] OPINION

FERGUSON, Circuit Judge:

The Natural Resources Defense Council ("NRDC") challenges aspects of the Environmental Protection Agency's ("EPA") recent Clean Water Act storm water discharge rule. <sup>1</sup> NRDC argues that the deadlines

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contained in the rule and the scope of its coverage are unlawful under section 402(l), (p) of the Clean Water Act, [\*\*3] 33 U.S.C. § 1342(l), (p). We grant partial relief.

1 National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (1990) (to be codified at 40 C.F.R. § 122.26); National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadline for Group Applications, 56 Fed. Reg. 12,098 (1991) (to be codified at 40 C.F.R. § 122.26(e)).

### I. BACKGROUND

In 1972 Congress enacted significant amendments to the Clean Water Act ("CWA"), <sup>2</sup> 33 U.S.C. §§ 1251-1387 (1988), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One major focus of the CWA is the control of "point source" pollution. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The CWA also established [\*\*4] the National Pollutant Discharge Elimination System ("NPDES"), requiring permits for any discharge of pollutants from a point source pursuant to section 402 of the CWA, 33 U.S.C. § 1342. The CWA empowers EPA or an authorized state to conduct an NPDES permitting program. 33 U.S.C. § 1342(a)-(b). Under the program, as long as the permit issued contains conditions that implement the requirements of the CWA, the EPA may issue a permit for discharge of any pollutant. 33 U.S.C. § 1342(a)(1).

2 The Act is popularly known as the Clean Water Act or the Federal Water Pollution Control Act. 33 U.S.C. § 1251. For more background on the CWA, see *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 202-209, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976); *Sierra Club v. Union Oil of California*, 813 F.2d 1480, 1483 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931, 108 S. Ct. 1102, 99 L. Ed. 2d 264 (1988); and *Natural Resources Defense Council v. Train*, 166 App. D.C. 312, 510 F.2d 692, 695-97 (D.C. Cir. 1975).

This case involves runoff [\*\*5] from diffuse sources that eventually passes through storm sewer systems and is thus subject to the NPDES permit program. *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines, 56 Fed. Reg. 56,548 (1991). One recent study concluded that pollution from such sources, including runoff from urban areas, construction sites, and agricultural land, is now a leading cause of water quality impairment. 55 Fed. Reg. at 47,991.<sup>3</sup>

3 The Nationwide Urban Runoff Program (NURP) conducted from 1978 through 1983 found that urban runoff from residential, commercial and industrial areas produces a quantity of suspended solids and chemical oxygen demand that is equal to or greater than that from secondary treatment sewage plants. 55 Fed. Reg. at 47,991. A significant number of samples tested exceeded water quality criteria for one or more pollutants. *Id.* at 47,992. Urban runoff is adversely affecting 39% to 59% of the harvest-limited shellfish beds in the waters off the East Coast, West Coast and in the Gulf of Mexico. 56 Fed. Reg. at 56,548.

[\*\*6] *A. Efforts to Regulate Storm Water Discharge.*

Following the enactment of the CWA amendments in 1972, EPA promulgated NPDES permit regulations exempting a number of classes of point sources, including uncontaminated storm water discharge, on the basis of "administrative infeasibility," i.e., the extraordinary administrative burden imposed on EPA should it have to issue permits for possibly millions of point sources of runoff. *Natural Resources Defense Council v. Costle*, 186 App. D.C. 147, 568 F.2d 1369, 1372 & n.5, 1377 (D.C. Cir. 1977). NRDC [\*1296] challenged the exemptions. Relying on the language of the statute, its legislative history and precedent, the D.C. Circuit held that the EPA Administrator did not have the authority to create categorical exemptions from regulation. *Id.* at 1379. However, the court acknowledged the agency's discretion to shape permits in ways "not inconsistent with the clear terms of the Act." *Id.* at 1382.

Following this litigation, EPA promulgated regulations covering storm water discharges in 1979, 1980 and 1984. 56 Fed. Reg. 56,548. NRDC challenged various aspects of these rules both at the administrative [\*\*7] level as well as in the courts.

Recognizing both the environmental threat posed by storm water runoff<sup>4</sup> and EPA's problems in implementing regulations,<sup>5</sup> Congress passed the Water Quality Act of 1987<sup>6</sup> containing amendments to the CWA ("the 1987 amendments"), portions of which set up a new scheme for regulation of storm water runoff. Section 402(p), as amended, established deadlines by which certain storm water dischargers must apply for permits, the EPA or states must act on permits and dischargers must implement their permits. *See* Appendix A. The Act also set up a moratorium on permitting requirements for most storm water discharges, which ends on October 1, 1992. There are five exceptions that are required to obtain permits before that date:

4 *See* 132 Cong. Rec. 32,381 (1986).

5 Senator Stafford, speaking in favor of the conference report for the Water Quality Act, noted that "EPA should have developed this program long ago. Unfortunately, it did not. The conference substitute provides a short grace period during which EPA and the States generally may not require permits for municipal separate storm sewers." 132 Cong. Rec. 32,381 (1986). Senator Chafee stated "the Agency has been unable to move forward with a [storm water discharge control] program, because the current law did not give enough guidance to the Agency. This provision provides such guidance, and I expect EPA to move rapidly to implement this control program." 133 Cong. Rec. 1,264 (1987).

[\*\*8]

6 Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.).

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, . . . determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the

United States.

CWA § 402(p)(2); 33 U.S.C. § 1342(p)(2).

Section 402(p) also outlines an incremental or "phase-in" approach to issuance of storm water discharge permits. The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first. 133 Cong. Rec. 991 (1987). Section 402(p) requires EPA to promulgate rules regulating permit application [\*\*9] procedures in a staggered fashion.

Responding to the 1987 amendments requiring the EPA to issue permit application requirements for storm water discharges associated with industrial activities and large municipalities, the EPA issued final rules on November 16, 1990, almost two years after its deadline ("the November 1990 rule"). 55 Fed. Reg. at 47,990c. EPA issued amended rules on March 21, 1991 ("the March 1991 rule"). 56 Fed. Reg. at 12,098. It is to portions of these rules that NRDC objects.

#### *B. Jurisdiction.*

We have jurisdiction pursuant to CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1). Section 509(b)(1) describes six types of actions by the EPA administrator that are subject to review in the court of appeals. Although the parties do not specify the section upon which they rely, § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) allows the court to review [\*1297] the issuance or denial of a permit under CWA § 402, 33 U.S.C. § 1342. The court also has the power to review rules that regulate the underlying permit procedures. *NRDC v. EPA*, 211 App. D. C. 179, 656 F.2d 768, 775 (D.C. Cir. 1981); *cf. E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 136, 51 L. Ed. 2d 204, 97 S. Ct. 965 (1976). [\*\*10] NRDC filed timely petitions for review of the final rules at issue here pursuant to CWA § 509(b)(1), 33 U.S.C. 1369(b)(1).

#### *C. Standing.*

Any "interested person" may seek review of designated actions of the EPA Administrator. 33 U.S.C. § 1369(b)(1). This court has held that the injury-in-fact rule for standing of *Sierra Club v. Morton*, 405 U.S. 727, 733, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) covers the "interested person" language. *Trustees for Alaska v. EPA*, 749 F.2d 549, 554 (9th Cir. 1984) (adopting the analysis in *Montgomery Environmental Coalition v.*



*Costle*, 207 App. D.C. 233, 646 F.2d 568, 578 (D.C. Cir. 1980)). A petitioner under *Sierra Club* must suffer adverse affects to her economic interests or "aesthetic and environmental well-being." *Sierra Club*, 405 U.S. at 734. Intervenor are various industry and trade groups subject to regulation under the rules at issue. NRDC claims, inter alia, that EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water contaminants. NRDC's allegations and the potential economic impact of the rules on the intervenors satisfy the [\*\*11] broad standing requirement applicable here.

## II. DISCUSSION

### A. Standard of Review.

5 U.S.C. § 706(2)(A) (1988) authorizes the court to "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Under this standard a court must find a "rational connection between the facts found and the choice made." *Sierra Pacific Indus.*, 866 F.2d 1099, 1105 (9th Cir. 1989) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)). The court must decide whether the agency considered the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971).

On questions of statutory construction, courts must carry out the unambiguously expressed intent of Congress. If a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). [\*\*12] Congress may leave an explicit gap, thus delegating legislative authority to an agency subject to the arbitrary and capricious standard. *Id.* at 843-44. If legislative delegation is implicit, courts must defer to an agency's

statutory interpretation as long as it is reasonable. *Id.* at 844. This is because an agency has technical expertise as well as the authority to reconcile conflicting policies. *See id.* Nevertheless, questions of congressional intent that can be answered with "traditional tools of statutory construction" are still firmly within the province of the courts. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987).

### B. EPA's Extension of Statutory Deadlines.

#### 1. Background.

NRDC challenges EPA's extension of certain statutory deadlines in the November 1990 and March 1991 rules. The statutory scheme calls for EPA to consider permit applications from the most serious sources of pollutants first: industrial dischargers and large municipal separate storm sewer systems ("large systems").<sup>7</sup> The statute required EPA to establish regulations [\*1298] for permit application requirements for these two groups by February [\*\*13] 4, 1989; to receive applications for permits one year later, February 4, 1990; and to approve or deny the permits by February 4, 1991. Permittees may be given up to three years to comply with their permits. CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A). Medium sized municipal separate storm sewer systems ("medium systems") (those serving a population of 100,000 or more but less than 250,000) are on a similar schedule, except that the deadlines are two years later. CWA § 402(p)(4)(B), 33 U.S.C. § 1342(4)(B). The temporary statutory exemption for all storm water sources expires on October 1, 1992. CWA § 402(p)(1), 33 U.S.C. § 1342(p)(1). EPA states that discharges from municipal separate storm sewer systems serving a population of under 100,000 are to be regulated after that date.

<sup>7</sup> Large municipal systems are those serving a population of 250,000 or more. § 402(p)(2)(C).

The EPA rules at issue changed the statutory deadlines as follows:

Deadlines pursuant to CWA § 402(p) <sup>8</sup>		EPA Deadlines <sup>9</sup>	
Discharge type	Deadline to issue rules	Deadline for application and approval of permits	Application deadlines

Industrial	2/4/89	2/4/90 - applications due	see below
		2/4/91 - approval due	
Large municipal systems	08/04/89	2/4/90 - applications due	Part 1 - 11/18/91
		2/4/91 - approval	Part 2 - 11/16/92
Medium municipal systems	08/04/91	2/4/92 - applications due	Part 1 - 5/18/92
		2/4/93 - approval due	Part 2 - 5/17/93
<b>EPA Application Deadlines for "Industrial Activity" Dischargers</b>			
Individual	Group		
due 11/18/91	Part 1 9/30/91; Part 2 - 10/1/92		

8 Since NRDC filed this action, Congress has passed certain legislation affecting some of the deadlines at issue. Congress ratified the date of September 30, 1991 for part 1 of group applications for industrial dischargers. *See* Dire Emergency Supplemental Appropriations Act of 1991, Pub. L. No. 102-27, § 307, 105 Stat. 130, 152 (1991).

Section 1068 of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA") clarifies the deadlines for storm water discharges associated with industrial activity from facilities owned or operated by a municipality. Pub. L. No. 102-240, § 1068, 105 Stat. 1914, 2007 (1991). ISTEA deadlines are being reviewed in a separate case. Nothing in this opinion should be viewed as requiring EPA to comply with deadlines that have been altered or superseded by the ISTEA.

9 *See* 55 Fed. Reg. at 48,071-72 (to be codified at 40 C.F.R. § 122.26(e)); 56 Fed. Reg. at 12,100 (to be codified at 40 C.F.R. § 122.26(e)(2)(iii)). EPA changed certain of these deadlines after this case was submitted. These changes are the subject of a separate case.

The EPA rules at issue set no date for final approval or denial of applications from municipal or industrial dischargers, nor for compliance by these regulated entities. *See* 55 Fed. Reg. at 48,072.

[\*\*14] As the chart illustrates, EPA made other elaborations on the statutory scheme in addition to extending the deadlines. Medium and large municipal systems and industrial dischargers are now subject to a two-part application process. 55 Fed. Reg. at 48,072. The November 1990 rules allow industrial dischargers to apply for either individual or group permits. *Id.* at 48,066-67. [\*1299] The March 1991 rules further extended the deadline for part 1 of the group industrial discharger permits to September 30, 1991. <sup>10</sup> 56 Fed. Reg. at 12,098. A final rule published on April 2, 1992 extended the deadline for the part 2 group application for industrial dischargers from May 18, 1992 to October 1, 1992. 57 Fed. Reg. at 11,394. The EPA rules at issue contain neither deadlines for final EPA or state approval of permits nor deadlines for compliance with the permit terms.

10 NRDC initially claimed that this extension was unlawful because it was granted without proper notice and comment. However, Congress approved this extended deadline in a supplemental appropriations bill. Dire Emergency Supplemental Appropriations Act of 1991, Pub.L. No. 102-27 § 307, 105 Stat. 130, 152 (1991). This Act moots the procedural and substantive challenge to this extended deadline.

[\*\*15] Seeking to compel the EPA to conform to the statutory scheme, NRDC asks this court:

a) to declare unlawful EPA's failure to issue certain of the storm water permitting regulations by February 4, 1989 and EPA's extension of certain statutory deadlines;

b) to enjoin EPA from granting future extensions of the deadlines;

c) to compel EPA to include deadlines for permit approval or denial and permit compliance consistent with the statute; and

d) to compel EPA to require that medium and small municipal systems meet the same deadlines as large systems.

## 2. Discussion.

### a. Request for Declaratory Relief.

NRDC asks the court to (1) declare unlawful EPA's failure to issue storm water permitting regulations by February 4, 1989; and (2) declare unlawful EPA's extension of deadlines for submission of permit applications by large and medium systems and individual industrial dischargers.

A request for declaratory relief in a challenge to an agency action is ripe for review if the action at issue is final and the questions involved are legal ones. *Public Util. Dist. No. 1 v. Bonneville Power Admin.*, 947 F.2d 386, 390 n. 1 (9th Cir. 1991) (citations omitted), *cert. denied*, [\*\*16] \_\_\_U.S.\_\_\_, 112 S. Ct. 1759, 118 L. Ed. 2d 422, 60 U.S.L.W. 3537 (1992). Here, the agency regulations are final. *See* 55 Fed. Reg. at 47,990, 56 Fed. Reg. at 12,096. The question of whether the EPA is bound by the statutory scheme set by Congress is a legal one. The request for declaratory relief is therefore ripe for consideration by this court.

The granting of declaratory relief "rests in the sound discretion of the [ ] court exercised in the public interest." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Civil Procedure* § 2759, at 645 (1983). The guiding principles are whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings. *McGraw Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342 (9th Cir.) (citing Borchar, *Declaratory Judgments* 299 (2d ed. 1941)), *cert. denied*, 385 U.S. 919, 87 S. Ct. 229, 17 L. Ed. 2d 143 (1966). A court

declaration delineates important rights and responsibilities and can be "a message not only to the parties but also to the public and has significant educational and lasting importance." [\*\*17] *Bilbrey v. Brown*, 738 F.2d 1462, 1471 (9th Cir. 1984). Because of the importance of the interests and the principles at stake, we grant declaratory relief.

EPA does not have the authority to ignore unambiguous deadlines set by Congress. *Delaney v. EPA*, 898 F.2d 687, 691 (9th Cir.), *cert. denied*, 111 S. Ct. 556, 112 L. Ed. 2d 563 (1990). In arguing against injunctive relief, EPA points to cases recognizing factors indicating that equitable relief may be inappropriate. *See, e.g., In re Barr Laboratories, Inc.*, 289 App. D.C. 187, 930 F.2d 72, 74 (D.C. Cir.) (agency's choice of priorities is an important factor in considering whether to grant equitable relief), *cert. denied*, 116 L. Ed. 2d 241, 112 S. Ct. 297, 112 S. Ct. 298 (1991); *Natural Resources Defense Council v. Train*, 166 App. D.C. 312, 510 F.2d 692, 712 (D.C. Cir. 1975) (court may need to give [\*1300] agency some leeway due to budgetary commitments or technological problems); *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 569-70 (D.D.C. 1986) (EPA's good faith is a factor). None of these factors militates against an award of declaratory relief. They do not grant an executive [\*\*18] agency the authority to bypass explicit congressional deadlines. The deadlines are not aspirational - Congress set them and expected compliance. *See* 132 Cong. Rec. 32,381-82 (remarks of Senator Stafford, commenting on EPA delay and the establishment of statutory deadlines as "outside dates.") This court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to express statutory requirements. For these reasons, we grant NRDC's request for declaratory relief. EPA's failure to abide by the statutory deadlines is unlawful.

### b. Request for Injunction.

NRDC asks the Court to enjoin the EPA from further extensions for permit applications from municipal and industrial dischargers. Injunctions are an extraordinary remedy issued at a court's discretion when there is a compelling need. 11 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2942, at 365, 368-69 (1973). We decline to enjoin the EPA on discretionary grounds.

Injunctive relief could involve extraordinary

supervision by this court. Injunctive relief may be inappropriate where it requires constant supervision. *Id.* at 376. At issue are deadlines for the three major [\*\*19] categories of dischargers, each of which has a two-part application. The permitting process will go on for several years. While recognizing the importance of the interests involved, we nevertheless decline to engage in the active management of such a remedy.

In this situation, we must operate on the assumption that an agency will follow the dictates of Congress and the court. As noted above, the EPA does not have the authority to predicate future rules or deadlines in disagreement with this opinion. *See Allegheny General Hosp. v. NLRB*, 608 F.2d 965, 970 (3rd Cir. 1979). We presume that the EPA will duly perform its statutory duties. *See Upholstered Furniture Action Council v. California Bureau of Home Furnishings*, 442 F. Supp. 565, 568 (E.D. Cal. 1977) (three judge court). Because we decline to take on potentially extensive supervision of the EPA, Congress may need to find other ways to ensure compliance if the agency is recalcitrant.

c. Deadlines for Permit Approval and Compliance.

NRDC requests that the court compel EPA to revise the rules to include deadlines for permit approval or denial and permit compliance consistent with the statute. Section [\*\*20] 402(p)(4)(A) calls for the EPA to issue or deny permits for industrial and large municipalities by February 4, 1991, which is one year after the applications are submitted, and states that "any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of the issuance of such permit." CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A). The statute sets out a similar schedule for medium municipalities, except that the deadlines are two years later. CWA § 402(p)(4)(B), 33 U.S.C. § 1342(p)(4)(B).

The regulations promulgated by the EPA contain neither final approval deadlines nor compliance deadlines for industrial dischargers or medium and large municipalities. 55 Fed. Reg. at 48,072. By failing to regulate final approval and compliance, EPA has omitted a key component of the statutory scheme. To ensure adherence to the statutory time frame, especially in the face of deadlines already missed, the regulated community must be informed of these deadlines. EPA's failure to include these important deadlines is an arbitrary and capricious exercise of its responsibility to issue

regulations pursuant to the statute.

[\*\*21] We see no need for additional delay while supplemental regulations are issued. Given the extraordinary delays already encountered, EPA must avoid further delay. [\*1301] The regulations should inform the regulated community of the statute's outside dates for compliance.<sup>11</sup> *See* CWA § 402(p)(4)(A)-(B), 33 U.S.C. § 1342(p)(4)(A)-(b).

11 In addition, pursuant to the statute, compliance deadlines applicable to each facility shall be contained in its permit.

d. Timeline for Small and Medium Systems.

The parties disagree on when small systems (those serving a population of less than 100,000) should be regulated. As noted above, the temporary statutory exemption for all storm water sources expires on October 1, 1992. The statute requires EPA to establish a comprehensive program to regulate point sources subject to the moratorium, such as small municipalities, by that date. CWA § 401(p)(1), (6), 33 U.S.C. § 1342(p)(1), (6).

Pointing to a perceived statutory gap, NRDC argues that small systems should be subject to the same permitting [\*\*22] schedule applicable to medium systems, to assure that they are regulated when the permitting moratorium ends on October 1, 1992. However, the plain language of the statute prohibits this. Section 402(p)(1) forbids requiring a permit for entities not listed as exceptions (such as small municipalities) before October 1, 1992. Yet the deadline for part 1 of the application for medium systems is currently May 18, 1992. 55 Fed. Reg. at 48,072.

Even if NRDC is correct that EPA is not proceeding so that regulations will be in place on October 1, 1992, we cannot ignore the plain language of the statute by adopting NRDC's solution. The CWA does not require regulation of such systems prior to expiration of the moratorium. We therefore reject NRDC's proposal that small systems be put on the same schedule as medium ones.

NRDC asks the court to put the medium systems on the same schedule as the large systems, in order to achieve closer compliance with the timeline set out in § 402(p)(4)(B). However, EPA's current schedule for medium systems, although delayed, is still within the

statutory scheme in its relation to the schedule for large systems. That is, Congress placed the medium [\*\*23] systems on a staggered permitting schedule to start two years after the large systems and industrial users. The EPA schedule now has medium municipal system applications due six months after the applications for the large municipal systems. 55 Fed. Reg. at 48,072. For this reason, the current deadline for medium municipalities does not appear to be unreasonable despite the unlawful delay.

*C. Exclusion of Certain Sources from Regulation.*

*1. Definition of "Municipal Separate Storm Sewer System."*

Section 402(p) refers to "municipal separate storm sewer systems serving a population" of a specified size. CWA § 402(p)(2)(C), (D), 33 U.S.C. § 1342 §§ 402(p)(2)(C), (D). NRDC contends that EPA's definition of this term violates the plain language of the statute, fails to take into account the statutory definition of the word "municipality" and is arbitrary and capricious because the agency considered improper factors when it defined the term. All of this, according to NRDC, results in an impermissible narrowing of the municipalities covered by the first two rounds of permitting.

The 1987 amendments to the CWA did not contain definitions of "municipal" or "separate storm [\*\*24] sewer system," but the CWA amendments enacted in 1972 defined "municipality" as follows:

except as otherwise specifically provided, when used in this chapter: . . . (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 [\*1302] management agency under section 1288 of this title [33 U.S.C. § 1288].

33 U.S.C. § 1362.

In the November 1990 regulations, the EPA defined "municipal separate storm sewer" as: "a conveyance or system of conveyances . . . owned or operated by a State, city, town, borough, county, parish, district, association or other public body. . . ." 55 Fed. Reg. at 48,065 (to be codified at 40 C.F.R. § 122.26(b)(8)). This definition

echoes the language of 33 U.S.C. § 1362(4). However, when defining large and medium municipal separate storm sewer *systems serving a population* of a specified size, EPA brought in other factors. 55 Fed. Reg. at 48,064 (to be codified [\*\*25] at 40 C.F.R. § 122.26(b)(4), (7)). EPA defines medium and large separate storm sewer systems using two main categories:

1) separate storm sewer systems located in an incorporated place with the requisite population, and

2) separate storm sewer systems located in unincorporated, urbanized portions of counties containing the requisite population (as listed in Appendices H and I to the rule), excluding those municipal separate sewers located in incorporated places, townships or towns within such counties. <sup>12</sup> 55 Fed. Reg. at 48,064. NRDC opposes this definition for municipal separate storm sewer systems for the reasons explained below.

12 The rule also permits the Administrator to include certain other systems as part of a medium or large system due to the physical interconnections between the systems, their locations, or certain other factors. See 40 C.F.R. § 122.26(b)(4)(iii), (iv) and (b)(7)(iii), (iv).

First, NRDC argues that according to the definitional section cited above and principles of [\*\*26] statutory construction, general definitions apply wherever the defined term appears elsewhere in the law. See 33 U.S.C. § 1362 ("except as otherwise specifically provided" the definitions apply throughout the act); *Sierra Club v. Clark*, 755 F.2d 608, 613 (8th Cir. 1985). NRDC argues that the scope of the statutory definition of "municipality" in 33 U.S.C. § 1362(4) and the scope of the phrase "municipal separate storm sewer system serving a population" are the same. NRDC thus proposes that the correct definition is a system of conveyances owned or operated by the full range of entities described at 33 U.S.C. § 1362(4), (cities, towns, etc.) with populations within the ranges designated at § 402(p)(2), i.e., 250,000 or more for large systems and between 100,000 and 250,000 for medium systems.

However, we do not believe that the entire phrase used in the act, "municipal separate storm sewer system serving a population of [a specified size]" can be equated with the term "municipality" in the manner that NRDC proposes. The act contains no definition of either "system" or "serving a population." The word "system" is

particularly ambiguous in the context of storm [\*\*27] sewers.<sup>13</sup> We therefore agree with EPA that there is no single, plain meaning for the disputed words.

13 Storm sewers located within the boundaries of a city might be part of a state highway system, a flood control district, or a system operated by the state or county. *See* 55 Fed. Reg. at 48,041.

Because the term is ambiguous, we must look first to whether Congress addressed the issue in another way. *See Abourezk v. Reagan*, 251 App. D.C. 355, 785 F.2d 1043, 1053 (D.C. Cir. 1986) ("if the court finds that Congress had a specific intent . . . , the court stops there and enforces that intent regardless of the agency's interpretation") (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 & n. 9 (1984)), *aff'd by an equally divided court*, 484 U.S. 1, 108 S. Ct. 252, 98 L. Ed. 2d 1 (1987). The legislative history is not illuminating. Although it explains that a purpose of the permitting scheme was to attack the most serious sources of discharge first,<sup>14</sup> [\*\*28] this general goal is not helpful in discerning the specific meaning of "municipal separate storm sewer system serving a population." Without clear guidance from Congress, we turn to the agency's justifications [\*\*1303] for its choices in the face of NRDC's objections.

14 *See, e.g.*, 133 Cong. Rec. 991 (1987) (statement of Rep. Stangeland).

NRDC claims that EPA's definition is arbitrary and capricious because EPA considered improper factors, including its own work load, the incorporation status of municipalities, and urban density. "An agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). [\*\*29]

EPA's final definition took into account many issues and concerns of the regulated community. *See* 55 Fed. Reg. at 48,039. EPA considered eight different options for defining large and medium municipal separate storm sewer systems. 55 Fed. Reg. at 48,038-43. EPA

considered focusing on ownership or operation of a system by an incorporated place, but found that this approach did not take into account systems operated by flood control districts, state transportation systems, or concerns relating to watershed management. It instead fashioned a multi-faceted approach. This choice of approach is not unreasonable.

NRDC challenges EPA's consideration of incorporation as a factor. It claims that limiting regulation to incorporated places of the appropriate size excludes portions of 378 counties that contain over 100,000 people. NRDC essentially contends that because counties are a type of municipality, storm water conveyances in all counties with populations over 100,000 should come within the definition of either medium or large municipal separate storm sewer systems. We have already rejected NRDC's claim that the definition of regulated "systems" must include [\*\*30] conveyances in all "municipalities."

EPA's use of incorporation as a factor is not arbitrary and capricious or inconsistent with the statute. The agency proceeded on the reasonable assumption that cities possess the police powers needed effectively to control land use within their borders. *See* 55 Fed. Reg. at 48,039, 48,043. The first major category within the definition of regulated "systems," municipal separate storm sewers located within incorporated places having the requisite population, is reasonable.

NRDC questions EPA's second major category, which covers storm sewers located in unincorporated urbanized areas of counties with the designated population, but excludes conveyances located in incorporated places with populations under 100,000 within those counties. The exclusion, however, has a legitimate statutory basis. The statute prohibits EPA from requiring permits for systems serving under 100,000 persons prior to October 1, 1992. CWA § 402(p)(1), 33 U.S.C. § 1342(p)(1). EPA reasonably concluded that conveyances within small incorporated places should be considered parts of small systems limited to those incorporated places, rather than parts of larger [\*\*31] systems serving whole counties. EPA's definition attempts to capture population centers of over 100,000 (by including urbanized, unincorporated areas) without violating the congressional stricture against regulation of areas with populations under 100,000 (thus excluding incorporated areas of less than 100,000 within a county).

In arriving at its definition of "municipal separate

storm sewer systems serving" a designated population, EPA investigated numerous options and considered comments from a range of viewpoints. We find "a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

NRDC objects to EPA's use of 1980 census data and EPA's definition of urban density. While it appears that NRDC has solid arguments as to why it would be preferable to use 1990 census figures and adopt its method of determining urban density, our role is not to determine whether EPA has chosen the best among all possible [\*1304] methods. We can only determine if its choices are rational. EPA chose the 1980 census data because it was the most widely available decennial census data at the time of rule formulation and promulgation. Neither [\*\*32] this choice nor its use of the Census Bureau's definition of urbanized area is arbitrary and capricious.

EPA took agency work load into account in arriving at its definition. 55 Fed. Reg. at 48,039. NRDC objects on the basis that Congress considered the issue of work load when it developed the "phase-in" approach and allowed permit applications on a system- or jurisdiction-wide basis. However, this broad congressional scheme does not prohibit further consideration of EPA's work load as one among many factors in its attempt to fashion a workable program.

In summary, NRDC's argument that the phrase "municipal separate storm sewer system serving a population" has the plain meaning NRDC proposes is not persuasive. Although EPA's definition in the face of the statute's ambiguity is complex, if not convoluted, it is not arbitrary and capricious, and we therefore reject NRDC's request that the definition be declared invalid.

## 2. EPA Exemption for Light Industry.

NRDC challenges the portion of the EPA rule excluding various types of "light industry" from the definition of "discharge associated with industrial activity."

Under CWA § 402(p)(2)(B), a "discharge associated with [\*\*33] industrial activity" is an exception to the permit moratorium. In the November rule, EPA modified the statutory scheme by drawing distinctions among light and heavy industry and considering actual exposure to

industrial materials. Although the statute does not define "associated with industrial activity," the EPA definition excludes industries it considers more comparable to retail, commercial or service industries. The excluded categories are manufacturers of pharmaceuticals, paints, varnishes, lacquers, enamels, machinery, computers, electrical equipment, transportation equipment, glass products, fabrics, furniture, paper board, food processors, printers, jewelry, toys and tobacco products. 55 Fed. Reg. at 48,008. These types of facilities need apply for permits only if certain work areas or actual materials are exposed to storm water. *Id.* EPA justifies these exemptions on the assumption that most of the activity at these types of manufacturers takes place indoors, and that emissions from stacks, use of unhooded manufacturing equipment, outside material storage or disposal, and generation of large amounts of dust and particles will all be minimal. 55 Fed. Reg. at 48,008c. [\*\*34]

Thus, EPA considers actual exposure to certain materials or stormwater for the light industry categories, but does not consider actual exposure for the other industrial categories. After careful review of the statutory language and the record, we conclude that this distinction is impermissible.

We note that the language "discharges associated with industrial activity" is very broad. The operative word is "associated." It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary.

There is a brief discussion of the issue in the legislative history: "[a] discharge is associated with industrial activity if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings." 133 Cong. Rec. 985 (1987); *see also* 132 Cong. Rec. 31,968 (1986) (same). EPA argues that the words "directly related" indicate Congress's intent to require permits for only those materials that come in contact with industrial materials. [\*\*35] *See* 55 Fed. Reg. at 48,007. However, the examples given - parking lots and administrative buildings - indicate that the intent was to exclude only those facilities or parts of a facility that are completely non-industrial.

EPA's definition follows the language quoted above:

"Storm water discharge associated with industrial activity means the [\*1305] 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." 40 C.F.R. § 122.26(b)(14). EPA applies this definition differently depending on type of industry. EPA bases its regulation of industrial activity on Standard Industrial Classification ("SIC") categories. For most of the industrial SIC categories (identified at 40 C.F.R. § 122.26(b)(i-x)), the EPA definition includes all stormwater discharges from plant yards, access roads and rail lines, material handling sites, storage and disposal sites, shipping and receiving areas, and manufacturing buildings. 40 C.F.R. § 122.26(b)(14). However, for the "light industry" categories identified in 40 C.F.R. § 122.26(b)(14)(xi), stormwater must [\*\*36] be actually exposed to raw materials, by-products, waste, etc., before permitting is required.

EPA justifies this difference on the ground that for "light industry," industrial activity will take place indoors, and that generation of large amounts of particles and emissions will be minimal. There is nothing in the record submitted to the Court however, which supports this assumption. *See, e.g.*, 55 Fed. Reg. at 48,008. Without supportable facts, we are unable to rely on our usual assumption that the EPA has rationally exercised the duties delegated to it by Congress. To exempt these industries from the normal permitting process based on an unsubstantiated assumption about the this group of facilities is arbitrary and capricious.

In addition, by designating these light industries as a group that need only apply for permits if actual exposure occurs, EPA impermissibly alters the statutory scheme. The statute did set up a similar approach for oil, gas, and mining industries. However, no other classes of industrial activities are subject to the more lenient "actual exposure" test. To require actual exposure entirely shifts the burden in the permitting scheme. Most industrial [\*\*37] facilities will have to apply for permits and show the EPA or state that they are in compliance. Light industries will be relieved from applying for permits unless actual exposure occurs. The permitting scheme then will work only if these facilities self-report, or the EPA searches out the sources and shows that exposure is occurring. We do not know the likelihood of either self-reporting or EPA inspection and monitoring of light industries, and the regulations appear to contemplate

neither for these industries. For this reason, the proposed regulation is also arbitrary and capricious.

In conclusion, we hold that the rule for light industries is arbitrary and capricious, vacate the rule, and remand for further proceedings.

### 3. *Exclusion of Construction Sites of Less than Five Acres.*

NRDC challenges the exemption for construction sites of less than five acres. EPA concedes that the construction industry should be subject to storm water permitting because at a high level of intensity, construction is equivalent to other regulated industrial activities. 55 Fed. Reg. at 48,033. Construction sites can pollute with soil sediments, phosphorus, nitrogen, nutrients from [\*\*38] fertilizers, pesticides, petroleum products, construction chemicals and solid wastes. *Id.* EPA states that such substances can be toxic to aquatic organisms, and affect water used for drinking and recreation. *Id.*

Following its characterization of construction sites as suitable for regulation, EPA defined its task as determining "an acreage limit [] appropriate for identifying sites that amount are (sic) to industrial activity." 55 Fed. Reg. at 48,036. EPA originally proposed regulations that exempted operations that disturb less than one acre of land and are not part of a common plan of development or sale. 55 Fed. Reg. at 48,035-36. In response to comments by the regulated community about the administrative burden presented by the regulation, EPA increased the exemption to five acres. 55 Fed. Reg. at 48,036. EPA also noted that larger sites will involve heavier equipment for removing vegetation and bedrock than smaller sites. *Id.* at 48,036. [\*1306]

We find that EPA's rationale for increasing the limit from one to five acres inadequate and therefore arbitrary and capricious. EPA cites no information to support its [\*\*39] perception that construction activities on less than five acres are non-industrial in nature.

EPA also claims agency power, inherent in statutory schemes, to make categorical exemptions when the result is *de minimis*. *Alabama Power Co. v. Costle*, 204 App. D.C. 51, 636 F.2d 323, 360 (D.C. Cir. 1979). However, if construction activity is industrial in nature, and EPA concedes that it is, EPA is not free to create exemptions



from permitting requirements for such activity. *See Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d at 1369, 1377 (D.C. Cir. 1977) (once Congress has delineated an area that requires permits, EPA is not free to create exemptions).

Further, we find the *de minimis* principle inapplicable here. The *de minimis* exemption is only available where a regulation would "yield a gain of trivial or no value." *Alabama Power Co., supra*, at 361. Because of the lack of data, we cannot know whether exempting sites of less than five acres will indeed have only a *de minimis* effect.

The *de minimis* concept is based on the principle that the law does not concern itself with trifling matters. *Id.* at 360. [\*\*40] We question its applicability in a situation such as this where the gains from application of the statute are being weighed against administrative burdens to the regulated community. *See id.* at 360-361 (implied authority to make cost-benefit decisions must derive from statute, and not general *de minimis* doctrine).

Further, EPA's claim that the five-acre exemption is *de minimis* is contradicted by the admission that even small construction sites can have a significant impact on local water quality. The EPA acknowledges that "over a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades." 55 Fed. Reg. at 48,033. Without data supporting the expanded exemption, we owe no deference to EPA's line-drawing. We thus hold that EPA's choice of a five-acre limit is arbitrary and capricious, invalidate that portion of the rule exempting construction sites of five acres or less from permitting requirements, and remand for further proceedings.

#### 4. Exemption for oil and gas activities.

The 1987 amendments created an exemption from the permit requirement for uncontaminated runoff [\*\*41] from mining, oil and gas facilities. *See* Appendix, CWA § 402(1)(2), 33 U.S.C. §§ 1342(l)(2). Section 402(1)(2) states that a permit is not required for discharges of storm water runoff from mining, oil or gas operations composed entirely of flows from conveyance systems used for collecting precipitation runoff and "which are not contaminated by contact with, or do not come into contact with any overburden, raw material, intermediate products, finished product, byproduct, or waste products". NRDC claims that the November 1990 rule

sets up an impermissible standard for determining contamination at oil and gas facilities. The relevant portion of the rule states that at these facilities, an operator is not required to submit a permit application unless the facility has had a discharge of a reportable quantity <sup>15</sup> since November 1987, or contributes to a violation of a water quality standard. 55 Fed. Reg. 48,067 (to be codified at 40 C.F.R. § 122.26(c)(1)(iii)). A facility which has had a release of oil or a hazardous substance in excess of RQs since [\*1307] 1987 must submit a permit application. *Id.*; 55 Fed. Reg. at 48,029-30.

15 "Reportable Quantities" (RQs) are not effluent guidelines setting up permissible limits for pollutants. Rather, they are quantities the discharge of which "may be harmful to the public health or welfare of the United States." CWA § 311(b)(4), 33 U.S.C. § 1321(b)(4). EPA has established RQs for a large number of substances, pursuant to both CWA section 311, 33 U.S.C. § 1321, and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") section 102, 42 U.S.C. § 9602. *See* 40 C.F.R. Parts 110, 117, 302. The operator of any vessel or facility which releases the RQ of any substance must immediately notify the National Response Center. *See, e.g.*, 40 C.F.R. § 110.10.

[\*\*42] NRDC claims that oil and gas operations should be subject to the stricter standards which apply to mining operations. <sup>16</sup> It also objects to EPA's use of RQs as the only test for contamination of runoff from oil and gas storm water dischargers, claiming it is inconsistent with the legislative history. We conclude that the legislative history does not support NRDC's position.

16 Operators of mines must submit permit applications whenever storm water discharges come into contact with overburden, waste products, etc. 40 C.F.R. § 122.26(c)(1)(iv).

The conference report states:

Permits are not required where stormwater runoff is diverted around mining operations or oil and gas operations and does not come in contact with overburden, raw material, product, or process wastes. In addition, where stormwater runoff is not contaminated by contact with such materials, *as determined by the administrator*,

permits are also not required. With respect to oil or grease or hazardous substances, the determination of whether stormwater [\*\*43] is "contaminated by contact with" such materials, *as established by the Administrator*, shall take into consideration whether these materials are present in such stormwater runoff in excess of reportable quantities under section 311 of the Clean Water Act . . . , or in the case of mining operations, above natural background levels.

H.R. Rep. No. 1004, 99th Cong., 2d Sess., at 151 (emphasis added).

Thus, the EPA Administrator has discretion to determine whether or not storm water runoff at an oil, gas or mining operation is contaminated with two types of materials: (1) overburden, raw material, product, or process wastes and (2) oil, grease or hazardous substances. The report sets out factors for the Administrator to consider in determining contamination for the latter group of pollutants.

NRDC first claims that because section 402(1)(2) treats oil, gas and mining together, the EPA rule must do the same. NRDC's second objection is based on its interpretation of the language in the conference report. Because the conference report lists RQs as only one factor to be taken into consideration, NRDC insists EPA cannot make it the only factor to measure contamination for oil and gas [\*\*44] facilities.

Both of these arguments must fail in light of the conference report, which gives the Administrator discretion to determine when contamination has occurred with respect to the substances listed in the statute, i.e., overburden, raw materials, waste products, etc. *See* CWA § 402(1)(2). The conference report states that the Administrator shall take certain factors into account, but the report is clear that the determination of whether storm water is contaminated is within the Administrator's discretion.

NRDC argues that the remarks of certain congressmen during congressional debate show that the mining, oil, and gas exemptions were to apply only if the discharges were entirely free of contaminants. We find these examples less persuasive than the clear language of the conference report. Moreover, in light of the discretion granted the Administrator in the conference report, we cannot say that the rule as promulgated is an arbitrary and capricious exercise of that discretion.

NRDC also contends that Congress intended that EPA consider reportable quantities only in determining if a discharge is contaminated with oil, grease, or hazardous substances. Other pollutants, according [\*\*45] to NRDC, must be found to contaminate the discharge if they exceed background levels.

EPA did not, in fact, limit itself to reportable quantities in determining which oil or gas facilities must apply for a permit. The rule requires a permit for any facility which "contributes to a violation of a water quality standard." 40 C.F.R. § 122.26(c)(1)(iii)(C). This requirement addresses contamination with substances other than oil and hazardous substances. We find no support in the statute or the legislative history for NRDC's claim that, with respect [\*1308] to these substances, levels above background must be considered "contamination." The conference report quoted above requires consideration of background levels of any pollutant only with respect to mining operations.

#### *D. Lack of Controls for Municipal Storm Water Discharge.*

NRDC contends that EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments. Because Congress gave the administrator discretion to determine what controls are necessary, NRDC's argument fails.

Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial [\*\*46] and other types of storm water. In the 1987 amendments, Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge. CWA § 402(p)(3)(A), (B), 33 U.S.C. § 1342(p)(3)(A)-(B). The Act states that 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-storm water discharges into the storm sewers; and

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

*appropriate for the control of such pollutants.*

Section 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B) (emphasis added).

NRDC charges that the EPA regulations accomplish neither of the goals above, i.e., they do not effectively prohibit non-storm water discharges nor do they require the controls described in Par. (iii), above. NRDC argues that Congress granted the moratorium precisely to give EPA the opportunity to develop [\*\*47] new, substantive standards for storm water control of municipal sources and instead EPA wrote vague regulations containing no minimum criteria or performance standards.<sup>17</sup> However, the language in Par. (iii), above, requires the Administrator or a state to design controls. Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements. NRDC also claims that the testing requirements are inadequate because there is only limited sampling at a limited number of sites. However, we must defer to EPA on matters such as this, where EPA has supplied a reasoned explanation of its choices. *See* 55 Fed. Reg. at 48,049.

17 The requirements for permit applications are set forth at 40 C.F.R. § 122.26(d). Individual NPDES permit writers (EPA or state officials) will decide whether application proposals are adequate. Applicants must submit information on source control methods and estimate the annual pollutant load reduction to be achieved from their proposed management programs, but they are not required to achieve any specified level of reduction of any pollutants. *See* 55 Fed. Reg. at 48,070-71.

[\*\*48] NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language and our standard of review. Congress could have written a statute requiring stricter standards, and it did not. We therefore reject NRDC's argument that EPA's storm water control regulations fail to comply with the statute.<sup>18</sup>

18 We base our holding on NRDC's challenge to the regulations at issue. Whether a specific permit complies with the requirements of section 402(p)(3)(B) would, of course, be another matter not controlled by this decision.

*E. Lack of Notice and Comment on the Approval of Part 1 of Industrial Group Storm Water Applications.*

NRDC objects to the lack of opportunity for notice and comment before EPA approval of part 1 of group applications for industrial dischargers. Each member of a proposed group must submit part 1 of the application.<sup>19</sup> If EPA approves part 1, only [\*1309] a small subset of the member facilities need submit part 2 of the application. 55 Fed. Reg. at 48,072 (to [\*\*49] be codified at 40 C.F.R. 122.26(e)(2)). NRDC claims that because approval of part 1 waives the requirement of filing part 2 for most members of a group, EPA's decision on part 1 is equivalent to a "rule" requiring notice and comment from the public. The issue thus presented is whether EPA's decision on a part 1 group permit application is a "rule" as defined in 5 U.S.C. § 551(4) (1988)<sup>20</sup> requiring public notice and opportunity to comment under 5 U.S.C. § 553 (1988), or is otherwise subject to the notice and comment requirement.

19 Part 1 must include the identity of the group's participants, a description of the participants' industrial activities, a list of significant materials exposed to precipitation and the identity of the subset of the group's members who will submit quantitative data in part 2 of the application. 55 Fed. Reg. at 48,067.

20 A rule means "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4).

[\*\*50] NRDC argues that approval or disapproval of a part 1 application requires public comment because it has "general applicability" pursuant to 5 U.S.C. § 551(4) and because it will have a "palpable effect" in that it will relieve the majority of entities in the group from submitting data in part 2 of the application. NRDC cites *NRDC v. EPA*, 683 F.2d 752 (3rd Cir. 1982) and *Council of Southern Mountains, Inc. v. Donovan*, 209 App. D.C. 318, 653 F.2d 573 (D.C. Cir. 1981) in support of its argument. Both cases involved the postponement of regulations. *See NRDC*, 683 F.2d at 753-54, 764 (indefinite postponement of effective date of final amendments to regulations dealing with the discharge of toxic pollutants requires notice and comment because it has a substantial impact on the public and the industry);

*Council of Southern Mountains, Inc.*, 653 F.2d at 575, 580 n. 28 (deferral of implementation of regulations requiring coal operators to supply life-saving equipment ordinarily would require notice and comment because it has a "palpable effect" upon the industry and the public).

We find these cases to be distinguishable. Both involve [\*\*51] the postponement of rules of general applicability to an entire industry, or to a large class of pollutants. In contrast, although the part 1 application process will relieve some entities from the need to furnish further data, the decision is specific to a particular permit application and approval of a preliminary application will not implement, interpret or prescribe any general law or policy pursuant to 5 U.S.C. § 551(4). Rulemaking ordinarily involves "broad judgments, legislative in nature rather than the resolution of a particular dispute of facts." *Washington Utilities & Transportation Com'n v. Federal Communication Commission*, 513 F.2d 1142, 1160 (9th Cir. 1975), *cert. denied*, 423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 2d 54 (1975). The decision to approve a part 1 permit application, although it may affect a large number of applicants, is nevertheless focused on a specific factual question: whether the application adequately designates a representative smaller group subject to the more extensive data gathering requirements in part 2 of the application *See* 55 Fed. Reg. at 48,028. Because the decision involves a discrete, factual issue, the better view [\*\*52] is that it is neither a rule nor otherwise subject to the notice and comment requirement.

Because approval of a part 1 application is essentially a factual determination, we hold that EPA's group permit application process for industrial dischargers is not invalid by its failure to provide for notice and comment.

### III. CONCLUSION

In summary, we grant and deny relief as follows:

1. "*Deadlines*" issue. We grant the request for declaratory relief and deny the request for injunctive relief. We deny the request to place small, medium and large municipalities on the same permitting schedule. We hold that EPA's failure to include deadlines for permit approval or denial and compliance consistent with CWA § 402(p) is arbitrary and capricious.

2. *Exclusion of Sources from Regulation*. We uphold the definition of "municipal [\*1310] separate storm

sewers serving a population." We hold that the exemption for construction sites of less than five acres is arbitrary and capricious and remand for further proceedings. Based on the record before us, we vacate that portion of the rule regulating "light industry" and remand for further proceedings.

3. *Other issues*. We uphold the rule as to oil and [\*\*53] gas operations and storm water control. We further hold that EPA approval of part 1 of a group application for an industrial discharger is not a rule requiring notice and comment from the public.

Petition for Review GRANTED IN PART and DENIED IN PART.

#### APPENDIX A

CWA § 402, 33 USCA § 1342

(1) *Limitation on permit requirement*

....

(2) *Stormwater runoff from oil, gas, and mining operations*

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

....

(p) *Municipal and industrial [\*\*54] stormwater discharges*

(1) *General rule*

Prior to October 1, 1992, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section

for discharges composed entirely of stormwater.

*(2) Exceptions*

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

*(3) Permit requirements*

*(A) Industrial discharges*

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

[\*\*55] *(B) Municipal discharge*

Permits for discharges from municipal storm sewers

-

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

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

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or [\*1311] the State determines appropriate for the control of such pollutants.

*(4) Permit application requirements*

*(A) Industrial and large municipal discharges*

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but [\*\*56] in no event later than 3 years after the date of issuance of such permit.

*(B) Other municipal discharges*

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

*(5) Studies*

The Administrator, in consultation with the States, shall conduct a study for the purposes of -

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary [\*\*57] to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) *Regulations*

Not later than October 1, 1992, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

**CONCUR BY:** O'SCANNLAIN (In Part)

**DISSENT BY:** O'SCANNLAIN (In Part)

**DISSENT**

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts [\*58] I, II.A, II.C.1, II.C.4, II.E, and much of Part II.B of the majority opinion. I dissent from Part II.B.2.c, directing EPA to issue supplemental regulations. I dissent also from Parts II.C.2 and II.C.3, in which the court invalidates EPA's exclusion of storm water discharges from certain light industrial and small construction sites from the definition of "discharges associated with industrial activity." Finally, I concur in the result, but not the reasoning, of Part II.D, holding that EPA has not acted unlawfully by failing to include specific control requirements in the permit application regulations.

[\*1312] I

The majority holds that EPA has violated statutory requirements by failing to set dates for approval of, and compliance with, permits as part of its permit application program. *Ante* at 6206. Despite the holding in Part II.B.2.b that injunctive relief is inappropriate (with which I agree), the majority in Part II.B.2.c orders EPA to issue supplemental regulations setting such deadlines immediately.

I am not convinced that the statute requires EPA to

set these deadlines as part of the permit application process. The provision at issue reads, in relevant part:

(4) Permit application [\*59] requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously [\*60] as practicable, but in no event later than 3 years after the date of issuance of such permit.

CWA § 402(p)(4); 33 U.S.C. § 1342(p)(4) (1988).

While the statute establishes a time line EPA must follow, it does not, in my view, require that EPA include the deadline for permit approval in the permit application regulations. I agree that, given EPA's past delays and the fact that the statutory dates for issuance or denial of permits are now long past, it is appropriate for this court to declare that the statute requires EPA to issue or deny permits within one year of the application deadline. I do not, however, see that any purpose is served by requiring EPA to issue supplemental regulations setting out these deadlines, and I doubt our authority to do so.

With respect to compliance deadlines, the statute contemplates that such deadlines will be set in individual permits as they are issued. *See* CWA § 402(p)(4)(A), (B)

("Any such permit shall provide for compliance. . ."). Each permit must contain a compliance deadline, which may not exceed three years from the date of issuance. Nothing in the statute requires EPA to establish compliance deadlines now, before any permits have [\*\*61] been issued. Accordingly, in my view, NRDC's challenge to the lack of compliance deadlines in EPA's current regulations is premature. I therefore dissent from Part II.B.2.c of the majority opinion.

## II

I dissent also from Parts II.C.2 and II.C.3. In my view, EPA's definition of "discharge associated with industrial activity" is a reasonable construction of an ambiguous statute, entitled to deference. While my colleagues acknowledge that we may not overturn an agency rule that represents a "permissible construction" of a statute, *ante* at 6200 (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)), they fail to apply that axiom.

## A

EPA's rule excludes from the permitting requirement certain light industry facilities at which "areas where material handling equipment or activities, raw materials, intermediate [\*1313] products, final products, waste materials, byproducts, or industrial machinery" are not exposed to storm water. *See* 40 C.F.R. § 122.26(b)(14). EPA determined that discharges from such facilities do not fall within the definition of "discharges associated with industrial activity." In my view, this determination was reasonable.

The majority concedes [\*\*62] that the statute does not define "discharge associated with industrial activity." *Ante* at 6213. The operative phrase, as my colleagues note, is "associated with." *See id.* For purposes of evaluating the light industry exemption, I concede that manufacturing falls within the generally accepted meaning of "industrial activity," and that many of the facilities exempted by the EPA rule are manufacturers. Nonetheless, that concession does not compel the conclusion that discharges from such facilities are "associated with industrial activity."

The majority concludes, without explanation, that the phrase "discharges associated with industrial activity" is "very broad." *Ante* at 6214. Neither the plain meaning of the term "associated" nor the legislative history of the

statute support this conclusion. "Associated with" means closely related to or connected with. *See Webster's Ninth New Collegiate Dictionary* 110 (1986). To the extent it casts any light on the subject, the legislative history supports a narrow reading of the phrase "associated with." Four members of the House, in the course of floor debates on the measure both before and after President Reagan's veto, explained [\*\*63] that:

[a] discharge is associated with industrial activity if it is *directly related to manufacturing, processing or raw materials storage areas* at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings.

133 Cong. Rec. 985 (1987) (statement of Rep. Hammerschmidt) (emphasis added).<sup>1</sup> The underscored language suggests that Congress intended to regulate only discharges directly related to certain activities at industrial facilities. EPA's interpretation, that discharges are "directly related" to these activities only if storm water may reasonably be expected to come into contact with them before its discharge, is eminently logical.

<sup>1</sup> This statement was repeated verbatim by Reps. Stangeland and Snyder. 133 Cong. Rec. at 991-92; 132 Cong. Rec. at 31,959, 31,964 (1986). Rep. Rowland offered a slight variation on the theme:

One of the discharge categories is "a discharge associated with an industrial activity." A discharge is not considered to be associated with industrial activity unless it is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. Such discharges include [sic] those from parking lots and administrative areas and employee buildings.

132 Cong. Rec. at 31,968. Rep. Rowland apparently misspoke; he probably meant, like the other legislators who addressed the topic, to say "such discharges *do not* include" those from parking lots.

[\*\*64] The majority opinion interprets the exclusion of parking lots as an expression of congressional intent "to exclude only those facilities or parts of a facility that are completely non-industrial." *Ante* at 6215. My colleagues' reliance on the second

sentence of the statement quoted above to establish this intent, however, is misplaced. The sentence relied on cannot assist us in our search for the meaning of "associated with" because it employs that very term. Moreover, it does not pretend to establish an exhaustive list of areas excluded from regulation. Legislators listed discharges from parking lots and administrative and employee buildings as *among those* not directly related to industrial activity; no one suggested that *only* discharges associated with those structures were to be excluded.

EPA's definition is consistent with the plain words of the statute and, to the extent any intent is discernible, the congressional intent. EPA has defined the term "storm water discharge associated with industrial activity" to cover only those discharges reasonably expected to come into contact with industrial activities. A large number of facilities automatically fall within EPA's [\*\*65] definition and are required to [\*1314] apply for permits. Because facilities falling within certain specified classifications under the Standard Industrial Classification manual generally conduct their operations entirely indoors, minimizing the likelihood of contact with storm water, EPA has not automatically included them within the regulations. However, these facilities *are* required to apply for permits if "areas where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, byproducts, or industrial machinery at these facilities are exposed to storm water." 40 C.F.R. § 122.26(b)(14). If a storm water discharge is in fact directly related to or associated with the industrial activity carried on at a facility falling within the light industry category, the facility must obtain a permit.<sup>2</sup>

2 Thus, nothing turns on the assumption, attacked by my colleagues as unsupported by the record, *ante* at 6215, that industrial activities at this category of facilities will take place largely indoors. Where the assumption does not hold true, the permit requirement applies with full force. I also note that NRDC has pointed us to no evidence undermining EPA's assumption.

Unlike my colleagues, I decline to assume that EPA will not carry out its responsibility to identify and to require permits of facilities where industrial activities are in fact exposed to storm water, or that such facilities will ignore their statutory duty to apply for permits. Should that

occur, a lawsuit challenging EPA's failure to enforce its regulations might well be in order. An unsubstantiated suspicion that EPA may not vigorously enforce its regulations, however, does not make those regulations arbitrary or capricious.

[\*\*66] In my view, the statute's treatment of oil and gas facilities supports EPA's reading of the term "associated with industrial activity." Congress specifically exempted from the permit requirement discharges from oil and gas facilities and mining operations which have not come in contact with raw materials, finished products, or waste products. CWA § 402(1)(2). This section indicates a congressional intent to exempt uncontaminated discharges which have not come into contact with "industrial activities" from regulation. For oil, gas, and mining operations, Congress in this section supplied a specific, and quite limited, definition of "industrial activities." For other facilities, that definition was left to the discretion of EPA, which has adopted a much broader definition, encompassing contact with such things as industrial machinery and materials handling equipment. *See* 40 C.F.R. § 122.26(b)(14).

I do not mean to suggest that the majority's construction of the statute is untenable. It may even be preferable to the reading chosen by the agency. Nonetheless, in my view the statute is ambiguous and the legislative history does not demonstrate any clear congressional intent. The question [\*\*67] before this court, therefore, is not whether "the agency construction was the only one it permissibly could have adopted" or even whether it is the "reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 843, n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). We need only inquire if the agency's construction is a permissible one. *Id.* at 843. EPA's definition falls well within permissible bounds, and should be upheld.

## B

Although the issue is closer, I also am not persuaded that EPA's exemption for construction sites under five acres should be struck down. EPA has not conceded that "construction activity is industrial in nature." *Ante* at 6217-18. In the preamble to its final rule, EPA noted that "Construction activity *at a high level of intensity is comparable to other activity that is traditionally viewed as industrial*, such as natural resource extraction."<sup>3</sup> 55 Fed. Reg. 48,033 (1990) (emphasis added). EPA



explained that it was "attempting to focus [regulation] only on those construction activities [\*1315] that resemble industrial activity." 55 Fed. Reg. at 48,035 [\*\*68] (emphasis added).

3 EPA did admit that "even small construction sites may have a significant negative impact on water quality in localized areas," 55 Fed. Reg. at 48,033. In the absence of any indication of what EPA meant by "small," however, that statement does not undermine EPA's exemption of sites under five acres.

Neither NRDC nor the majority point to anything in the statute or the legislative history that would require the agency to define "industrial activity" as including all construction operations. Accordingly, I believe deference is due EPA's definition, provided it is not arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A.*, 467 U.S. at 844.

In trying to determine when construction should be treated as industrial activity, EPA considered a number of possible approaches. See 55 Fed. Reg. at 48,035. Exempting construction that would be completed within a certain designated time frame was deemed inappropriate, because the work [\*\*69] could be both intensive and expansive but nonetheless take place over a short period of time. Basing the limit on quantity of soil removed was also rejected as not relating to the amount of land surface disturbed. EPA finally settled on the surface area disturbed by the construction project as a feasible and appropriate mechanism for "identifying sites that are [sic] amount to industrial activity." 55 Fed. Reg. at 48,036.

Having determined that not all construction amounts to industrial activity, and that the appropriate basis for differentiation is land area disturbed, EPA then had to determine where to draw the line. Initially, EPA proposed to exempt all construction operations disturbing less than one acre of land, as well as single family residential projects disturbing less than five acres. 53 Fed. Reg. 49,431 (1988). In the final rule, however, EPA adopted a five-acre minimum for all construction projects. 55 Fed. Reg. 48,066 (1990); 40 C.F.R. § 122.26(b)(14)(x).

Admittedly, the final rule contains little in the way of justification for treating two-acre sites differently than five-acre ones, but that does not necessarily make [\*\*70] it arbitrary and capricious. Line-drawing is often difficult. NRDC was apparently willing to accept EPA's proposed

one-acre/five-acre rule. Although NRDC now challenges the blanket five-acre rule, it offers no evidence that sites excluded from the permitting requirement constitute "industrial activity." In such absence of any evidence in the record undermining EPA's conclusion on an issue squarely within its expertise, I believe the rule must be upheld. 4

4 Because I conclude that the rule falls within the permissible bounds of the statutory definition of "discharges associated with industrial activity," I need not consider the applicability of the *de minimis* exception.

### III

Finally, while I concur in the result reached by the majority in Part II.D, rejecting NRDC's claim that EPA has unlawfully failed to require substantive controls on municipal discharges, I disagree with the majority's reasoning. In my view, NRDC's claim is premature, and we should decline to address its merits.

NRDC contends that the 1987 amendments [\*\*71] require EPA to establish substantive controls for municipal storm water discharges. In support of this argument, NRDC relies on CWA § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B), which provides:

Permits for discharges from municipal storm sewers

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\* \* \*

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

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . . .

This section refers only to *permits*, and says nothing about permit applications. Because EPA has yet to issue any permits, NRDC's claim on this point is premature. In the absence of any indication to the contrary, we must assume that any permit issued will comply with all applicable statutory requirements. The statute does not require that EPA detail the substantive controls to be imposed when establishing permit application requirements. Accordingly, I would reject NRDC's claim without [\*1316] reaching the issue of the Administrator's discretion in selecting those controls.

IV

In sum, I join much of my colleagues' opinion. However, I would not require EPA to issue supplemental regulations detailing the time line for [\*\*72] issuance of and compliance with permits, and I would uphold EPA's

definition of "discharge associated with industrial activity." Finally, I would reject NRDC's claim that EPA is required to detail control measures in the permit application regulations on the grounds that the statute requires control measures only in the permits themselves.

**Citation #9**  
**135 ca4th 1377**

LEXSEE

**CITY OF RANCHO CUCAMONGA, Plaintiff and Appellant, v. REGIONAL WATER QUALITY CONTROL BOARD-SANTA ANA REGION et al., Defendants and Respondents; COUNTY OF SAN BERNARDINO et al., Real Parties in Interest and Respondents.**

E037079

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION TWO**

**135 Cal. App. 4th 1377; 38 Cal. Rptr. 3d 450; 2006 Cal. App. LEXIS 86; 2006 Cal. Daily Op. Service 845; 2006 Daily Journal DAR 1126; 36 ELR 20026**

**January 26, 2006, Filed**

**NOTICE:**

As modified Feb. 27, 2006.

**SUBSEQUENT HISTORY:** Modified by City of Rancho Cucamonga v. Reg'l Water Quality, 2006 Cal. App. LEXIS 246 (Cal. App. 4th Dist., Feb. 27, 2006)

**PRIOR HISTORY:** [\*\*\*1] APPEAL from the Superior Court of San Bernardino County, No. RCV 071613, Shahla Sabet, Judge.

**COUNSEL:** James L. Markman; Richards, Watson & Gershon, John J. Harris and Evan J. McGinley for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Mary E. Hackenbracht, Assistant Attorney General, Richard Magasin and Jennifer F. Novak, Deputy Attorneys General, for Defendants and Respondents.

**JUDGES:** Gaut J., with Hollenhorst, Acting P. J. and Richli J., concurring.

**OPINION BY:** GAUT

**OPINION**

[\*\*452] GAUT, J.--

1. Introduction

This case involves environmental regulation of municipal storm sewers that carry excess water runoff to the Santa Ana River as it passes through San Bernardino County on its way to the Pacific Ocean. Federal and state laws impose regulatory controls on storm sewer discharges. Municipalities are required to obtain and comply with a federal regulatory permit limiting the quantity and quality of water runoff that can be discharged from these storm sewer systems.

In this instance, the Regional Water Quality Control Board for the Santa Ana Region (the Regional Board) conducted public hearings and then issued a comprehensive 66-page [\*\*\*2] municipal storm sewer permit governing 18 local [\*1380] public entities. Two permittees, the City of Rancho Cucamonga and the City of Upland, among others, filed an administrative appeal with the State Water Resources Control Board (the State Board.) The State Board summarily dismissed the appeal. The Cities of Rancho Cucamonga and Upland<sup>1</sup> then filed a petition for writ of mandate and complaint against the State Board and the Regional Board.

1 Upland is not a party to this appeal.

The trial court sustained without leave to amend the demurrer of the State Board to the entire action. It sustained the demurrer as to four causes of action and granted the motion to strike of the Regional Board. After a hearing, the trial court denied the petition for writ of mandate.

Both procedurally and substantively, the City of Rancho Cucamonga challenges the conditions imposed by the NPDES<sup>2</sup> permit and waste discharge requirements (the 2002 permit). It contends the procedure by which the 2002 permit was adopted was not legal, that [\*\*\*3] the 2002 permit's conditions are not appropriate for the area, and that the permit's requirements are too expensive. Because we conclude the permit was properly adopted and its conditions and requirements are appropriate, we reject these contentions.

## 2 The National Pollutant Discharge Elimination System.

### 2. The National Pollutant Discharge Elimination System

California cases have repeatedly explained the complicated web of federal and state laws and regulations concerning water pollution, especially storm sewer discharge into the public waterways. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619-621 [26 Cal. Rptr. 3d 304, 108 P.3d 862] (*Burbank*); *Building Industry Assn. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872-875 [22 Cal. Rptr. 3d 128] (*Building Industry*); *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092-1094 [1 Cal. Rptr. 3d 76] (*Communities*); *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1451-1453 [\*\*453] [126 Cal. Rptr. 2d 389]).

[\*\*\*4] For purposes of this case, the important point is described by the California Supreme Court in *Burbank*: "Part of the Federal Clean Water Act [33 U.S.C. § 1251 et seq.] 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* [(1992) 503 U.S. [\*1381] 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046]). 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. § 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.)" (*Burbank, supra*, 35 Cal.4th at p. 621.)

California's Porter-Cologne Act (Wat. Code, § 13000 et seq.) establishes a statewide program for water quality control. Nine regional boards, overseen by the State Board, administer the program in their respective regions. (Wat. Code, §§ 13140, [\*\*\*5] 13200 et seq., 13240, and 13301.) Water Code sections 13374 and 13377 authorize the Regional Board to issue federal NPDES permits for five-year periods. (33 U.S.C. § 1342, subd.(b)(1)(B).)

As discussed more fully in part 6 *post*, the state-issued NPDES permits are subject to the informal hearing procedures set forth for administrative adjudications. (Gov. Code, § 11445.10 et seq.; Cal. Code Regs., tit. 23, § 647 et seq.) The issuance of permits is specifically excluded from the procedures for administrative regulations and rulemaking. (Gov. Code, §§ 11340 et seq., 11352.)

### 3. Factual and Procedural Background

The Regional Board issued the first NPDES permit for San Bernardino County in 1990. The principal permittee was the San Bernardino Flood Control District (the District). The 1990 permit required the permittees to develop and implement pollution control measures, using "best management practices" and monitoring programs, to eliminate illegal discharges [\*\*\*6] and connections, and to obtain any necessary legal authority to do so. The management programs could be existing or new.

In 1993, the District developed the NPDES drain area management program (DAMP).

The second NPDES permit was issued in 1996 and was based on the report of waste discharge (ROWD) prepared by the principal permittee and copermitees, including Rancho Cucamonga. The 1996 permit proposed extending the existing program, which included inspections of industrial and commercial sources; policies for development and redevelopment; better public education; and implementation of a monitoring program. It offered a commitment to reduce pollutants to the "maximum extent practicable."

In 2000, the permittees submitted another ROWD to renew their NPDES permit. The 2000 ROWD proposed continuing to implement and develop water quality management and monitoring programs.

[\*1382] Based on the 2000 ROWD, the Regional Board staff created five successive drafts of the 2002

permit, incorporating written comments by Rancho Cucamonga and others and comments made during two public workshops. Some of the comments addressed the economic considerations of anticipated prohibitive compliance costs.

[\*\*\*7] The notice of the public hearing to consider adoption of the 2002 permit hearing [\*\*454] announced: "relevant Regional Board files are incorporated into the record;" the governing procedures were those for an informal hearing procedure as set forth in "Title 23, California Code of Regulations, Section 647 et seq.;" and "Hearings before the Regional Water Board are not conducted pursuant to Government Code section 11500 et seq.," the alternative formal hearing procedure for administrative adjudication. The notice was mailed to all permittees. The accompanying "fact sheet," which was publicly circulated, offered further information about the conduct and nature of the hearing and the legal and factual grounds for the Regional Board's recommendation to adopt the 2002 permit.

The informal public hearing was conducted on April 26, 2002. Neither Rancho Cucamonga nor any of the permittees objected to the form or substance of the hearing. Ultimately, after a staff presentation and testimony, including a statement from Rancho Cucamonga's counsel, the Regional Board adopted the 2002 permit. After the State Board dismissed their administrative appeal, [\*\*\*8] Rancho Cucamonga and Upland filed the instant action.

The operative pleading is the second amended petition for writ of mandate and complaint. The petition alleges that the State Board and the Regional Board acted illegally and in excess of their jurisdiction in developing, adopting and implementing the 2002 permit. Based on 26 pages of general allegations, the petition asserts eight causes of action, alleging the State Board and the Regional Board violated sections 13241, 13263, and 13360 of the Water Code (the Porter-Cologne Act); the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.); the California Administrative Procedure Act (Gov. Code, §§ 11340-11529); the California Constitution; and the federal Clean Water Act; and seeking declaratory and injunctive relief.

The State Board successfully opposed the action on demurrer. The Regional Board eliminated four causes of action, the fourth, fifth, seventh, and eighth by demurrer and motion to strike. On the remaining four causes of

action, the trial court found in favor of the Regional Board.

[\*1383] 4. State Board's Demurrer

Rancho Cucamonga maintains the [\*\*\*9] trial court should not have sustained the demurrer of the State Board without leave to amend because the State Board is the ultimate authority on state-issued NPDES permits, and, therefore, was properly joined as a party: "Because the State Board has for all intents and purposes adopted the rules and policies of general application upon which the Permit is based, it is clearly a proper party to this action."

The difficulty with Rancho Cucamonga's theory of liability against the State Board is, to quote Gertrude Stein about the City of Oakland, "There is no there there." (Stein, *Everybody's Autobiography* (1937).) In other words, Rancho Cucamonga's allegations against the State Board lack any substance. Instead, Rancho Cucamonga launches an unspecific attack on the State Board without identifying any particular problems. The petition makes the unexceptional allegation that the State Board formulates general water control policy which it implements and enforces through regional boards. It also alleges the State Board has not complied with the Administrative Procedure Act but it does not identify any objectionable policies or how there is no compliance. Instead the petition complains [\*\*\*10] about a State Board letter directing that all NPDES permits follow consistent principles regarding standard urban storm water mitigation plans. [\*\*455] Additionally, the petition maintains the 2002 permit included new reporting requirements and increased costs of compliance.

But the foregoing allegations did not articulate any improper State Board conduct. The 2002 permit, issued by the Regional Board and not by the State Board, is not subject to formal rulemaking procedures. (Gov. Code, § 11352, subd. (b).) The State Board's letter, explaining a precedential decision concerning mitigation plans, is not an example of formal rulemaking. (Gov. Code, § 11425.60, subd. (b).) By dismissing Rancho Cucamonga's administrative appeal concerning the 2002 permit, the State Board declined to become involved and the Regional Board's decision to issue the permit became final and subject to judicial review. (*People ex rel Cal. Regional Wat. Quality Control Bd. v. Barry* (1987) 194 Cal.App.3d 158, 177 [239 Cal. Rptr. 349].) But the State Board was not made a proper party by reason of its

dismissal of the administrative appeal.

[\*\*\*11] Furthermore, even if Rancho Cucamonga had identified any cognizable claim against the State Board, it would have been barred by the 30-day statute of limitations for challenging an improperly adopted State Board regulation or order. (Wat. Code, § 13330; Gov. Code, § 11350.)

[\*1384] We hold the trial court properly sustained without leave to amend the State Board's demurrer to the second amended petition for writ of mandate and complaint.

#### 5. Standard of Review for Petition for Writ of Mandate

In deciding a petition for writ of mandate, the trial court exercises its independent judgment. (Code Civ. Proc., § 1094.5, subd. (c); Wat. Code, § 13330, subd. (d); *Building Industry, supra*, 124 Cal.App.4th at p. 879.) But, "[i]n exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings ... . [¶] ... [¶] ... Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817-818 [85 Cal. Rptr. 2d 696, 977 P.2d 693] (*Fukuda*).)

[\*\*\*12] On appeal, the reviewing court determines whether substantial evidence supports the trial court's factual determinations. (*Fukuda, supra*, 20 Cal.4th at p. 824; *Building Industry, supra*, 124 Cal.App.4th at p. 879.) The trial court's legal determinations receive a de novo review with consideration being given to the agency's interpretations of its own statutes and regulations. (*Building Industry, supra*, at p. 879; *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482 [22 Cal. Rptr. 3d 772].)

#### 6. Rancho Cucamonga's Objections to the Administrative Record and Lack of Notice

The notice of the administrative hearing for adoption of the 2002 permit included the statement that the Regional Board's files would be incorporated as part of the record. Before trial on the writ petition, Rancho Cucamonga attempted to raise an omnibus objection to the entire administrative record and a specific objection to four documents, three studies about marine pollution

and one economic study. The trial court ruled the objections had been waived by not making them before or at the time of the hearing. Applying the presumption of administrative [\*\*\*13] regularity, we affirm the trial court's evidentiary ruling. (*Mason v. Office of Admin. [\*\*456] Hearings* (2001) 89 Cal.App.4th 1119, 1131 [108 Cal. Rptr. 2d 102].)

The reasons given by Rancho Cucamonga as to why the trial court should have sustained its objections to all or part of the administrative record are that it did not waive its objections to the record because Rancho Cucamonga did not know the hearing was adjudicative; the Regional Board did not provide [\*1385] notice of an informal hearing (Gov. Code, § 11445.30); and Rancho Cucamonga never had an opportunity to object to the administrative record.

(1) As noted previously, Government Code section 11352, subdivision (b), makes the issuance of an NPDES permit exempt from the rulemaking procedures of the Administrative Procedure Act. Permit issuance is a quasi-judicial, not a quasi-legislative, rulemaking proceeding: "The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function." (*Sommerfield v. Helmick* (1997) 57 Cal.App.4th 315, 320 [67 Cal. Rptr. 2d 51]; see *City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718 [279 Cal. Rptr. 22].)

[\*\*\*14] Instead, the Regional Board correctly followed the administrative adjudication procedures (Gov. Code, § 11445.10 et seq.) and the companion regulations at California Code of Regulations, title 23, sections 647-648.8 for informal adjudicative public hearings. These procedures were announced in the notice of hearing which also stated that Government Code section 11500 et seq., governing formal administrative adjudication hearings, would not apply, thus satisfying Government Code section 11445.30 requiring notice of an informal hearing procedure. At the time of the hearing, Rancho Cucamonga did not object to the informal procedure. Rancho Cucamonga's effort to argue that federal notice requirements (40 C.F.R. § 124.8, subd. (b)(6)(ii) (2005)) should also have been followed fails because this involved a state-issued NPDES permit adopted according to California procedures.

Because Rancho Cucamonga was given notice that the hearing on the permit would proceed as an informal administrative adjudication, it cannot successfully argue

it was relieved of the obligation to object to the administrative record [\*\*\*15] at the time of the hearing. An informal administrative adjudication contemplates liberality in the introduction of evidence. (23 Cal. Code Regs., tit. 23, §§ 648, subd. (d), 648.5.1.) If Rancho Cucamonga wished to object to the informal hearing procedures, including the liberal introduction of evidence, it should have raised its objections as provided by statute and regulation before or at the time of the hearing (Gov. Code, §§ 11445.30, 11445.40, 11445.50; 23 Cal. Code Regs., tit. 23, § 648.7), not a year later in the subsequent civil proceeding.

#### 7. Economic Considerations for Issuance of NPDES Permit

Rancho Cucamonga's next assignment of error is that the Regional Board failed to consider the economic impact of the requirements of the 2002 permit by not conducting a cost-benefit analysis. Rancho Cucamonga relies on the California Supreme Court's *Burbank* opinion, in which the court held: "When ... a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit *more stringent* than federal [\*\*\*16] law [\*1386] requires, California law allows the board to take into account economic factors, including the wastewater discharger's cost of compliance." (*Burbank, supra*, 35 Cal.4th at p. 618.) Rancho Cucamonga contends that the 2002 permit exceeds federal requirements and that, therefore, this case should be remanded for a consideration of [\*\*457] economic factors. (See *ibid.*; Wat. Code, § 13241, subd. (d).)

The two problems with this argument are the trial court found there was no evidence that the 2002 permit exceeded federal requirements and Rancho Cucamonga does not explain now how it does so. There was also evidence that the 2002 permit was based on a fiscal analysis and a cost-benefit analysis. In the absence of the foundational predicate and in view of evidence that cost was considered, Rancho Cucamonga's contention on this point fails.

(2) We also reject Rancho Cucamonga's related procedural argument that the Regional Board's motion to strike was impermissible as piecemeal adjudication. (*Regan Roofing v. Superior Court* (1994) 24 Cal.App.4th 425, 432-436; *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1851-1855 [16 Cal. Rptr. 2d 458].) [\*\*\*17] It is well recognized a court may strike all

or part of a pleading as it did in this instance. (Code Civ. Proc., §§ 431.10, 436; *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683 [40 Cal. Rptr. 2d 169].)

#### 8. Substantial Evidence

Rancho Cucamonga also challenges the trial court's independent factual determination that sufficient evidence supports the findings of the Regional Board. Rancho Cucamonga's main contention is that the 2002 permit was not distinctively crafted for San Bernardino County but, instead, copied a similar permit for other counties without identifying any particular water quality impairment in San Bernardino County caused by the permittees. In other words, no evidence in the record supports issuance of the 2002 permit and the trial court did not identify any such evidence in its statement of decision.

(3) One problem with Rancho Cucamonga's foregoing argument is that the Clean Water Act requires an NPDES permit to be issued for *any* storm sewer discharge, whether there is any actual impairment in a particular region. (33 U.S.C. § 1342; *Communities, supra*, 109 Cal.App.4th at pp. 1092-1093.) [\*\*\*18] Therefore, Rancho Cucamonga's contention that the permit fails to identify impaired water bodies in the region is beside the point.

In its statement of decision, the trial court discussed the inadequacy of the arguments and evidence cited by Rancho Cucamonga and concluded: "The San Bernardino Permit is based in part on the Basin Plan for this region. It is [\*1387] also based on the permittees' own reports and monitoring within this region ... . It incorporates the permittees' management program, which is unique to these cities and county." The trial court included a citation to the 1993 DAMP report's "Geographic Description of the Drainage Area," which discusses the specific conditions present in San Bernardino County.

On appeal, Rancho Cucamonga faults the trial court for not presenting a more detailed description of the evidence supporting the issuance of the permit. We do not think the trial court, or this court, must bear that burden.

(4) First, "[a]n agency may ... rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence.



(*Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d 525, 535-536 [127 Cal. Rptr. 775].)" [\*\*\*19] (*Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 866 [226 Cal. Rptr. 575].) Here the Regional Board adopted the recommendation of its staff in issuing the permit. And, as the record shows, the staff's recommendation was based on the previous 1990 and 1996 permits, the 1993 DAMP [\*\*458] report and the 2000 ROWD, the permittees' application for renewal of the 1996 permit, as well as more general water quality factors. The evidence contradicts Rancho Cucamonga's assertion, that "the Regional Board simply copied verbatim the NPDES Permit for North Orange County, a coastal region with markedly different water quality conditions and problems."

As part of the trial court's consideration of the petition for writ of mandate, Rancho Cucamonga and the Regional Board directed the court to review specific items of evidence contained in the administrative record. In its opposing brief, the Regional Board offered a detailed account of the evidence supporting the issuance of the permit. The trial court indicated it had reviewed the parties' submissions before ruling. It discussed the evidence at the hearing on the petition and referred to it in its statement of decision. [\*\*\*20] (*Lala v. Maiorana* (1959) 166 Cal.App.2d 724, 731 [333 P.2d 862].) Rancho Cucamonga had the burden of showing the Board abused its discretion or its findings were not supported by the facts. (*Building Industry, supra*, 124 Cal.App.4th at pp. 887-888.) To the extent it attempted to do so at the trial court level, it was not successful.

This court has independently reviewed the record with particular attention to the evidence as emphasized by the parties. We do not, however, find it incumbent upon us or the trial court to review the many thousands of pages submitted on appeal and identify the particular evidence that constitutes substantial evidence. Instead, we deem the trial court's findings sufficient and not affording any grounds for reversal. (*Building Industry, supra*, 124 Cal.App.4th at p. 888; see *Weisz Trucking Co., Inc. v. Emil R. Wohl* [\*1388] *Construction* (1970) 13 Cal.App.3d 256, 264 [91 Cal. Rptr. 489], citing *Perry v. Jacobsen* (1960) 184 Cal.App.2d 43, 50 [7 Cal. Rptr. 177].)

#### 9. Safe Harbor Provision

As it did repeatedly below, Rancho Cucamonga

maintains the 2002 permit violates section 402(k) of the Clean [\*\*\*21] Water Act (33 U.S.C. § 1342(k)), because the permit does not include "safe harbor" language, providing that, if a permittee is in full compliance with the terms and conditions of its permit, it cannot be found in violation of the Clean Water Act. (*U.S. Public Interest v. Atlantic Salmon* (1st Cir. 2003) 339 F.3d 23, 26; *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 205 [48 L.Ed.2d 578, 96 S.Ct. 2022].) The trial court found there was no statutory right to a "safe harbor" provision to be included as the term of the permit. We agree.

This seems like much ado about nothing because 33 United States Code section 1342 (k), already affords Rancho Cucamonga the protection it seeks: "Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health." Rancho Cucamonga does not cite any persuasive authority as to why this statutory protection had to [\*\*\*22] be duplicated as a provision in the 2002 permit.

Furthermore, the 2002 permit complied with the State Board's water quality order No. 99-05, a precedential decision requiring NPDES permits to omit "safe harbor" language used in earlier permits. A permit without "safe harbor" language was upheld in *Building Industry, supra*, 124 [\*\*459] Cal.App.4th at page 877. The trial court did not err.

#### 10. Maximum Extent Practicable

Rancho Cucamonga protests that the 2002 permit's discharge limitations/prohibitions exceed the federal requirement that storm water dischargers should "reduce the discharge of pollutants to the maximum extent practicable." (33 U.S.C. § 1342(p)(3)(B)(iii).) The trial court, however, found there was no evidence presented that the 2002 permit exceeded federal requirements. Because there is no evidence, the issue presented is hypothetical and, therefore, premature. (*Building Industry, supra*, 124 Cal.App.4th at p. 890.)

Additionally, as Rancho Cucamonga recognizes, *Building Industry* rejected the contention that a "regulatory permit violates federal law because it allows the Water Boards to impose municipal [\*\*\*23] storm

sewer control measures more [\*1389] stringent than a federal standard known as 'maximum extent practicable.' [Citation.] [Fn. omitted.] ... [W]e ... conclude the Water Boards had the authority to include a permit provision requiring compliance with state water quality standards." (*Building Industry, supra*, 124 Cal.App.4th at p. 871.) The *Burbank* case, allowing for consideration of economic factors when federal standards are exceeded, does not alter the analysis in this case where there was no showing that federal standards were exceeded and where there was evidence that economic factors were considered. Furthermore, like the permit in *Building Industries*, the 2002 permit contemplates controlling discharge of pollutants to the maximum extent practicable through a "cooperative iterative process where the Regional Water Board and Municipality work together to identify violations of water quality standards." (*Building Industry, supra*, at p. 890.) The 2002 permit does not exceed the maximum extent practicable standard.

#### 11. The Requirements of the 2002 Permit

Rancho Cucamonga lastly complains the requirements of the 2002 permit are "overly prescriptive," [\*\*\*24] illegally dictating the manner of compliance and improperly delegating to the permittees the inspection duties of the State Board and the Regional Board. Rancho Cucamonga's arguments contradict the meaning and spirit of the Clean Water Act.

(5) In creating a permit system for dischargers from municipal storm sewers, Congress intended to implement actual programs. (*National Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977) 186 U.S. App.D.C. 147 [568 F.2d 1369, 1375].) The Clean Water Act authorizes the imposition of permit conditions, including: "management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (33 U.S.C. § 1342(p)(3)(B)(iii).) The act authorizes states to issue permits with conditions necessary to carry out its provisions. (33 U.S.C. § 1342(a)(1).) The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants. (*National Resources Defense Council v. U.S. EPA* (1992) 966 F.2d 1292, 1308.) [\*\*\*25] That is what the Regional Board has created in the 2002 permit.

Rancho Cucamonga's reliance on Water Code section 13360 is misplaced because that code section involves enforcement and implementation of state water quality law, (Wat. Code, § 13300 et seq.) not compliance with the Clean Water Act (Wat. Code, § 13370 et seq.) The federal law [\*\*460] preempts the state law. (*Burbank, supra*, 35 Cal.4th at p. 618.) The Regional Board must comply with federal law requiring detailed conditions for NPDES permits.

[\*1390] Furthermore, the 2002 permit does afford the permittees discretion in the manner of compliance. It is the permittees who design programs for compliance, implementing best management practices selected by the permittees in the DAMP report and approved by the Regional Board. Throughout the permit, the permittees are granted considerable autonomy and responsibility in maintaining and enforcing the appropriate legal authority; inspecting and maintaining their storm drain systems according to criteria they develop; establishing the priorities for their own inspection requirements; and establishing programs [\*\*\*26] for new development. The development and implementation of programs to control the discharge of pollutants is left largely to the permittees.

More particularly, we agree with the Regional Board that the permit properly allocated some inspection duties to the permittees. As part of their ROWD application for a permit, the permittees proposed to "Conduct Inspection, Surveillance, and Monitoring. Carry out all inspections, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal storm drain system." The ROWD also discussed continuing existing inspection programs.

(6) Water Code section 13383 provides that as part of compliance with the Clean Water Act, the Regional Board may establish inspection requirements for any pollutant discharger. Federal law, either expressly or by implication, requires NPDES permittees to perform inspections for illicit discharge prevention and detection; landfills and other waste facilities; industrial facilities; construction sites; certifications of no discharge; nonstormwater discharges; permit compliance; and local [\*\*\*27] ordinance compliance. (40 C.F.R. 122.26(d), (g) (2005); 33 U.S.C. § 1342(p)(3)(B)(ii).) Permittees must report annually on their inspection activities. (40 C.F.R. § 122.42(c)(6) (2005).)

Rancho Cucamonga claims it is being required to conduct inspections for facilities covered by other state-issued general permits. 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(d)(2) (2005).)

[\*1391] 12. Disposition

Rancho Cucamonga is the only of the original 18 permittees still objecting to the 2002 NPDES permit. It has not successfully demonstrated that substantial evidence does not support the trial court's factual determinations or the [\*\*\*28] trial court erred in its interpretation and application of state and federal law.

We affirm the judgment and order the prevailing parties to recover their costs on appeal.

Hollenhorst, Acting P. J., and Richli, J., concurred.

On February 27, 2006, the opinion was modified to read as printed above.

**Citation #10**  
**265 f.supp.2d 1142**

LEXSEE

**CITY OF ARCADIA, et al., Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, - and - NATURAL RESOURCES DEFENSE COUNCIL, et al., Defendants-Intervenors.**

**No. C 02-5244 SBA**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**265 F. Supp. 2d 1142; 2003 U.S. Dist. LEXIS 9044**

**May 16, 2003, Decided**

**May 16, 2003, Filed**

**SUBSEQUENT HISTORY:** Affirmed by City of Arcadia v. United States EPA, 411 F.3d 1103, 2005 U.S. App. LEXIS 11240 (9th Cir. Cal., 2005) Related proceeding at City of Arcadia v. State Water Res. Control Bd., 2006 Cal. App. LEXIS 92 (Cal. App. 4th Dist., Jan. 26, 2006)

**DISPOSITION:** [\*\*1] Defendants' motion to dismiss granted; plaintiffs' motion for partial summary judgment denied, and objections overruled. Action dismissed in its entirety, without leave to amend in part and with prejudice in part. Intervenors' evidentiary objections overruled as moot.

**COUNSEL:** For Plaintiff: Noam I. Duzman, Richard Montevideo, Robert S. Bower, Rutan & Tucker LLP, Costa Mesa, CA.

For USA, Defendant: Charles M. O'Connor, AUSA & Chief, Environment & Natural Resources, United States Attorney's Office, San Francisco, CA. AND-- S. Randall Humm - Trial Attorney, Pamela Tonglao - Trial Attorney, U.S. Dept. of Justice, Washington, DC.

**JUDGES:** SAUNDRA BROWN ARMSTRONG, United States District Judge.

**OPINION BY:** SAUNDRA BROWN ARMSTRONG

**OPINION**

[\*1143] **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, DENYING AS MOOT PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND DISMISSING ACTION**

[Docket Nos. 18, 28, 31, 43, 47]

Plaintiffs City of Arcadia and other California cities (collectively, "Plaintiffs") bring this action against defendants United States Environmental Protection Agency ("EPA"), the EPA Administrator, and the EPA Region IX Administrator (collectively, "Defendants") for injunctive and declaratory relief. The Natural Resources Defense Council, Santa Monica BayKeeper, and Heal the Bay (collectively, "Intervenors") have intervened as defendants.

Now before the Court are Defendants' [\*\*2] Motion to Dismiss Second Amended Complaint (the "Motion to Dismiss"), in which Intervenors join, and Plaintiffs' Motion for Summary Adjudication of Issues (the "Motion for Partial Summary Judgment"). Having read and considered the papers submitted and being fully informed, the Court GRANTS the Motion to Dismiss, DENIES AS MOOT the Motion for Partial Summary Judgment, and DISMISSES this action.<sup>1</sup>

<sup>1</sup> These matters are suitable for disposition without a hearing. *See* Fed. R. Civ. P. 78; Civ. L.R. 7-1(b).

**I. BACKGROUND**

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2 Over the years the Court has had the pleasure and privilege of reading some excellent moving papers. Some of these submissions stand out as truly superlative. Defendants' opening and reply briefs for their Motion to Dismiss are shining examples of such superlative submissions. In these briefs Defendants discuss three areas of federal law generally regarded as highly complex--environmental regulation, administrative law, and justiciability--in direct, succinct, well-supported, and powerfully illuminating fashion. Whereas a poor presentation of the statutory and regulatory framework and Defendants' arguments might have required the Court to spend hours to apprehend their arguments, the high quality of Defendants' writing enabled the Court to grasp them in a matter of minutes. Defendants' briefs also thankfully avoid leveling the sorts of thinly veiled (or, at times, not-at-all-veiled) *ad hominem* attacks that unfortunately pervade too much legal writing nowadays. The Court thus commends Defendants' counsel for their outstanding writing and expresses its appreciation for it.

### [\*\*3] A. Statutory and Regulatory Background

#### 1. Water Pollution Control Under the Clean Water Act

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, utilizes two fundamental approaches to control water pollution: technology-based regulations and water quality standards. Technology-based [\*1144] regulations seek to reduce pollution by requiring a discharger to effectuate equipment or process changes, without reference to the effect on the receiving water; water quality standards fix the permissible level of pollution in a specific body of water regardless of the source of pollution.

The National Pollutant Discharge Elimination System ("NPDES") permit program is a key means of implementing both technology-based requirements and water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1); 40 C.F.R. § 122.44(a), (d)(1). An NPDES permit establishes specific limits of pollution for an individual discharger. A discharge of pollutants (other than dredged or fill material) from any "point source,"

which is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may [\*\*4] be discharged," 33 U.S.C. § 1362(14), into the waters of the United States is prohibited unless that discharge complies with the discharge limits and other requirements of an NPDES permit. *Id.* §§ 1311(a), 1362(12). At present, 45 states, including California, are authorized to administer the NPDES permit program. State Program Status, *at* [http://cfpub.epa.gov/npdes/statestats.cfm?program\\_id=45&view=general](http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=general). In the remaining states, EPA issues the permits. 33 U.S.C. § 1342(a).

#### 2. Total Maximum Daily Loads ("TMDLs")

Section 303(d) of the CWA and EPA's implementing regulations require states to identify and prioritize waterbodies where technology-based effluent limitations and other required controls are insufficiently stringent to attain water quality standards. *See* 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7(b). States must develop a "total maximum daily load," or "TMDL," for each pollutant of concern in each waterbody so identified. A TMDL represents the maximum amount of pollutant "loading" that a waterbody can receive from all combined sources without exceeding applicable [\*\*5] state water quality standards. Although the term "total maximum daily load" is not expressly defined in the CWA, EPA's regulations define a TMDL for a pollutant as the sum of: (1) the "wasteload allocations," which is the amount of pollutant that can be discharged to a waterbody from point sources, (2) the "load allocations," which represent the amount of a pollutant in a waterbody attributable to nonpoint sources or natural background, and (3) a margin of safety. 40 C.F.R. §§ 130.2(g)-(i), 130.7(c)(1).

Under CWA Section 303(d)(2), EPA is required to review and approve or disapprove TMDLs established by states for impaired waters within thirty days of submission. 33 U.S.C. § 1313(d)(2). If EPA disapproves a state TMDL submission, EPA must issue its own TMDL for that waterbody within thirty days. *Id.*

#### 3. Implementation of TMDLs

TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002) ("TMDLs are primarily informational tools that allow the states to proceed from the identification of [\*\*6] waters requiring additional

planning to the required plans.") (citing *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984-85 (9th Cir. 1994)). A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. *See, e.g., Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) ("Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies. . . . The theory is that individual-discharge permits [\*1145] will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL."); *Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp. 962, 966 (W.D. Wash. 1996) ("TMDL development in itself does not reduce pollution. . . . TMDLs inform the design and implementation of pollution control measures."); *Pronsolino*, 291 F.3d at 1129 ("TMDLs serve as a link in an implementation chain that includes . . . state or local plans for point and nonpoint [\*\*7] source pollution reduction . . ."); *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir. 1996) (noting that a TMDL sets a goal for reducing pollutants). Thus, a TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies.

For point sources, limitations on pollutant loadings may be implemented through the NPDES permit system. 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA regulations require that effluent limitations in NPDES permits be "consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. *Id.* For nonpoint sources, limitations on loadings are not subject to a federal nonpoint source permitting program, and therefore any nonpoint source reductions can be enforced against those responsible for the pollution only to the extent that a state institutes such reductions as regulatory requirements pursuant to state authority. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1355-56 (N.D. Cal. 2000), *aff'd sub nom. Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). [\*\*8]

#### **4. California Water Quality Control Statutory and Regulatory Framework**

California effectuates the foregoing requirements of the CWA primarily through institutions and procedures set out in certain provisions of the California Water Code

(the "Water Code"), including those of the California Porter-Cologne Water Quality Control Act (the "Porter-Cologne Act"), Cal. Water Code § 13000 *et seq.* These Water Code provisions established the State Water Resources Control Board (the "State Board") within the California Environmental Protection Agency to formulate and adopt state policy for water quality control. Cal. Water Code §§ 174-186, 13100, 13140. The State Board is designated as the state water pollution control agency for all purposes stated in the CWA and is the agency authorized to exercise powers delegated to it under the CWA. 33 U.S.C. § 1313; Cal. Water Code § 13160.

The Porter-Cologne Act established nine California Regional Water Quality Control Boards (individually, a "Regional Board"; collectively, the "Regional Boards"), Cal. Water Code §§ 13200, 13201, which operate under the purview of the State Board, *see id.* § 13225. Each Regional [\*\*9] Board is comprised of nine members, *id.* § 13201, and is required to appoint an executive officer, *id.* § 13220(c), to whom the Regional Board may delegate all but some of its powers and duties, *id.* § 13223. Each Regional Board is required to formulate and adopt water quality control plans for all areas within the region. *Id.* § 13240. The State Board may approve such plan, or it may return it to the Regional Board for further submission and resubmission to the State Board. *Id.* § 13245. It must act on any water quality control plan within 60 days of a Regional Board's submission of such plan to the State Board, or 90 days after resubmission of such plan. *Id.* § 13246. A water quality control plan will not become effective unless and until it is approved by the State Board, followed by approval by the state's Office of Administrative Law ("OAL") in accordance with the appropriate procedures. [\*1146] *Id.* § 13245; Cal. Gov't Code §§ 11340.2, 11349.3, 11353(b)(5).

The State Board is required to formulate, adopt, and revise general procedures for the formulation, adoption, and implementation of water quality control plans by the Regional Boards. Cal. Water Code § 13164. [\*\*10] The State Board may adopt water quality control plans for purposes of the CWA that include the regional water quality control plans submitted by the Regional Boards. *See id.* § 13170. Such plans, when adopted by the State Board, supersede any regional water quality control plans for the same waters to the extent of any conflict. *Id.*

### **B. Factual Summary and Procedural History**

#### **1. The Consent Decree**

The events underlying the instant action were set in motion by the disposition of *Heal the Bay, Inc., et al. v. Browner, et al.*, No. C 98-4825 SBA ("*Heal the Bay*"), an action previously before this Court. In *Heal the Bay*, an individual and two environmental groups (which groups are now two of the three Intervenor in the instant action) brought a civil action against EPA, the EPA Administrator, and the EPA Region IX Administrator. Their suit primarily concerned EPA's alleged failure to perform its alleged duty under the CWA either to approve or to disapprove TMDLs submitted to EPA by the state of California.

On March 23, 1999, the Court filed an Amended Consent Decree (the "Consent Decree")<sup>3</sup> in which "EPA agreed to ensure that a TMDL [would] [\*\*11] be completed for each and every pairing of a [Water Quality Limited Segment, as defined in 40 C.F.R. 130.2(j),] and an associated pollutant in the Los Angeles Region" set forth in an attachment to the Consent Decree by specified deadlines. (Consent Decree PP2a, 2b, 3, 3c.)<sup>4</sup> Pursuant to the Consent Decree, for each pairing EPA was required either to approve a TMDL submitted by California by a specified deadline or, if it did not approve a TMDL by the date specified, to establish a TMDL within one year of the deadline, unless California submitted and EPA approved a TMDL prior to EPA's establishing the TMDL within the one-year period. (*Id.* P3a.) By March 24, 2002, EPA was required either to have approved a state-submitted TMDL for trash in the Los Angeles River or to have established the TMDL itself. (*Id.* PP2d, 3a; *id.* Att. 2, 3.)<sup>5</sup>

3 No original consent decree was entered. Rather, according to Defendants' representations in their opening brief, the Consent Decree incorporated amendments from an original proposal at the urging of proposed intervenors California Association of Sanitation Agencies and California Alliance of POTWs. (*See* Mot. to Dismiss at 6.)

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4 The Court takes judicial notice of the existence of the Consent Decree and the contents thereof. *See, e.g., Egan v. Teets*, 251 F.2d 571, 577 n.10 (9th Cir. 1957) (holding that district court was entitled to take judicial notice of prior proceedings involving same petitioner before same district court). The Consent Decree is filed as Docket No. 25 in *Heal the Bay*, No. C 98-4825

SBA.

5 Defendants contend that the relevant deadline was March 22, 2002, (Mot. to Dismiss at 6), and Plaintiffs echo this contention in their Second Amended Complaint, (Second Am. Compl. P25). Review of the terms of the Consent Decree, however, reveal that the deadline was a different date. The Consent Decree defines "effective date" as the date on which the Consent Decree is entered. (*Id.* P2d.) Although the Court signed the Consent Decree on March 22, 1999, (*id.* at 29), it was not entered on the docket until March 24, 1999. Under the terms of Attachments 2 and 3 of the Consent Decree, TMDLs for trash for all Water Quality Limited Segments the Los Angeles River were to be submitted by California within two years of the effective date--March 24, 2001. (*Id.* Atts. 2, 3.) Since EPA was required to ensure that a TMDL was in place within one year of California's deadline to submit a proposed TMDL, (*id.* P3a), the deadline for final approval or establishment of a TMDL was March 24, 2002.

Nevertheless, based on the evidence tendered by EPA, it is clear that EPA believed that the deadline was March 22, 2002. (*See* Decl. of David W. Smith in Supp. of EPA's Mot. to Dismiss, Ex. B at 2.) As is evident from the discussion below, this discrepancy is immaterial to the Court's analysis of the merits of the Motion to Dismiss.

[\*\*13] [\*1147] **2. EPA's Issuance of TMDLs and Approval of State-submitted TMDLs**

One of the responsibilities of the Regional Board for the Los Angeles region (the "Los Angeles Regional Board") is to develop TMDLs under the CWA for waterbodies in Los Angeles and Ventura Counties. (Decl. of Dennis Dickerson in Supp. of EPA's Mot. to Dismiss (the "Dickerson Declaration") P2.) With few exceptions, TMDLs are developed as draft TMDLs by Los Angeles Regional Board staff and then submitted to the board to be adopted as amendments to the Los Angeles Regional Board's Water Quality Control Plan, which is known as the Basin Plan. (*Id.*) Basin Plan amendments are then submitted to the State Board, and then subsequently to the OAL; after they have been approved by both of these agencies, they are submitted to EPA. (*Id.*)

On September 19, 2001, the Los Angeles Regional Board adopted TMDLs for trash for the Los Angeles



River watershed. (*Id.* P3.) "Trash" was defined as man-made litter, as defined in California Government Code § 68055.1(g). (*Id.* Ex. A at 2). These TMDLs (the "State Trash TMDLs") were approved by the State Board on February 19, 2002, by OAL on July 16, 2002, and ultimately [\*\*14] by EPA by letter dated August 1, 2002. (*Id.* P3, Ex. C; Second Am. Compl. for Injunctive & Declaratory Relief ("SAC") PP27, 30.) Prior to its approval of the State Trash TMDLs, however, EPA issued its own TMDLs for trash for the Los Angeles River Basin (the "EPA Trash TMDLs") on March 19, 2002. (SAC P26; Decl. of David W. Smith in Supp. of EPA's Mot. to Dismiss (the "Smith Declaration") Ex. B.) The EPA's August 1, 2002, letter approving the State Trash TMDLs announced that they "superseded" the EPA Trash TMDLs. (SAC P31; Smith Decl. P7, Ex. C.)

### **3. TMDLs Now in Effect and Implementation Provisions**

Under the provisions of the TMDLs now in effect--the State Trash TMDLs--the numeric target is zero trash in the Los Angeles River. (Dickerson Decl. Ex. A at 16, 29.) Based on this target, California has determined that the wasteload allocations for trash in the Los Angeles River also must be zero. (*Id.*)

To achieve this goal, California has provided, along with the State Trash TMDLs, implementation provisions that specify a phasing-in of progressive reductions in municipal stormwater wasteload allocations over a ten-year period, following completion of a two-year initial [\*\*15] baseline monitoring period. (*Id.* Ex. A at 21.) While the baseline monitoring program is taking place, cities will be deemed to be in compliance with the wasteload allocations provided that all of the trash that is collected during this period is disposed of in compliance with all applicable regulations. (*Id.* Ex. A at 27.) A baseline monitoring report is due to the Los Angeles Regional Board by February 15, 2004. (*Id.* P6.)<sup>6</sup>

6 Plaintiffs have filed Plaintiffs' Objections to Declarations of David W. Smith and Dennis Dickerson Offered by Defendants in Support of Defendants' Motion to Dismiss Second Amended Complaint ("Plaintiffs' Objections"). Plaintiffs' Objections challenge the admissibility of, *inter alia*, the statements in paragraph 6 of the Dickerson Declaration. The Court considers and resolves the objections to these statements in note 20, *infra*. Although Plaintiffs have objected to all

the statements in paragraph 6, careful review of the arguments advanced in these objections reveals that they are not in fact objecting to the statement in paragraph 6 that "the baseline monitoring report is due to the [Los Angeles] Regional Board by February 15, 2004." (Dickerson Decl. P6; *see* Pls.' Objections at 3-4.) To the extent that Plaintiffs are in fact objecting to this statement, however, the Court OVERRULES their objections to this statement for the reasons set forth in note 20, *infra*.

[\*\*16] [\*\*1148] The State Trash TMDLs and incremental wasteload allocations will be implemented through the Los Angeles stormwater permit, which the Los Angeles Regional Board will need to amend to incorporate specific, enforceable permit requirements. (*Id.* P8.)<sup>7</sup> The implementation provisions in the TMDLs allow permittees to "employ a variety of strategies to meet the progressive reductions in their Waste Load Allocations" and maintain that they "are free to implement trash reduction in any manner they choose." (*Id.* Ex. A at 29.) The wasteload reduction strategies are broadly classified as either end-of-pipe full capture structural controls, partial capture control systems, and/or institutional controls. (*Id.*) The provisions state that permittees will be deemed to be in compliance with the final wasteload allocation for their associated drainage areas if they utilize "full capture systems" that are adequately sized and maintained and maintenance records are available for inspection by the Los Angeles Regional Board. (*Id.* Ex. A at 30.)

7 Under heading II.2 of Plaintiffs' Objections, Plaintiffs object to the statements in paragraph 8 of the Dickerson Declaration relating to the Los Angeles Regional Board's understanding of how the State Trash TMDLs will be implemented. (Pls.' Objections at 4.) All of the grounds on which Plaintiffs object are meritless. First, Plaintiffs contend that the statements are objectionable as "extra-record evidence." Such evidence, however, may be considered by the Court in connection with a motion to dismiss for lack of subject matter jurisdiction. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Since Defendants contend that Plaintiffs' challenges to the merits of EPA's approval of the State Trash TMDLs are unripe, and since the Court considers how these

TMDLs will be implemented at least in part for this purpose, this evidence is properly before the Court. Second, Plaintiffs contend that the statements constitute inadmissible hearsay. These statements, however, do not contain or even implicitly rely on any out-of-court statement by one other than Mr. Dickerson for the truth of the matter stated.

Third, Plaintiffs claim that the statements lack foundation, although they do not explain what they mean by this. To the extent Plaintiffs are asserting that the declarant lacks personal knowledge of the Los Angeles Regional Board's intentions, that assertion is refuted by the fact that Mr. Dickerson has been Executive Officer of the board since 1997. (Dickerson Decl. P1.) Fourth, Plaintiffs insist that "the statements are objectionable and inadmissible as the best evidence of the implementation requirements vis-a-vis the TMDLs, is set forth in the TMDLs themselves, as well as in the terms of other enforceable documents, documenting the actions taken by the [Los Angeles] Regional Board, such as the terms of the Municipal Storm Water Permit referenced in the declaration." (Pls.' Objections at 4.) This objection misunderstands the nature of the "best evidence" rule: that rule applies *only* where the witness attempts to testify as to the *contents of a writing, recording, or photograph*. See Fed. R. Evid. 1002. Such is not the case here. Moreover, this objection reflects a fundamental misunderstanding of the nature of TMDLs. TMDLs are *not* self-executing; they require the appropriate state to issue regulations implementing them. It is also not clear what Plaintiffs mean by their assertion that documents "documenting the actions taken by the Regional Board" constitute "enforceable documents." Finally, Plaintiffs assail the statements at issue as "not competent." (*Id.*) Plaintiffs do not explain what they mean by this objection. The Court thus disregards it. Accordingly, the Court **OVERRULES** the objections under Heading II.2 of Plaintiffs' Objections.

[\*\*17] [\*1149] **4. The Instant Action**

Plaintiffs filed their initial complaint on June 28, 2002, in the United States District Court for the Central

District of California. On August 30, 2002, they filed an amended complaint. On October 30, 2002, the case was transferred to this Court, the United States District Court for the Northern District of California. Pursuant to the parties' stipulation and the Court's Order thereon, Plaintiffs filed a Second Amended Complaint for Injunctive and Declaratory Relief (the "SAC" or "Complaint") on December 12, 2002.

The SAC is the operative complaint for purposes of the Motion to Dismiss and the Motion for Partial Summary Judgment. The SAC purports to assert three claims for relief. The First Claim for Relief is ostensibly brought pursuant to a provision of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706, (SAC at 34), although certain allegations thereunder also invoke the CWA, the Regulatory Flexibility Act (the "RFA"), and the Small Business Regulatory Enforcement Fairness Act of 1996 (the "SBREFA"), (*id.* PP84-85).<sup>8</sup> The First Claim for Relief alleges several violations of the APA: (1) EPA acted without authority [\*\*18] and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79); (2) EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (*id.* PP80, 83); (3) EPA acted arbitrarily and capriciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (*id.* PP81-82); (4) the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (*id.* PP84-86);<sup>9</sup> and (5) EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance with the procedures of the CWA and California law, (*id.* P87).<sup>10</sup> The Second Claim for Relief challenges [\*1150] the validity of two alleged agency actions, the EPA Trash TMDLs and the "*de facto* TMDL procedure," under the APA, 5 U.S.C. § 551 *et seq.*; the [\*\*19] RFA, 5 U.S.C. § 601 *et seq.*; and the SBREFA, 5 U.S.C. § 801 *et seq.* (SAC at 40; *id.* PP89-99.) The violations alleged under the Second Claim for Relief, however, appear to relate mostly to procedural requirements under the RFA and the SBREFA. (See *id.* PP91-93, 95-98 (invoking 5 U.S.C. §§ 601(5), 601(6), 603, 604(a), 604(b), 605(b), and 611).)<sup>11</sup> The Third Claim for Relief is derivative of the first two

claims. It seeks a declaration under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, as to which party's interpretation of the law is correct and a judicial determination of Plaintiffs' rights and duties. (*Id.* PP100-105.)

8 With respect to the First Claim for Relief, the SAC comes perilously close to violating Federal Rule of Civil Procedure 8(a)'s mandate of providing "a *short and plain* statement of the claim showing that the pleader is entitled to relief..." Fed. R. Civ. P. 8(a) (emphasis added). In particular, Plaintiffs' practice of indicating that the First Claim for Relief is based exclusively on the APA, (SAC at 34), yet at the same time claiming in the allegations thereunder that the actions at issue violate other statutes, (*id.* PP84-85), is confusing. Aside from potentially misleading Defendants as to the nature of the claims against them, it has required the Court to spend needless additional time and effort scrutinizing the allegations of the SAC because the Court cannot trust the accuracy of the headings of the SAC. The practice is especially reprehensible because the Court has already been forced to spend undue time and effort identifying and parsing out the five independent, discrete claims for relief that are set out in stream-of-consciousness fashion in the allegations underlying the "First Claim for Relief"--which heading necessarily suggests a *single* claim. *See infra*.

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9 This alleged *de facto* TMDL procedure is also claimed to violate the CWA, the RFA, and the SBREFA. (*Id.* PP84-85.)

10 Although not clearly stated, this last claim (claim (5)) within the First Claim for Relief appears to challenge the *merits* of EPA's approval of the State Trash TMDLs, as opposed to, for example, challenging EPA's authority to approve *any* state-submitted TMDLs after it issued the EPA Trash TMDLs, (*see id.* PP80, 83). Presumably, this last claim encompasses challenges to, for example, EPA's approval of the State Trash TMDLs where these TMDLs covered "unlisted" waters. (*See id.* PP42, 49, 62.) Defendants appear to have also construed this claim as challenging the merits of EPA's approval of the State Trash TMDLs, and they move to dismiss this claim as unripe. (*See Mot. to Dismiss*

at 20-24.) Plaintiffs appear to concur in Defendants' construction of this claim. (*See Pls.' Opp. Br.* at 16-20.) Accordingly, the Court construes this last claim as challenging the merits of EPA's approval of the State Trash TMDLs.

11 This is yet another example of Plaintiffs' objectionable drafting of the SAC. In particular, the paragraph alleging improper agency action supposedly giving rise to the Second Claim for Relief, paragraph 96, identifies four bases on which the CWA, the APA, the RFA, and the SBREFA were violated. (*Id.* P96.) Of these four bases, however, only the first (denoted reason "(a)") appears to have anything to do with the APA; the remaining three ("(b)," "(c)," and "(d)") appear to relate solely to provisions of the RFA and SBREFA, at least based on the allegations of the previous paragraphs under the heading "Second Claim for Relief." (*Id.*; *compare id.* (*e.g.*, alleging that EPA failed to perform an initial screening of the EPA Trash TMDLs to determine whether they would have a significant economic impact on a substantial number of small entities) *with id.* PP91-93, 95 (*e.g.*, alleging that RFA requires agencies to screen all proposed rules and identify whether such rules would have such an impact, (*id.* P92))).

The Court is thus left with the distinct impression that either Plaintiffs have been careless in drafting the Second Claim for Relief or they have invoked various statutes and inserted a number of allegations in scattershot fashion in the hope that something will slip by Defendants undetected and "stick." Aside from arguably violating Rule 8(a), this practice is unfair not only to Defendants, but also to the Court, because it makes the Court's resolution of Defendants' arguments considerably more difficult. (Nor is the Court interested in any supporting evidence or clarification from Plaintiffs' counsel regarding the nature of their claims that is not in the four corners of the SAC or incorporated therein by reference. The SAC speaks for itself on that score.) Based on its review of the SAC, the Court construes the allegations underlying the Second Claim for Relief as alleging violation of the APA, the RFA, and the SBREFA only with respect to EPA's alleged failure to provide Plaintiffs with notice and an opportunity for comment with

regard to the *de facto* TMDL procedure, discussed *infra*, and the establishment of the EPA Trash TMDLs; the Court construes them to allege violation of the RFA and the SBREFA, but not the APA, with regard to the remaining allegations under the heading of "Second Claim for Relief." (See SAC P96.)

[\*\*21] On January 13, 2003, Defendants and Intervenor filed answers to the SAC. On that same day, Defendants also filed the instant Motion to Dismiss, which seeks dismissal of the entire action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Intervenor filed Intervenor's Notice in Support of Defendants' Motion to Dismiss on February 3, 2003, indicating in brief fashion that they agreed with the arguments in the Motion to Dismiss and therefore supported the motion. On March 10, 2003, Plaintiffs filed their Motion for Partial Summary Judgment.

Most of the plaintiffs in the instant action are currently plaintiffs in a California state court action against the Los Angeles Regional Board and the State Board challenging the legality of the State Trash TMDLs. (*Id.* P33.) Three other lawsuits have similarly been filed challenging either [\*1151] California's establishment of the State Trash TMDLs or EPA's approval of the same. (*Id.*)

## II. LEGAL STANDARD

### A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) authorizes a party to seek dismissal of an action for lack of subject matter jurisdiction. "When subject matter jurisdiction is challenged under [\*\*22] Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001). "A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment." *Id.* (quoting *Smith v. McCullough*, 270 U.S. 456, 459, 70 L. Ed. 682, 46 S. Ct. 338 (1926)). In adjudicating such a motion, the court is not limited to the pleadings, and may properly consider extrinsic evidence. See *Ass'n of Am. Med. Colleges v. United States*, 217

F.3d 770, 778 (9th Cir. 2000). The court presumes lack of jurisdiction until the plaintiff proves otherwise. See *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

### B. Rule 12(b)(6)

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a claim. [\*\*23] *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); accord *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). The complaint is construed in the light most favorable to the plaintiff, and all properly pleaded factual allegations are taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969); see also *Everest & Jennings, Inc. v. Am. Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). "Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro*, 250 F.3d at 731. In adjudicating a motion to dismiss, the court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). [\*\*24]

When the complaint is dismissed for failure to state a claim, "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Leave to amend is properly denied "where the amendment would be futile." *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

## III. DISCUSSION

Defendants have filed a Motion to Dismiss; Plaintiffs have filed a Motion for Partial Summary Judgment. The Motion for Partial Summary Judgment seeks adjudication of issues pertaining to Plaintiffs' challenge to the procedural legitimacy of the State Trash TMDLs. Because the Court grants the Motion to Dismiss (as discussed below), it does not reach the merits of the Motion for Partial Summary Judgment and therefore

denies it as moot. Accordingly, the following discussion pertains [\*1152] only to the Motion to Dismiss, except where noted.

At the outset, the Court notes that it need not analyze all the arguments presented in Defendants' opening brief because Plaintiffs [\*\*25] concede that certain of their claims are moot. In particular, Defendants contend in their opening brief for the Motion to Dismiss that the EPA Trash TMDLs no longer have any force or effect because EPA has announced that the State Trash TMDLs "supercede" the EPA Trash TMDLs; consequently, Defendants maintain, Plaintiffs' claims that EPA lacked authority to establish the EPA Trash TMDLs, (SAC P78-79), and that the procedures by which EPA established them were unlawful, (*id.* PP81-82, 90, 94, 96-97, 99), are moot. (Mot. to Dismiss at 12-15.) In their opposition brief, Plaintiffs express satisfaction with Defendants' assurances that the EPA Trash TMDLs are no longer (and can never be) in effect and therefore "withdraw their claims directly challenging the validity of EPA's TMDLs . . ." (Pls.' Opp. Br. at 4 n.6.) Defendants acknowledge this withdrawal in their reply brief. (Defs.' Reply Br. at 1.) As a result, the Court GRANTS the Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) with regard to claims (1) and (3) (SAC PP78-79 and SAC PP81-82, respectively) within the First Claim for Relief of the SAC identified in Part I.B.4 of this Order, *supra*. The Court [\*\*26] also GRANTS the Motion to Dismiss pursuant to Rule 12(b)(1) with regard to the Second Claim for Relief of the SAC to the extent it challenges the validity of the EPA Trash TMDLs. (*See* SAC PP90, 94, 96-97, 99.) The Court now addresses the parties' arguments in relation to the remaining claims.

#### **A. Challenge to EPA's Authority to Approve the State Trash TMDLs**

Plaintiffs claim that EPA lacked authority to approve the State Trash TMDLs because it had already established the EPA Trash TMDLs. (SAC PP80, 83.) Defendants move to dismiss this claim pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (Mot. to Dismiss at 19-20.) Defendants contend that EPA in fact has a statutory *obligation* under 33 U.S.C. § 1313 to review any proposed TMDLs submitted by a state and either approve them or disapprove them. (*Id.*) Defendants assert that nothing in the CWA or otherwise divests EPA of jurisdiction to

approve a state-submitted TMDL once EPA has issued its own TMDLs, and in fact, recognizing such a principle would thwart Congressional intent to vest states with the primary responsibility of implementing the CWA's provisions. [\*\*27] (*Id.* at 20.) Plaintiffs counter (in less than straightforward fashion) that by allowing California to submit the State Trash TMDLs to EPA after EPA established the EPA Trash TMDLs, EPA effectively "remanded" a "TMDL submission" to California, and EPA lacked authority to "remand" this submission and subsequently approve California's "resubmission." (*See* Pls.' Opp. Br. at 15-16.)<sup>12</sup>

12 Plaintiffs also argue that EPA lacked authority to approve the State Trash TMDLs because these TMDLs cover "unlisted" waters; according to Plaintiffs, EPA has authority only to approve TMDLs for "listed" waters. (*Id.* at 14-15.) As Defendants correctly point out, this argument goes to the merits of EPA's approval of the State Trash TMDLs, not to the issue of whether EPA had any authority to approve any state-submitted TMDLs after issuing its own TMDLs--the issue raised by this claim. (Defs.' Reply Br. at 10 n.9.) Plaintiffs' argument is relevant only to their own Motion for Partial Summary Judgment, not to the arguments raised in the Motion to Dismiss.

[\*\*28] Plaintiffs' counterargument is meritless. No authority supports the conclusion that EPA lacks authority to approve [\*1153] state-submitted TMDLs after EPA has established its own TMDLs, nor does this conclusion logically follow from the proposition that EPA is required to approve or disapprove a state-submitted TMDL within 30 days of submission. Moreover, as Defendants astutely note, recognizing such a principle "would lead to absurd results. Under this scenario, once EPA establishes a TMDL, the State could never update it or modify it based on changed circumstances." (Mot. to Dismiss at 20.) Finally, like Defendants, (*see* Defs.' Reply Br. at 10), the Court is at a loss to understand what Plaintiffs mean by their contention that EPA "remanded" the EPA Trash TMDLs to California for revision and resubmission. Nothing in the allegations of the Complaint remotely suggest any sort of sending back of TMDLs to California for revision or additional development. And even if there were such a "remand," it does not follow that EPA lacked authority to approve the State Trash TMDLs.

For these reasons, the Court GRANTS the Motion to Dismiss with respect to claim (2) within the First Claim for Relief, [\*\*29] (SAC PP80, 83), *see supra* Part I.B.4. Additionally, it is evident that Plaintiffs cannot amend the SAC to allege facts sufficient to rehabilitate this claim because it is meritless as a matter of law. Accordingly, this claim is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE.

### B. The "De\_Facto TMDL Procedure"

Under claim (4) within their First Claim for Relief, *see supra* Part I.B.4, and the Second Claim for Relief, Plaintiffs challenge the "*de facto* TMDL procedure,"<sup>13</sup> which they consider to consist of:

the establishment by the [Los Angeles] Regional Board of the TMDL, followed by the preparation and notice of the TMDL by USEPA, followed by the approval of the TMDL by the State Board, followed by the "establishment" by USEPA of the EPA TMDL, followed by the determination by USEPA to review and/or approve the subsequently submitted State TMDL, and to thereafter find the USEPA established TMDL is "superceded" . . . .

(SAC P85.) Plaintiffs assert that this procedure violates the APA, the RFA, and the SBREFA. (*Id.* PP84-85, 96-98.) Plaintiffs allege not only that they have previously suffered from the effectuation of the *de facto* [\*\*30] TMDL procedure, but also that they will suffer from the effectuation of the procedure in the future. (*See id.* PP84-86.)

13 Plaintiffs do not expressly use the phrase "*de facto* TMDL procedure" in the SAC. Instead, they refer to this procedure as the "TMDL Procedure" and contend that EPA has effected a "*de facto* adoption" of the "TMDL Procedure." (SAC P85.) For ease of reference, the Court will refer to what Plaintiffs call the "TMDL Procedure" as the "*de facto* TMDL procedure."

Defendants move to dismiss these claims by pointing out that the APA and the RFA, which was amended by the SBREFA, permit challenges *only* to "final agency action." (Mot. to Dismiss at 16-19.)<sup>14</sup> They explain that the APA defines "agency action" to include "the whole or

a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." (*Id.* at 16 (quoting 5 U.S.C. § 551(13).) (They do not indicate whether this definition applies to the RFA and [\*\*31] SBREFA as well.) Defendants assert that what Plaintiffs characterize as a *de* [\*\*1154] *facto* TMDL procedure is not an "agency action," much less a final agency action, but in fact a sequence of events; as such, they maintain, the procedure cannot give rise to a challenge under the APA or under the RFA, as amended by the SBREFA.

14 Defendants also contend that the RFA, as amended by the SBREFA, provides a narrow and exclusive means of judicial review that is not available here due to the nature of Plaintiffs' challenge to the *de facto* TMDL procedure. (*See id.* at 16.)

Plaintiffs respond to Defendants' arguments somewhat curiously. Despite vehemently asserting that Defendants' arguments are incorrect, they do not dispute that a challenge will lie only to final agency action. Instead, they contend that the *de facto* TMDL procedure "led up to and resulted in 'final agency action,'" (Pls.' Opp. Br. at 22), namely the August 1, 2002, approval of the State Trash TMDLs. Plaintiffs also argue at great length that [\*\*32] their challenge to this procedure is not moot because it falls under the "capable of repetition, yet evading review" exception to the mootness doctrine. (*Id.* at 22-25.)

Defendants' arguments are persuasive, and Plaintiffs' responses are both unconvincing and nonresponsive. As Defendants correctly note, (*see* Defs.' Reply Br. at 4-5), Plaintiffs' suggestion that they are challenging EPA's approval of the State Trash TMDLs, as opposed to the so-called "TMDL procedure," is belied by the allegations of the SAC: by their plain language, the allegations of paragraphs 84 through 86 and paragraphs 96 through 98 challenge the "TMDL procedure," (SAC 84-86, 96-98); Plaintiffs' challenge to EPA's approval of the State Trash TMDLs is set out in paragraph 87, (*see id.* P87), the justiciability of which challenge is discussed in Part III.C of this Order, *infra*. Plaintiffs do not demonstrate how the "procedure" is "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act" or falls within any other definition, statutory or otherwise, of final agency action. 15 Indeed, as Defendants also correctly note, (*see* [\*\*33] Defs.' Reply Br. at 4-5), Plaintiffs' assertion that the

TMDL procedure *consummated in* final agency action, namely EPA's approval of the State Trash TMDLs, is an implicit admission that the "procedure" itself is not final agency action. Nor do Plaintiffs make any effort to distinguish or refute any of the authorities cited by Defendants in support of their arguments. Finally, as Defendants yet again correctly point out, Plaintiffs' mootness argument is nonresponsive because Defendants do not contend that this claim is moot. (*Id.* at 8.)<sup>16</sup>

15 Even though the Court has not been able to locate a statutory definition of "agency action" for purposes of the RFA and SBREFA, Plaintiffs have put forward no argument to suggest that it should be given a meaning substantially different than that provided in the APA. The Court sees no reason to conclude that "agency action" should be given a significantly more expansive definition than that provided for purposes of the APA.

16 Plaintiffs do not respond to Defendants' argument that judicial review is unavailable under the RFA, as amended by the SBREFA, for alleged violations of 5 U.S.C. § 603. (Mot. to Dismiss at 18.) The Court agrees with Defendants that the implication of this lack of response is that any opposition to this argument is waived. (*See* Defs.' Reply Br. at 3-4.) The Court disagrees with Defendants, however, that Plaintiffs have failed to respond to Defendants' arguments that the *de facto* TMDL procedure does not constitute "final agency action" under the RFA, as amended by the SBREFA; but the Court finds their response to this argument meritless for the reasons stated above.

[\*\*34] In sum, it is apparent that the alleged *de facto* TMDL procedure, consisting of the various events identified in paragraph 85 of the SAC, is not subject to challenge under the APA, RFA, or SBREFA because it is not final agency action within the meaning of those statutes. *Cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990) (rejecting challenge to alleged land withdrawal [\*1155] review program on grounds that alleged program was not final agency action within meaning of APA). Accordingly, the Court GRANTS Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) with respect to claim (4) within the First Claim for Relief, (SAC PP84-86). The Court also GRANTS Defendants' motion pursuant to Rule 12(b)(6) with regard to the Second

Claim for Relief. Given that the Second Claim for Relief challenges the validity of the EPA Trash TMDLs and the alleged *de facto* TMDL procedure alone, and given that Plaintiffs have withdrawn their challenge to the validity of the EPA Trash TMDLs, the Second Claim for Relief is now dismissed in its entirety.

It is further evident that Plaintiffs cannot amend the SAC to allege [\*\*35] facts sufficient to rehabilitate these claims because they are not actionable as a matter of law. Accordingly, both claim (4) within the First Claim for Relief and the Second Claim for Relief are DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE.

### ***C. Ripeness of Plaintiffs' Challenge to EPA's Approval of State Trash TMDLs***

Plaintiffs' remaining claim (aside from the Third Claim for Relief, which is dependent on the First and Second Claims for Relief) challenges the merits of EPA's approval of the State Trash TMDLs. (*See id.* P87.) Defendants move to dismiss this claim as unripe for judicial review. Specifically, Defendants contend that the issues are not yet sufficiently developed to be fit for judicial review under the APA because Plaintiffs' existing NPDES permit imposes no obligations on Plaintiffs in connection with the State Trash TMDLs and because the Los Angeles Regional Board intends to revisit these TMDLs at the end of the monitoring period. (Mot. to Dismiss at 21-23.) Defendants further contend that Plaintiffs will not suffer any immediate hardship if review is withheld because EPA's approval of the State Trash TMDLs imposes no present, affirmative duties on [\*\*36] Plaintiffs and requires no immediate changes in Plaintiffs' conduct. (*Id.* at 23-24.)

Plaintiffs respond by arguing that they have suffered "injury in fact," both economic and non-economic. (Pls.' Opp. Br. at 16-17.) Citing to the text of the State Trash TMDLs, a copy of which is appended to the Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss (the "Montevideo Declaration") as Exhibit 3, Plaintiffs claim that they are impacted by these TMDLs:

By the terms of the TMDL itself, most Plaintiffs are directly impacted by its terms and presently have express monitoring obligations to comply with,

not to mention pending compliance dates requiring annual reductions in trash. Moreover, the TMDL calls out very specific and expensive implementation measures, including possible implementation through full capture vortex systems totaling \$ 109.3 million for all affected entities within the County [of Los Angeles] by the end of Year 1, and a total of \$ 2,053,100,000 for the first 12 years of implementation. Even the Trash TMDL itself concludes that "Trash abatement in the Los Angeles [\*\*37] River system may be expensive."

(Pls.' Opp. Br. at 18 (citing Montevideo Decl., Ex. 3 (State Trash TMDLs)) (internal citations and emphasis omitted).) Similarly, Plaintiffs maintain that "to come into compliance by the Compliance Dates, [they] must begin employing strategies now to meet the progressive reductions in Waste Load Allocations required by the State Trash TMDL[s]." (*Id.* at 19.) [\*1156] Plaintiffs further allege that the NPDES permit that applies to all of Plaintiffs provides that the State Trash TMDLs are "effective and enforceable." (*Id.* at 18 (citing Montevideo Decl., Ex. 5, at 10 P14).) Citing paragraph 36 of the SAC, they also contend that they have suffered from the TMDLs' being in effect because they are exposed to "unwarranted enforcement action and third party citizen suits." (*Id.*) Finally, Plaintiffs contend that they have suffered "procedural injuries," to wit, their being "forced to submit comments to two different levels of government (the State of California and the EPA) on two sets of TMDL over a series of many months and several hearings." (*Id.* at 20.)

Defendants dispute all of Plaintiffs' arguments in their reply. Defendants note that [\*\*38] "Plaintiffs point to no present effect of the TMDLs on their day-to-day conduct." (Defs.' Reply Br. at 12.) They point out that, contrary to Plaintiffs' contention, Plaintiffs in fact have no monitoring obligations with which to comply because the Los Angeles County Department of Public Works has assumed that responsibility for all of Plaintiffs. (*Id.*) Defendants clarify that the first compliance date under the TMDLs is not until 2006, and the TMDLs identify several potential compliance options without mandating the use of any particular measure. (*Id.*) They further note that Plaintiffs fail to respond to the record evidence that the Los Angeles Regional Board will revisit the TMDLs

at the conclusion of the monitoring period, that is, prior to the first compliance deadline, and that such reconsideration has been considered a rational basis for delaying judicial review. (*Id.* at 13 (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998), and *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1323 (9th Cir. 1992)).) Finally, Defendants assail Plaintiffs' reliance on the aforementioned [\*\*39] statement in Plaintiffs' NPDES permit because this statement does not establish that the State Trash TMDLs are effective or enforceable against *Plaintiffs*. (*Id.*)

The "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18, 125 L. Ed. 2d 38, 113 S. Ct. 2485 (1993). Unripe claims are subject to dismissal for lack of subject matter jurisdiction. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 784 n.9 (9th Cir. 2000). In determining whether a case is ripe for review, a court must consider two main issues: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). To address these issues in the context of a challenge to the lawfulness of administrative action, the Supreme Court has identified three factors to consider: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further [\*\*40] administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998).

In light of these three factors, the Court finds this claim unripe for review. First, delayed review would cause, at most, minimal hardship to the parties. Indeed, Plaintiffs have not demonstrated that they will suffer *any* hardship if review is delayed. Despite their preoccupation with various official pronouncements that the State Trash TMDLs are "effective" and "enforceable," Plaintiffs cannot point to a single future event or condition that is fairly certain to occur and will adversely [\*1157] impact *Plaintiffs* themselves.<sup>17</sup> That is because the TMDLs do not presently impose any obligations on Plaintiffs and because they are subject to revision before such obligations will be imposed. Nor do Plaintiffs provide



any evidence or explanation whatever of the "unwarranted enforcement action and third party citizen suits" to which they claim to be exposed.

17 The Court notes parenthetically that Plaintiffs' invocation of "injury in fact" in their opposition brief, (Pls.' Opp. Br. at 16-17), is inapposite. Injury-in-fact is a concept that relates to the issue of standing, not ripeness. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Plaintiffs appear to confuse Defendants' arguments as relating to standing, not ripeness. (Pls.' Opp. Br. at 20 ("Federal courts have long recognized procedural injuries, as well as actual injuries, as an alternative basis for standing.")) Nevertheless, the Court construes Plaintiffs' allegations of "injury in fact" as allegations of hardship.

[\*\*41] Equally unsupported is Plaintiffs' contention that they will bear economic costs in complying with the State Trash TMDLs. The sole evidentiary basis of this allegation, set out in paragraph 35 of the SAC and discussed more thoroughly in Plaintiffs' Opposition, is the estimates provided in the text of the TMDLs themselves. (*See* SAC P35; Pls.' Opp. Br. at 18.) But this matter is inadmissible hearsay because it is offered by an out-of-court declarant, *i.e.*, the Los Angeles Regional Board, for the truth of the matter stated, *i.e.*, that the TMDLs will in fact impose these costs.<sup>18</sup> Yet even if this evidence were admissible, it would be insufficient to support Plaintiffs' contention that they will suffer economic injury: the cited portions of the State Trash TMDLs provide estimates of costs to be borne by "permittees"; there is no indication that these costs will be borne by *Plaintiffs* in particular. (*See* Montevideo Decl., Ex. 3, at 37, 40, *cited in* Pls.' Opp. Br. at 18.) Similarly, Plaintiffs provide no evidentiary support for the bald contention in their opposition brief that *Plaintiffs* must begin employing "strategies" now to meet the progressive reductions [\*\*42] in wasteload allocations required by the State Trash TMDLs. (Pls.' Opp. Br. at 19.)

18 The author of the State Trash TMDLs appears to be the Los Angeles Regional Board. (*See* Montevideo Decl., Ex. 3.) Since the Los Angeles Regional Board is an entity created by state law and is subordinate to a state agency, the State Board, the text of the State Trash TMDLs is

arguably ascribable to the State Board and the state of California as well.

But these statements cannot be attributed to EPA by virtue of its approval of the State Trash TMDLs. Plaintiffs have laid no legal or evidentiary foundation tending to show that EPA's mere approval of the *TMDLs themselves* implies that EPA further agreed with or endorsed as accurate California's estimates of the costs of compliance provided with those TMDLs.

Even if Plaintiffs will be forced to comply with obligations imposed by the State Trash TMDLs and will suffer costs therefrom, the first Compliance Point is not until Year 3 of the implementation period, which runs [\*\*43] from October 1, 2005, to September 30, 2006. (*See* Montevideo Decl., Ex. 3, at 28.) Thus, as a practical matter, Plaintiffs have three years to reach the specified Compliance Point. They have "ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n*, 523 U.S. at 734. Accordingly, Plaintiffs cannot be heard to complain that they will suffer hardship if review is withheld at the present time.<sup>19</sup>

19 To the extent that Plaintiffs identify past events that are not alleged to recur in the future, such as Plaintiffs' allegedly having to submit comments to two levels of government, for the purpose of demonstrating hardship, those events are irrelevant because Plaintiffs are solely seeking *prospective* relief (aside from attorney's fees and costs of suit).

[\*1158] Second, judicial intervention would likely interfere with further administrative action on the part of the state of California. Plaintiffs have not refuted Defendants' [\*\*44] evidence that the Los Angeles Regional Board will be revisiting the State Trash TMDLs at the end of the monitoring period.<sup>20</sup> It is thus possible that the compliance [\*1159] dates or compliance points will be altered or abolished altogether. The State Board may submit new TMDLs to EPA for review and potential approval well before the compliance dates in the State Trash TMDLs. And even if the State Trash TMDLs remain mostly intact, it is certainly possible that the State Board will approve additional regulations that alleviate much of the burden on Plaintiffs. Again, Plaintiffs must bear in mind that it is the state of California, not the federal government, that is charged with implementing

the State Trash TMDLs.

20 Plaintiffs' Objections challenge the admissibility of, *inter alia*, the portion of Defendants' evidence tending to show that the Los Angeles Regional Board will be revisiting the State Trash TMDLs at the end of the monitoring period, namely relevant statements in paragraphs 6 and 12 of the Dickerson Declaration. (The statements in paragraph 7 of the Dickerson Declaration and Exhibit C thereto also constitute such evidence, (*see* Mot. to Dismiss at 22), although Plaintiffs do not object to those statements.)

Plaintiffs challenge the statements in paragraph 6 of the Dickerson Declaration on five grounds. First, Plaintiffs contend that these statements are irrelevant "to the issue in question." (Pls.' Objections at 3.) The Court is unclear about what Plaintiffs mean by "the issue in question," but at any rate, the Court overrules this objection because these statements are indeed relevant to an important issue relating to ripeness: whether the Los Angeles Regional Board will revisit the State Trash TMDLs at the end of the monitoring period. Second, Plaintiffs assert that the statements are inadmissible hearsay because they seek "to introduce statements from parties other than the declarant, into evidence." (*Id.*) This argument fails because the statements are not offered for the truth of the matter stated by persons or parties other than Mr. Dickerson. That the Los Angeles Regional Board's *discussed* (*i.e.*, verbally articulated) the possibility of reopening the TMDLs in the future does not implicate hearsay concerns, *see United States v. Ballis*, 28 F.3d 1399, 1405 (5th Cir. 1994); and the board's orders to its staff are more akin to written or verbal acts.

Third, Plaintiffs assail the statements as "incompetent" because "the opinions and views of individual Regional Board members is [*sic*] not relevant or admissible evidence of the actions or positions of the entire Board." (Pls.' Objections at 3 (emphasis omitted).) But nowhere are the "opinions and views" of the individual Regional Board members set out in the statements in paragraph 6. Fourth, Plaintiffs claim that these

statements are "not the best evidence of the position of the entire Regional Board, as the views and positions of an entire Board can only be discerned from the meeting minutes and resolutions which confirm the actions of the public body." (*Id.* (emphasis omitted).) But the "views and positions" of the board are not set out therein. Fifth, Plaintiffs argue that the statements should be excluded as "extra-record evidence." This objection is meritless because the statements are relevant to the ripeness of Plaintiffs' challenge to EPA's approval of the State Trash TMDLs, and the Court may appropriately look beyond the pleadings in evaluating a motion to dismiss pursuant to Rule 12(b)(1).

In sum, Plaintiffs appear to have construed the statements in paragraph 6 of the Dickerson Declaration as stating that the Los Angeles Regional Board intends to *revise* the State Trash TMDLs after completion of the monitoring period, and they have evidently made their objections with this understanding in mind. Careful review of these statements reveals, however, that these statements demonstrate only that board staff have been ordered to report on the TMDLs and make recommendations on whether or not to revise the TMDLs based on the result of the monitoring. Thus, the import of the statements in paragraph 6 is that *the board will be in a position to revisit, and potentially reconsider, the TMDLs at the end of the monitoring period*, not that they have actually decided to revise the TMDLs. Accordingly, and for the reasons stated above, the Court **OVERRULES** the objections under heading II.1 in Plaintiffs' Objections.

Although Plaintiffs have objected to the admissibility of the statements in paragraph 12 of the Dickerson Declaration, the Court does not rely on those statements in evaluating issues of ripeness. The Court finds that the statements in paragraphs 6 and 7 of the Dickerson Declaration are sufficient to support a conclusion that the Los Angeles Regional Board will be revisiting--which is not to be confused with an intent to revise--the State Trash TMDLs at the end of the monitoring period. Accordingly, the Court **OVERRULES AS MOOT** the objections under heading II.5 in Plaintiffs' Objections.

Finally, the Court has reviewed the remaining objections in Plaintiffs' Objections. The Court does not rely on any of the matter to which Plaintiffs have objected other than those under headings II.1 and II.2 in evaluating the Motion to Dismiss. Accordingly, the Court **OVERRULES AS MOOT** the remaining objections in Plaintiffs' Objections.

[\*\*45] Finally, the Court would benefit from further factual development of the issues presented. For example, Plaintiffs allege that in approving the State Trash TMDLs, EPA failed "to use 'best science' and [failed] to carefully consider suggestions on how to structure the TMDL program to be more effective and flexible to ensure workable solutions, with such failure resulting in an inequitable share of the burden [of pollution reduction] being placed on municipalities, such as Plaintiffs herein, to attain water quality standards." (SAC P47.) Since TMDLs are not self-executing, but require issuance of state regulations for implementation, delaying review will enable the Court to determine more easily and accurately whether the TMDL program could in fact have been structured more flexibly and whether Plaintiffs are bearing an inequitable share of the burden of pollution reduction.

In light of the Court's evaluation of the foregoing three factors, the Court concludes that Plaintiffs' claim is unripe for judicial review. Accordingly, Plaintiffs' claim (5) within the First Claim for Relief, (*id.* P87), is **DISMISSED** pursuant to Rule 12(b)(1) due to the Court's lack of subject matter jurisdiction. [\*\*46] Since the Court lacks jurisdiction over this claim, it lacks authority to grant Plaintiffs leave to amend the claim; accordingly, the claim is dismissed **WITHOUT LEAVE TO AMEND** in this action. Finally, because the Court necessarily does not reach the merits of the claim, the dismissal is **WITHOUT PREJUDICE**.

#### ***D. Third Claim for Relief***

Plaintiffs' Third Claim for Relief is wholly predicated on their first two claims for relief. Because these two claims for relief are dismissed, the Third Claim for Relief is **DISMISSED** on the same bases, and to the same extent, as the two claims (and sub-claims thereunder) are dismissed.

#### ***E. Motion for Partial Summary Judgment***

Plaintiffs' Motion for Partial Summary Judgment seeks summary judgment in Plaintiffs' favor on the issues of (1) whether Defendants had authority and jurisdiction to approve the State Trash TMDLs to the extent that they covered unlisted waters and (2) whether Defendants had authority and jurisdiction to approve the State Trash TMDLs given that they had previously established the EPA Trash TMDLs. For the reasons stated above, the Court grants the Motion to Dismiss. Accordingly, the Motion for Partial Summary Judgment [\*\*47] is **DENIED AS MOOT**. For the same reason, the Court **OVERRULES AS MOOT** Intervenor's Evidentiary Objections to Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss <sup>21</sup> and Plaintiffs' Objections to [\*1160] Declaration of Anjali I. Jaiswal and Exhibits.

21 Although the Montevideo Declaration relates both to Plaintiffs' opposition to the Motion to Dismiss and to Plaintiffs' Motion for Partial Summary Judgment, Intervenor's objections to the Montevideo Declaration are made in connection with their opposition to the Motion for Partial Summary Judgment. Accordingly, the Court considers their objections solely for that purpose.

#### ***IV. CONCLUSION***

Plaintiffs have no reason or right to be before this Court, at least at this time. All of their claims are moot, meritless, or unripe. Plaintiffs' challenges to the EPA Trash TMDLs were quite obviously mooted out the minute that EPA approved the State Trash TMDLs. Indeed, given [\*\*48] that Plaintiffs readily withdrew these challenges based solely on Defendants' representations in their moving papers that the EPA Trash TMDLs are void, (Pls.' Opp. Br. at 4 n.6), the Court wonders why Plaintiffs proceeded to file a lawsuit on this basis. Plaintiffs' challenge to EPA's authority to approve the State Trash TMDLs following its establishment of the EPA Trash TMDLs and their challenge to the "*de facto* TMDL procedure" are so patently meritless that the Court fails to understand why Plaintiffs decided to assert these claims in the first place. Finally, Plaintiffs' challenges to the "merits" of the State Trash TMDLs may very well be valid, but in the absence of any indication that they will suffer imminent hardship, these claims are premature.

The Court does not suggest by any means that Plaintiffs have acted in bad faith by continuing to

prosecute this action after EPA approved the State Trash TMDLs. But after receiving Defendants' opening brief for their Motion to Dismiss, Plaintiffs should have recognized that their claims could not be maintained at present, if at all. The arguments in their opposition brief appear to reflect more of a "win at all costs" approach than [\*\*49] considered judgment. And while the Court does not doubt that Plaintiffs would appreciate a judicial declaration as to the validity of the State Trash TMDLs, the Court lacks jurisdiction to grant such relief where Plaintiffs are not in jeopardy of imminent harm and future events could obviate the controversy.

Accordingly,

IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss Second Amended Complaint [Docket No. 18] is GRANTED, such that:

a. The First Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED, as follows:

i. The claim that EPA acted without authority and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79), is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

ii. The claim that EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (SAC PP80, 83), is DISMISSED

WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief [\*\*50] can be granted;

iii. The claim that EPA acted arbitrarily and capriciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (SAC PP81-82), is DISMISSED WITHOUT LEAVE TO AMEND and [\*1161] WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

iv. The claim that the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (SAC PP84-86), is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief can be granted;

v. The claim that EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance with the procedures of the CWA and California law, (SAC P87), is DISMISSED WITHOUT

LEAVE TO AMEND in this action and WITHOUT PREJUDICE as unripe and, thus, for lack of subject matter jurisdiction;

b. The Second Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED, as [\*\*51] follows:

i. To the extent the Second Claim for Relief challenges the validity of the EPA Trash TMDLs, the claim is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

ii. To the extent the Second Claim for Relief challenges the validity of the alleged *de facto* TMDL procedure, the claim is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief can be granted;

c. The Third Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED on the same bases, and to the same extent, as the First and Second Claims for Relief are dismissed, given that the Third Claim for Relief is derivative of the first two claims.

2. Plaintiffs' Motion for Summary Adjudication of Issues [Docket No. 28] is

DENIED AS MOOT.

3. Plaintiffs' Objections to Declarations of David W. Smith and Dennis Dickerson Offered by Defendants in Support of Defendants' Motion to Dismiss Second Amended Complaint [Docket No. 31] are OVERRULED on the merits with respect to the objections under headings II.1 and II.2 therein and OVERRULED AS MOOT with respect [\*\*52] to all remaining objections.

4. Intervenors' Evidentiary Objections to Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss [Docket No. 43] are OVERRULED AS MOOT.

5. Plaintiffs' Objections to Declaration of Anjali I. Jaiswal and Exhibits [Docket No. 47] are OVERRULED AS MOOT.

IT IS FURTHER ORDERED THAT this action is DISMISSED in its entirety. The Clerk shall enter judgment in favor of defendants accordingly. All deadlines and events presently calendared are VACATED. [\*1162] The Clerk shall close the file and terminate any pending matters.

IT IS SO ORDERED.

Dated: May 16, 2003

SAUNDRA BROWN ARMSTRONG

United States District Judge

#### JUDGMENT

In accordance with the Court's Order Granting Defendants' Motion to Dismiss, Denying as Moot Plaintiffs' Motion for Partial Summary Judgment, and Dismissing Action,

IT IS HEREBY ORDERED THAT judgment is entered in favor of defendants and defendants-intervenors, and against plaintiffs, on all of plaintiffs' claims for relief as follows:

1. The First Claim for Relief in the Second Amended Complaint for Injunctive and [\*\*53] Declaratory Relief ("SAC") is DISMISSED, such that:

a. The claim that EPA acted without authority and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79), is DISMISSED WITH PREJUDICE;

b. The claim that EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (SAC PP80, 83), is DISMISSED WITH PREJUDICE;

c. The claim that EPA acted arbitrarily and capriciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (SAC PP81-82), is DISMISSED WITH PREJUDICE;

d. The claim that the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the

State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (SAC PP84-86), is DISMISSED WITH PREJUDICE;

e. The claim that EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance [\*\*54] with the procedures of the CWA and California law, (SAC P87), is DISMISSED WITHOUT PREJUDICE;

2. The Second Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED WITH PREJUDICE in its entirety; and

3. The Third Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED to the same extent as the First and Second Claims for Relief are dismissed.

IT IS SO ORDERED.

Dated: May 16, 2003

SAUNDRA BROWN ARMSTRONG

United States District Judge

**Citation #11**  
**723 f.3d 1191 \*\***

LEXSEE

**LUCIA FANCHER, individually and as personal representative of the estate of Nick Dominguez, Plaintiff - Appellee, v. JOHNNY BARRIENTOS, in his individual and official capacity; SHERIFF TODD GARRISON, COUNTY OF DOÑA ANA, Defendants - Appellants.**

**No. 12-2114**

**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

**723 F.3d 1191; 2013 U.S. App. LEXIS 14113**

**July 12, 2013, Filed**

**SUBSEQUENT HISTORY:** Motion granted by, in part, Motion denied by, in part Fancher v. Barrientos, 2013 U.S. Dist. LEXIS 187992 (D.N.M., Aug. 19, 2013)

**PRIOR HISTORY:** [\*\*1]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. (D.C. NO. 2:11-CV-00118-LH-LAM).

**COUNSEL:** Kevin M. Brown (Desiree D. Gurule and Elizabeth V. Friedenstein with him on the briefs), Brown Law Firm, Albuquerque, New Mexico, for Defendants Appellants.

Mark Fine, Fine Law Firm, Albuquerque, New Mexico, for Plaintiff - Appellee.

**JUDGES:** Before LUCERO, MURPHY, and MATHESON, Circuit Judges.

**OPINION BY:** MURPHY

**OPINION**

[\*1193] MURPHY, Circuit Judge.

### **I. Introduction**

Defendant Johnny Barrientos, a deputy of the Doña Ana County Sheriff's Department, appeals the district court's denial of his motion for summary judgment in a 42 U.S.C. § 1983 action brought by Lucia Fancher, individually and on behalf of the estate of her son, Nick

Dominguez. Fancher alleges Barrientos used excessive force in violation of the Fourth Amendment when he shot Dominguez seven times following a confrontation in Mesquite, New Mexico. Dominguez died as a result of one or more gunshot wounds. Barrientos asserts he is entitled to qualified immunity because his use of deadly force was objectively reasonable and did not violate clearly established law. The district court granted Barrientos's motion for summary judgment to the extent Fancher's claim [\*\*2] arose from the firing of the initial shot, but denied the motion to the extent the claim arose from the firing of the subsequent six shots.

On appeal, Barrientos makes three arguments. First, he asserts the district court erred in analyzing the second through seventh shots separately from the [\*1194] first shot. Next, he argues the district court did not sufficiently consider the risks posed to third parties in analyzing the reasonableness of shots two through seven. Finally, he argues the law was not clearly established that his actions violated the Fourth Amendment. This court lacks jurisdiction to consider the first two arguments, and is unpersuaded by the third. Thus, exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms** the denial of summary judgment by the district court.<sup>1</sup>

1 Fancher's complaint also includes claims against Sheriff Todd Garrison in his individual and official capacities as well as the County of Doña Ana. Although all defendants filed the notice of appeal, the only issues raised relate to the denial of qualified immunity to Barrientos. Sheriff Garrison did not claim entitlement to qualified immunity and the county is not entitled



to qualified immunity, *Starkey ex rel. A.B. v. Boulder Cnty. Soc. Servs.*, 569 F.3d 1244, 1263 n.4 (10th Cir. 2009) [\*\*3] ("Qualified immunity . . . is available only in suits against officials sued in their personal capacities, not in suits against governmental entities or officials sued in their official capacities.").

## II. Background

Because, when reviewing the denial of a summary judgment motion asserting qualified immunity, we lack jurisdiction to review the district court's conclusions as to what facts the plaintiffs may be able to prove at trial, *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008); *see also supra* Part III.A., we restate the district court's account of the relevant factual background here:

On March 29, 2010, at approximately 5:41 p.m., Deputy Barrientos responded to a reported theft of two 20-packs of bottled Budweiser beer from the Mesquite Mercantile in Mesquite, New Mexico. There was no report that the suspects were armed or threatening. Deputy Barrientos was on duty, in full uniform with his badge displayed, and driving a marked patrol vehicle. Defendant Barrientos was issued two patrol rifles, but his squad car was equipped with only one lock for one of the rifles. He had the assault rifle in the front seat of his car . . . .

Upon arrival at the Mercantile, Deputy Barrientos [\*\*4] interviewed a female clerk who told him that the manager in the back office had a security camera video of the theft. Deputy Barrientos reviewed the video, which showed a male in a white shirt and blue jeans at the counter, and a second male wearing a black jacket and black pants moving quickly across the screen. The clerk told Deputy Barrientos that the individual at the counter was named Michael and might live in a trailer near Highway 192.

Deputy Barrientos began searching the property outside the Mercantile when police dispatch advised him at

approximately 6:02 p.m. of a trespass involving two vehicles and several subjects drinking at the Helena Chemical plant, across the road from the Mercantile. While proceeding to the plant, Deputy Barrientos observed a male wearing a white shirt and blue jeans riding a bicycle down an alley. Deputy Barrientos stopped the bicyclist for questioning at approximately 6:06 p.m. Deputy Barrientos identified the bicyclist as an older man named Carlos Cenicerros, who informed him that he knew where the individuals who stole the beer were and that they were near a red car.

As Deputy Barrientos interviewed Mr. Cenicerros, a man from a nearby house approached [\*\*5] them and stated that the suspects were in the area of an irrigation canal by a tree. Deputy Barrientos began searching for the suspects, driving his patrol vehicle northbound on the [\*1195] east side of a large irrigation canal accessible from Highway 192. He spotted a red car turn onto the west side of the canal driving northbound. Believing that the red car was associated with the theft at the Mercantile, Deputy Barrientos activated his emergency equipment and initiated a traffic stop at approximately 6:18 p.m. The red car yielded at a tree near the intersection of the large irrigation canal and a smaller canal.

Deputy Barrientos's practice and training are to leave the patrol vehicle running with the emergency equipment engaged during traffic stops. The window was down to facilitate his visual search of the area. The squad car was parked facing north on a clearing of hard dirt.

Deputy Barrientos approached and questioned the driver who remained in the car. Because the driver was a man in his late fifties and the sole occupant of the vehicle, Deputy Barrientos concluded that he was not involved in the theft and released him.

Immediately after the red car drove off, Deputy Barrientos observed [\*\*6] Mr. Ceniceros seated on the ground across the large canal to the northeast. Deputy Barrientos had not moved from where he had been standing beside the driver's door of the red car. He walked toward Mr. Ceniceros to question him further about the suspects. There was a water pipe spanning the large canal which allowed foot traffic to move from one side to the other. When asked about the suspects' location, Mr. Ceniceros said he did not know, but indicated behind Deputy Barrientos with his eyes and by nodding.

Just then, Deputy Barrientos heard a noise behind him and turned around to see that a beer bottle had landed near him. The bottle landed between 10 to 15 feet away from him. In his experience, a bottle can be used as a weapon. He was still unable to see the suspects.

Because the thrown beer bottle indicated someone was hiding and he did not know who it was or what was going on, Deputy Barrientos drew his weapon and walked toward a large irrigation pump in order to see behind it. Using a tactical maneuver that he was trained to use, Deputy Barrientos moved around the pump in an attempt to expose the suspects while maintaining a safe distance. Deputy Barrientos saw two young men and [\*\*7] a young woman hiding in a depression on the far side of a steel I-beam that served as a foundation for the pump. Deputy Barrientos recognized one of the young men who wore a white shirt and blue jeans, later identified as Michael Herrera, from the Mercantile security video. Deputy Barrientos also recognized his own cousin, Valerie Gonzalez, and was concerned that she might try to harm him because she had gang affiliations and had previously made negative comments about the fact that Deputy Barrientos was a law enforcement officer. The second young man, wearing black pants without a shirt,

was later identified as Nick Dominguez. Nick Dominguez was 17 years of age at the time.

Deputy Barrientos notified dispatch at 6:21 p.m. that he had three suspects at gun point. He then commanded the subjects to show their hands. Mr. Herrera complied while remaining on his knees. Ms. Gonzalez also complied. Mr. Dominguez, however, remained crouched on the ground concealing his hands, which concerned Deputy Barrientos because he feared that the suspects could have weapons concealed in their clothing. Mr. Dominguez's failure to comply prevented Deputy Barrientos from frisking the suspects to this point.

[\*1196] Deputy [\*\*8] Barrientos commanded Ms. Gonzalez to step over the I-beam and lie down, and she complied. Mr. Herrera remained on his knees and kept his hands raised. Deputy Barrientos ordered Mr. Dominguez to move closer to him and to step over the I-beam and lie down next to Ms. Gonzalez. After refusing to comply with several commands, Mr. Dominguez stepped over the I-beam but did not lie down as instructed. Instead, Mr. Dominguez moved toward Deputy Barrientos in three motions, asking "right here?" each time. Mr. Dominguez moved within a couple of feet of Deputy Barrientos. Deputy Barrientos again ordered Mr. Dominguez to lie down, but instead he dropped to one knee and then suddenly lunged at Deputy Barrientos, grabbing his duty weapon with both hands.

As the two men struggled, Mr. Dominguez yelled to the other suspects to run away. Deputy Barrientos again commanded Mr. Dominguez to release his weapon and get on the ground but he did not comply. During the struggle, Ms. Gonzalez remained prone on the ground with her head and shoulders toward Deputy Barrientos and Mr. Dominguez,

while Mr. Herrera remained on his knees. Both suspects were just a few feet away from the struggle.

The men fell to their [\*\*9] knees with Mr. Dominguez on Deputy Barrientos's left side. The weapon discharged into the ground and malfunctioned. The discharge concerned Deputy Barrientos because the bullet could have struck himself, Ms. Gonzalez, or Mr. Herrera, who were both just a few feet away; Mr. Cenicerros, who was a few yards away; or an occupant at one of the residences across the field. After the weapon discharged, Mr. Dominguez continued trying to take it away from Deputy Barrientos. Deputy Barrientos forced the weapon's barrel into the dirt and then drew his taser.

Deputy Barrientos tasered Mr. Dominguez in the back. Although the taser deployed, it did not work. Mr. Dominguez then let go of the gun, pushed free from the struggle, and fled directly toward the patrol vehicle, jumping over the smaller irrigation canal. Deputy Barrientos saw that the malfunction was a so-called "stove pipe" jam, where the spent shell casing lodges in the ejection port and prevents the weapon from firing. He quickly cleared the malfunction and ran after Mr. Dominguez.

Mr. Dominguez entered the driver's side of the patrol vehicle just as Deputy Barrientos caught up to him. At that moment, Deputy Barrientos was aware that Mr. [\*\*10] Dominguez had just tried to take his duty weapon away from him and that there were two loaded long guns in the vehicle. Deputy Barrientos believed that a round fired from one of the long guns, an AR-15 assault rifle, could have struck a nearby residence.

Deputy Barrientos quickly approached the patrol vehicle and, with his duty weapon in his right hand, tried to remove the ignition keys with his left hand

while shouting at Mr. Dominguez to stop and get out of the vehicle. Mr. Dominguez pushed Deputy Barrientos's left hand away, resisting his attempt to remove the ignition keys. The engine was racing. As Deputy Barrientos struggled to remove the ignition keys, Mr. Dominguez shifted the patrol vehicle into reverse.

Deputy Barrientos fired his duty weapon at Mr. Dominguez's center mass, or chest area. He began firing his weapon before the vehicle started going backwards. Deputy Barrientos was sure that he had hit Mr. Dominguez [\*1197] with the initial shot to the chest because he saw him slump.

After firing his weapon, the car began to press up against his shoulder. He could feel the car pushing him away and turning him to the right. Deputy Barrientos testified that he took two or three steps away [\*\*11] from the car after the first shot. He testified that he felt safer after he backed away from the vehicle. The squad car continued to move in reverse, away from Deputy Barrientos. He nevertheless continued shooting at Mr. Dominguez after he had moved backwards those two to three steps, even though he did not at that time have any indication that Mr. Dominguez was armed.

Deputy Barrientos fired seven shots. Mr. Herrera heard a period of silence between two separate rounds of gunfire. He heard a series of gunshots, followed by five to seven seconds in which he did not hear any gunshots, followed by the sound of two more gunshots.

Mr. Cenicerros saw Deputy Barrientos fire shots at Mr. Dominguez while he was in the car. Immediately after Deputy Barrientos fired the last shot, Mr. Cenicerros saw Deputy Barrientos at a distance of between eight to ten feet from the side of the squad car.

Deputy Barrientos testified that, if his

long gun had not been in the car, he likely would not have shot Mr. Dominguez. Although he had mace on him at the time he first shot Mr. Dominguez and was within range to use it, Deputy Barrientos did not consider using it instead of deadly force. Deputy Barrientos was [\*\*12] sure that firing his weapon effectively eliminated any threat posed by Mr. Dominguez. At 6:22 p.m., Deputy Barrientos notified dispatch that the subject was down.

....

New Mexico State Police Agent Norman Rhoades was assigned to be the "crime scene manager" of the crime scene in this case. Based on Deputy Barrientos's initial statement describing events and evidence at the crime scene, Agent Rhoades prepared crime scene diagrams. The diagrams show that the squad car moved in a backwards arc from its initial position and came to a stop at the end of its backward arc in a field of weeds and fine sand. Based on his investigation, Agent Rhoades determined that, when Mr. Dominguez was behind the wheel of the squad car, the car only moved in reverse away from Deputy Barrientos.

Agent Rhoades indicated in the diagrams that a shot into the chest through the heart was "Possibly 2nd shot;" the shot into the upper left front seat backrest was "Possibly 3rd shot;" the shot into the upper left front door was "Possibly 4th shot;" and the shot into the lower left front door was "Possibly 5th shot." Agent Rhoades acknowledged, though, that the sequences 2 through 5 in the diagrams "could be altered [\*\*13] as far as the sequence goes." He explained that, for example, wound C could have just as likely been caused by shot 2, 3, 4, or 5. The diagrams further state: "Possibly 6th shot, into upper left front door striking both arms," and "Possibly 7th shot, striking suspect's head." Agent Rhoades acknowledged that

shots 6 and 7 could be re-sequenced.

Mem. Op. & Order at 1-10 (citations omitted).

Fancher brought suit under 42 U.S.C. § 1983, alleging Barrientos's use of deadly force against Dominguez was unreasonable and violated the Fourth Amendment. Barrientos moved for summary judgment, arguing he was entitled to qualified immunity because his use of deadly force was [\*\*1198] objectively reasonable as a matter of law. Relying heavily on *Thomas v. Durastanti*, 607 F.3d 655, 665 (10th Cir. 2010), the district court concluded Barrientos did not violate Dominguez's constitutional rights by firing the first shot because his reaction to a violent, fleeing felon was objectively reasonable. Alternatively, the court concluded it was not clearly established at the time of the shooting that Barrientos's firing of the first shot was unlawful. The district court also concluded, however, that multiple unresolved [\*\*14] factual issues precluded summary judgment as to the firing of the remaining shots:

Deputy Barrientos testified that he saw Mr. Dominguez slump after the first shot. He also testified that, after the first shot, he stepped away from the car, and thus, was not in immediate danger of being run over with the vehicle, which was moving backwards away from him. Significantly, Deputy Barrientos testified that he felt safer after having taken those steps away from the vehicle. Additionally, Deputy Barrientos's testimony indicated that Mr. Dominguez was not reaching for the long guns in the vehicle after the first shot.

A jury could construe Mr. Dominguez's slumping as an indication that he was no longer able to control the vehicle, to escape, or to fire a long gun, and thus, may no longer have presented a danger to the public, Deputy Barrientos, or other responding officers. Moreover, a jury could also reasonably construe Deputy Barrientos's testimony that he did not fire the second shot until after he stepped back, felt safer, and noticed Mr. Dominguez slump as indicating that enough time passed between the first and second shots for Deputy Barrientos to

recognize and react to the changed circumstances [\*\*15] and cease firing his gun. There is thus a question of fact as to whether, under the totality of circumstances, Deputy Barrientos reasonably perceived that he or others were in danger at the precise moments that he fired shots two through seven, and thus, whether those additional shots were excessive.

Mem. Op. & Order at 30. The court therefore denied qualified immunity to Barrientos as to shots two through seven. This appeal followed.

### III. Discussion

#### A. Jurisdiction<sup>2</sup> and Standard of Review

2 This court has an independent obligation to ensure it has subject matter jurisdiction at every stage of the litigation. *Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1208 n.10 (10th Cir. 2012).

This court has jurisdiction under 28 U.S.C. § 1291 to review "all final decisions of the district courts of the United States." Ordinarily, an order denying summary judgment is not a "final decision" within the meaning of § 1291. *Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1266 (10th Cir. 2013). The denial of qualified immunity to a public official, however, is immediately appealable under the collateral order doctrine to the extent it involves abstract issues of law. *Johnson v. Jones*, 515 U.S. 304, 317, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995); [\*\*16] *Armijo ex rel. Chavez v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1258 (10th Cir. 1998). Thus, "[a] determination that the law allegedly violated by the defendant was clearly established at the time of the challenged actions is an abstract issue of law that is immediately appealable. A determination that under either party's version of the facts the defendant violated clearly established law is also immediately appealable." *Foote v. Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997).

[\*1199] This court, however, lacks jurisdiction at this stage "to review a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference." *Fogarty*, 523 F.3d at 1154. Thus, in reviewing the district

court's rejection of Barrientos's qualified immunity defense, "we must scrupulously avoid second-guessing the district court's determinations regarding whether [Fancher] has presented *evidence* sufficient to survive summary judgment." *Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997).<sup>3</sup>

3 *Johnson's* jurisdictional rule is subject to a few exceptions. If the district court does not "identify [\*\*17] the particular charged conduct that it deemed adequately supported by the record, we may look behind the order denying summary judgment and review the entire record *de novo* to determine for ourselves as a matter of law which factual inferences a reasonable jury could and could not make." *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010). "Second, when the 'version of events' the district court holds a reasonable jury could credit 'is blatantly contradicted by the record,' we may assess the case based on our own *de novo* view of which facts a reasonable jury could accept as true." *Id.* at 1225-26 (quoting *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)). Finally, this court "need not defer to the district court's assessment of the reasonable factual inferences that arise from a complaint at the motion to dismiss stage." *Id.* at 1226. The first and third of these exceptions are plainly inapplicable, and Barrientos has not advanced an argument in support of the second.

Within this court's limited jurisdiction, we review the district court's denial of a summary judgment motion asserting qualified immunity *de novo*. *Dodds v. Richardson*, 614 F.3d 1185, 1192 (10th Cir. 2010). "When a defendant asserts [\*\*18] qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009).

#### B. Barrientos's Assertion of Qualified Immunity

##### 1. "Segmented" Analysis

Barrientos first argues the district court erred in analyzing shots two through seven separately from the first shot. Barrientos nominally frames this argument as a legal issue, asserting that segregating the shots as the district court did constitutes a "misapplication of the

totality of the circumstances standard" which is applied when analyzing excessive force claims. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (holding that determining whether force was excessive under the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"); *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (holding deadly force may not [\*\*19] be used "to prevent the escape of an apparently unarmed suspected felon . . . unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others"). Ultimately, however, Barrientos's argument depends upon a challenge to the facts the district court concluded a reasonable jury could infer based upon the evidence in the summary judgment record. For example, Barrientos asserts the district court's use of a segmented approach was error "when *the facts of the incident are* that Barrientos and the public were placed in danger [\*1200] from the moment he was attacked by the decedent until the time that Barrientos was completely sure that neither he nor the public were in further danger." Appellant's Br. at 19 (emphasis added).

The district court relied on *Thomas* for the proposition that "circumstances may change within seconds eliminating the justification for deadly force." 607 F.3d at 666; *accord Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) ("We therefore hold that force justified at the beginning of an encounter is not justified even seconds later if the justification [\*\*20] for the initial force has been eliminated."). Barrientos does not take issue with the district court's reliance on *Thomas* or *Waterman* as an abstract legal matter, i.e., he does not argue it is never appropriate in an incident involving the firing of multiple shots by a police officer to analyze the shots separately if the circumstances so warrant. Instead, Barrientos strenuously argues that the circumstances of *this* case are not amenable to such analysis. Specifically, he argues that, unlike the situation in *Waterman*, "the threat of harm caused by the decedent to Barrientos and to nearby community members existed for the duration of the approximately ninety . . . second incident." Appellant's Br. at 22. The district court, however, concluded the evidence was sufficient for a reasonable

jury to draw a contrary inference:

Although in some circumstances multiple shots fired in a matter of seconds should be grouped together in the qualified immunity analysis, this case is different. Here, there is evidence that Deputy Barrientos had time between the first shot and the following shots to take a few steps back to get out of the way of the car, to assess the situation, and to know that Mr. [\*\*21] Dominguez had slumped and may not have presented a continuing danger to himself or to the public.

Mem. Op. & Order at 16. Because Barrientos's first argument on appeal cannot reasonably be understood as anything other than an attack on these conclusions of the district court, this court lacks jurisdiction to consider it. *Fogarty*, 523 F.3d at 1154; *Clanton*, 129 F.3d at 1153.

## 2. Danger to Third Parties

Barrientos's second argument on appeal is similarly unreviewable. Barrientos argues the district court did not consider the risk posed to third parties in applying the segmented approach. In support of this argument Barrientos lists several material facts which he alleges the district court failed to consider when analyzing whether Dominguez posed a continuing threat after the first shot. Barrientos goes on to argue that these facts should have led the district court to conclude that he "could not reasonably have known that [Dominguez] was sufficiently subdued such that he no longer presented a threat to the officer or the community when Deputy Barrientos fired shots two through seven." *Id.* at 25. Again, Barrientos's argument amounts to nothing more than a request for review of the "factual [\*\*22] conclusions" of the district court, a task which exceeds the scope of our jurisdiction on interlocutory review of the denial of qualified immunity. *Fogarty*, 523 F.3d at 1154.

## 3. Clearly Established Law

Unlike Barrientos's first two arguments, his third presents no jurisdictional difficulties. Whether a constitutional right was clearly established at the time an alleged violation occurred is a "quintessential" example of a purely legal determination fit for interlocutory review. *Garrett v. Stratman*, 254 F.3d 946, 952 n.8 (10th

Cir. 2001). Nonetheless, in light of the facts we must assume to be true at this stage of the proceedings, we readily conclude Barrientos's argument is without [\*1201] merit. In *Casey v. City of Federal Heights*, this court discussed the "clearly established" standard in the context of excessive force claims:

Ordinarily . . . for a rule to be clearly established there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains. However, because excessive force jurisprudence requires an all-things-considered inquiry with "careful attention to the facts [\*\*23] and circumstances of each particular case," *Graham*, 490 U.S. at 396, there will almost never be a previously published opinion involving exactly the same circumstances. We cannot find qualified immunity wherever we have a new fact pattern. Indeed, the Supreme Court has warned that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). The *Hope* decision shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional.

509 F.3d 1278, 1284 (10th Cir. 2007) (citations and quotations omitted). According to the factual scenario upon which the district court based its rejection of Barrientos's claim to qualified immunity, which this court lacks the authority to review, Barrientos fired six shots into a suspect who was "no longer able to control the vehicle, to escape, or to fire a long gun, and thus, may no longer have presented a danger to the public, Deputy Barrientos, or other responding officers." Mem. Op. & Order at [\*\*24] 30. Prior to shooting Dominguez, Barrientos "stepped back, felt safer, and noticed Mr. Dominguez slump." *Id.* This allowed him "enough time . . . to recognize and react to the changed circumstances and cease firing his gun." *Id.* Under these circumstances, we have no trouble concluding Barrientos lacked probable cause to believe Dominguez posed a threat of serious harm to Barrientos or others at the time he fired shots two through seven. *Garner*, 471 U.S. at 3, 11 ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). We further have no trouble concluding a reasonable officer in Barrientos's position would have known that firing shots two through seven was unlawful. *Casey*, 509 F.3d at 1284. Accordingly, the district court, in evaluating Barrientos's assertion of qualified immunity, did not err in concluding Barrientos violated clearly established law when he fired shots two through seven.

#### IV. Conclusion

For the foregoing reasons, the judgment of the district court is **affirmed**.

**Citation #12**  
**98 ca4th 1351**



LEXSEE

**HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Plaintiffs and Appellants,  
v. CITY OF SALINAS et al., Defendants and Respondents.**

**No. H022665.**

**COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT**

**98 Cal. App. 4th 1351; 121 Cal. Rptr. 2d 228; 2002 Cal. App. LEXIS 4198; 2002 Cal.  
Daily Op. Service 4853; 2002 Daily Journal DAR 6161**

**June 3, 2002, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1] Rehearing Denied July 2, 2002.

Review Denied August 28, 2002, Reported at: 2002 Cal. LEXIS 5938.

**PRIOR HISTORY:** Superior Court of Monterey County. Super. Ct. No. M45873. Richard M. Silver, Judge.

**DISPOSITION:** The judgment is reversed. Costs on appeal are awarded to plaintiffs.

**COUNSEL:** Timothy J. Morgan; Jonathan M. Coupal and Timothy A. Bittle for Plaintiffs and Appellants.

James C. Sanchez, City Attorney; Richards, Watson & Gershon, Mitchell E. Abbott and Patrick K. Bobko for Defendants and Respondents.

**JUDGES:** Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.

**OPINION BY:** Elia

**OPINION**

[\*1352] [\*\*229] **ELIA, J.**

In this "reverse validation" action, plaintiff taxpayers challenged a storm drainage fee imposed by the City of Salinas. Plaintiffs contended that the fee was a "property-related" fee requiring voter approval, pursuant to California Constitution, article XIII D, section 6, subdivision (c), which was added by the passage of

Proposition 218. The trial court ruled that the fee did not violate this provision because (1) it was not a property-related fee [\*1353] and (2) it met the exemption [\*\*\*2] for fees for sewer and water services. We disagree with the trial court's conclusion and therefore reverse the order.

**BACKGROUND**

In an effort to comply with the 1987 amendments to the federal Clean Water Act (33 U.S.C. § 1251 et seq.; 40 C.F.R. § 122.26(a) et seq. (2001)), the Salinas City Council took measures to reduce or eliminate pollutants contained in storm water, which was channeled in a drainage system separate from the sanitary and industrial waste systems. On June 1, 1999, the city council enacted two ordinances to fund and maintain the compliance program. These measures, ordinance Nos. 2350 and 2351, added former chapters 29 and 29A, respectively, to the Salinas City Code. Former section 29A-3 allowed the city council to adopt a resolution imposing a "Storm Water Management Utility fee" to finance the improvement of storm and surface water management facilities. The fee would be imposed on "users of the storm water drainage system."

On July 20, 1999, the city council adopted resolution No. 17019, which established rates for the storm and surface water management system. The resolution specifically states: "There is hereby imposed on each [\*\*\*3] and every developed parcel of land within the City, and the owners and occupiers thereof, jointly and severally, a storm drainage fee." The fee was to be paid annually to the City "by the owner or occupier of each and every developed parcel in the City who shall be

presumed to be the primary utility rate payer . . . ." The amount of the fee was to be calculated according to the degree to which the property contributed runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of "impervious area" <sup>1</sup> on that parcel.

1 "Impervious Area," according to resolution No. 17019, is "any part of any developed parcel of land that has been modified by the action of persons to reduce the land's natural ability to absorb and hold rainfall. This includes any hard surface area which either prevents or retards the entry of water into the soil mantle as it entered under natural conditions pre-existent to development, and/or a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions pre-existent to development."

[\*\*\*4] [\*\*230] Undeveloped parcels--those that had not been altered from their natural state--were not subject to the storm drainage fee. In addition, developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the City's storm drainage facilities were required to pay in proportion to the amount they did contribute runoff or used the City's treatment services.

[\*1354] On September 15, 1999, plaintiffs filed a complaint under Code of Civil Procedure section 863 to determine the validity of the fee. <sup>2</sup> Plaintiffs alleged that this was a property-related fee that violated article XIII D, section 6, subdivision (c), of the California Constitution because it had not been approved by a majority vote of the affected property owners or a two-thirds vote of the residents in the affected area. The trial court, however, found this provision to be inapplicable on two grounds: (1) the fee was not "property related" and (2) it was exempt from the voter-approval requirement because it was "related to" sewer and water services.

2 Plaintiffs are the Howard Jarvis Taxpayers Association, the Monterey Peninsula Taxpayers Association, and two resident property owners.

[\*\*\*5] *DISCUSSION*

Article XIII D was added to the California

Constitution in the November 1996 election with the passage of Proposition 218, the Right to Vote on Taxes Act. Section 6 of article XIII D <sup>3</sup> requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. (§ 6, subd. (a)(2).) The provision at issue is section 6, subdivision (c) (hereafter section 6(c)), which states, in relevant part: "Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area."

3 All further unspecified section references are to article XIII D of the California Constitution.

Section 2 [\*\*\*6] defines a "fee" under this article as a levy imposed "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (§ 2, subd. (e).) A "property-related service" is "a public service having a direct relationship to property ownership." (§ 2, subd. (h).) (1a) The City maintains that the storm drainage fee is not a property-related fee, but a "user fee" which the property owner can avoid simply by maintaining a storm water management facility on the property. Because it is possible to own property without being subject to the fee, the City argues this is not a fee imposed "as an incident of property ownership" or "for a property-related service" within the meaning of section 2.

We cannot agree with the City's position. Resolution No. 17019 plainly established a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the [\*1355] City. The resolution [\*\*231] expressly stated that "each owner and occupier of a developed lot or parcel of real property within the City, is served by the City's storm drainage facilities" and burdens the [\*\*\*7] system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property "should therefore pay for the improvement, operation and maintenance of such facilities." Accordingly, the resolution makes the fee applicable to "each and every developed parcel of land within the City." (Italics added.) This is not a charge directly based on or measured by use, comparable to the metered use of

water or the operation of a business, as the City suggests. (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal. 4th 830, 838 [102 Cal. Rptr. 2d 719, 14 P.3d 930] [art. XIII D inapplicable to inspection fee imposed on private landlords; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal. App. 4th 79 [101 Cal. Rptr. 2d 905] [water usage rates are not within the scope of art. XIII D].)

The "Proportional Reduction" clause on which the City relies does not alter the nature of the fee as property related. <sup>4</sup> A property owner's operation of a private storm drain system reduces the amount owed to the City to the extent that runoff into the City's system is reduced. The fee [\*\*\*8] nonetheless is a fee for a public service having a direct relationship to the ownership of developed property. The City's characterization of the proportional reduction as a simple "opt-out" arrangement is misleading, as it suggests the property owner can avoid the fee altogether by declining the service. Furthermore, the reduction is not proportional to the amount of services requested or used by the occupant, but on the physical properties of the parcel. Thus, a parcel with a large "impervious area" (driveway, patio, roof) would be charged more than one consisting of mostly rain-absorbing soil. Single-family residences are assumed to contain, on average, a certain amount of impervious area and are charged \$ 18.66 based on that assumption.

4 According to the public works director, proportional reductions were not anticipated to apply to a large number of people.

Proposition 218 specifically stated that "[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local [\*\*\*9] government revenue and enhancing taxpayer consent." (Prop. 218, § 5; reprinted at Historical Notes, 2A West's Ann. Cal.Const. (2002 supp.) foll. art. XIII C, p. 38 [hereafter Historical Notes].) (2) We are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers--in this case, the voters of California--in a manner that effectuates their purpose in adopting the law. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 244-245 [149 Cal. Rptr. 239, 583 P.2d 1281]; *Arden Carmichael, Inc. v. County of Sacramento* (2000) 93 Cal. App. 4th 507, 514-515 [113 Cal. Rptr. 2d 248]; *Board of Supervisors v. Lonergan* (1980) 27 Cal. 3d 855, 863 [167 [\*1356] Cal.

Rptr. 820, 616 P.2d 802].) (1b) To interpret the storm drainage fee as a use-based charge would contravene one of the stated objectives of Proposition 218 by "frustrat[ing] the purposes of voter approval for tax increases." (Prop. 218, § 2.) We must conclude, therefore, that the storm drainage fee "burden[s] landowners as landowners," and is therefore subject [\*\*\*10] to the voter-approval requirements of article XIII D unless an exception applies. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra*, 24 Cal. 4th at p. 842.)

[\*\*232] EXCEPTION FOR "SEWER" OR "WATER" SERVICE

As an alternative ground for its decision, the trial court found that the storm drainage fee was "clearly a fee related to 'sewer' and 'water' services." The exception in section 6(c) applies to fees "for sewer, water, and refuse collection services." Thus, the question we must next address is whether the storm drainage fee was a charge for sewer service or water service.

The parties diverge in their views as to whether the reach of California Constitution, article XIII D, section 6(c) extends to a storm drainage system as well as a sanitary or industrial waste sewer system. The City urges that we rely on the "commonly accepted" meaning of "sewer," noting the broad dictionary definition of this word. <sup>5</sup> The City also points to Public Utilities Code section 230.5 and the Salinas City Code, which describe storm drains as a type of sewer. <sup>6</sup>

5 Webster's Third New International Dictionary, for example, defines "sewer" as "1: a ditch or surface drain 2: an artificial usu. subterranean conduit to carry off water and waste matter (as surface water from rainfall, household waste from sinks or baths, or waste water from industrial works)." (Webster's 3d New Internat. Dict. (1993) p. 2081.) The American Heritage Dictionary also denotes the function of "carrying off sewage or rainwater." (American Heritage College Dict. (3d ed. 1997) p. 1248.) On the other hand, the Random House Dictionary of the English Language (2d ed. 1987) page 1754, does not mention storm or rainwater in defining "sewer" as "an artificial conduit, usually underground, for carrying off waste water and refuse, as in a town or city."

[\*\*\*11]

6 Public Utilities Code section 230.5 defines "Sewer system" to encompass all property connected with "sewage collection, treatment, or disposition for sanitary or drainage purposes, including . . . all drains, conduits, and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters." Salinas City Code section 36-2, subdivision (31) defines "storm drain" as "a sewer which carries storm and surface waters and drainage, but which excludes sewage and industrial wastes other than runoff water."

Plaintiffs "do not disagree that storm water is carried off in storm sewers," but they argue that we must look beyond mere definitions of "sewer" to examine the legal meaning in context. Plaintiffs note that the storm water management system here is distinct from the sanitary sewer system and the industrial waste management system. Plaintiffs' position echoes that of the [\*1357] Attorney General, who observed that several California [\*\*\*12] statutes differentiate between management of storm drainage and sewerage systems. <sup>7</sup> (81 Ops.Cal.Atty.Gen. 104, 106 (1998).) Relying extensively on the Attorney General's opinion, plaintiffs urge application of a different rule of construction than the plain-meaning rule; they invoke the maxim that "if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted." (*In re Marquis D.* (1995) 38 Cal. App. 4th 1813, 1827 [46 Cal. Rptr. 2d 198].) Thus, while section 5, which addresses assessment procedures, refers to exceptions specifically [\*\*233] for "*sewers, water, flood control, [and] drainage systems*" (italics added), the exceptions listed in section 6(c) pertain only to "sewer, water, and refuse collection services." Consequently, in plaintiffs' view, the voters must have intended to exclude drainage systems from the list of exceptions to the voter-approval requirement.

<sup>7</sup> For example, Government Code section 63010 specifies "storm sewers" in delimiting the scope of "[d]rainage," while separately identifying the facilities and equipment used for "[s]ewage collection and treatment." ( Gov. Code, § 63010, subd. (q)(3), (10).) Government Code section

53750, part of the Proposition 218 Omnibus Implementation Act, explains that for purposes of articles XIII C and article XIII D " '[d]rainage system' " means "any system of public improvements that is intended to provide for erosion control, landslide abatement, or for other types of water drainage." Health and Safety Code section 5471 sets forth government power to collect fees for "services and facilities . . . in connection with its water, sanitation, storm drainage, or sewerage system."

[\*\*\*13] The statutory construction principles invoked by both parties do not assist us. The maxim proffered by plaintiffs, "although useful at times, is no more than a rule of reasonable inference" and cannot control over the lawmakers' intent. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal. 4th 342, 350 [45 Cal. Rptr. 2d 279, 902 P.2d 297]; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal. 4th 985, 991 [73 Cal. Rptr. 2d 682, 953 P.2d 858].) On the other hand, invoking the plain-meaning rule only begs the question of whether the term "sewer services" was intended to encompass the more specific sewerage with which most voters would be expected to be familiar, or all types of systems that use sewers, including storm drainage and industrial waste. The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

We conclude that the term "sewer services" is ambiguous in the context of both section 6(c) and Proposition 218 as a whole. We must keep in mind, however, the voters' [\*\*\*14] intent that the constitutional provision be construed liberally to curb the rise in "excessive" taxes, assessments, and fees exacted [\*1358] by local governments without taxpayer consent. (Prop. 218, §§ 2, 5; reprinted at Historical Notes, *supra*, p. 38.) Accordingly, we are compelled to resort to the principle that exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage. <sup>8</sup> (Cf. *Estate of Banerjee* (1978) 21 Cal. 3d 527, 540 [147 Cal. Rptr. 157, 580 P.2d 657]; *City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16 Cal. App. 4th 1005 [20 Cal. Rptr. 2d 658].)

<sup>8</sup> Sanitary sewerage carries "putrescible waste"

from residences and businesses and discharges it into the sanitary sewer line for treatment by the Monterey Regional Water Pollution Control Agency. (Salinas City Code, § 36-2, subd. (26).)

The City itself treats storm drainage differently [\*\*\*15] from its other sewer systems. The stated purpose of ordinance No. 2350 was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of "non-storm water" into the storm drainage system, which channels storm water into state waterways. According to John Fair, the public works director, the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water.<sup>9</sup> The Salinas City Code contains requirements [\*\*234] addressed specifically to the management of storm water runoff.<sup>10</sup> (See, e.g., Salinas City Code, §§ 31-802.2, 29-15.)

9 Resolution No. 17019 defined "Storm Drainage Facilities" as "the storm and surface water sewer drainage systems comprised [*sic*] of storm water control facilities and any other natural features [that] store, control, treat and/or convey surface and storm water. The Storm Drainage Facilities shall include all natural and man-made elements used to convey storm water from the first point of impact with the surface of the earth to a suitable receiving body of water or location internal or external to the boundaries of the City. . . ." The "storm drainage system" was defined to include pipes, culverts, streets and gutters, "storm water sewers," ditches, streams, and ponds. (See also Salinas City Code, former § 29-3, subd. (l) [defining "storm drainage system"].)

[\*\*\*16]

10 Storm water under ordinance No. 2350 includes "stormwater runoff, snowmelt runoff, and surface runoff and drainage." (Salinas City Code, former § 29-3, subd. (dd).)

For similar reasons we cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." Government Code section 53750, enacted to explain some of the terms used in articles XIII C and XIII D, defines "[w]ater" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

We conclude that article XIII D required the City to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of [\*1359] the affected area. The trial court therefore [\*\*\*17] erred in ruling that ordinance Nos. 2350 and 2351 and Resolution No. 17019 were valid exercises of authority by the city council.

#### DISPOSITION

The judgment is reversed. Costs on appeal are awarded to plaintiffs.

Premo, Acting P. J., and Mihara, J., concurred.

A petition for a rehearing was denied July 2, 2002, and respondents' petition for review by the Supreme Court was denied August 28, 2002.

**SECTION 7  
DOCUMENTATION  
IN SUPPORT OF TEST CLAIM  
IN RE  
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD  
ORDER NO. R9-2013-0001  
NPDES NO. CAS 0109266  
OF  
COUNTY OF SAN DIEGO  
VOLUME IV  
MISCELLANEOUS AUTHORITIES**

**INDEX TO SECTION 7 DOCUMENTATION**

**VOLUME IV  
MISCELLANEOUS AUTHORITIES**

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STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD  
**ORDER WQ 2015-0075**

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In the Matter of Review of

Order No. R4-2012-0175, NPDES Permit No. CAS004001

**WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL SEPARATE STORM SEWER  
SYSTEM (MS4) DISCHARGES WITHIN THE COASTAL WATERSHEDS OF  
LOS ANGELES COUNTY, EXCEPT THOSE DISCHARGES ORIGINATING FROM THE  
CITY OF LONG BEACH MS4**

Issued by the  
California Regional Water Quality Control Board,  
Los Angeles Region

***SWRCB/OCC FILES A-2236 (a)-(kk)***

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BY THE BOARD:

In this order, the State Water Resources Control Board (State Water Board) reviews [Order No. R4-2012-0175](#) (NPDES Permit No. CAS004001) adopted by the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) on November 8, 2012. Order No. R4-2012-0175 regulates discharges of storm water and non-storm water from the municipal separate storm sewer systems (MS4s) located within the coastal watersheds of Los Angeles County, with the exception of the City of Long Beach MS4, and is hereinafter referred to as the “Los Angeles MS4 Order” or the “Order.” We received 37 petitions challenging various provisions of the Los Angeles MS4 Order. For the reasons discussed herein, we generally uphold the Los Angeles MS4 Order, but with a number of revisions to the findings and provisions in response to issues raised in the petitions and as a result of our own review of the Order.

**I. BACKGROUND**

The Los Angeles MS4 Order regulates discharges from the MS4s operated by the Los Angeles County Flood Control District, Los Angeles County, and 84 municipal permittees (Permittees) in a drainage area that encompasses more than 3,000 square miles and multiple watersheds. The Order was issued by the Los Angeles Water Board in



accordance with section 402(p)(3)(B) of the Clean Water Act<sup>1</sup> and sections 13263 and 13377 of the Porter-Cologne Water Quality Control Act (Porter-Cologne Act),<sup>2</sup> as a National Pollutant Discharge Elimination System (NPDES) permit to control storm water and non-storm water discharges that enter the area's water bodies from the storm sewer systems owned or operated by the multiple governmental entities named in the Order. The Los Angeles MS4 Order superseded Los Angeles Water Board [Order No. 01-182](#) (2001 Los Angeles MS4 Order), and is the fourth iteration of the NPDES permit for MS4 discharges in the relevant area.

The Los Angeles MS4 Order incorporates most of the pre-existing requirements of the 2001 Los Angeles MS4 Order, including the water quality-based requirement to not cause or contribute to exceedances of water quality standards in the receiving water. The Los Angeles MS4 Order also requires Permittees to comply with new water quality-based requirements to implement 33 watershed-based total maximum daily loads (TMDLs) for the region. The Order links both of these water quality-based requirements to the programmatic elements of the Order by allowing Permittees to comply with the water quality-based requirements, in part, by developing and implementing a watershed management program (WMP) or enhanced watershed management program (EWMP), as more specifically defined in the Order.

Following adoption of the Los Angeles MS4 Order, we received 37 timely petitions challenging various provisions of the Order and, in particular, the provisions implementing TMDLs and integrating water quality-based requirements and watershed-based program implementation. Several petitioners asked that their petitions be held in abeyance;<sup>3</sup> however, due to the number of active petitions also seeking review, we declined to hold those petitions in abeyance at that time.<sup>4</sup> Five petitioners additionally requested that we partially stay the Los Angeles MS4 Order. Following review, the Executive Director of the State Water Board denied the stay requests for failure to comply with the prerequisites for a stay as specified in California Code of Regulations, title 23, section 2053.

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<sup>1</sup> 33 U.S.C. § 1342(p)(3)(B).

<sup>2</sup> Wat. Code, §§ 13263, 13377.

<sup>3</sup> See Cal. Code Regs., tit. 23, § 2050.5, subd. (d).

<sup>4</sup> By letter dated January 30, 2013, we provided an opportunity for petitioners to submit an explanation for why a petition should be held in abeyance notwithstanding the existence of the active petitions. In response, two petitioners, City of Signal Hill and the City of Claremont, argued that their petitions raised unique issues not common to the remaining petitions and therefore appropriate for abeyance. We thereafter denied their requests on July 29, 2013, finding that the unique issues could nevertheless be resolved concurrently with the issues in the other petitions. On October 9, 2013, the City of Claremont withdrew two of the claims in its petition.

We deemed the petitions complete by letter dated July 8, 2013, and, as permitted under our regulations,<sup>5</sup> consolidated the petitions for review.

An issue front and center in the petitions is the appropriateness of the approach of the Los Angeles MS4 Order in addressing what we generally refer to as “receiving water limitations.” Receiving water limitations in MS4 permits are requirements that specify that storm water and non-storm water discharges must not cause or contribute to exceedances of water quality standards in the waters of the United States that receive those discharges. In precedential State Water Board [Order WQ 99-05](#) (*Environmental Health Coalition*), we directed that all MS4 permits contain specific language that explains how the receiving water limitations will be implemented. (For clarity, we refer to MS4 permit language that relates to implementation of the permit’s receiving water limitations as “receiving water limitations provisions.”) We held a workshop on November 20, 2012, concerning receiving water limitations in MS4 permits. The purpose of the workshop was to receive public comment on an issue paper discussing several alternatives to the receiving water limitations provisions currently included in MS4 permits as directed by Order WQ 99-05 (Receiving Water Limitations Issue Paper).<sup>6</sup>

Because the Los Angeles MS4 Order contains new provisions that authorize the Permittees to develop and implement WMP/EWMPs in lieu of requiring compliance with the receiving water limitations provisions, we view our review of the Order as an appropriate avenue for resolving some of the issues raised in our November 20, 2012 workshop. Through notice to all interested persons, we bifurcated the responses to the petitions and solicited two separate sets of responses: (1) Responses to address issues related to whether the WMP/EWMP alternatives contained in the Los Angeles MS4 Order are an appropriate approach to revising the receiving water limitations provisions in MS4 permits (August 15, 2013 Receiving Water Limitations Submissions); and (2) Responses to address all other issues raised in the petitions (October 15, 2013 Responses).<sup>7</sup> We held a workshop on October 8, 2013, to hear public comment on the first set of responses.

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<sup>5</sup> Cal. Code Regs., tit. 23, § 2054.

<sup>6</sup> Information on that workshop is available at [http://www.waterboards.ca.gov/water\\_issues/programs/stormwater/rwl.shtml](http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml) (as of Nov 18, 2014).

<sup>7</sup> We requested the bifurcated responses initially by letter dated July 15, 2013. Subsequent letters on July 29, 2013, and September 18, 2013, clarified the nature of the submissions and extended the submission deadline for the second response.

State Water Board regulations generally require final disposition on petitions within 270 days of the date a petition is deemed complete.<sup>8</sup> However, in this case, we required additional time to review the large number of issues raised in the petitions. When the State Water Board anticipates addressing a petition on the merits after the review period passes, it may indicate that it will review the matter on its own motion.<sup>9</sup> On April 1, 2014, we adopted [Order WQ 2014-0056](#) taking up review of the issues in the petitions on our own motion.<sup>10</sup>

We now resolve the issues in the petitions with this order.

## II. ISSUES AND FINDINGS

The 37 petitions raise over sixty contentions claiming deficiencies in the Los Angeles MS4 Order. This Order addresses the most significant contentions. To the extent petitioners raised issues that are not discussed in this Order, such issues are dismissed as not raising substantial issues appropriate for State Water Board review.<sup>11</sup>

Before proceeding to the merits of the petitions, we will resolve several procedural issues.

### Requests to Take Official Notice or Supplement the Record with Additional Evidence

We received a number of requests to take official notice of documents not in the administrative record of the adoption of the Los Angeles MS4 Order by the Los Angeles Water Board (hereinafter Administrative Record)<sup>12</sup> and a number of requests to admit supplemental evidence not considered by the Los Angeles Water Board.<sup>13</sup> We reviewed the requests with

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<sup>8</sup> Cal. Code Regs., tit. 23, § 2050.5, subd. (b).

<sup>9</sup> See Wat. Code, § 13320, subd. (a); Cal. Code Regs., tit. 23, § 2050.5, subd. (c).

<sup>10</sup> To avoid premature litigation on the petition issues as a result of our review extending past the 270 day-regulatory review period, at our suggestion most of the petitioners asked that their petitions be placed in abeyance until adoption by the State Water Board of a final order. We granted those requests. Simultaneously with adopting this order, we are removing the petitions from abeyance and acting upon them.

<sup>11</sup> *People v. Barry* (1987) 194 Cal.App.3d 158, 175-177; *Johnson v. State Water Resources Control Bd.* (2004) 123 Cal.App.4th 1107, 1114; Cal. Code Regs., tit. 23, § 2052, subd. (a)(1).

<sup>12</sup> The Administrative Record was prepared by the Los Angeles Water Board and is available at <[http://www.waterboards.ca.gov/losangeles/water\\_issues/programs/stormwater/municipal/AdminRecordOrderNoR4\\_2012\\_0175/index.shtml](http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/AdminRecordOrderNoR4_2012_0175/index.shtml)> (as of Nov. 18, 2014).

<sup>13</sup> Several requests for official notice or to admit supplemental evidence were received concurrently with submission of the petitions, with the August 15, 2013 Receiving Water Limitations Submissions, and with the October 15, 2013 Responses. Additional requests for official notice were submitted concurrently with comments on first and revised public drafts of this order and were opposed by several parties. (Request for Official Notice, Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay, Jan. 21, 2015; Request for Official Notice, Natural Resources Defense Council, Los Angeles Waterkeeper and Heal the Bay, June 2, 2015.) Although we have reviewed these additional requests for official notice, we have not granted the requests for the various reasons articulated in this section, in Section II.B.8, and in footnote 74.

consideration of whether they were appropriate for notice or admission based on the legal standards governing our proceedings<sup>14</sup> and whether the documents would materially aid in our review of the issues in the proceedings. We grant the requests with regard to documents 1-7 below, and additionally take official notice on our own motion of documents 8, 9, and 10.<sup>15</sup>

1. [Order No. 2013-0001-DWQ](#), NPDES Permit for Storm Water Discharges from Small MS4s, adopted by State Water Board, February 5, 2013;<sup>16</sup>
2. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia issued by the United States Environmental Protection Agency (USEPA), November 9, 2012, and a responsiveness summary issued in support of its original adoption of the permit, October 7, 2011;<sup>17</sup>
3. Administrative Procedures Update Number 90-004 on Antidegradation Policy Implementation for NPDES Permitting, issued by the State Water Board, July 2, 1990;<sup>18</sup>
4. Chapter 7 of the NPDES Permit Writers' Manual, updated by USEPA, September 2010;<sup>19</sup>
5. Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA, August 8, 2012;<sup>20</sup>

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<sup>14</sup> For official notice see Cal. Code Regs., tit. 23, § 648.2; Gov. Code, § 11515; Evid. Code, § 452. For admission of supplemental evidence see Cal. Code Regs., tit. 23, § 2050.6.

<sup>15</sup> We note that two documents for which we received requests for official notice are already in the administrative record: USEPA, Memorandum Setting Forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (Nov. 12, 2010) (Administrative Record, section 10.II, RB-AR23962-23968); USEPA, Chapter 6 of the NPDES Permit Writers' Manual (updated Sept. 2010) (Administrative Record, section 10.IV, RB-AR24905-24932).

<sup>16</sup> County of Los Angeles October 15, 2013 Response, Att. C; also available at <[http://www.waterboards.ca.gov/water\\_issues/programs/stormwater/docs/phsii2012\\_5th/order\\_final.pdf](http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/phsii2012_5th/order_final.pdf)> (as of Nov. 18, 2014).

<sup>17</sup> Los Angeles Water Board Request for State Water Board to Take Official Notice of Or Accept as Supplemental Evidence Exhibit A through SS (Oct. 15, 2013) (Los Angeles Water Board Request for Official Notice), Exh.'s A, B; also available at <[http://www.epa.gov/reg3wapd/pdf/pdf\\_npdes/stormwater/DCMS4/MS4FinalLimitedModDocument/FinalModifiedPermit\\_10-25-12.pdf](http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/MS4FinalLimitedModDocument/FinalModifiedPermit_10-25-12.pdf)> and <[http://www.epa.gov/reg3wapd/pdf/pdf\\_npdes/stormwater/DCMS4/FinalPermit2011/DCMS4FINALResponsivenessSummary093011.pdf](http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/FinalPermit2011/DCMS4FINALResponsivenessSummary093011.pdf)> (as of Nov. 18, 2014).

<sup>18</sup> Los Angeles Water Board Request for Official Notice, Exh.C; also available at <[http://www.swrcb.ca.gov/water\\_issues/programs/npdes/docs/apu\\_90\\_004.pdf](http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/apu_90_004.pdf)> (as of Nov. 18, 2014).

<sup>19</sup> Chapter 7 of USEPA's NPDES Permit Writers' Manual, EPA-833-K-10-001, September 2010 (NPDES Permit Writers' Manual) was submitted as Exhibit C to Natural Resources Defense Council, Los Angeles Waterkeeper and Heal the Bay Request for Official Notice (Dec. 10, 2012) (Environmental Petitioners' Request for Official Notice). The chapter may additionally be accessed through links at <<http://water.epa.gov/polwaste/npdes/basics/NPDES-Permit-Writers-Manual.cfm>> (as of Nov. 18, 2014).

6. Memorandum to the Water Management Division Directors, Regions I-X, and NPDES State Directors, issued by USEPA, 1989;<sup>21</sup>
7. “Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12,” issued by USEPA, Region 9, June 3, 1987;<sup>22</sup>
8. [Order WQ 2014-0077-DWQ](#), amending NPDES Statewide Storm Water Permit for State of California Department of Transportation, [Order 2012-0011-DWQ](#), adopted by State Water Board, May 20, 2014;<sup>23</sup>
9. Statement from USEPA soliciting comments on the USEPA Memorandum Setting forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (November 12, 2010), issued March 17, 2011.<sup>24</sup>
10. Memorandum, “Revisions to the November 22, 2002 Memorandum ‘Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,’” issued by USEPA, November 26, 2014.<sup>25</sup>

In addition, we are incorporating the administrative record of the November 20, 2012 workshop on receiving water limitations, including the Receiving Water Limitations Issue Paper and comments by interested persons, into our record for the petitions on the Los Angeles MS4 Order.<sup>26</sup>

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*(continued from previous page)*

<sup>20</sup> Environmental Petitioners’ Request for Official Notice, Exh.B, available at <[http://www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality/docs/a2236/a2236m\\_rfon.pdf](http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf)> (as of Nov. 18, 2014).

<sup>21</sup> Environmental Petitioners’ Request for Official Notice, Exh.D; also available at <<http://www.epa.gov/npdes/pubs/owm0231.pdf>> (as of Nov. 18, 2014).

<sup>22</sup> Environmental Petitioners’ Request for Official Notice, Exh.E; available at <[http://www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality/docs/a2236/a2236m\\_rfon.pdf](http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf)> (as of Nov. 18, 2014).

<sup>23</sup> Available at <[http://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/water\\_quality/2014/wqo2014\\_0077\\_dwq.pdf](http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2014/wqo2014_0077_dwq.pdf)> (as of Nov. 18, 2014).

<sup>24</sup> Available at <[http://water.epa.gov/polwaste/npdes/stormwater/upload/sw\\_tmdlwla\\_comments.pdf](http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf)> (as of Nov. 18, 2014).

<sup>25</sup> Available at <[http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA\\_SW\\_TMDL\\_Memo.pdf](http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA_SW_TMDL_Memo.pdf)> (as of March 30, 2015).

<sup>26</sup> The Receiving Water Limitations Issue Paper and comments and workshop presentations by interested person are available at <[http://www.waterboards.ca.gov/water\\_issues/programs/stormwater/rwl.shtml](http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml)>.

Among other requests, we are not granting the requests to take official notice of or supplement the Administrative Record with the notices of intent, workplans, draft programs, and other documents filed by Permittees toward development of WMPs/EWMPs and associated monitoring programs following adoption of the Los Angeles MS4 Order or comments submitted on those documents, or the conditional approvals of several of the programs. With regard to factual evidence regarding actions taken by Permittees to comply with the Los Angeles MS4 Order after it was adopted, we believe it appropriate to close the record with the adoption of the Los Angeles MS4 Order. However, we are keenly aware that the success of the Los Angeles MS4 Order in addressing water quality issues depends primarily on the careful and effective development and implementation of programs consistent with the requirements of the Order; we speak to that issue later in our discussion.

*City of El Monte's Amended Petition*

Petitioner City of El Monte (El Monte) timely filed a petition on December 10, 2012, challenging a number of provisions of the Los Angeles MS4 Order. Thereafter, on February 19, 2013, El Monte filed an amended petition, based on information it asserted was not available prior to the deadline for submission of the petition.

Water Code section 13320, subdivision (a) provides that a petition for review of a regional water quality control board (regional water board) action must be filed within 30 days of the regional water board's action.<sup>27</sup> The State Water Board interprets that requirement strictly and petitions filed more than 30 days from regional water board action are rejected as untimely. El Monte asserted that the two additional arguments raised in the amended petition were based on information that was not available prior to the deadline for submitting the petition and were therefore appropriate for State Water Board consideration.

Even if we were required by statute or regulation to accept amended petitions based on new information, here, El Monte's new arguments are not supported by information previously unavailable. First, El Monte argues that the Supreme Court's decision in *Los Angeles County Flood Control District v. Natural Resources Defense Council* (2013) 133 S.Ct. 710 invalidated certain provisions of the Los Angeles MS4 Order that require compliance with water quality standards and total maximum daily load requirements through receiving water monitoring. Contrary to El Monte's assertion, the decision by the Supreme Court did not invalidate any requirements of the Los Angeles MS4 Order and did not result in any changes to

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<sup>27</sup> See also Cal. Code Regs., tit. 23, § 2050.

the Order. The Supreme Court decision, to the extent it applies to the legal issues before us in this matter, constitutes precedential case law and must be considered in our review of the Los Angeles MS4 Order, but it does not constitute new information that supports an amended petition.<sup>28</sup>

Second, El Monte argues that the Los Angeles Water Board failed to consider various provisions of the California Watershed Improvement Act of 2009<sup>29</sup> when it adopted the Los Angeles MS4 Order. To the extent El Monte believed that the California Watershed Improvement Act was relevant to adoption of the Los Angeles MS4 Order, El Monte had the opportunity to raise that issue in comments before the Los Angeles Water Board and in its timely petition to the State Water Board. Having failed to raise the issue before the Los Angeles Water Board and in its timely petition, El Monte cannot raise the issue in an amended petition.<sup>30</sup>

We reject El Monte's amended petition as untimely.

*Environmental Petitioners' Motion to Strike*

Petitioners Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay (Environmental Petitioners), submitted a motion on November 11, 2013, requesting that the State Water Board strike sections of the October 15, 2013 Responses by six petitioners (Motion to Strike). The relevant sections respond to a collateral estoppel argument made by the Environmental Petitioners in their August 15, 2013 Receiving Water Limitations Submission to the State Water Board. Several parties asserted in their petitions that requiring compliance with water quality standards in MS4 permits violates federal law or conflicts with prior State Water Board precedent. The Environmental Petitioners responded in their August 15, 2013 Receiving Water Limitations Submission that these arguments were barred by collateral estoppel because the claims were settled in prior court cases challenging the 2001 Los Angeles MS4 Order. Six of the October 15, 2013 Responses, namely those by the Cities of

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<sup>28</sup> We note that the State Water Board has the option of allowing additional briefing when there are material legal developments concerning issues raised in a petition, but we did not find such briefing would aid review of the petitions in this case.

<sup>29</sup> Wat. Code, § 16100 et seq.

<sup>30</sup> In addition to being untimely, El Monte's argument lacks merit. The California Watershed Improvement Act of 2009 grants authority to local government permittees regulated by an MS4 permit to develop and implement watershed improvement plans, but does not limit the authority of a regional water board to impose terms related to watershed management in an MS4 permit. Further, the terms of the WMPs/EWMPs are largely consistent with the watershed improvement plans authorized by the Act, so a permittee can comply with the Los Angeles MS4 Order while also using the authority provided by the California Watershed Improvement Act of 2009 if it so chooses.

Arcadia, Claremont, Covina, Duarte and Huntington Park, San Marino et al.,<sup>31</sup> and Sierra Madre, incorporated a response to the collateral estoppel argument.

We stated in a July 15, 2013 letter that “[i]nterested persons may not use the [October 15]<sup>32</sup> deadline for responses on the remaining petition issues as an opportunity to respond to comments filed on the receiving water limitations approach.” We clarified further in a July 29, 2013 letter: “[W]hen submitting subsequent responses to the petitions in accordance with the [October 15] deadline, petitioners and interested persons should not raise new issues related to the specific questions regarding the watershed management program/enhanced watershed management program or respond to any August 15, 2013, submissions; however petitioners and interested persons will not be precluded from responding to specific issues raised in the original petitions on grounds that the issues are related to the receiving water limitations language.”

We find that the collateral estoppel responses by the six petitioners are disallowed by the direction we provided in our July 15 and July 29, 2013 letters. However, as will be apparent in our discussion in section II.A, we do not rely on the Environmental Petitioners’ collateral estoppel argument in resolving the petitions. Our determination that portions of the October 15, 2013 Responses are disallowed is, therefore, immaterial to the resolution of the issues.<sup>33</sup>

Having resolved the procedural issues, we turn to the merits of the Petitions.

#### **A. Implementation of the Iterative Process as Compliance with Receiving Water Limitations**

The Los Angeles MS4 Order includes receiving water limitations provisions that are consistent with our direction in Order WQ 99-05 in Part V.A of the Los Angeles MS4 Order. Part V.A. provides, in part, as follows:

1. Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited.

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<sup>31</sup> The cities of San Marino, Rancho Palos Verdes, South El Monte, Norwalk, Artesia, Torrance, Beverly Hills, Hidden Hills, Westlake Village, La Mirada, Vernon, Monrovia, Agoura Hills, Commerce, Downey, Inglewood, Culver City, and Redondo Beach submitted a joint October 15, 2013 Response.

<sup>32</sup> The July 15, 2013 letter set a deadline of September 20, 2013, which was subsequently extended to October 15, 2013.

<sup>33</sup> In a November 21, 2013 letter, we indicated that we would consider the Motion to Strike concurrently with drafting of this Order, but that we would not accept any additional submissions in this matter, including any responses to the Motion to Strike. City of San Marino objected to the letter and submitted an opposition to the Motion to Strike. Several petitioners submitted joinders in City of San Marino’s motion. For the same reasons articulated above, we are not accepting these submissions; they would not affect our resolution of the issues.



2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible [footnote omitted], shall not cause or contribute to a condition of nuisance.
3. The Permittees shall comply with Parts V.A.1 and V.A.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications. . . .<sup>34</sup>

The petitioners that are permittees (hereinafter referred to as “Permittee Petitioners”)<sup>35</sup> argue that the above language either means, or should be read and/or clarified to mean, that good faith engagement in the requirements of Part V.A.3, traditionally referred to as the “iterative process,” constitutes compliance with Parts V.A.1. and V.A.2. The position put forth by Permittee Petitioners is one we took up when we initiated a process to re-examine the receiving water limitations and iterative process in MS4 permits statewide with our Receiving Water Limitations Issue Paper and the November 20, 2012 workshop. We summarize the law and policy regarding Permittee Petitioners’ position again here and ultimately disagree with Permittee Petitioners that implementation of the iterative process does or should constitute compliance with receiving water limitations.

The Clean Water Act generally requires NPDES permits to include technology-based effluent limitations and any more stringent limitations necessary to meet water quality standards.<sup>36</sup> In the context of NPDES permits for MS4s, however, the Clean Water Act does not explicitly reference the requirement to meet water quality standards. MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP) in all cases, but requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency.<sup>37</sup> Specifically the Clean Water Act states as follows:

Permits for discharges from municipal storm sewers –

. . .

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

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<sup>34</sup> Los Angeles MS4 Order, Part V.A, pp. 38-39.

<sup>35</sup> For ease of reference, where an argument is made by multiple Permittee Petitioners, even if not by all, we attribute that argument to Permittee Petitioners generally, and do not list which of the 37 Permittee Petitioners in fact make the argument. Where only one or two Permittee Petitioners make a particular argument, we have identified the specific Permittee Petitioner(s).

<sup>36</sup> 33 U.S.C. §§ 1311, 1342(a).

<sup>37</sup> 33 U.S.C. § 1342(p)(3)(B); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as . . . the State determines appropriate for the control of such pollutants.<sup>38</sup>

Thus, a permitting agency imposes requirements related to attainment of water quality standards where it determines that those provisions are “appropriate for the control of [relevant] pollutants” pursuant to the Clean Water Act municipal storm water provisions.

Under the Porter-Cologne Act, waste discharge requirements must implement applicable water quality control plans, which include the beneficial uses to be protected for a given water body and the water quality objectives reasonably required for that protection.<sup>39</sup> In this respect, the Porter-Cologne Act treats MS4 dischargers and other dischargers even-handedly and anticipates that all waste discharge requirements will implement the water quality control plans. However, when implementing requirements under the Porter-Cologne Act that are not compelled by federal law, the State Water Board and regional water boards (collectively, “water boards”) have some flexibility to consider other factors, such as economics, when establishing the appropriate requirements.<sup>40</sup> Accordingly, since the State Water Board has discretion under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, the State Water Board may also utilize the flexibility under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.

We have previously exercised the discretion we have under federal law in favor of requiring compliance with water quality standards, but have required less than strict compliance. We have directed, in precedential orders, that MS4 permits require discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters,<sup>41</sup> but have prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements. That iterative process involves reporting of the violation, submission of a report describing proposed improvements to BMPs

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<sup>38</sup> 33 U.S.C. § 1342(p)(3)(B).

<sup>39</sup> Wat. Code, § 13263. The term “water quality standards” encompasses the beneficial uses of the water body and the water quality objectives (or “water quality criteria” under federal terminology) that must be met in the waters of the United States to protect beneficial uses. Water quality standards also include the federal and state antidegradation policy.

<sup>40</sup> Wat. Code, §§ 13241, 13263; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.

<sup>41</sup> State Water Board Orders WQ 98-01 (*Environmental Health Coalition*), WQ 99-05 (*Environmental Health Coalition*), WQ 2001-15 (*Building Industry Association of San Diego*).

expected to better meet water quality standards, and implementation of these new BMPs.<sup>42</sup> The current language of the existing receiving waters limitations provisions was actually developed by USEPA when it vetoed two regional water board MS4 permits that utilized a prior version of the State Water Board's receiving water limitations provisions.<sup>43</sup> In State Water Board Order WQ 99-05, we directed that all regional boards use USEPA's receiving water limitations provisions.

There has been significant confusion within the regulated MS4 community regarding the relationship between the receiving water limitations and the iterative process, in part because the water boards have commonly directed dischargers to achieve compliance with water quality standards by improving control measures through the iterative process. But the iterative process, as established in our precedential orders and as generally written into MS4 permits adopted by the water boards, does not provide a "safe harbor" to MS4 dischargers. When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process.<sup>44</sup>

The position that the receiving water limitations are independent from the provisions that establish the iterative process has been judicially upheld on several occasions. The receiving water limitations provisions of the 2001 Los Angeles MS4 Order specifically have been litigated twice, and in both cases, the courts upheld the provisions and the Los Angeles Water Board's interpretation of the provisions. In a decision resolving a challenge to the 2001 Los Angeles MS4 Order, the Los Angeles County Superior Court stated: "[T]he Regional [Water] Board acted within its authority when it included [water quality standards compliance] in

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<sup>42</sup> State Water Board Order WQ 99-05, pp. 2-3; see also State Water Board Order WQ 2001-15, pp. 7-9. Additionally, consistent with federal law, we found it appropriate to require implementation of BMPs in lieu of numeric water quality-based effluent limitations to meet water quality standards. See State Water Board Orders WQ 91-03 (*Citizens for a Better Environment*), WQ 91-04 (*Natural Resources Defense Council*), WQ 98-01, WQ 2001-15. This issue is discussed in greater detail in Section II.C. of this order.

<sup>43</sup> See State Water Board Orders WQ 99-05, WQ 2001-15.

<sup>44</sup> Several Permittee Petitioners have argued that the State Water Board's opinion in State Water Board Order WQ 2001-15 must be read to endorse a safe harbor in the iterative process. We disagree. Regardless, the State Water Board's position that the iterative process of the subject permit did not create a "safe harbor" from compliance with receiving water limitations was clearly established in subsequent litigation on that order. (See *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (Super. Ct. 2003, No. GIC780263), *affd.* *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4<sup>th</sup> 866.)

the Permit without a ‘safe harbor,’ whether or not compliance therewith requires efforts that exceed the ‘MEP’ standard.”<sup>45</sup> The lack of a safe harbor in the iterative process of the 2001 Los Angeles MS4 Order was again acknowledged in 2011 and 2013, this time by the Ninth Circuit Court of Appeal. In these instances, the Ninth Circuit was considering a citizen suit brought by the Natural Resources Defense Council against the County of Los Angeles and the Los Angeles County Flood Control District for alleged violations of the receiving water limitations of that order. The Ninth Circuit held that, as the receiving water limitations of the 2001 Los Angeles MS4 Order (and accordingly as the precedential language in State Water Board Order WQ 99-05) was drafted, engagement in the iterative process does not excuse liability for violations of water quality standards.<sup>46</sup> The California Court of Appeal has come to the same conclusion in interpreting similar receiving water limitations provisions in MS4 Orders issued by the San Diego Regional Water Quality Control Board in 2001 and the Santa Ana Regional Water Quality Control Board in 2002.<sup>47</sup>

While we reiterate that the judicial rulings have been consistent with the water boards’ intention and position regarding the relationship between the receiving water limitations and the iterative process, we acknowledge that some in the regulated community perceived the 2011 Ninth Circuit opinion in particular as a re-interpretation of that relationship. Our Receiving Water Limitations Issue Paper and subsequent workshop reflected our desire to re-examine the issue in response to concerns expressed by the regulated community in the aftermath of that ruling.

As stated above, both the Clean Water Act and the Porter-Cologne Act afford some discretion to not require strict compliance with water quality standards for MS4 discharges. In each of the discussed court cases above, the court’s decision is based on the specific permit language; thus the cases do not address our authority with regard to requiring compliance with water quality standards in an MS4 permit as a threshold matter, and they do not require us to continue to exercise our discretion as we decided in State Water Board Order

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<sup>45</sup> *In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-5, 7. The decision was affirmed on appeal (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4<sup>th</sup> 985); however, this particular issue was not discussed in the court of appeal’s decision.

<sup>46</sup> *Natural Resources Defense Council v. County of Los Angeles* (9<sup>th</sup> Cir. 2011) 673 F.3d. 880, rev’d on other grounds sub nom. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2013) 133 S.Ct. 710, mod. by *Natural Resources Defense Council v. County of Los Angeles* (9<sup>th</sup> Cir. 2013) 725 F.3d 1194, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135.

<sup>47</sup> *Building Industry Assn. of San Diego County, supra*, 124 Cal.App.4<sup>th</sup> 866; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4<sup>th</sup> 1377.

WQ 99-05. Although it would be inconsistent with USEPA's general practice of requiring compliance with water quality standards over time through an iterative process,<sup>48</sup> we may even have the flexibility to reverse<sup>49</sup> our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will either no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance.<sup>50</sup>

However, with this Order, we now decline to do either. As the storm water management programs of municipalities have matured, an increasing body of monitoring data indicates that many water quality standards are in fact not being met by many MS4s. The iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards. Compliance with water quality standards is and should remain the ultimate goal of any MS4 permit. We reiterate and confirm our determination that provisions requiring compliance with receiving water limitations are "appropriate for the control of . . . pollutants" addressed in MS4 permits and that therefore, consistent with our authority under the Clean Water Act, we will continue to require compliance with receiving water limitations.<sup>51</sup>

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<sup>48</sup> See, e.g. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia, *supra*, fn. 17.

<sup>49</sup> Of course any change of direction would be subject to ordinary principles of administrative law. (See Code Civ. Proc., § 1094.5, subd. (b).)

<sup>50</sup> As such, it is not necessary to address the collateral estoppel arguments raised by the Environmental Petitioners and opposed by Permittee Petitioners. We agree that it is settled law that we have the discretion to require compliance with water quality standards in an MS4 permit under federal and state law. We also agree that it is settled law that the receiving water limitations provisions currently spelled out in our MS4 permits do not carve out a safe harbor in the iterative process. But the question for us is whether we should continue to exercise our discretion to utilize the same approach to receiving water limitations established under our prior precedent, or proceed in a new direction.

<sup>51</sup> Several Permittee Petitioners argued in comments submitted on the first draft of this order that, because we find that we have some discretion under Clean Water Act section 402(p)(3) to not require compliance with receiving water limitations, the Los Angeles Water Board's action in requiring such compliance -- and our action in affirming it -- is pursuant to state authority. (See, e.g., Cities of Arcadia, Claremont, and Covina, Comment Letter, Jan. 21, 2015.) The Permittee Petitioners argue that the action is therefore subject to evaluation in light of the factors set out in Water Code section 13263 and 13241 pursuant to *City of Burbank*, *supra*, 35 Cal.4th 613. Under *City of Burbank*, a regional water board must consider the factors specified in section 13241 when issuing waste discharge requirements under section 13263, subdivision (a), but only to the extent those waste discharge requirements exceed the requirements of the federal Clean Water Act. (35 Cal.4th at 627.) Nowhere in our discussion in this section do we mean to disavow either that the Los Angeles Water Board acted under federal authority to impose "such other provisions as . . . determine[d] appropriate for the control of . . . pollutants" in adopting the receiving water limitations provisions of the Los Angeles MS4 Order in the first instance or that we are acting under federal authority in upholding those provisions. (33 U.S.C. § 1342(p)(3)(B)(iii).) The receiving water limitations provisions do not exceed the requirements of federal law. We nevertheless also point out that the Los Angeles Water Board engaged in an analysis of the factors under section 13241 when adopting the Order. (See Los Angeles MS4 Order, Att. F, Fact Sheet, pp. F-139 to F-155.)

As we explained in 2001, “[u]rban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses.”<sup>52</sup> More than a decade later, this is still true. By definition, many of our urban waterways will never attain water quality standards and fully realize their beneficial uses if municipal runoff is allowed to continue to cause or contribute to exceedances of water quality standards. Further, the efforts of other dischargers who are required to not cause or contribute to exceedances of water quality standards would be largely in vain if we did not regulate MS4 dischargers with a somewhat even hand.

Such an approach is additionally consistent with the Porter-Cologne Act’s emphasis on water quality control plans as the cornerstone of water quality planning and regulation and the act’s expectation that all waste discharge requirements will implement the water quality control plans. We believe that direct enforcement of water quality standards is necessary to protect water quality, at a minimum as a back-stop where dischargers fail to meet requirements of the Order designed to achieve progress toward meeting the standards. We will not reverse our precedential determination in State Water Board Order WQ 99-05 that established the receiving water limitations provisions for MS4 permits statewide and reiterate that we will continue to read those provisions consistent with how the courts have: engagement in the iterative process does not excuse exceedances of water quality standards. We accordingly also decline to direct any revisions to the receiving water limitations provisions of the Los Angeles MS4 Order, which are consistent with our precedential language.<sup>53</sup>

Yet, we are sympathetic to the assertions made by MS4 dischargers that the receiving water limitations provisions mandated by our Order WQ 99-05 may result in many years of permit noncompliance, because it may take years of technical efforts to achieve compliance with the receiving water limitations, especially for wet weather discharges.

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<sup>52</sup> State Water Board Order WQ 2001-15, p. 7.

<sup>53</sup> We disagree with Permittee Petitioners’ argument that the receiving water limitations in Part V.A of the Los Angeles MS4 Order are confusing, unclear, or overbroad, because they prohibit causing or contributing to a violation of a receiving water limitation rather than a violation of water quality standards. The Los Angeles Water Board defines “receiving water” as “[a] ‘water of the United States’ in to which waste and/or pollutants are or may be discharged.” (Los Angeles MS4 Order, Att. A., p. A-16.) The Los Angeles Water Board further defines “receiving water limitations” as “[a]ny applicable numeric or narrative water quality objective or criterion, or limitation to implement the applicable water quality objective or criterion, for the receiving water as contained in Chapter 3 or 7 of the Water Quality Control Plan for the Los Angeles Region (Basin Plan), water quality control plans or policies adopted by the State Water Board, or federal regulations, including but not limited to, 40 CFR §131.38.” (*Ibid.*) Receiving water limitations are therefore the water quality standards, including water quality objectives and criteria, that apply to the receiving water as expressed in the water quality control plan for the region, statewide water quality control plans that specify objectives for water bodies in the region, State Water Board policies for water quality control, and federal regulations.

Accordingly, we believe that the MS4 permits should incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.

With the WMP/EWMP provisions of the Los Angeles MS4 Order, the Los Angeles Water Board is striving to allow one such alternative compliance path. As such, the fundamental issue for review before us in this matter is whether the Los Angeles MS4 Order's WMP/EWMP provisions constitute a legal and technically sound compliance alternative for achieving receiving water limitations. We discuss and resolve this issue in the next section.

## **B. WMP/EWMP as Alternative Compliance Options for Complying with Receiving Water Limitations**

The WMP/EWMP provisions allow Permittees to choose an integrated and collaborative watershed-based approach to meeting the requirements of the Los Angeles MS4 Order, including the receiving water limitations. Permittees develop a plan, either collaboratively or individually, that addresses water quality priorities within a watershed. Permittees first prioritize water quality issues within each watershed. Permittees may use the WMP/EWMP to address water body-pollutant combinations for which a TMDL has been developed, giving highest priority to those with interim and final compliance deadlines within the permit term. Permittees may also address water body-pollutant combinations for which no TMDL has been developed, but where the water body is impaired or shows exceedances of the standards for the relevant pollutant from an MS4 source. Once prioritization is completed, Permittees assess the sources of the pollutants and select watershed strategies that are designed to eliminate non-storm water discharges to the MS4 that are a source of pollutants, that meet all applicable TMDL-derived interim and final water quality-based effluent limitations (WQBELs) and/or limitations to be met in the receiving water (referred to herein as "other TMDL-specific limitations")<sup>54</sup> pursuant to corresponding compliance schedules, and that ensure that discharges from the MS4 do not cause or contribute to exceedances of receiving water limitations. Except as described below for storm water retention projects, Permittees conduct a "reasonable assurance analysis" for each water body-pollutant combination incorporated into the

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<sup>54</sup> Some of the TMDL limitations of the Los Angeles MS4 Order are expressed not as WQBELs but as standards to be met in the receiving water. The Los Angeles MS4 Order refers to these limitations as "receiving water limitations;" however, in order to avoid confusion with the general receiving water limitations in Part V.A., we will use the term "other TMDL-specific limitations." Accordingly, while the Los Angeles MS4 Order uses the term "receiving water limitations" to refer to both the receiving water limitations in part V.A and some of the TMDL-based requirements in Attachments L-R, when we use the term we refer only to the receiving water limitations in part V.A.

WMP/EWMP to demonstrate the ability of the program to meet those objectives. Permittees additionally implement an integrated monitoring and assessment program to determine progress, adapting strategies and measures as necessary.<sup>55</sup>

In addition to all the requirements above, for those Permittees that choose to develop and implement an EWMP, the EWMP provisions also require that Permittees collaborate on multi-benefit regional projects and, wherever feasible, retain all non-storm runoff, as well as all storm water runoff from the 85<sup>th</sup> percentile 24-hour storm event (hereinafter “storm water retention approach”) for the drainage areas tributary to the projects.<sup>56</sup>

The primary controversy concerning the WMP/EWMP provisions of the Los Angeles MS4 Order is the manner in which they interact with the receiving water limitations and the WQBELs and other TMDL-specific limitations. Under certain conditions detailed in the Order, Permittees may be deemed in compliance with the receiving water limitations and the WQBELs and other TMDL-specific limitations by fully implementing the WMP/EWMP, rather than by demonstrating that the receiving water limitations and the WQBELs and other TMDL-specific limitations have actually been achieved. Specifically:

1. Permittees that develop and implement a WMP/EWMP and fully comply with all requirements and dates of achievement for the WMP/ EWMP as established in the Los Angeles MS4 Order, are deemed to be in compliance with the receiving water limitations in Part V.A for the water body-pollutant combinations addressed by the WMP/EWMP.<sup>57</sup>

2. Permittees fully in compliance with the requirements and dates of achievement of the WMP/EWMP are deemed in compliance with the *interim* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the WMP/EWMP.<sup>58</sup>

3. Permittees implementing an EWMP and utilizing the storm water retention approach in a drainage area tributary to the applicable water body are deemed in compliance with the *final* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the storm water retention approach.<sup>59</sup>

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<sup>55</sup> Los Angeles MS4 Order, Part VI.C., pp. 49-67.

<sup>56</sup> *Id.*, Part VI.C.1.g., pp. 48-49.

<sup>57</sup> *Id.*, Part VI.C.2.b., p. 52.

<sup>58</sup> *Id.*, Parts VI.C.3.a., p. 53, VI.E.2.d.i.4., pp. 143-44. The Los Angeles MS4 Order establishes separate requirements for Trash TMDLs and the WMP/EWMP are not a means of achieving compliance with the Trash TMDL provisions. (See Part VI.E.5, pp. 147-154.) References to TMDLs in this section exclude the Trash TMDLs.

<sup>59</sup> *Id.*, Part VI.E.2.e.i.(4), p. 145. As with Part VI.E.2.d.i.4, this Part does not apply to Trash TMDLs.



4. Because the Order additionally provides that full compliance with the general TMDL requirements in Part VI.E and the WQBELs and other TMDL-specific limitations in Attachments L through R constitutes compliance with the receiving water limitations in V.A for the specific pollutants addressed by the relevant TMDL,<sup>60</sup> provisions 2 and 3 above also constitute compliance with the receiving water limitations for the particular water body-pollutant combinations.

5. Finally, Permittees that have declared their intention to develop a WMP/EWMP may be deemed in compliance with receiving water limitations and with interim WQBELs with compliance deadlines occurring prior to approval of the WMP/EWMP if they meet certain conditions during the development phase.<sup>61</sup>

Both Environmental Petitioners and Permittee Petitioners put forth a number of arguments to the effect that the WMP/EWMP provisions of the Los Angeles MS4 Order are contrary to federal and state law or reflect poor policy. We discuss each argument below.

#### **1. Anti-backsliding**

The Environmental Petitioners argue that the inclusion of the WMP/EWMP in the Los Angeles MS4 Order violates the anti-backsliding provisions of the Clean Water Act and of the federal regulations.<sup>62</sup> The Clean Water Act generally prohibits the relaxation of an effluent limitation established in an NPDES permit when that permit is renewed; the federal regulations include similar provisions. The Environmental Petitioners argue that the WMP/EWMP of the Los Angeles MS4 Order, by allowing a discharger to be deemed in compliance with receiving water limitations, even where a discharger may in fact be causing or contributing to an exceedance of a water quality standard, represent a relaxation of the receiving water limitations provisions contained in the 2001 Los Angeles MS4 Order.<sup>63</sup>

We do not agree with the Environmental Petitioners that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the anti-backsliding provisions of either the Clean Water Act or the federal regulations. Anti-backsliding provisions are an important aspect

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<sup>60</sup> *Id.*, Part VI.E.2.c.ii., p. 143. Although this provision reflects a departure from provisions in previous MS4 permits, the provision has not generated controversy and has not been contested in the petitions. The State Water Board supports this provision in MS4 permits, as discussed at section II.B.5.b. of this order.

<sup>61</sup> *Id.*, Parts VI.C. 2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.

<sup>62</sup> 33 U.S.C. § 1342(o); 40 C.F.R. §122.44(f).

<sup>63</sup> The receiving water limitations of the 2001 Los Angeles MS4 Order (like the receiving water limitations in Section V.A. of the Los Angeles MS4 Order) were modeled on the precedential language in State Water Board Order WQ 99-05.

of the Clean Water Act that generally promote continued progress toward clean water, but the provisions do not apply in all circumstances and are subject to certain exceptions. The 2001 Los Angeles MS4 Order required compliance with receiving water limitations, directed Permittees to achieve those limitations through the iterative process, but retained the Los Angeles Water Board's discretion to enforce compliance with the receiving water limitations at any time. The Los Angeles MS4 Order requires compliance with receiving water limitations, but allows implementation of control measures through the WMPs/EWMPs to constitute such compliance, and reserves direct enforcement of the receiving water limitations to situations where a permittee fails to comply with the WMP/EWMP provisions. The approaches under the prior and current orders are designed to achieve the same results – compliance with receiving water limitations – but through distinct paths that are not easily comparable for purposes of the specific, technical anti-backsliding requirements laid out in federal law.<sup>64</sup> We nevertheless discuss the provisions below.

The Clean Water Act contains both statutory anti-backsliding provisions in section 402(o) and regulatory anti-backsliding provisions in 40 C.F.R. section 122.44(f). The Clean Water Act's statutory prohibition against backsliding applies under a narrow set of criteria specified in Clean Water Act section 402(o). First, section 402(o) prohibits relaxing effluent limitations originally established based on best professional judgment, when there is a newly revised effluent limitation guideline.<sup>65</sup> The WMP/EWMP is not derived from an effluent limitation guideline, so this first prohibition is inapplicable. Second, section 402(o) prohibits relaxing effluent limitations imposed pursuant to Clean Water Act sections 301(b)(1)(C) or 303(d) or (e).<sup>66</sup> The receiving water limitations provisions in the 2001 Los Angeles MS4 Order were not

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<sup>64</sup> Responding to an argument that NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia violated anti-backsliding requirements by removing certain numeric limitations in the prior permit, USEPA stated: "The Commenter implies that a Permit that replaces a numeric effluent limit with a non-numeric one is somehow automatically less stringent on that parameter. However, the narrative requirement only violates the anti-backsliding prohibition if the two provisions are comparable. . . . In this case, the two provisions are not comparable: EPA has determined that compliance with the performance standards in the Final Permit will result in more water quality protections for the DC MS4's receiving streams than did the previous aggregate numeric limit." (Responsiveness Summary, p. 84, *supra*, fn.17, citing *Communities for a Better Environment v. State Water Resources Control Bd.* (2005) 132 Cal. App. 4th 1313.)

<sup>65</sup> 33 U.S.C. § 1342(o)(1) ("In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314 (b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.").

<sup>66</sup> *Ibid.* ("In the case of effluent limitations established on the basis of section 1311 (b)(1)(C) or section 1313 (d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313 (d)(4) of this title.").

established based on either section 301(b)(1)(C) or section 303(d) or (e), so this prohibition on backsliding is inapplicable.<sup>67</sup> The receiving water limitations provisions in MS4 permits are imposed under section 402(p)(3)(B) of the Clean Water Act rather than under section 301(b)(1)(C),<sup>68</sup> and are accordingly not subject to the anti-backsliding requirements of section 402(o).

With respect to the regulatory anti-backsliding provisions in 40 Code of Federal Regulations section 122.44(l), the non-applicability is less clear cut. USEPA promulgated 40 Code of Federal Regulations section 122.44(l)(1) and its predecessor anti-backsliding regulations prior to the Water Quality Act of 1987, which established the municipal permitting requirements of section 402(p)(3)(B). There is ample regulatory history to demonstrate USEPA's intent in establishing the anti-backsliding policy and regulations with respect to evolving technology standards for traditional point sources.<sup>69</sup> We have found no definitive guidance, however, since that time from USEPA or the courts applying the general provisions of section 122.44(l) in the context of municipal storm water permits.<sup>70</sup> Further, we have previously noted that anti-backsliding principles may be difficult to assess in the context of non-

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<sup>67</sup> The Environmental Petitioners do not argue that the Los Angeles MS4 Order is contrary to Clean Water Act section 303(d)(4) (33 U.S.C. § 1313(d)(4)), which also sets out anti-backsliding requirements. Section 303(d)(4) sets out the conditions under which effluent limitations based on TMDL wasteload allocations may be relaxed. Specifically, effluent limitations for a discharge impacting an impaired water body where standards have not yet been attained may only be relaxed if either the cumulative effect of the revisions still assures the attainment of the water quality standards or the designated use that is not being attained is removed. (33 U.S.C. § 1313(d)(4)(A).) Where a water body has attained standards, effluent limitations may only be relaxed consistent with the federal antidegradation policy. (33 U.S.C. § 1313(d)(4)(B).)

<sup>68</sup> *Defenders of Wildlife, supra*, 191 F.3d at pp. 1165-1166.

<sup>69</sup> See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979) (describing codification of predecessor regulation codified at 40 C.F.R. 122.15(i).) In the context of municipal storm water, the MEP standard is the technology standard; the record here supports that MEP, as reflected in the permit conditions, has evolved since the issuance of the 2001 Los Angeles MS4 Order to become more stringent. (See, e.g., Los Angeles MS4 Order, Part VI.D.9.h.vii., p.132, compared to 2001 Los Angeles MS4 Order, Part 4.F.5.c., pp.48-49 [trash controls]; Los Angeles MS4 Order, Part VI.D.7.c., pp. 97-109, as compared to 2001 Los Angeles MS4 Order, Part 4.D.3., pp.36-37 [new development/redevelopment project performance criteria]; Los Angeles MS4 Order, Part VI.D.8.d., pp.113-114, as compared to 2001 Los Angeles MS4 Order, Part 4.E., pp.42-45 [requirements for construction sites less than one acre].)

<sup>70</sup> As requested by the Environmental Petitioners, we took official notice of a Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA Region III on August 8, 2012. (See fn. 19). We acknowledge that the letter states at page 3 that a provision in the Prince George County, Maryland, Phase I MS4 draft permit allowing for more time to complete tasks that were required under the previous permit constituted backsliding. The letter refers in passing to section 122.44(l)(1), but the letter has no regulatory effect and, further, is devoid of any analysis. The Environmental Petitioners have also pointed us to discussion of the regulatory anti-backsliding provisions in the NPDES Permit Writers' Manual. (NPDES Permit Writers' Manual, p. 7-4.) The relevant section of the NPDES Permit Writers' Manual does not explicitly distinguish between municipal storm water permits and traditional NPDES Permits in its discussion of the applicability of regulatory anti-backsliding provisions; however, nor does it specifically direct application of the anti-backsliding regulatory provisions to municipal storm water permits. We do not find this discussion to be to be determinative on the issue.

quantitative, non-numeric requirements such as BMPs and plans.<sup>71</sup> It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because, assuming for the sake of argument they do apply, the WMP/EWMP provisions would qualify for an exception to backsliding as discussed below.

Even if the receiving water limitations in MS4 permits could be considered subject to the anti-backsliding requirements of the Clean Water Act or the federal regulations, backsliding would be permissible based on the new information available to the Los Angeles Water Board when it developed and adopted the Los Angeles MS4 Order. The Clean Water Act and federal regulations contain exceptions to the anti-backsliding requirements where new information is available to the permitting authority that was not available at the time of the issuance of the prior permit and that would have justified the imposition of less stringent effluent limitations at that time.<sup>72</sup> The Los Angeles Water Board makes a compelling argument in its October 15, 2013 Response that the development of 33 watershed-based TMDLs adopted since 2001, the inclusion and implementation of three of those TMDLs in the 2001 Los Angeles MS4 Order, and the TMDL-specific and general monitoring and analysis during implementation, have made new information available to the Los Angeles Water Board that fundamentally shaped the WMP/EWMP alternative of the Los Angeles MS4 Order. The Los Angeles Water Board states that the new information resulted in a new understanding that “time to plan, design, fund, operate and maintain [best management practices (BMPs)] is necessary to attain water quality improvements, and these BMPs are best implemented on a watershed scale.”<sup>73</sup> The Los Angeles Water Board further points out that, in terms of water supply, there has been a paradigm shift in the last decade from viewing storm water as a liability to viewing it as a regional asset, and that the Los Angeles MS4 Order was drafted to incorporate this new paradigm into its structure.

The WMP/EWMP approach represents a comprehensive attempt to implement the Board’s new understanding regarding how to make progress toward achieving water quality

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<sup>71</sup> See Order WQ 96-13 (*Save San Francisco Bay Association*) at pp. 8-10. Although the relevant portion of that decision primarily concerned Clean Water Act section 402(o), its analysis is equally instructive with respect to 40 C.F.R. section 122.44(l). (In passing, we note that the order appears to assume that the permit’s water quality-based requirements for the MS4 permit were derived pursuant to section 301(b)(1)(C); however, that assumption is in error based on the *Defenders of Wildlife* decision and subsequent State Water Board precedent.)

<sup>72</sup> See 33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(1) (anti-backsliding does not apply if the circumstances on which the previous permit was based have materially and substantially changed and would constitute cause for permit modification under 40 C.F.R. section 122.62); 40 C.F.R. § 122.62(a)(2) (stating that new information not available at the time the previous permit was issued is cause for modification); see also 40 C.F.R. §122.44(l)(2)(i)(B)(1).

<sup>73</sup> Los Angeles Water Board October 15, 2013 Response, p. 51.

standards as well as supporting the development of new water supplies.<sup>74</sup> The anti-backsliding requirements of the Clean Water Act and the federal regulations thus did not foreclose the incorporation of the WMP/EWMP alternatives into the Los Angeles MS4 Order even though the alternatives allow additional time to achieve receiving water limitations as compared to the immediate compliance required under the 2001 Los Angeles MS4 Order.

We shall amend Finding II.N. and Part III.D.4, page F-20, of Attachment F, Fact Sheet, as follows:

**Finding II.N:**

**N. Anti-Backsliding Requirements.** Section 402(o)(2) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous permit. **The Fact Sheet of this Order contains further discussion regarding anti-backsliding.**

**Attachment F, Fact Sheet, Part III.D.4:**

**4. Anti-Backsliding Requirements.** Sections 402(o)(2) and 303(d)(4) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. ~~All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous permit.~~ **While this Order allows implementation of Watershed Management Plans/EWMPs to constitute compliance with receiving water limitations under certain circumstances, the availability of that alternative and the corresponding availability of additional time to come into compliance with receiving water limitations, does not violate the anti-backsliding provisions. The receiving**

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<sup>74</sup> The Environmental Petitioners argue that information relied on to develop the WMP/EWMP approach was available to the Los Angeles Water Board at the time of the issuance of the 2001 Los Angeles MS4 Order, since regional and watershed based strategies and technologies in storm water planning, as well as the potential benefits of storm water for water supply, were considered prior to the last permit cycle. Similarly, the Environmental Petitioners argue that some of the data gathered through TMDL development was through the process of assessing impairments and through preparing drafts of the TMDL and was therefore available to the Los Angeles Water Board in 2001. (Environmental Petitioners, Written Comments, Jan. 21, 2015, pp. 15-17, 23-25.) The Environmental Petitioners have asked us to take official notice of several documents that support these assertions. It is not necessary for us to do so because we do not disagree with the Environmental Petitioners that some of the information that the Los Angeles Water Board has cited in support of an exception to the anti-backsliding requirements was available at the time of the adoption of the 2001 Los Angeles MS4 Order. We nevertheless concur with the Los Angeles Water Board that the more than a decade of implementation of storm water requirements, as well as the development and implementation of TMDL requirements, since 2001, has, as a whole, fundamentally reshaped our understanding of the physical and time scale on which such measures must be implemented to bring MS4s into compliance with receiving water limitations. Further, we find that all regional water boards are informed by the information gained in the Los Angeles region, so that any regional water board that adopts an alternative compliance path in a subsequent Phase I permit would not be in violation of anti-backsliding requirements, regardless of the particular storm water permitting history of that region.

water limitations provisions of this Order are imposed under section 402(p)(3)(B) of the Clean Water Act rather than based on best professional judgment, or based on section 301(b)(1)(C) or sections 303(d) or (e), and are accordingly not subject to the anti-backsliding requirements of section 402(o). Although the non-applicability is less clear with respect to the regulatory anti-backsliding provisions in 40 Code of Federal Regulations section 122.44(l), the regulatory history suggests that USEPA's intent was to establish the anti-backsliding regulations with respect to evolving technology standards for traditional point sources. (See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979)). It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because the WMP/EWMP provisions qualify for an exception to backsliding as based on new information. The Watershed Management Plan/EWMP provisions of this Order were informed by new information available to the Board from experience and knowledge gained through the process of developing 33 watershed-based TMDLs and implementing several of the TMDLs since the adoption of the previous permit. In particular, the Board recognized the significance of allowing time to plan, design, fund, operate and maintain watershed-based BMPs necessary to attain water quality improvements and additionally recognized the potential for municipal storm water to benefit water supply. Thus, even if the receiving water limitations are subject to anti-backsliding requirements, they were revised based on new information that would support an exception to the anti-backsliding provisions. (33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(1); 40 C.F.R. §122.44(l)(2)(i)(B)(1)).

## 2. Antidegradation

The Environmental Petitioners argue that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the federal and state antidegradation policies.<sup>75</sup> The federal and state antidegradation policies generally require that the existing quality of water bodies be maintained, unless degradation is justified through specific findings. At a minimum, any degradation may not lower the quality of the water below the water quality standards.<sup>76</sup>

The federal and state antidegradation policies are not identical; however, where the federal antidegradation policy is applicable, the State Water Board has interpreted State Water Board Resolution No. 68-16, the state antidegradation policy, to incorporate the federal antidegradation policy.<sup>77</sup> In the context of the Los Angeles MS4 Order, a federal NPDES permit, compliance with the federal antidegradation policy would require consideration of the following: First, the Los Angeles MS4 Order must ensure that “existing instream uses and the level of

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<sup>75</sup> 40 C.F.R. § 131.12; State Water Board Resolution No. 68-16, Statement of Policy with Respect to Maintaining High Quality Waters in California (State Water Board Resolution No. 68-16).

<sup>76</sup> *Ibid.*

<sup>77</sup> State Water Board Order WQ 86-17 (*Fay*), pp. 16-19.

water quality necessary to protect the existing uses” is maintained and protected.<sup>78</sup> Second, if the baseline quality of a water body for a given constituent “exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected” through the requirements of the Los Angeles MS4 Order unless the Los Angeles Water Board makes findings that (1) any lowering of the water quality is “necessary to accommodate important economic or social development in the area in which the waters are located;” (2) “water quality adequate to protect existing uses fully“ is assured; and (3) “the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control” are achieved.<sup>79</sup>

The Los Angeles MS4 Order must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy.<sup>80</sup> In particular, the Los Angeles Water Board must find that not only present, but also anticipated future uses of water are protected, and must ensure “best practicable treatment or control” of the discharges.<sup>81</sup> The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.<sup>82</sup>

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<sup>78</sup> 40 C.F.R. § 131.12(a)(1). This provision has been interpreted to mean that, “[i]f baseline water quality is equal to or less than the quality as defined by the water quality objective, water quality shall be maintained or improved to a level that achieves the objectives.” (State Water Board, Administrative Procedures Update, Antidegradation Policy Implementation for NPDES Permitting, 90-004 (APU 90-004), p. 4.) This provision is completely consistent with, and implemented by, the receiving water limitations provisions discussed above.

<sup>79</sup> 40 C.F.R. § 131.12(a)(2); see also State Water Board Resolution No. 68-16, Resolve 2. The federal regulations additionally require strict maintenance of water quality for “outstanding national resources.” (40 C.F.R. § 131.12(a)(3).) There are no designated outstanding national resource waters covered by the Los Angeles MS4 Order.

<sup>80</sup> See State Water Board Order WQ 86-17 (*Fay*), p. 23, fn. 11.

<sup>81</sup> State Water Board Resolution No. 68-16, Resolve 2. Best practicable treatment or control is not defined in Resolution No. 68-16; however, the State Water Board has evaluated what level of treatment or control is technically achievable using “best efforts.” (See State Water Board Orders WQ 81-5 (*City of Lompoc*), WQ 82-5 (*Chino Basin Municipal Water District*), WQ 90-6 (*Environmental Resources Protection Council*.) A Questions and Answers document on Resolution No. 68-16 by the State Water Board states as follows: “To evaluate the best practicable treatment or control method, the discharger should compare the proposed method to existing proven technology; evaluate performance data, e.g. through treatability studies; compare alternative methods of treatment or control; and/or consider the method currently used by the discharger or similarly situated dischargers . . . The costs of the treatment or control should also be considered . . .” (Questions and Answers, Resolution No. 68-16, State Water Board (Feb. 16, 1995), pp. 5-6.)

<sup>82</sup> APU 90-004, p.4. The baseline for application of the federal antidegradation policy is 1975. For state antidegradation requirements, see also *Asociacion de Gente Unida por el Agua v. Central Valley Water Board* (2012) 210 Cal.App.4<sup>th</sup> 1255, 1270. The baseline for the application of the state antidegradation policy is generally the highest water quality achieved since 1968. However, where a water quality objective for a particular constituent was adopted after 1968, the baseline for that constituent is the highest water quality achieved since the adoption of the (*Continued*)

The Los Angeles MS4 Order contains a conclusory antidegradation finding, but the Fact Sheet contains additional discussion.<sup>83</sup> The Fact Sheet discussion essentially conveys that, where there are high quality waters in the region, the antidegradation requirements are met because the Order requires best practicable treatment or control in the form of MEP and water quality standards compliance and, further, where the water quality is already impaired, the Order requires implementation of TMDL requirements to achieve water quality standards over time. The Fact Sheet also finds that the Los Angeles MS4 Order does not authorize an increase in waste discharges. The Los Angeles Water Board argues that it was not required to make more detailed findings because, using its best professional judgment and available data, it concluded that the Los Angeles MS4 Order would prevent any degradation. For this proposition, the Los Angeles Water Board cites to State Water Board guidance from 1990 (APU 90-004).<sup>84</sup> The guidance may be construed to exempt the Los Angeles Water Board from conducting an extensive pollutant by pollutant analysis for each water body in the region, but it does not exempt the Board from clearly stating its basis for finding that its action is consistent with the antidegradation policies.

The Los Angeles Water Board has provided a more extensive analysis of why the Los Angeles MS4 Order complies with the antidegradation policies in its October 15, 2013 Response. The Los Angeles Water Board argues that most of the water bodies impacted by the Los Angeles MS4 Order are already impaired for multiple constituents and that, even if some of these water bodies may have been higher quality in 1968, a scenario largely contradicted by the available data,<sup>85</sup> the appropriate baseline for the quality of such waters is the level of control achieved under the prior permit. The Los Angeles Water Board further argues that the Los Angeles MS4 Order has provisions that are equally or more stringent than those of the

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objective. Resolution 68-16 requires a comparison of the existing quality to “the quality established in policies as of the date on which such policies become effective.” (Resolution 68-16, Resolve 1.)

<sup>83</sup> Los Angeles MS4 Order, Finding II.M; Fact Sheet, Att. F, pp. F19-F20.

<sup>84</sup> APU 90-004, p. 2.

<sup>85</sup> We reviewed the Administrative Record, including the 1998 Clean Water Act section 303(d) List (May 12, 1999) (Administrative Record, section 10.VI.E., RB-AR35684-35733), the 2010 Clean Water Act section 303(d) List (Oct. 11, 2011) (Administrative Record, section 10.VI.E., RB-AR35734-35785), Santa Monica Bay Restoration Project, An Assessment of Inputs of Fecal Indication Organisms and Human Enteric Viruses from Two Santa Monica Bay Storm Drains (1990) (Administrative Record, section 10.VI.E., RB-AR43363-43413), Toxic Substances Monitoring Program, 10 Year Summary Report 1978-1987 (Administrative Record, Order No. 01-182, R0044602-0045053) and comments submitted by interested persons to the Los Angeles Water Board (Administrative Record RB-AR1006-1038, RB-AR1100-1128, RB-AR1768-2119, RB-AR2653-2847, RB-AR5642-17888). We found no specific evidence presented to the Los Angeles Water Board of high quality waters in the region with regard to pollutants typically associated with storm water discharges; however, we also recognize that in the absence of specific evidence of high quality waters, a blanket statement that there are no high quality water body-pollutant combinations may be overbroad.



2001 Los Angeles MS4 Order and therefore will not allow water quality to degrade below the level of control achieved under the prior permit.

We agree with the Los Angeles Water Board that the Los Angeles MS4 Order maintains and improves the level of control achieved under the 2001 Los Angeles MS4 Order. We expect that the Los Angeles MS4 Order's TMDL requirements and receiving water limitations, which may be implemented through the WMP/EWMP provisions, will be the means for achieving water quality standards for the majority of degraded water bodies in the region. To assert, as the Environmental Petitioners do, that compliance with the receiving water limitations provisions of the 2001 Los Angeles Order is more stringent than establishing specific implementation requirements with clear deadlines for TMDL and receiving water limitations compliance is misguided. We are concerned with the totality of the provisions in the two permits and find that, viewed from that broader perspective, the Los Angeles MS4 Order is at least as stringent in addressing degradation as its predecessor.<sup>86</sup> The Los Angeles MS4 Order improves on past practices that have been inadequate to protect water quality, and includes a monitoring and assessment program that will identify any changes in water quality.<sup>87</sup> In general, under the Los Angeles MS4 Order, we expect to see a trajectory away from any past degradation, even if there may be some continued short-term degradation.

We are not persuaded, however, that the level of control achieved under the 2001 Los Angeles MS4 Order necessarily represents the baseline for purposes of an antidegradation analysis. The 2001 Los Angeles MS4 Order had only minimal findings regarding antidegradation and it is not apparent that any degradation that may have continued under the conditions of the 2001 Los Angeles MS4 Order was anticipated by the Los Angeles Water Board and supported with appropriate analysis regarding economic and social benefits<sup>88</sup> and best practicable treatment or control. We therefore find that the appropriate baseline remains 1968 or the highest quality of receiving waters attained since 1968. We acknowledge

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<sup>86</sup> In making this finding we also recognize that the Permittees may be deemed in compliance with receiving water limitations prior to approval of the WMP/EWMP. (Los Angeles MS4 Order Parts VI.C.2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.) As discussed further under section II.B.6., we find that the Los Angeles Water Board reasonably exercised its discretion in allowing for compliance during the program development phase and further that the program development phase does not detract from the overall effectiveness of the permit provisions.

<sup>87</sup> See *Asociacion de Gente Unida, supra*, 210 Cal.App.4<sup>th</sup> at p. 1278.

<sup>88</sup> We note that the administrative record provides evidence that some discharge of storm water is to the maximum benefit of the people of the state because such discharge is necessary for flood control and public safety and helps accommodate development. (See, e.g., Administrative Record, section 10.VI.C, RB-AR30101; RB-AR32557-32558.)

that the evidence in the record indicates that it is unlikely that many water bodies were high quality even as far back as 1968, but we cannot make a blanket statement to that effect.<sup>89</sup>

Despite this conclusion, we will not remand the antidegradation issue to the Los Angeles Water Board for further consideration, but will make the findings ourselves based on the record before us. Our findings are necessarily made at a generalized level. Even if the directive of APU 90-004 to carry out a complete antidegradation analysis for each water body-pollutant combination is applicable here, there is simply insufficient data available (to us or the Los Angeles Water Board) to make such findings. The APU 90-004 contemplates the appropriate antidegradation analysis for a discrete discharge or facility. It has limited value when considering antidegradation in the context of storm water discharges from diffuse sources, conveyed through multiple outfalls, with multiple pollutants impacting multiple water bodies within a municipality, or in this case, region, especially given that reliable data on the baseline water quality from 1968 is not available.<sup>90</sup>

The Environmental Petitioners propose that antidegradation be addressed in subsequent actions of the Los Angeles Water Board by requiring that the reasonable assurance analysis (discussed in greater detail in section II.B.4.c. of this Order) supporting a WMP/EWMP also demonstrate that the proposed control measures will maintain high quality of waters with regard to pollutants for which they are not impaired. We reject this approach for two reasons. First, the Los Angeles Water Board was required under the federal and state antidegradation policies to evaluate whether permit conditions would lead to degradation of high quality waters at the time of permit issuance. Second, requiring Permittees to incorporate an evaluation of all water body-pollutant combinations, including those where there are no impairments or exceedances, would require them to expand the reasonable assurance analysis beyond its useful function and manageable scope.

We shall amend Finding II.M and Part D.3 at pages F-19 to F-20 of Attachment F, the Fact Sheet, as follows:

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<sup>89</sup> See fn. 85.

<sup>90</sup> We note that USEPA did not conduct a detailed antidegradation analysis in issuing NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia, presumably for similar reasons. The court in *Asociacion de Gente Unida* relied on APU 90-004 in part in rejecting an antidegradation analysis conducted by the Central Valley Regional Water Quality Control Board for discharges of pollutants to groundwater from dairy facilities region-wide, but the court's objection was to the regional water board's reliance on an illusory prohibition of discharge to groundwater in finding that no antidegradation analysis was required, not to the sufficiency of any generalized antidegradation analysis the Board might have conducted in lieu of its reliance on the prohibition. (210 Cal.App.4<sup>th</sup> at pp. 1271-1273.)

## Finding II. M.

### M. Antidegradation Policy

40 CFR section 131.12 requires that state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. Resolution No. 68-16 requires that existing water quality be maintained unless degradation is justified based on specific findings. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the state and federal antidegradation policies. The permitted discharge is consistent with the antidegradation provision of section 131.12 and State Water Board Resolution No. 68-16 as set out in the Fact Sheet.

### Attachment F, Fact Sheet Part III.D.3.

**3. Antidegradation Policy.** 40 CFR section 131.12<sup>4</sup> requires that the state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in [State Water Board Resolution No. 68-16](#) ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the State and federal antidegradation policies. Resolution No. 68-16 and 40 CFR section 131.12 require the Regional Water Board to maintain high quality waters of the State unless degradation is justified based on specific findings. First, the Board must ensure that "existing instream uses and the level of water quality necessary to protect the existing uses" are maintained and protected. Second, if the baseline quality of a water body for a given constituent exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected through the requirements of the Order unless the Board makes findings that (1) any lowering of the water quality is necessary to accommodate important economic or social development in the area in which the waters are located; (2) water quality adequate to protect existing uses fully is assured; and (3) the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control are achieved. The Board must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy. In particular, the Board must find that not only present, but also anticipated future uses of water are protected, and must ensure best practicable treatment or control of the discharges. The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies. until it is demonstrated that any change in quality will

~~be consistent with maximum benefit to the people of the State, will not unreasonably affect beneficial uses, and will not result in water quality less than that described in the Regional Water Board's policies. Resolution 68-16 requires that discharges of waste be regulated to meet best practicable treatment or control to assure that pollution or nuisance will not occur and the highest water quality consistent with the maximum benefit to the people of the State be maintained.~~

The discharges permitted in this Order are consistent with the antidegradation provisions of 40 CFR section 131.12 and Resolution 68-16 **as set out in the Findings below:-**

**1. Many of the water bodies within the area covered by this Order are of high quality. The Order requires the Permittees to meet best practicable treatment or control to meet water quality standards. As required by 40 CFR section 122.44(a), the Permittees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p). Many of the waters within the area covered by this Order are impaired and for multiple pollutants discharged through MS4s and are not high quality waters with regard to these pollutants. In most cases, there is insufficient data to determine whether these water bodies were impaired as early as 1968, but the limited available data shows impairment dating back for more than two decades. Many such water bodies are listed on the State's CWA Section 303(d) List and either the Regional Water Board or USEPA has established TMDLs to address the impairments. This Order ensures that existing instream (beneficial) water uses and the level of water quality necessary to protect the existing uses is maintained and protected. This Order requires the Permittees to comply with permit provisions to implement the WLAs set forth in the TMDLs in order to restore the beneficial uses of the impaired water bodies consistent with the assumptions and requirements of the TMDLs. This Order further requires compliance with receiving water limitations to meet water quality standards in the receiving water either by demonstrating compliance pursuant to Part V.A and the Permittee's monitoring and reporting program pursuant to Part VI.B or by implementing Watershed Management Programs/EWMPs with a compliance schedule. This Order includes requirements to develop and implement storm water management programs, achieve water quality-based effluent limitations, and effectively prohibit non-storm water discharges through the MS4.**

**2. To the extent that some of the water bodies within the jurisdiction are high quality waters with regard to some constituents, this Order finds as follows:**

**a. Allowing limited degradation of high quality water bodies through MS4 discharges is necessary to accommodate important economic or social development in the area and is consistent with the maximum benefit to the people of the state. The discharge of storm water in certain circumstances is to the maximum benefit to the people of the state because it can assist with maintaining instream flows that support beneficial uses, may spur the development of multiple-benefit projects, and may be necessary for flood control, and public safety as well as to accommodate development in the**

area. The alternative – capturing all storm water from all storm events – would be an enormous opportunity cost that would preclude MS4 permittees from spending substantial funds on other important social needs. The Order ensures that any limited degradation does not affect existing and anticipated future uses of the water and does not result in water quality less than established standards. The Order requires compliance with receiving water limitations that act as a floor to any limited degradation.

b. The Order requires the highest statutory and regulatory requirements and requires that the Permittees meet best practicable treatment or control. The Order prohibits all non-storm water discharges, with a few enumerated exceptions, through the MS4 to the receiving waters. As required by 40 CFR section 122.44(a), the Permittees must comply with the “maximum extent practicable” technology-based standard set forth in CWA section 402(p), and implement extensive minimum control measures in a storm water management program. Recognizing that best practicable treatment or control may evolve over time, the Order includes new and more specific requirements as compared to Order No. 01-182. The Order incorporates options to implement Watershed Management Programs or EWMPs that must specify concrete and detailed structural and non-structural storm water controls that must be implemented in accordance with an approved time schedule. The Order contains provisions to encourage, wherever feasible, retention of the storm water from the 85<sup>th</sup> percentile 24-hour storm event.

~~The issuance of this Order does not authorize an increase in the amount of discharge of waste. The Order includes new requirements to implement WLAs assigned to Los Angeles County MS4 discharges that have been established in 33 TMDLs, most of which were not included in the previous Order.~~

### **3. Compliance Schedules and the Appropriateness of Enforcement Orders**

The Environmental Petitioners concede that immediate compliance with receiving water limitations is not achievable in many instances and that some additional time to reach compliance is warranted. They have proposed an alternative to the WMP/EWMP that would incorporate many of the provisions of those programs but require implementation through the mechanism of a time schedule order or other enforcement order rather than as permit conditions. The Los Angeles MS4 Order already provides that Permittees who are out of compliance with final WQBELs and other TMDL-specific limitations may request a time schedule order.<sup>91</sup> Under the alternative proposed by the Environmental Petitioners, all Permittees that are currently out of compliance with receiving water limitations not addressed by a TMDL as well as with interim TMDL requirements with passed compliance deadlines, would be issued a time schedule order or other enforcement order not to exceed the five year term of

<sup>91</sup> Los Angeles MS4 Order, Part VI.E.4., pp.146-147.

the permit. The Permittees would then implement a WMP/EWMP type plan to achieve compliance with the appropriate limitations within the confines of the enforcement order.

In the prior two sections, we found that the WMP/EWMP provisions are not contrary to the anti-backsliding or antidegradation requirements of federal and state law. We therefore disagree with the Environmental Petitioners that the relevant provisions must be stricken from the Order and incorporated instead into an enforcement order for those reasons. We also find that, given that strict compliance with water quality standards is discretionary in MS4 permits, the Los Angeles Water Board was not restricted to limiting the schedule for compliance with receiving water limitations to the term of the Los Angeles MS4 Order.

Further, from a policy perspective, we find that the MS4 Permittees that are developing and implementing a WMP/EWMP should be allowed additional time to come into compliance with receiving water limitations and interim and final TMDLs through provisions built directly into their permit, rather than through enforcement orders. Building a time schedule into the permit itself, as the Los Angeles MS4 Order does, is appropriate because it allows a more efficient regulatory structure compared to having to issue multiple enforcement orders. More importantly, it is appropriate to regulate Permittees in a manner that allows them to strive for compliance with the permit terms, provided no provision of law otherwise precludes including the schedule in the NPDES permit. For example, for traditional point source discharges subject to strict compliance with water quality standards pursuant to section 301(b)(1)(C), the terms of a compliance schedule are dictated by our compliance schedule policy (State Water Board Resolution 2008-0025) and any additional time for compliance could only be under the auspices of an enforcement order outside the permit.<sup>92</sup>

The WMP/EWMP provisions constitute an effort to set ambitious, yet achievable, targets for Permittees; receiving water limitations, on the other hand, while the ultimate goal of MS4 permitting, may not in all cases be achievable within the five-year permit cycle. Generally, permits are best structured so that enforcement actions are employed when a discharger shows some shortcoming in achieving a realistic, even if ambitious, permit condition and not under circumstances where even the most diligent and good faith effort will fail to achieve the required condition. We add that it is our intention to encourage a watershed-based approach to addressing storm water issues going forward and that it would be contrary to that intention to

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<sup>92</sup> We also note that the State Water Board's Policy for the Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (2005) (State Implementation Policy) and the CTR itself (40 C.F.R. § 131.38(e)) restrict the scope of compliance schedules for effluent limitations addressing the discharge of toxic pollutants; however the policy does not apply to storm water discharges. (State Implementation Policy, p.3, fn.1.)

structure the watershed-based requirements as an enforcement order. We will not require Permittees that propose and timely implement a WMP/EWMP to request time schedule orders or other enforcement orders as a precondition of being in compliance with the receiving water limitations or interim TMDL requirements of the Los Angeles MS4 Order.

While declining to structure the WMP/EWMP provisions generally as an enforcement order, we acknowledge that time schedule orders are appropriate under some circumstances. We have already noted that the Los Angeles MS4 Order allows a Permittee to request a time schedule order where a final compliance deadline for a state-adopted TMDL has passed and the Permittee believes that additional time to comply with the requirement is necessary.<sup>93</sup> We expect that a Permittee will request a time schedule order also if the Permittee fails to meet a final compliance deadline for a TMDL after the adoption date of the Los Angeles MS4 Order. We will also provide that a Permittee may request a time schedule order if the Permittee fails to meet a final compliance deadline for a receiving water limitation set in the Permittee's WMP/EWMP.

We shall add a new Part VI.C.6.b and revise Part VI.E.4.b as follows:

Part VI.C.6

**b. Where a Permittee believes that additional time to comply with a final receiving water limitation compliance deadline set within a WMP/EWMP is necessary, and the Permittee fails to timely request or is not granted an extension by the Executive Officer, a Permittee may, no less than 90 days prior to the final compliance deadline, request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.**

Part VI.E.4

b. Where a Permittee believes that additional time to comply with the final water quality-based effluent limitations and/or receiving water limitations is necessary, a Permittee may within 45 days of Order adoption, **or no less than 90 days prior to the final compliance deadline if after adoption of the Order,** request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.

#### **4. Rigor and Accountability in the WMPs/EWMPs**

We now turn to a consideration, from a technical as well as policy lens, as to whether the WMPs/EWMPs are structured in a manner that will maximize the likelihood of

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<sup>93</sup> *Ibid.*

reaching the ultimate goal of the compliance alternative – achieving receiving water limitations.<sup>94</sup> We can support an alternative approach to compliance with receiving water limitations only to the extent that that approach requires clear and concrete milestones and deadlines toward achievement of receiving water limitations and a rigorous and transparent process to ensure that those milestones and deadlines are in fact met. Conversely, we cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations.

We find below that the WMP/EWMP provisions generally ensure the appropriate rigor, transparency, and accountability, and that, with the few revisions we direct, are designed to lead to achievement of receiving water limitations.<sup>95</sup>

a. Milestones and Compliance Deadlines

We first consider whether the WMP/EWMP provisions require clear, concrete, and finite milestones and deadlines.

For water body-pollutant combinations addressed by TMDLs, the Los Angeles MS4 Order requires the Permittees to incorporate the compliance schedules found in Attachments L through R of the Order, which reflect previously adopted TMDL-based requirements, into the WMP/EWMP, and, as necessary, to develop interim milestones and dates for their achievement.<sup>96</sup> A Permittee that does not thereafter comply with the approved compliance schedule must instead demonstrate compliance with the WQBELs and other TMDL-specific limitations of the Order.<sup>97</sup> For water body-pollutant combinations not addressed by a TMDL, but where the relevant pollutant is one for which the water body is identified as impaired on the Clean Water Act section 303(d) List and the pollutant is in the same class as a TMDL pollutant, the Order requires that the WMP/EWMP incorporate a schedule consistent with the TMDL schedule for the same class pollutant.<sup>98</sup> A Permittee that does not thereafter comply with

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<sup>94</sup> From a legal standpoint, our analysis serves to verify that the Los Angeles MS4 Order's alternative compliance approach through WMPs/EWMPs is supported by the findings and by evidence in the record. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.)

<sup>95</sup> We do not agree with Permittee Petitioners that the WMP/EWMP provisions are precluded by the program requirements of 40 Code of Federal Regulations section 122.26. Nor do we agree that the requirements are vague or lack definition. The WMP/EWMP provisions of the Order are guidelines for development of a subsequent program with more specificity to be approved by the Los Angeles Water Board or its Executive Officer.

<sup>96</sup> Los Angeles MS4 Order, Part VI.C.5.c., pp.64-65.

<sup>97</sup> *Id.*, Part VI.E.2.d.i(4)(c), p.144.

<sup>98</sup> *Id.*, Part VI.C.2.a.i., pp. 49-50.



the approved compliance schedule must instead demonstrate immediate compliance with the receiving water limitations in Part V.A.<sup>99</sup> We will not disturb these provisions.

With regard to exceedances of receiving water limitations not addressed by a TMDL, and where the pollutant is not in the same class as a pollutant addressed by a TMDL, the Order requires that the WMP/EWMP include milestones based on measurable criteria or indicators and a schedule for achieving the milestones. The WMP/EWMP must also incorporate a final date for achievement of receiving water limitations, but that date is circumscribed simply as “as soon as possible.”<sup>100</sup> Parts VI.C.2.a.ii.(4) and VI.C.2.a.iii.(2)(c) help clarify the meaning of “as soon as possible:”

Permittees shall identify enforceable requirements and milestones and dates for their achievement to control MS4 discharges such that they do not cause or contribute to exceedances of receiving water limitations within a timeframe(s) that is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary. The time between dates shall not exceed one year. Milestones shall relate to a specific water quality endpoint (e.g., x% of the MS4 drainage area is meeting the receiving water limitations) and dates shall relate either to taking a specific action or meeting a milestone.<sup>101</sup>

We will make a revision to the compliance schedule provisions to make it clear that the term “as soon as possible” is to be interpreted consistent with the more specific direction cited above. However, because the WMP/EWMP, and therefore the proposed compliance schedule, is subject to public review and comment and approval by the Los Angeles Water Board or its

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<sup>99</sup> *Id.*, Part VI.C.2.c., p.52.

<sup>100</sup> *Id.*, Part VI.C.5.c.iii.(3), p. 65. If the pollutant is not in the same class as those addressed in a TMDL, but the water body is still identified as impaired for that pollutant, the WMP/EWMP must either have a final compliance deadline within the 5 year permit term or Permittees are expected to initiate development of a stakeholder-proposed TMDL and incorporate a compliance schedule consistent with the TMDL. (*Id.*, Part VI.C.2.a. ii., pp. 50-51) (If the exceedances are in a drainage area implementing the storm water retention approach, there is no requirement to initiate the TMDL development process.) The requirement to address receiving water limitations is ongoing. As exceedances are found through monitoring for water body-pollutant combinations not identified on the 303(d) List, Permittees must either meet receiving water limitations or include the water body-pollutant combination in the WMP/EWMP and set enforceable requirements and milestones and dates for their achievement within a time frame that is as short as possible. (*Id.*, Part VI.C.2.a.iii, pp. 51-52.) Permittees are deemed in compliance with receiving water limitations only for water body-pollutant combinations addressed in the WMP/EWMPs. Thus, as pointed out by several interested parties, for lower priority water body-pollutant combinations not incorporated into a WMP/EWMP for which exceedances are detected, Permittees may be in violation of the receiving water limitations. A Permittee always has the ability to reprioritize a water body-pollutant combination from low priority to high priority and amend its WMP/EWMP to incorporate measures to address that water body-pollutant combination.

<sup>101</sup> *Id.*, Parts VI.C.2.a.ii.4, p. 50, VI.C.2.a.iii.(2)(c), p. 51 (identical language).

Executive Officer,<sup>102</sup> we do not find it necessary to constrain the determination of milestones and dates for the achievement of receiving water limitations any further.

We shall amend Part VI.C.5.c.iii.(3)(b) as follows:

- (b) A final date for achieving the receiving water limitations as soon as possible, **consistent with Parts VI.C.2.a.ii.(4) & VI.C.2.a.iii.(2)(c).**

b. Constraints on Extension of Deadlines

The fact that the Los Angeles MS4 Order requires the establishment of concrete and rigorous deadlines within the WMP/EWMP for the achievement of receiving water limitations is critical to ensuring progress on such achievement; however, the Order also contemplates that the deadlines, with the exception of those compliance deadlines established in a TMDL, may be extended.<sup>103</sup> The WMP/EWMP is subject to an adaptive management process. Based on the results of that process the Permittees may propose modifications, including modifications to compliance deadlines and interim milestones, in the Annual Report.<sup>104</sup>

The potential for multiple extensions is nevertheless ameliorated by the fact that extensions of compliance deadlines and interim milestones require Los Angeles Water Board Executive Officer approval,<sup>105</sup> and are accordingly, subject to a 30-day public comment period.<sup>106</sup> The public comment period will allow all other interested persons to weigh in on the appropriateness of any requested extensions. If thereafter dissatisfied with the determination made by the Executive Officer, interested persons may additionally seek review of the Executive Officer's decision by the Los Angeles Water Board.<sup>107</sup> Of course, in cases where no extension

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<sup>102</sup> *Id.*, Part VI.C.4.c., p.56, Table 9, p. 54, Part VI.A.5.b., p. 42, Att. F, Fact Sheet, p. F-42. Under Part VI.A.5.b, “[a]ll documents submitted to the Regional Water Board Executive Officer for approval shall be made available to the public for a 30-day period to allow for public comment.”

<sup>103</sup> *Id.*, Parts VI.C.7, p.66, VI.C.8, pp.66-67.

<sup>104</sup> *Id.*, Part, VI.C.8, p.67. Under another provision of the Order, Permittees may at any time request an extension of deadlines for achievement of interim milestones established to address exceedances of receiving water limitations not otherwise addressed by a TMDL. (*Id.*, Part VI.C.6.a., p.65.) (We note that the cited provision refers to “milestones established pursuant to Part VI.C.4.c.ii.(3),” but the intent appears to have been to reference Part VI.C.5.c.iii.(3).) But as we read the Los Angeles MS4 Order, extensions of not just interim deadlines for achievement of milestones but also final compliance deadlines to achieve receiving water limitations are already allowed under the adaptive management provisions of Part VI.C.8.a.ii.: “Based on the results of the adaptive management process, Permittees shall report any modifications, including where appropriate *new compliance deadlines* and interim milestones, with the exception of those compliance deadlines established in a TMDL, necessary to improve the effectiveness of the Watershed Management Program or EWMP, in the Annual Report . . . .” (Emphasis added.)

<sup>105</sup> *Id.*, Parts VI.C.8, p.67, VI.C.6.a., p.65. We recognize that as currently written the adaptive management provisions in effect deem any modifications to the WMPs/EWMPs approved if the Executive Officer “expresses no objections” within 60 days. (*Id.*, Part VI.C.8.a.iii., p. 67.) With our revisions, any deadline extensions must be affirmatively approved by the Executive Officer.

<sup>106</sup> *Id.*, Part VI.A.5.b, p. 42.

<sup>107</sup> *Id.*, Part VI.A.6, p.42.

is available, as with final deadlines established in TMDLs,<sup>108</sup> or where no extension is requested or granted, failure to meet a deadline means that the Permittee will have to comply from that time forward with the receiving water limitations or WQBELs and other TMDL-specific limitations or request a time schedule order. Therefore, Permittees cannot rely on the certainty of a deadline extension, and Permittees have a strong incentive to implement control measures that will in fact get them to compliance by the established deadline. Given that the Permittees and the Los Angeles Water Board are working with limited data<sup>108</sup> regarding storm water impacts and control measure performance, especially where TMDLs have not been developed, we are hesitant to remove all flexibility for deadline extensions, and find that the Order strikes an appropriate balance.

Permittee Petitioners seek even greater flexibility under the WMP/EWMP provisions for adjusting approved control measures and time lines. They advocate for amendments that would allow a Permittee to propose alternative controls or time lines upon a demonstration that required controls for timely achievement of a limitation are either technically infeasible or otherwise constitute a substantial hardship to the Permittee. We have found above that, in the case of final deadlines set in the WMP/EWMP for achievement of receiving water limitations not otherwise addressed in a TMDL, the Los Angeles MS4 Order already provides for an opportunity to propose new deadlines through the adaptive management process. We will make a clarifying revision below to confirm that Permittees may ask for extensions in meeting receiving water limitations not addressed by a TMDL. Technical infeasibility or substantial hardship may be grounds for such a request. The Los Angeles Water Board Executive Officer, in turn, may, after allowing for public review and comment, choose to (1) extend the deadline, (2) decline the extension but approve any time schedule order requested by the Permittee, or (3) decline the extension and not approve a time schedule order, with the result that the Permittee will be out of compliance with the provision of the WMP/EWMP and therefore the receiving water limitations of Part V.A. As stated previously, interested persons may thereafter ask the Los Angeles Water Board to review the Executive Officer's determination.<sup>109</sup>

With regard to final deadlines for WQBELs and other TMDL-specific limitations, we will not amend the WMP/EWMP provisions to add flexibility for extensions. We find that the only option appropriately available to a Permittee unable to meet final deadlines that are set out in a TMDL and incorporated into the Los Angeles MS4 Order and the WMP/EWMPs, is to

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<sup>108</sup> *Id.*, Part VI.C.8.a.ii., p.67.

<sup>109</sup> *Id.*, Part VI.A.6, p.42.

request a time schedule order, consistent with Part VI.E.2.e. of the Order, as that Part was amended in section II.B.3. above.<sup>110</sup>

We shall amend Part VI.C.6.a as follows:

- a. Permittees may request an extension of deadlines for achievement of interim milestones **and final compliance deadlines** established pursuant to Part VI.C.45.c.iii.(3) ~~only~~, **with the exception of those final compliance deadlines established in a TMDL**. Permittees shall provide requests in writing at least 90 days prior to the deadline and shall include in the request the justification for the extension. Extensions ~~shall be subject to approval by~~ **must be affirmatively approved by** the Regional Water Board Executive Officer, **notwithstanding Part VI.C.8.a.iii.**

*c. Rigor and Accountability in the Process*

We see three additional components of the WMPs/EWMPs as essential to ensuring that the proposed WMPs/EWMPs are in fact designed to achieve receiving water limitations within the appropriate time frame.

First, as documents to be approved by either the Los Angeles Water Board or its Executive Officer, the WMPs/EWMPs are subject to a public review and comment period.<sup>111</sup> Such review includes consideration of proposed control measures, deadlines for achievement of final limitations, and the reasonable assurance analysis that supports the WMP/EWMP. We expect this public process to vet the proposed WMPs/EWMPs and facilitate revisions to strengthen the programs as needed, thereby providing some assurance that approved WMPs/EWMPs will achieve the water quality targets set out.

Second, the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP.<sup>112</sup> Competent use of the reasonable assurance analysis should facilitate achievement of final compliance within the specified deadlines.<sup>113</sup>

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<sup>110</sup> Final TMDL deadlines are established and incorporated into the Basin Plans during the TMDL development process. That process invites stakeholder participation and the proposed schedule is subject to public review and comment and approval by the relevant regional water board, the State Water Board, and USEPA. The deadlines are established with consideration of the time needed for compliance for all dischargers contributing to an impairment, including industrial and construction storm water dischargers and traditional NPDES dischargers. Although we recognize that it may not always be feasible for municipal storm water dischargers to meet final TMDL deadlines, short of amending the Basin Plan to modify the deadlines (see *California Association of Sanitation Agencies v. State Water Resources Control Board* (2012) 208 Cal.App.4<sup>th</sup> 1438), we find it appropriate for the dischargers to request time schedule orders rather than be granted an extension within the provisions of the Los Angeles MS4 Order.

<sup>111</sup> See Los Angeles MS4 Order, Parts VI.C.4.d., p. 57, VI.C.6, p. 65, Table 9, p.54; see also *id.*, Part VI.A.5., p. 42.

<sup>112</sup> *Id.*, Part VI.C.5.b.iv.(5), pp. 63-64.

<sup>113</sup> We note that the Los Angeles Water Board has released guidance on the development of a reasonable assurance analysis. The guidance was released after adoption of the Los Angeles MS4 Order and accordingly is not (*Continued*)

Third, the adaptive management provisions of the Order ensure that the Permittees will evaluate monitoring data and other new information every two years and consider progress up to that point on achieving WQBELs and other TMDL-specific limitations. Permittees are required as part of the adaptive management process to propose modifications to improve the effectiveness of the WMP/EWMP and implement those modifications.<sup>114</sup>

While we are supportive of all of these measures, we find that they should be strengthened. As a preliminary matter, we will require the Permittees to submit specific information, concurrently with the two-year adaptive management process, that will assist the Los Angeles Water Board in determining how effective the WMP/EWMP path is in spurring the completion of on-the-ground structural control measures that lead to measurable water quality improvement. As we discuss further in Section II.B.8 of this Order, we will direct the Los Angeles Water Board to report to the State Water Board periodically on the effectiveness of the WMP/EWMP approach and expect the additional information submitted by the Permittees to inform that report.

More significantly, we will add a provision that requires Permittees to comprehensively update the reasonable assurance analysis and the WMP/EWMP, following an opportunity to implement the adaptive management process. Given the limitations inherent in models, as well as the potential incentive to choose the lowest effort and cost level predicted by the model to achieve receiving water limitations,<sup>115</sup> we are concerned that reliance on one initial reasonable assurance analysis is insufficient to ensure that in the long term WMPs/EWMPs will

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*(continued from previous page)*

part of the Administrative Record. We nevertheless take this opportunity to state that we expect any revisions and updates to the guidance to be subject to a public process as part of reissuance of the Los Angeles MS4 Order.

<sup>114</sup> Los Angeles MS4 Order, Part VI.C.8., pp. 66-67. We add that the adaptive management process will also allow Permittees to revise their WMPs/EWMPs to take advantage of funding opportunities as they arise in the future, including funding opportunities through Assembly Bill 2403 (approved by Governor, June 28, 2014 (2013-2014 Reg. Sess.)) and Proposition 1 (approved by ballot Nov. 4, 2014). We are cognizant of criticism that the adaptive management process is just another version of the ineffective iterative process of the receiving water limitations. These arguments are misplaced. Unlike the iterative process of the receiving water limitations, the adaptive management process is only one component of a series of actions required under the WMP/EWMP and acts as a periodic check to ensure that all the other requirements are achieving the stated goals of the WMP/EWMP within clearly stated deadlines. As our discussion above makes clear, we would not endorse an alternative compliance path with the sole requirement to adaptively manage implemented control measures. Further, the adaptive management process in the Los Angeles MS4 Order differs from the iterative process in that Permittees must carry out the adaptive management process every two years, limiting any discretionary determination as to when the program must be evaluated. (Los Angeles MS4 Order, Part VI.C.8.a.)

<sup>115</sup> The numerical analysis methods and models approved for use by Permittees for estimating hydrologic conditions and contaminant fate and transport in the watersheds should, in principle, be able to propagate any and all known uncertainty to the outputs and results. It is in the public interest that the Los Angeles Water Board communicate this uncertainty to all stakeholders, as the results in most cases will affect the beneficial uses of California waters. Moreover, it is highly desirable that, to the extent possible, the Los Angeles Water Board define a minimum level of uncertainty (or level of confidence) acceptable for a reasonable assurance analysis to be approved.

achieve relevant water quality goals. . Currently, as stated above, the Permittees are required to implement the adaptive management process every two years from the date of program approval. Under the provision we add, the Permittees will be required to comprehensively update the reasonable assurance analysis (including potentially considering whether the model itself and its assumptions require updating) and the WMP/EWMP after several years of adaptive management, based on previous years' monitoring data and other performance measures. The Permittee will submit a full revised package to the Los Angeles Water Board Executive Officer for approval, following public review.

Given that the WMPs/EWMPs in many cases address water quality targets that are to be achieved a decade or more in the future, a periodic, complete re-consideration and recalibration of the assumptions and predictions that support the proposed control measures and implementation schedule in light of new data, above and beyond the two-year adaptive management requirements of the Los Angeles MS4 Order, is essential, notwithstanding the additional time and effort that Permittees must expend on the update. We also recognize that such review is a staff intensive process for the Los Angeles Water Board, but addressing storm water impacts is a priority for that Board. Although we expect that the update will be necessary in most cases, the new requirements provide that the Executive Officer of the Los Angeles Water Board may waive the requirement for an update if the Permittee demonstrates through water quality monitoring that the WMP/EWMP is meeting appropriate targets. Our direction to require a comprehensive update of the reasonable assurance analyses and the WMPs/EWMPs after several cycles of adaptive management should in no way be construed as limiting the Los Angeles Water Board Executive Officer's discretion to request such updates earlier in the implementation process or the obligation of the Permittees to initiate such updates earlier in the implementation process based on the ongoing adaptive management process.

The second added provision will not be relevant for the permit term of the order before us; however, we anticipate that the next iteration of an MS4 Order for the Los Angeles area will closely track the Los Angeles MS4 Order to allow for continued implementation of the WMP/EWMPs.

We shall amend Part VI.C.8 by adding new subsections a.iv. and b. as follows:

**a.**

**iv. Permittees shall report the following information to the Regional Water Board concurrently with the reporting for the adaptive management process:**

**(1) On-the-ground structural control measures completed;**

**(2) Non-structural control measures completed;**

- (3) Monitoring data that evaluates the effectiveness of implemented control measures in improving water quality;**
- (4) Comparison of the effectiveness of the control measures to the results projected by the RAA;**
- (5) Comparison of control measures completed to date with control measures projected to be completed to date pursuant to the Watershed Management Program or EWMP;**
- (6) Control measures proposed to be completed in the next two years pursuant to the Watershed Management Program or EWMP and the schedule for completion of those control measures;**
- (7) Status of funding and implementation for control measures proposed to be completed in the next two years.**

**b. Watershed Management Program Resubmittal Process**

- i. In addition to adapting the Watershed Management Program or EWMP every two years as described in Part VI.C.8.a., Permittees must submit an updated Watershed Management Program or EWMP with an updated Reasonable Assurance Analysis by June 30, 2021, or sooner as directed by the Regional Water Board Executive Officer or as deemed necessary by Permittees through the Adaptive Management Process, for review and approval by the Regional Water Board Executive Officer. The updated Reasonable Assurance Analysis must incorporate both water quality data and control measure performance data, and any other information informing the two-year adaptive management process, gathered through December 31, 2020. As appropriate, the Permittees must consider any new numeric analyses or other methods developed for the reasonable assurance analysis. The updated Watershed Management Program or EWMP must comply with all provisions in Part VI.C. The Regional Water Board Executive Officer will allow a 60-day public review and comment period with an option to request a hearing. The Regional Water Board Executive Officer must approve or disapprove the updated Watershed Management Program or EWMP by June 30, 2022. The Executive Officer may waive the requirement of this provision, following a 60-day public review and comment period, if a Permittee demonstrates through water quality monitoring data that the approved Watershed Management Program or EWMP is meeting appropriate water quality targets in accordance with established deadlines.**

## 5. Determination of Compliance with Final Requirements

### a. Compliance with Final TMDL Requirements<sup>116</sup>

Part VI.E.2.e.i.4. of the Los Angeles MS4 Order provides that Permittees will be deemed in compliance with the final WQBELs and other TMDL-specific limitations if “[i]n drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85<sup>th</sup> percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water.”<sup>117</sup> Part VI.E.2.e.i.4 is one of four options available to the Permittee in Part VI.E.2.e. to be deemed in compliance with WQBELs and other TMDL-specific limitations. The other three options allow a Permittee to establish compliance with a final WQBEL or other TMDL-specific limitation by showing that (1) there are no violations of the final WQBEL; (2) there are no exceedances of the receiving water limitation for the specific pollutant in the receiving water at or downstream of the Permittee’s outfall, or (3) there is no direct or indirect discharge from the Permittee’s MS4 to the receiving water during any relevant time period.<sup>118</sup> These three options ensure that either the receiving water limitations or WQBELs and other TMDL-specific limitations are in fact being complied with. In contrast, the storm water retention approach assumes compliance with *final* WQBELs and other TMDL-specific limitations, and accordingly, compliance with the receiving water limitations in Part V for the relevant water body-pollutant combinations,<sup>119</sup> even if the final WQBELs and other TMDL-specific limitations are not actually being achieved. The Environmental Petitioners argue that the Los Angeles Water Board has failed to establish through findings and record evidence that the storm water retention approach will in fact achieve compliance with the WQBELs and other TMDL-specific limitations and that the Los Angeles

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<sup>116</sup> The Los Angeles MS4 Order additionally deems compliance with *interim* WQBELs and other TMDL-specific limitations if the “Permittee has submitted and is fully implementing an approved” WMP/EWMP. (Los Angeles MS4 Order, Part VI.E.2.d.i.(4), p. 143; see also *id.*, Part VI.C.3.a., p. 53.) Because Permittees are required to incorporate into the WMP/EWMP compliance schedules “compliance deadlines occurring within the permit term for all applicable interim . . . water quality-based effluent limitations and/or receiving water limitations in Part VI.E and Attachments L through R,” we expect that in most cases full implementation of the WMP/EWMP necessarily results in compliance with interim WQBELs and other TMDL-specific limitations. However, to the extent this is not the result reached, we find that requiring implementation of the WMP/EWMP with control measures designed to achieve interim WQBELs and other TMDL-specific limitations, in lieu of showing actual compliance with any *interim* numeric requirements, is consistent with the assumptions and requirements of the wasteload allocations of the relevant TMDLs. (40 C.F.R. § 122.44(d)(1)(vii)(B).)

<sup>117</sup> Los Angeles MS4 Order, Part VI.E.2.e.i.(4), p. 145.

<sup>118</sup> *Id.*, Part VI.E.2.e.i.(1)-(3), pp. 144-45.

<sup>119</sup> We note again that Part VI.E.2.c.i. states that Part VI.E establishes the manner of achieving compliance with the receiving water limitations in Part V.A where the receiving water limitations are associated with water body-pollutant combinations addressed in a TMDL.



MS4 Order's reliance on the storm water retention approach for final compliance determination is therefore contrary to the law.

We are supportive of the EWMP's use of the storm water retention approach as a technical requirement. Retention of storm water is likely to be an effective path to water quality improvement. Furthermore, in addition to preventing pollutants from reaching the receiving water except as a result of high precipitation events (which also generally result in significant dilution in the receiving water), the storm water retention approach has additional benefits including recharge of groundwater, increased water supply, reduced hydromodification effects, and creation of more green space to support recreation and habitat.<sup>120</sup>

We have some concerns, however, with the lack of verification in the Los Angeles MS4 Order that final WQBELs and other TMDL-specific limitations or receiving water limitations will in fact be met as a result of implementation of the storm water retention approach. We acknowledge that, in most cases, the final TMDLs have deadlines outside of the permit term for the Los Angeles MS4 Order and that, therefore, with regard to those, our concerns are more theoretical at this point than immediate. Nevertheless, we agree with the Environmental Petitioners that the evidence in the Administrative Record is not sufficient to establish that the storm water retention approach will in all cases result in achievement of final WQBELs and other TMDL-specific limitations and, more importantly, are concerned that the Order itself does not incorporate clear requirements that would provide for such verification in the process of implementation.

With regard to evidence in the Administrative Record, it is clear that the storm water retention approach is a promising approach for achieving compliance with receiving water limitations, with multiple additional environmental benefits. But the research regarding the storm water retention approach is still in early stages and we cannot say with certainty at this point that implementation will lead to compliance with receiving water limitations in all cases.<sup>121</sup>

With that conclusion in mind, we look to the Los Angeles MS4 Order itself to determine if there are sufficient additional provisions to assure that, in the long run, the storm water retention approach will achieve the ultimate goal of compliance with receiving water limitations. We first note that the Order does not require a reasonable assurance analysis when

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<sup>120</sup> See e.g. Administrative Record, section 10.VI.C, RB-AR29263-29311, RB-AR32318-32350.

<sup>121</sup> We reviewed the citations to the Administrative Record provided in the Los Angeles Water Board October 15, 2013 Response and in the October 15, 2013 Responses of many of the Petitioners. We find that the cited studies show the storm water retention to be a promising approach to meeting water quality standards, but do not establish, at a sufficiently high level of confidence, that the storm water retention approach will definitively achieve compliance with the receiving water limitations.

a Permittee opts for the storm water retention approach. Permittees are required to conduct a reasonable assurance analysis for each water body-pollutant combination addressed by a WMP, with the objective of demonstrating the ability of the controls to ensure that MS4 discharges achieve applicable WQBELs and do not cause or contribute to exceedances of receiving water limitations.<sup>122</sup> The relevant provisions reference EWMPs, but elsewhere the Order states that the reasonable assurance analysis is only required for areas covered by the EWMP where retention of the 85<sup>th</sup> percentile, 24-hour storm event is not feasible.<sup>123</sup> The Fact Sheet also implies that the requirement for a reasonable assurance analysis is confined to situations where the storm water retention approach is not feasible.<sup>124</sup> In sum, then, Permittees that choose to develop and implement an EWMP are required to conduct a reasonable assurance analysis for each waterbody-pollutant combination addressed by the EWMP, except in the drainage areas that are tributary to the storm water retention projects.

The fact that the storm water retention approach does not require a reasonable assurance analysis prior to implementation to demonstrate the ability of the approach to achieve compliance with the limitations is mitigated in part by required monitoring and adaptive management to verify compliance following implementation. Although the provision could be clearer, we read the language “[i]n drainage areas where Permittees are implementing an EWMP” in Part VI.E.2.e.i.(4) to require Permittees to be in compliance with all aspects of the EWMP, including the monitoring and adaptive management provisions of Parts VI.C.7 and 8, to be deemed in compliance with final limitations through the storm water retention approach. As we read the Order, a Permittee’s showing that it has retained all non-storm water and all storm water up to and including the volume equivalent to the 85<sup>th</sup> percentile, 24-hour event, establishes compliance, but only if the Permittee continues to conduct monitoring and adapt the EWMP in response to the monitoring. The Los Angeles Water Board appears to read the Order the way we do, as it states in its October 15, 2013 Response that “the Permit requires monitoring and adaptive management, which will continue to inform the Los Angeles Water Board regarding the efficacy of this storm water retention approach in conjunction with implementation of the other storm water management program elements and any needed

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<sup>122</sup> Los Angeles MS4 Order, Part VI.C.5.b.iv.(5), pp. 63-64.

<sup>123</sup> *Id.*, Part VI.C.1.g., p. 48.

<sup>124</sup> *Id.*, Att. F, Fact Sheet, p. F-39.

modifications to the approach.”<sup>125</sup> The Los Angeles Water Board further states in comments submitted on a draft of this order, as follows:

The Los Angeles MS4 Order does not exclude EWMPs or areas within an EWMP where the stormwater retention standard is achieved from the integrated watershed monitoring, assessment and adaptive management processes. Neither does the Los Angeles MS4 Order specify or contemplate an end to the monitoring, assessment and adaptive management processes in the case of a Watershed Management Program (WMP) or EWMP. These required elements, including receiving water and outfall monitoring, evaluation of these monitoring data, and modification of the EWMP to improve its effectiveness, will be continually conducted throughout the Watershed Management Area addressed by the EWMP. . . . The Los Angeles Water Board understood that these regional multi-benefit projects would take time to implement and that Permittees needed to be afforded this time in the Los Angeles MS4 Order. The Los Angeles Water Board will continually evaluate progress during the implementation period. If, as full implementation nears, some Receiving Water Limitations are still not achieved, the Los Angeles Water Board and State Water Board have a variety of tools that can be used at a regional or statewide level including reconsideration of TMDLs, Basin Planning actions, policy development and permitting, among others.<sup>126</sup>

We will make a revision to Part VI.E.2.e.i. to make it clear that the Permittee must be in compliance with all other requirements of the EWMP in addition to implementation of the storm water retention approach in order to be deemed in compliance with the final WQBELs and other TMDL-specific limitations.

With no definitive evidence in the record establishing that the storm water retention approach will achieve final requirements, no reasonable assurance analysis required at the outset, and reliance only on subsequent monitoring and adaptive management to improve results if final limitations are not in fact achieved, the storm water retention approach does not provide a level of assurance of success that would lead us to conclude that its implementation, with nothing else, is sufficient to constitute compliance with final WQBELs and other TMDL-specific limitations. We understand that there are nevertheless very good reasons to encourage its use. Certainly for all non-storm water and for all storm water generated in storms up to the 85<sup>th</sup> percentile storm, the storm water retention approach achieves compliance because there is no discharge. And there are significant benefits beyond water quality, including most importantly benefits to water supply. We also believe that public projects requiring investment of this magnitude are unlikely to be carried out without a commitment from the water boards that Permittees will be considered in compliance even if the resulting improvement in water quality

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<sup>125</sup> Los Angeles Water Board, October 15, 2013 Response, p. 62.

<sup>126</sup> Los Angeles Water Board, Comment Letter, January 21, 2015, pp. 2-3.

does not rise all the way to complete achievement of the final WQBELs and other TMDL-specific limitations.

We are not willing to go as far as saying that compliance with the storm water retention approach alone constitutes compliance with final WQBELs and other TMDL-specific limitations for all time, regardless of the actual results.<sup>127</sup> Nonetheless, we anticipate that implementation of such projects will bring the drainage area most and, in many cases, all of the way to achievement of water quality standards. Where there is still a gap in required water quality improvement, we expect the Executive Officer of the Los Angeles Water Board to require appropriate actions, consistent with the provisions of the Los Angeles MS4 Order and the Los Angeles Water Board's stated interpretation of those provisions,<sup>128</sup> to close that gap with additional control measures in order for the Permittee to be considered in compliance with the WQBEL or other TMDL-specific limitation. There are various mechanisms to provide assurances that additional control measures will be implemented to achieve the WQBEL or other TMDL-specific limitation, and in some instances, it may be appropriate for the Los Angeles Water Board to issue a time schedule order governing the implementation of further control measures. Further, as acknowledged by the Los Angeles Water Board in its comments, in some circumstances, reconsideration of the underlying TMDLs and the final deadlines within those TMDLs may instead be warranted.<sup>129</sup> We additionally recognize that municipal storm water management is an area of continued development and, with continued research and data evaluation, water quality standards may evolve and become more nuanced or sophisticated over time.

While we decline to interpret the storm water retention approach to, in and of itself, constitute compliance with final WQBELs and other TMDL-specific limitations, we emphasize here that any additional control measures to reach compliance that may be required by the Los Angeles Water Board must not require changes to installed storm water retention projects. Any revisions should be prospective in nature and should not disturb projects that Permittees have already installed in good faith to comply with the provisions of their EWMP.

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<sup>127</sup> Further, Permittees still have substantial incentive to develop and implement an EWMP. If a permittee pursues an EWMP, it will be deemed in compliance with the receiving water limitations during the EWMP development phase, and it may also recognize significant non-water quality benefits.

<sup>128</sup> Los Angeles Water Board, Comment Letter, January 21, 2015, pp. 2-3. As explained in footnote 110, at this time we see limited options available to the Los Angeles Water Board in addressing compliance with final deadlines for WQBELs and other TMDL-specific limitations.

<sup>129</sup> We also acknowledge the need for and commit to supporting state-wide solutions for source reduction as appropriate, similar to the brake pad legislation adopted to address copper discharges. (Senate Bill 346 (approved by the Governor September 27, 2010).)

Ultimately, we must set out to verify through appropriate monitoring that final WQBELs and other TMDL-specific limitations can be achieved through the storm water retention approach, or be willing to revise that approach. However, new or additional measures required at that point should be additive to the storm water retention approach measures already installed.

In sum, despite the uncertainty inherent in allowing the storm water retention approach, we concur in its use in the Los Angeles MS4 Order, with the clarification that ultimate compliance is subject to continued planning, monitoring and adaptive management. We shall amend Part VI.E.2.e.i. as follows:

- i. A Permittee shall be deemed in compliance with an applicable final water quality-based effluent limitation and final receiving water limitation for the pollutant(s) associated with a specific TMDL if any of the following is demonstrated:

. . .

- (4) In drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85<sup>th</sup> percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water, **and the Permittee is implementing all requirements of the EWMP, including, but not limited to, Parts VI.C.7 and VI.C.8 of this Order.** This provision (4) shall not apply to final trash WQBELs.

*b. Compliance with Final Receiving Water Limitations*

The Los Angeles MS4 Order states that for receiving water limitations associated with water-body pollutant combinations addressed in a TMDL, compliance with the TMDL requirements of the Order in Part VI.E and Attachments L through R constitutes compliance with the receiving water limitations in Part V.A.<sup>130</sup> In other words, if there is an exceedance for a pollutant in a water body that has a TMDL addressing that pollutant, as long as the Permittee is complying with the requirements for the TMDL, the Permittee is deemed in compliance with the receiving water limitation. No petitioner has contested this provision and we find that it constitutes an appropriate approach to compliance with receiving water limitations for water body-pollutant combinations that are addressed by a TMDL.

For exceedances of receiving water limitations for a water body-pollutant combination not addressed by a TMDL, as previously discussed, the Permittee must either incorporate control measures to address the exceedances into the Permittee's WMP/EWMP or comply directly with the receiving water limitations provisions of Part V.A of the Order. For

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<sup>130</sup> Los Angeles MS4 Order, Part VI.E.2.c.ii., p. 143.

Permittees that choose the WMP/EWMP approach, the WMP/EWMP must incorporate “a final date for achieving the receiving water limitation.”<sup>131</sup> To the extent the Permittee does not achieve the limitation by that final date and does not request and receive an extension, the Permittee has “fail[ed] to meet [a] requirement or date for its achievement in an approved Watershed Management Program or EWMP”<sup>132</sup> and is immediately subject to the receiving water limitations provisions of the Order, with the same result that it is out of compliance. In other words, implementation of non-structural and structural control measures in accordance with the timelines established in the WMP/EWMP constitutes compliance with the receiving water limitations up until the final deadline for achievement of the relevant receiving water limitation; however, at the deadline for final compliance, there must be verification of achievement based on the receiving water limitation itself. While we find that the Order provisions lead to this result as written, for the sake of greater clarity, we will specifically state that final compliance with receiving water limitations must be determined through verification that the receiving water limitation is actually being achieved.

We shall amend Part VI.C.2.c. as follows:

- c. If a Permittee fails to meet any requirement or date for its achievement in an approved Watershed Management Program or EWMP, the Permittee shall be subject to the provisions of Part V.A. for the waterbody-pollutant combination(s) that were to be addressed by the requirement. **For water body-pollutant combinations that are not addressed by a TMDL, final compliance with receiving water limitations is determined by verification through monitoring that the receiving water limitation provisions in Part V.A.1 and 2 have been achieved.**

*c. Compliance with the Non-Storm Water Discharge Prohibition*

The Environmental Petitioners suggest that the Los Angeles MS4 Order is unclear as to whether compliance with the WMP/EWMP may also constitute compliance with the non-storm water discharge prohibition of the Order. We disagree that the Los Angeles MS4 Order is unclear on this issue. The Permittees’ obligation to comply with the receiving water limitations and WQBELs and other TMDL-specific limitations in Parts V.A and VI.E is independent of the Permittees’ obligation to comply with the effective prohibition of non-storm water discharges in Part III.A. The several provisions stating that Permittees will be deemed to be in compliance with the receiving water limitations of the Los Angeles MS4 Order for implementing the WMP/EWMP specifically reference Parts V.A and VI.E of the Order and not

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<sup>131</sup> *Id.*, Part VI.C.5.c.iii.(3)(b), p. 65.

<sup>132</sup> *Id.*, Part VI.C.2.c., p. 52.

III.A.<sup>133</sup> This notwithstanding, Parts VI.C.1.d and VI.C.5.b.iv.(2) require that a Permittee's WMP/EWMP include program elements and control measures to effectively prohibit non-storm water discharges consistent with Part III.A and Part VI.D.4.d or VI.D.10. Therefore, a Permittee's implementation of program elements and control measures consistent with Part III.A and Part VI.D.4.d or VI.D.10, through its approved WMP/EWMP, may provide a mechanism for compliance with Part III.A. Although we accordingly see no need to direct revisions to the Order, we provide this clarification here to respond to the Environmental Petitioners' concern and address any confusion that may exist.

#### **6. "Safe Harbor" During the Planning Phase for the WMP/EWMP**

Under the Los Angeles MS4 Order, a Permittee that has declared its intention to develop a WMP/EWMP is deemed in compliance with the receiving water limitations and with interim WQBELs with due dates prior to approval of the WMP/EWMP for the water body-pollutant combinations the WMP/EWMP addresses, provided it meets certain conditions, even though the Permittee is developing, not implementing the WMP/EWMP. Specifically, the Permittee is deemed in compliance if the Permittee (1) provides timely notice of its intent to develop a WMP/EWMP; (2) meets all interim and final deadlines for development of a WMP/EWMP; (3) targets implementation of watershed control measures in the existing program

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<sup>133</sup> Los Angeles MS4 Order, Parts VI.C.2.b., p. 52, VI.C.3.a., p. 53, VI.E.2.c.ii., p. 143, VI.C. 2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144. To the extent that a non-storm water discharge authorized by Part III.A may be causing or contributing to an exceedance of receiving water limitations in V.A, compliance with the WMP/EWMP provisions would constitute compliance with the receiving water limitations and any relevant interim WQBELs and other TMDL-specific limitations, as long as the WMP/EWMP addresses the water body-pollutant combination for that water body. However, the discharger would have to additionally comply with requirements in Part III.A. and Part VI.D.4.d or VI.D.10 through its approved WMP/EWMP for conditionally exempt non-storm water discharges that are found to cause or contribute to an exceedance in the receiving water. (See *id.*, Part III.A.4.c.-e., pp. 31-32.) We disagree that every discharge from a Permittee's MS4 to the receiving water of non-storm water that is not specifically authorized under Part III.A will necessarily be subject to enforcement under the Los Angeles MS4 Order. Section 402(p)(3)(B)(ii) of the Clean Water Act imposes a requirement to "effectively prohibit" non-storm water discharges. Part III.A of the Los Angeles MS4 Order effectuates that requirement with a requirement for the Permittee to prohibit non-storm water discharges: "Each Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters, except where such discharges are . . . [listing exceptions]." (Los Angeles MS4 Order, Part III.A.1, p. 27.) The Los Angeles MS4 Order incorporates a specific and detailed programmatic requirement – the Illicit Connections and Illicit Discharges Elimination Program – for the Permittees to achieve their obligation to effectively prohibit non-storm water discharges. (Los Angeles MS4 Order, Parts VI.D.4.d., pp. 81-86, VI.D.10, pp. 137-141.) We recognize that even the most comprehensive efforts to address unauthorized non-storm water discharges may not eliminate all such discharges. Where a Permittee is fully implementing its Illicit Connections and Illicit Discharges Elimination Program, either pursuant to Parts VI.D.4.d. or VI.D.10, or by incorporation of customized actions into a WMP/EWMP as approved by the Los Angeles Water Board (see Los Angeles MS4 Order Part VI.D.1.a., p. 67), we would expect any enforcement action under Part III.A to be supported by a fact-specific analysis of the nature and source of the unauthorized non-storm water discharge and the efforts of the Permittee to prohibit the discharge.

to address known contributions of pollutants; and (4) receives approval of the WMP/EWMP within the specified time periods.<sup>134</sup>

The Environmental Petitioners object to the availability of a “safe harbor” during the planning phase. We disagree with the Environmental Petitioners that providing a “safe harbor” in the planning phase is disallowed by applicable law -- see our discussion of anti-backsliding requirements in section II.B.1. and antidegradation requirements in section II.B.2. However, we understand that deeming a discharger in compliance with receiving water limitations during the planning phase, not just the implementation phase, could weaken the incentive for Permittees to efficiently and timely seek approval of a WMP/EWMP and to move on to implementation. It is the implementation of the WMP/EWMP that will in fact lead to progress toward compliance with receiving water limitations; the planning phase is essential, but should be only as long as necessary for a well-planned program with carefully analyzed controls to be developed. Given the significance of the water quality issues addressed by the WMP/EWMPs, it is paramount that implementation begin as soon as feasible. Accordingly, the “safe harbor” in the planning phase is appropriate only if it is clearly constrained in a manner that sustains incentives to move on to approval and implementation and is structured with clear, enforceable provisions.

Having reviewed the planning sections of the WMP/EWMP provisions carefully, we find that the Los Angeles MS4 Order does sufficiently constrain the planning phase, so that the “safe harbor” provided is not unreasonable. As already stated, compliance is deemed only if the Permittee is meeting the relevant deadlines for development and approval of the WMP/EWMP.<sup>135</sup> There are no provisions in the Order that allow for extensions to these deadlines. If a Permittee fails to obtain approval within the allowed number of months for the development of a WMP/EWMP, the Order states that the Permittee must then instead demonstrate actual compliance with receiving water limitations and with applicable interim WQBELs.<sup>136</sup> The Los Angeles MS4 Order is also clear that achievement of any TMDL-associated final deadlines occurring prior to the approval deadlines for the WMP/EWMP cannot be excused through commitment to planning for a WMP/EWMP.<sup>137</sup>

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<sup>134</sup> *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

<sup>135</sup> *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

<sup>136</sup> *Id.*, Part VI.C.4.e., p. 58.

<sup>137</sup> *Id.*, Parts VI.C.3.c., p. 53, VI.C.4.d.iii, p. 58. Under Part VI.C.4.d.iii., Permittees must ensure that MS4 discharges achieve compliance with interim, in addition to final, trash WQBELs during the planning phase.



Further, Permittees are subject to a number of conditions during the planning phase that will ensure that progress toward achievement of receiving water limitations is not put on hold pending approval of the plan. These include requirements to put in place Low Impact Development (LID) ordinances and green streets policies<sup>138</sup> and to continue to implement watershed control measures in the existing storm water management programs, including those to eliminate non-storm water discharges,<sup>139</sup> but in a manner that is targeted to address known pollutants.<sup>140</sup>

Given the clear, enforceable requirements limiting the planning phase of the WMP/EWMP provisions, we find that the Los Angeles MS4 Order's inclusion of provisions deeming compliance with the receiving water limitations and with interim WQBELs during development of the programs is reasonable.

In fact, we are concerned that the Los Angeles Water Board has left no room for any deviation from the prescribed development schedule for WMP/EWMPs. A Permittee working in good faith to develop a WMP/EWMP over multiple months may encounter an issue that requires it to ask for a short extension on an interim or final deadline. Under such circumstances, the Los Angeles Water Board should be able to consider the request for the extension, rather than have its hands tied and have to reject a WMP/EWMP based on lack of timeliness. We will add a provision to the Order that provides the Los Angeles Water Board or its Executive Officer discretion in granting such extensions, but the Permittee will not be deemed in compliance with the applicable receiving water limitations and WQBELs during the period of the extension.

We shall add a new Part VI.C.4.g. as follows:

**g. Permittees may request an extension of the deadlines for notification of intent to develop a Watershed Management Program or EWMP, submission of a draft plan, and submission of a final plan. The extension is subject to approval by the Regional Water Board or the Executive Officer. Permittees that are granted an extension for any deadlines for development of the WMP/EWMP shall be subject to the baseline requirements in Part VI.D and shall demonstrate compliance with receiving water limitations pursuant to Part V.A. and with applicable interim water quality-based effluent limitations in Part VI.E pursuant to subparts VI.E.2.d.i.(1)-(3) until the Permittee has an approved WMP/EWMP in place.**

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<sup>138</sup> *Id.*, Part VI.C.4.c., pp. 56-57.

<sup>139</sup> *Id.*, Part VI.C.4.d.i.-ii., pp. 57-58.

<sup>140</sup> *Id.*, Parts VI.C.2.d.iii., pp. 52-53, VI.C.3.b.iii., p. 53, VI.E.2.d.i.(4)(d)(3), p. 144.

## 7. Conclusion

In conclusion, we uphold the WMP/EWMP provisions as a reasonable alternative compliance option for meeting receiving water limitations and uphold the WMP/EWMP provisions in all other aspects, except as specifically stated above. We find that the WMP/EWMP approach is a clearly defined, implementable, and enforceable alternative to the receiving water limitations provisions that we mandated in Order WQ 99-05, and that the alternative provides Permittees an ambitious, yet achievable, path forward for steady and efficient progress toward achievement of those limitations while remaining in compliance with the terms of the permit.

We direct all regional water boards to consider the WMP/EWMP approach to receiving water limitations compliance when issuing Phase I MS4 permits going forward.<sup>141</sup> In doing so, we acknowledge that regional differences may dictate a variation on the WMP/EWMP approach, but believe that such variations must nevertheless be guided by a few principles.<sup>142</sup> We expect the regional water boards to follow these principles unless a regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.

1. The receiving water limitations provisions of Phase I MS4 permits should continue to require compliance with water quality standards in the receiving water and should not deem good faith engagement in the iterative process to constitute such compliance. The Phase I MS4 permits should therefore continue to use the receiving water limitations provisions as directed by State Water Board Order WQ 99-05.

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<sup>141</sup> We acknowledge that small MS4s permitted under the statewide General Permit for WDRs for Storm Water Discharges from Small MS4s (Order No. 2013-0001-DWQ) (General Phase II MS4 Permit) have similar practical issues as Phase I permittees in complying with receiving water limitations. Nevertheless, because the General Phase II MS4 Permit is issued by the State Water Board, not the regional water boards, we limit our guidance to regional water boards to the Phase I permits. The State Water Board is committed to working with small MS4s, the regional water boards, and interested persons in developing an alternative compliance option for the General Phase II MS4 Permit.

<sup>142</sup> In considering appropriate guidance for regional water boards drafting alternative compliance paths in municipal storm water permits, we have reviewed the proposed "strategic compliance program" model language that was submitted by the California Stormwater Quality Association (CASQA) and supported in whole or in part by a number of interested persons. (CASQA August 15, 2013 Receiving Water Limitations Submission, Attachment A, Section E.) While we have not in these proceedings adopted the CASQA language, or, for that matter, any specific language, for alternative compliance path provisions, regional water boards remain free to consider and incorporate the CASQA approach into their municipal storm water permits to the extent they determine and document that the approach, including any modifications, satisfies the principles we set out in this section as well as all other direction we have provided in this order.

2. The Phase I MS4 permits should include a provision stating that, for water body-pollutant combinations with a TMDL, full compliance with the requirements of the TMDL constitutes compliance with the receiving water limitations for that water body-pollutant combination.
3. The Phase I MS4 permits should incorporate an ambitious, rigorous, and transparent alternative compliance path that allows permittees appropriate time to come into compliance with receiving water limitations without being in violation of the receiving water limitations during full implementation of the compliance alternative.
4. The alternative compliance path should encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements.
5. The alternative compliance path should encourage the use of green infrastructure and the adoption of low impact development principles.
6. The alternative compliance path should encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.
7. The alternative compliance path should have rigor and accountability. Permittees should be required, through a transparent process, to show that they have analyzed the water quality issues in the watershed, prioritized those issues, and proposed appropriate solutions. Permittees should be further required, again through a transparent process, to monitor the results and return to their analysis to verify assumptions and update the solutions. Permittees should be required to conduct this type of adaptive management on their own initiative without waiting for direction from the regional water board.

**8. Direction to the Los Angeles Water Board to Report to the State Water Board on Implementation**

We recognize that our review has been limited to the provisions of the Los Angeles MS4 Order. The success of the WMP/EWMP approach depends in large part on the steps that follow adoption of these provisions, i.e., the effort invested by Permittees in developing WMPs/EWMPs that truly address the stringent provisions of the Order, the precision with which the Los Angeles Water Board reviews the draft programs and requires revisions, and, most importantly, the actual implementation and appropriate enforcement of the programs once approved. The work going forward must ensure that the WMPs/EWMPs in fact exhibit the rigor and accountability the provisions of the Los Angeles MS4 Order demand. We expect that the Los Angeles Water Board will make careful oversight and enforcement a priority and that they will be aided in this process by the public review and comment opportunities built into the terms of the Order.

The process of developing the WMPs/EWMPs is currently ongoing -- the Los Angeles Water Board has been reviewing draft and revised draft WMPs and workplans for EWMPs – and, although we have been asked by the Environmental Petitioners to take official notice of some of the submissions and conditional approvals in the process, it is premature for the State Water Board to speak to the sufficiency of the resulting WMPs/EWMPs until the Los Angeles Water Board, with full input from the stakeholders, has had the opportunity to consider, revise, and finally approve the programs. We note again that all documents submitted to the Los Angeles Water Board Executive Officer for approval are subject to a 30-day public comment period<sup>143</sup> and that any formal determination or approval by the Executive Officer may be reviewed by the Los Angeles Water Board upon request by an interested person.<sup>144</sup> And an interested person may petition the State Water Board to review an action or failure to act of the Los Angeles Water Board.<sup>145</sup>

Once the WMPs/EWMPs are approved, ensuring that they are diligently and timely implemented must remain a top priority for the Los Angeles Water Board. We expect that the Los Angeles Water Board will continue to work cooperatively and closely with the Permittees, the Environmental Petitioners, and other interested persons in this process, but that the Board will also use its enforcement authority to ensure that appropriate progress is made toward water quality goals. We intend to remain involved in this process, as we must learn statewide from the successes and shortcomings of the approach we are endorsing with this order. We accordingly direct the Los Angeles Water Board to report to us on progress in implementation of the WMPs/EWMPs, and progress in improving water quality during this and the next permit term by February 28, 2018, by February 29, 2020, and by March 31, 2022. Specifically, we ask that the Los Angeles Water Board report on region-wide data for the following:

- On-the-ground structural control measures completed;
- Non-structural control measures completed;
- Monitoring data that evaluates the effectiveness of implemented control measures in improving water quality;

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<sup>143</sup> Los Angeles MS4 Order, Part V.A.5.b, p. 42.

<sup>144</sup> *Id.*, Part V.A.6, p. 42.

<sup>145</sup> Wat. Code, § 13320. On April 28, 2015, the Executive Officer of the Los Angeles Water Board conditionally approved several submitted WMPs. On May 28, 2015, the Environmental Petitioners filed a petition challenging the conditional approvals and requesting review by the Los Angeles Water Board and by the State Water Board of the Executive Officer's determination.

- Comparison of the effectiveness of the control measures to the results projected by the reasonable assurance analyses;
- Comparison of control measures completed to date with control measures projected to be completed to date pursuant to the WMPs/EWMPs;
- Control measures proposed to be completed in the next two years pursuant to the WMPs/EWMPs and the schedule for completion of those control measures;
- Status of funding and implementation for control measures proposed to be completed in the next two years;
- Trends in receiving water quality related to pollutants typically associated with storm water;
- Available permit compliance data, including requests for compliance extensions;
- Enforcement actions taken and results.

In addition to covering the above information, the third report shall summarize and reflect the comprehensive information gathered through the updates of the reasonable assurance analyses and WMPs/EWMPs conducted by the Permittees in the second permit term.

### **C. Appropriateness of TMDL Requirements**

Section 303(d) of the Clean Water Act requires the water boards to identify impaired water bodies that do not meet water quality standards after applying required technology-based effluent limitations.<sup>146</sup> TMDLs are developed by either the regional water boards or by USEPA in response to section 303(d) listings of impaired water bodies. A TMDL is defined as the sum of the individual wasteload allocations for point sources of pollution, the load allocations for nonpoint sources of pollution, and the contribution from background sources of pollution,<sup>147</sup> and represents the maximum amount of a pollutant that a water body may receive and still achieve water quality standards. TMDLs developed by regional water boards include implementation provisions<sup>148</sup> and are typically incorporated into the regional water board's water quality control plan.<sup>149</sup> TMDLs developed by USEPA typically contain the total load and load allocations required by section 303(d), but do not set out comprehensive implementation provisions.<sup>150</sup> Most TMDLs are not self-executing, but instead rely upon subsequently-issued permits to impose requirements on discharges that implement the TMDLs' wasteload

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<sup>146</sup> 33 U.S.C. § 1313(d).

<sup>147</sup> 40 C.F.R. § 130.2(i).

<sup>148</sup> Wat. Code, §§ 13050, subd. (j), 13242.

<sup>149</sup> See 40 C.F.R. §§ 130.6(c)(1).

<sup>150</sup> *Am. Farm Bureau Fed'n v. U.S. E.P.A.* (M.D. Pa. 2013) 984 F. Supp. 2d 289, 314.

allocations.<sup>151</sup> The Los Angeles MS4 Order includes TMDL-specific requirements that implement 33 TMDLs (twenty-five adopted by the Los Angeles Water Board, seven established by USEPA, and one adopted by the Santa Ana Regional Water Quality Control Board that assigned requirements to two Permittees of the Los Angeles MS4 Order) in Part VI.E and in Attachments L-R.

Petitioners raise a number of challenges to the TMDL-based requirements of the Los Angeles MS4 Order. We take up several of those arguments in this section.<sup>152</sup>

### **1. Inclusion of Numeric WQBELs**

Permittee Petitioners argue that the numeric WQBELs incorporated into the Los Angeles MS4 Order as TMDL-based limitations are contrary to the Clean Water Act and to state law and policy. We disagree.

Under the federal regulations implementing the Clean Water Act, effluent limitations in NPDES permits developed to achieve water quality standards must be consistent with the assumptions and requirements of any available wasteload allocation for the discharge.<sup>153</sup> In addition, the Porter-Cologne Act requires that waste discharge requirements implement any relevant water quality control plans,<sup>154</sup> including TMDL requirements that have been incorporated into the water quality control plans. The Los Angeles MS4 Order incorporates numeric WQBELs and other limitations that the Los Angeles Water Board found are consistent with the TMDL requirements applicable to the Permittees.

Permittee Petitioners argue that there is no requirement under federal law for incorporation of TMDL requirements into an MS4 permit and that the inclusion of the requirements in Part VI.E and in Attachments L-R was therefore at the discretion of the Los Angeles Water Board. They point out, as we acknowledged in section II.A, that MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the MEP, but that requirements to strictly meet water quality standards are at the discretion of the permitting agency.<sup>155</sup> Because TMDL requirements are a path to achieving water quality standards, the Permittee Petitioners argue, the Los Angeles Water Board had the discretion not to include them in the Los Angeles MS4 Order.

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<sup>151</sup> *City of Arcadia v. EPA* (N.D. Cal. 2013) 265 F.Supp.2d 1142, 1144-1145.

<sup>152</sup> We note that we do not take up any arguments that challenge the terms of the TMDLs. Those arguments should have been made during the public process when the TMDLs were adopted. They are untimely now.

<sup>153</sup> 40 C.F.R. § 122.44(d)(1)(vii)(B).

<sup>154</sup> Wat. Code, § 13263, subd. (a).

<sup>155</sup> 33 U.S.C. § 1342(p); *Defenders of Wildlife, supra*, 191 F.3d 1159.

Answering the question of whether the Los Angeles Water Board was required under federal law to strictly effectuate TMDL compliance through the Los Angeles MS4 Order is a largely irrelevant exercise because we have already reaffirmed in this order that we will continue to require water quality standards compliance in MS4 permits. Further, given the back-stop nature of TMDLs, and the fact that each set of dischargers must meet their share of the allocation to reach the total reductions set out, a regime in which municipal storm water dischargers were given a pass on TMDL obligations would render the promise of water quality standards achievement through TMDLs illusory. This is especially true in a large urbanized area where pollutants in storm water constitute a significant share of the impairment and where other dischargers would be disproportionately burdened if MS4s were not held to their allocations. Although not dispositive, we also note that USEPA has assumed in guidance (discussed in more detail below) issued on storm water and TMDL implementation that MS4 permits must incorporate effluent limitations consistent with the assumptions and requirements of relevant wasteload allocations.<sup>156</sup> To the extent the TMDL provisions of the Clean Water Act and the federal regulations could be read to preclude mandatory incorporation of wasteload allocations into an MS4 permit, effluent limitations consistent with those load allocations should nevertheless be required under Clean Water Act section 402, subsection (p)'s direction that the MS4 permit shall require "such other controls" as the permitting authority determines "appropriate for the control of such pollutants."<sup>157</sup> Finally, for TMDLs incorporated into water quality control plans, the implementation plan associated with the TMDL applies to all dischargers named, including MS4 permittees, and the MS4 permits must be consistent with the direction in the water quality control plan.<sup>158</sup>

Having found that the Los Angeles Water Board acted in a manner consistent with federal and state law when it developed WQBELs to address applicable TMDLs, we next turn to whether *numeric* WQBELs were appropriate. We find that the Los Angeles Water Board

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<sup>156</sup> USEPA, Memorandum, "Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs," (Nov. 22, 2002) (2002 USEPA Memorandum); see also USEPA, Memorandum, "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,'" (Nov. 26, 2014) (2014 USEPA Memorandum). The 2014 USEPA Memorandum replaced a memorandum with the same title issued on November 12, 2010, which was subsequently opened to public comment. (USEPA Statement (March 17, 2011), available at <[http://water.epa.gov/polwaste/npdes/stormwater/upload/sw\\_tmdlwla\\_comments.pdf](http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf)> (as of Nov. 18, 2014).)

<sup>157</sup> 33 U.S.C. § 1342(p)(3)(B)(iii). See, e.g., State Water Board Orders WQ 91-03, WQ 91-04, WQ 98-01, WQ 99-05, WQ 2001-15.

<sup>158</sup> Wat. Code, § 13263, subd. (a); see also *State Water Res. Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 730 (noting the obligation of the water boards to follow the program of implementation included in a water quality control plan).

acted within its legal authority when establishing numeric WQBELs, and further that its choice of numeric WQBELs was a reasonable exercise of its policy discretion.

In the context of MS4 discharges, effluent limitations in NPDES permits may be expressed in the form of either numeric limitations or best management practices (BMPs). The federal regulations specifically state that BMP-based effluent limitations may be used to control pollutants for storm water discharges.<sup>159</sup> USEPA has issued two memoranda, on November 22, 2002 (2002 USEPA Memorandum), and on November 26, 2014 (2014 USEPA Memorandum), providing guidance to the states on translating wasteload allocations for storm water into effluent limitations in NPDES Permits.<sup>160</sup> The 2002 USEPA Memorandum contemplated that “the NPDES permitting authority will review the information provided by the TMDL . . . and determine whether the effluent limit is appropriately expressed using a BMP approach (including an iterative BMP approach) or a numeric limit.”<sup>161</sup> The 2002 USEPA Memorandum further stated that “EPA expects that most WQBELs for NPDES-regulated municipal . . . storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances.”<sup>162</sup> The 2014 USEPA Memorandum, after noting the increased information available to the permitting agencies after more than a decade of experience with setting wasteload allocations and effluent limitations, explained that:

Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant loads, the WLA should, where feasible, be translated into effective, measurable WQBELs that will achieve this objective. This could take the form of a numeric limit, or of a measurable, objective BMP-based limit that is projected to achieve the WLA. . . . The permitting authority’s decision as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs, with clear, specific, and measurable elements, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying

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<sup>159</sup> 40 C.F.R. § 122.44(k)(2); see also 33 U.S.C. § 1342(p)(3)(B)(iii). 40 Code of Federal Regulations section 122.44(k)(3) further contemplates that BMP-based effluent limitations are appropriate where it is infeasible to develop a numeric effluent limitation.

<sup>160</sup> 2002 USEPA Memorandum; 2014 USEPA Memorandum. In addition to the two memoranda, USEPA published guidance titled “Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits” ((Sept. 1996) 61 Federal Register 57425), which recommended inclusion of BMPs in first-round permits, and expanded or better-tailored BMPs in subsequent permits. In 2005, the State Water Board assembled a blue ribbon panel to address the feasibility of including numeric effluent limits as part of NPDES municipal, industrial, and construction storm water permits. The panel issued a report dated June 19, 2006, which included recommendations as to the feasibility of including numeric limitations in storm water permits. The report concluded that it was not feasible, at that time, to set enforceable numeric effluent limitations for municipal storm water discharges.

<sup>161</sup> 2002 USEPA Memorandum, p. 5.

<sup>162</sup> *Id.*, p. 2.



WLA, including the nature of the stormwater discharge, available data, modeling results, and other relevant information.<sup>163</sup>

Both options – to choose BMP-based WQBELs or to choose numeric WQBELs – were legally available to the Los Angeles Water Board. In adopting numeric WQBELs, the Los Angeles Water Board analyzed the specific facts and circumstances surrounding storm water discharges in the region and reasonably concluded that numeric WQBELs were warranted because storm water discharges constituted a significant contributor to the water quality standards exceedances in the area and the exceedances had not been to date resolved through BMP-based requirements. Moreover, the Los Angeles Water Board concluded that it could feasibly develop numeric WQBELs following the extensive work already conducted to develop the TMDLs, which involved analyzing pollutant sources and allocating loads using empirical relationships or quantitative models. We will not second-guess the determination of the Los Angeles Water Board, given its extensive and unique role in developing the TMDLs and the permit to implement the TMDLs, that numeric WQBELs were appropriate for the Los Angeles MS4 Order.<sup>164</sup>

We emphasize, however, that we are not taking the position that numeric WQBELs are appropriate in all MS4 permits or even with respect to certain TMDLs within an MS4 permit. In a recent amendment to State Water Board Order 2011-0011-DWQ, NPDES Statewide Storm Water Permit for State of California Department of Transportation (Caltrans),<sup>165</sup> we found BMP-based TMDL requirements to be “consistent with the assumptions and requirements of the WLAs” of the TMDLs applicable to Caltrans. That determination was based on a number of factors including the fact that Caltrans, a single discharger, was named in over 80 TMDLs statewide, the fact that Caltrans had relatively little contribution to the exceedances in each of those TMDLs, and the consideration that there was significant efficiency to be gained by streamlining and standardizing control measure implementation throughout Caltrans’ statewide storm water program. Similarly, regional water boards may find BMP-based requirements to be appropriate based on TMDL-specific, region-specific, or permittee-specific

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<sup>163</sup> 2014 USEPA Memorandum, p. 6.

<sup>164</sup> The Los Angeles Water Board incorporated a discussion in the Fact Sheet of how the TMDL wasteload allocations were translated into numeric WQBELs in order to implement the TMDLs in the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att.F, Fact Sheet, pp. F-89-F-100). See 40 C.F.R. § 124.8. We are not independently reviewing the calculations and analyses underlying the specific numeric limitations arrived at by the Los Angeles Water Board; rather, our review has been limited to a determination of whether the choice of numeric rather than BMP-based limitations was reasonable. To the extent any petitioners asked us to independently review the issue in their petitions seeking review of the Order, the issue is dismissed. See fn. 11.

<sup>165</sup> State Water Board Order WQ 2014-0077-DWQ.

considerations. In many ways, the Los Angeles MS4 Order was uniquely positioned to incorporate numeric WQBELs because of the extensive TMDL development in the region in the past decade and the documented role of MS4 discharges in contributing to the impairments addressed by those TMDLs. Thus, while we decline to remove the numeric WQBELs from the Los Angeles MS4 Order, we also decline to urge the regional water boards to use numeric WQBELs in all MS4 permits.<sup>166</sup>

## **2. Requirement for Reasonable Potential Analysis**

The federal regulations implementing NPDES permitting require the permitting authority to establish WQBELs for point source discharges when those discharges cause, have the “reasonable potential” to cause, or contribute to an excursion above water quality standards.<sup>167</sup> Permittee Petitioners argue that the Los Angeles Water Board did not conduct an appropriate reasonable potential analysis prior to imposing numeric WQBELs. The argument is misguided. The Los Angeles Water Board established that the MS4 discharges can cause or contribute to exceedances of water quality standards through the process of developing TMDLs and assigning wasteload allocations. At the permitting stage, the Los Angeles Water Board’s legal obligation was to develop WQBELs “consistent with the assumptions and requirements of any wasteload allocation” in the TMDLs,<sup>168</sup> and not to reconsider reasonable potential.<sup>169</sup>

## **3. USEPA-Established TMDLs**

USEPA has established seven TMDLs that include wasteload allocations for MS4 discharges covered by the Los Angeles MS4 Order. In contrast to state-adopted TMDLs, USEPA-established TMDLs do not contain an implementation plan or schedule for achievement of the wasteload allocations,<sup>170</sup> with the effect that Permittees must comply with wasteload allocations immediately. To avoid this result, the regional water board may either adopt a

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<sup>166</sup> Relying on the 2014 USEPA Memorandum, Permittee Petitioners also argue that the Los Angeles Water Board was required to disaggregate storm water sources within applicable TMDLs. The 2014 USEPA Memorandum only encourages permit writers to assign specific shares of the wasteload allocation to specific permittees during the permitting process, reasoning that permit writers may have more detailed information than the TMDL writers to assign reductions for specific sources. (2014 USEPA Memorandum, p.8.) In an MS4 system as complex and interconnected as that covered under the Los Angeles MS4 Order, we do not expect the permitting authority to be able to disaggregate wasteload allocations by discharger. Further, as discussed in section II.F. on joint responsibility, the Los Angeles MS4 Order has provided a means for Permittees with commingled discharges to demonstrate that they are not responsible for any given exceedance of a limitation.

<sup>167</sup> 40 C.F.R. § 122.44(d)(1)(iii).

<sup>168</sup> 40 C.F.R. § 122.44(d)(1)(vii)(B).

<sup>169</sup> See USEPA, NPDES Permit Writers Manual (updated September 2010), Chapter 6, section 6.3.3.

<sup>170</sup> See, e.g., *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, *supra*, 984 F. Supp. 2d at p. 314.

separate implementation plan as a water quality control plan amendment<sup>171</sup> or issue the Permittee a compliance order with a compliance schedule.<sup>172</sup> For the seven USEPA-established TMDLs applicable to the Permittees, the Los Angeles Water Board authorizes Permittees subject to a wasteload allocation in a USEPA-established TMDL to propose control measures that will be effective in meeting the wasteload allocation, and a schedule for their implementation that is as short as possible, as part of a WMP/EWMP.<sup>173</sup> Permittees that do not submit an adequate WMP/EWMP are required to demonstrate compliance with the wasteload allocations immediately.<sup>174</sup>

Permittee Petitioners argue that the Los Angeles Water Board has acted inconsistently in requiring BMP-based compliance with the USEPA-established TMDLs but requiring numeric WQBELs for the state-established TMDLs. We have already stated above in section C.1 that the permitting authority has discretion to choose between BMP-based and numeric effluent limitations depending on fact-specific considerations. The Los Angeles Water Board was not restricted to choosing one single uniform approach to implementing all 33 TMDLs in the Los Angeles MS4 Order. In fact, straight-jacketing NPDES permit writers to choose one approach to the exclusion of another, even within the confines of a single MS4 permit, would run afoul of USEPA's expectations in the 2014 USEPA Memorandum for a fact-specific, documented justification for the permit requirements included to implement a wasteload allocation.

The Environmental Petitioners argue that the provisions are contrary to law because they excuse Permittees from complying with final numeric wasteload allocations as long as they are implementing the BMPs proposed in the WMP/EWMP. The approach taken by the Los Angeles MS4 Order to compliance here is similar to the provisions for compliance with receiving water limitations that are not otherwise addressed by a TMDL: The Permittee proposes control measures and a timeline that is as short as possible and is considered in compliance with the final numeric limitations while implementing the control measures consistent with the schedule. We find that, given the absence of an implementation plan with final compliance deadlines specified in the Los Angeles Water Board's water quality control

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<sup>171</sup> Wat. Code, § 13242.

<sup>172</sup> *Id.*, See, e.g., § 13300.

<sup>173</sup> The Los Angeles MS4 Order's Fact Sheet states that the Los Angeles Water Board may choose to adopt implementation plans or issue enforcement orders in the future. (Los Angeles MS4 Order, Att. F, Fact Sheet, p. F-111.)

<sup>174</sup> Los Angeles MS4 Order, Part VI.E.3., pp. 145-146.

plan, this approach is consistent with the assumptions and requirements of the relevant wasteload allocations. We will not revise the provisions.

#### **D. Non-Storm Water Discharge Provisions**

Permittee Petitioners argue that the non-storm water discharge provisions of the Los Angeles MS4 Order are contrary to the Clean Water Act. Specifically, Permittee Petitioners assert that the Los Angeles MS4 Order improperly regulates non-storm water discharges from the MS4 to the receiving waters by imposing the prohibition of discharge “through the MS4 to the receiving waters” and by imposing WQBELs and other numeric limitations, rather than the MEP standard, on dry weather discharges.

The Los Angeles MS4 Order states that “[e]ach Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters” with certain exceptions including discharges separately regulated under an NPDES permit and discharges conditionally exempt from the prohibition consistent with the federal regulations.<sup>175</sup> Permittee Petitioners take issue with the imposition of the prohibition “through the MS4 to receiving waters” because the language does not track the specific requirement of the Clean Water Act that the MS4 permit “include a requirement to effectively prohibit non-stormwater discharges *into the storm sewer.*” (Emphasis added.)<sup>176</sup>

We find the variation in language to be a distinction without a difference. Whether the Los Angeles MS4 Order prohibits non-storm water discharges *into* the MS4 or *through* the MS4 to receiving waters, the intent and effect of the prohibition is to prevent non-exempt non-storm water discharges from reaching the receiving waters.<sup>177</sup> The legal standard governing non-storm water – effective prohibition -- is not altered because the Los Angeles MS4 Order imposes the prohibition at the point of entry into the receiving water rather than the point of entry into the MS4 itself. Instructively, USEPA has used the terms “into,” “from,” and “through” interchangeably when describing the prohibition.<sup>178</sup>

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<sup>175</sup> *Id.*, Part III.A, pp 27-33.

<sup>176</sup> 33 U.S.C. § 1342(p)(3)(B)(ii).

<sup>177</sup> The Los Angeles Water Board notes that the language in the Los Angeles MS4 Order is not significantly changed from the version in the 2001 Los Angeles MS4 Order, which prohibited non-storm water discharges “into the MS4 and watercourses.” The Board additionally asserts that phrasing the prohibition as “through the MS4 to receiving waters” provides Permittees with greater flexibility to use measures that control non-storm water after it enters the MS4, including regional solutions such as low-flow diversions and catch-basin inserts.

<sup>178</sup> See, e.g., 55 Fed. Reg. 47990, 47995-47996 (“Section 402(p)(B)(3) of the CWA requires that permits for discharges *from municipal separate storm sewer systems* require the municipality to ‘effectively prohibit’ non-storm water discharges *from the municipal separate storm sewer*...Ultimately, such non-storm water discharges *through a municipal separate storm sewer* must either be removed from the system or become subject to an NPDES permit. . . . (Continued)

Permittee Petitioners' objection to the phrasing of the prohibition in the Los Angeles MS4 Order appears to be based largely on the assumption that prohibiting non-storm water discharges at the point of entry into the receiving water rather than at the point of entry into the MS4 allows the Los Angeles Water Board to impose requirements on those discharges that would otherwise not be available under the Clean Water Act and federal regulations. We disagree.

As a preliminary matter, regardless of the phrasing of the non-storm water discharge prohibition, MEP is not the standard that governs non-storm water discharges. Permittee Petitioners have asserted that, for non-storm water discharges that enter the MS4, MEP is the governing standard just as it is for storm water discharges. This assertion misinterprets the statute. The Clean Water Act imposes two separate standards for regulation of non-storm water and storm water in an MS4 permit: The MS4 permit "shall include a requirement to effectively prohibit non-stormwater discharges" into the MS4, and "shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . . ." <sup>179</sup> Although the statute imposes the MEP standard to control of "pollutants" rather than specifically to "pollutants in storm water," any reading of section 402(p)(3)(B)(iii) to apply generally to both non-storm water and storm water would render the effective prohibition of non-storm water in section 402(p)(3)(B)(ii) meaningless. The federal regulations confirm the distinction between the treatment of storm water and non-storm water by establishing requirements to prevent illicit discharges from entering the MS4. <sup>180</sup> While the regulations have no definition for "non-storm water discharges," illicit discharges most closely represent the statutory term and are defined as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit . . . and discharges resulting from firefighting activities." <sup>181</sup> Further, contrary to assertions by Permittee Petitioners, the definition of storm water in the federal regulations is not inclusive of dry weather discharges. The federal regulations define storm water as "storm water runoff, snow melt runoff, and surface runoff and

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The CWA prohibits the point source discharge of non-storm water not subject to an NPDES permit *through municipal separate storm sewers to waters of the United States.*" (Emphasis added.)

<sup>179</sup> 33 U.S.C. § 1342(p)(3)(b)(iii).

<sup>180</sup> 40 C.F.R. § 122.26(d)(2)(iv)(B).

<sup>181</sup> *Id.*, § 122.26(b)(2). The preamble to the regulations states: "Today's rule defines the term 'illicit discharge' to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit." (55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).)

drainage.”<sup>182</sup> Surface runoff and drainage cannot be understood to refer to dry weather discharges where USEPA has specifically stated in the preamble to the relevant regulations that it would not expand the definition of storm water to include “a number of classes of discharges which are not in any way related to precipitation events.”<sup>183</sup> Accordingly, dry weather discharges are not a component of storm water discharges subject to the MEP standard.<sup>184</sup>

Second, the Los Angeles Water Board’s legal authority to impose TMDL-based WQBELs and other limitations on dry weather discharges is derived not from the phrasing of the discharge prohibition in the statute but from the TMDLs themselves, as well as the Clean Water Act direction to require “such other provisions” as the permitting authority “determines appropriate for the control of such pollutants.” We have already found that the Los Angeles MS4 Order reasonably (and legally) incorporated numeric WQBELs and other limitations to implement the TMDLs. The Los Angeles Water Board’s authority to impose the limitations for dry weather conditions is accordingly independent of the provisions establishing the non-storm water effective prohibition.

Permittee Petitioners also assert that requiring compliance with the non-storm water discharge prohibition through and from the MS4 would frustrate enforcement of the illicit connection and illicit discharge elimination programs of the Los Angeles MS4 Order, which continue to require the Permittee to prohibit illicit discharges and connections to the MS4.<sup>185</sup> On this point, we agree with the Los Angeles Water Board that the illicit connection and illicit discharge elimination program is a means to implement the non-storm water prohibition and independently implementable and enforceable. We are more sympathetic to the argument by Permittee Petitioners that, in the context of a complex MS4 system with commingled discharges, the prohibition of discharges through the MS4 to the receiving waters poses greater compliance challenges than a prohibition of discharges into the MS4; however, the Los Angeles MS4 Order’s Monitoring and Reporting Program contains a procedure by which a Permittee will notify the Board and the upstream jurisdiction when non-exempted, non-storm water discharges pose an issue in commingled discharges.<sup>186</sup> Further, the Los Angeles Water Board states in its

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<sup>182</sup> 40 C.F.R. § 122.26(b)(13).

<sup>183</sup> 55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).

<sup>184</sup> We disagree that the phrasing of the non-storm water discharge prohibition in the Los Angeles MS4 Order means that *any* dry weather discharges from the MS4 could be construed as a violation of the Clean Water Act for the same reasons articulated in footnote 133 of this order.

<sup>185</sup> Los Angeles MS4 Order, Parts VI.A.2.a.iii, p. 40, VI.D.4.d., p. 81-86, VI.D.10, p. 137-141.

<sup>186</sup> Los Angeles MS4 Order, Att. E, Monitoring and Reporting Program, Part IX.F.6, p. E-27.

October 15, 2013 Response that the upstream jurisdiction would then have the responsibility to further investigate and address the discharge.<sup>187</sup> The challenge of addressing compliance and enforcement in the context of interconnected MS4s and commingled discharges is a challenge pervasive in the MS4 regulatory structure and not unique to non-storm water discharges. We are not sufficiently persuaded by Permittee Petitioners' arguments regarding compliance to disturb the non-storm water prohibitions as currently established in the Los Angeles MS4 Order.

## **E. Monitoring Provisions**

Relying on Water Code sections 13165, 13225, and 13267, Permittee Petitioners argue that the Los Angeles Water Board was required to conduct a cost-benefit analysis to support the monitoring and reporting requirements of the Los Angeles MS4 Order. Because the monitoring and reporting provisions of the Los Angeles MS4 Order are incorporated pursuant to federal law, the cited provisions are inapplicable here. The monitoring and reporting provisions of the Los Angeles MS4 Order were established under the Clean Water Act and USEPA's regulations.<sup>188</sup> Further, under state law, Water Code section 13383, rather than Water Code section 13267, controls monitoring and reporting requirements in the context of NPDES permitting, and that provision does not include a requirement to ensure that the burden, including costs of the report, bear a reasonable relationship to the need for the report.<sup>189</sup>

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<sup>187</sup> Los Angeles Water Board, October 15, 2013 Response, p. 33 & fn. 116.

<sup>188</sup> See 33 U.S.C. §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)D, 122.41(h), 122.41(j), 122.41(l), 122.42(c), 122.44(i), 122.48.

<sup>189</sup> Permittee Petitioners argue that the cost considerations of Water Code sections 13225 and 13267 are relevant to the Los Angeles MS4 Order notwithstanding the fact that it was issued under federal authority because the requirements of those section are not inconsistent with the requirements of section 13383. (See Water Code, §13372, subd. (a) ("To the extent other provisions of this division are consistent with the requirements for state programs . . . those provisions apply . . .").) This exact assertion was taken up by the trial court in litigation challenging the 2001 Los Angeles MS4 Order and decided in favor of the Los Angeles Water Board. The trial court stated: "As noted in *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, the Court held, in part: 'state law is still preempted. . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' (464 U.S. at p. 248.) Applying Water Code sections 13225 and 13267 would stand, in the words of *Silkwood* as: 'an obstacle to the accomplishment of the full purposes and objectives of [the federal law].' (Ibid)." (*In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, at pp.19-20 (Administrative Record, section 10.II., RB-AR23197-23198.)). Further, we note that Water Code section 13383, subdivision (c) specifically references subdivision (c) of section 13267 when establishing facility inspection requirements; in contrast, section 13383, subdivision (a) does not reference subdivision (b) of section 13267, which incorporates the requirement that "[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." Water Code section 13383, subdivision (a), was therefore arguably intended to stand in place of the requirements in section 13267(b). Finally, even where authority to impose a monitoring and reporting requirement is clearly derived from Water Code section 13267, the provision requires consideration of the costs and benefits of monitoring and reporting, but not a full cost-benefit analysis. We therefore find that the Los Angeles Water Board did not fail to meet its legal obligations by not carrying out a full cost-benefit analysis specific to the monitoring and reporting requirements of the Los Angeles MS4 Order. However, in making this finding, in no way do we mean to disavow the significance of cost consideration in permitting actions, even where not specifically required by law. We note again that the Los Angeles Water Board carefully considered the costs of (Continued)

Moreover, the monitoring and reporting requirements of the Los Angeles MS4 Order do not exceed the requirements of the Clean Water Act and the federal regulations.<sup>190</sup> In particular, we find that the receiving water monitoring requirements of the Order are reasonable in light of the need to identify water quality exceedances and evaluate progress in compliance with water quality standards. The argument made by several Permittee Petitioners that the federal regulations allow only two types of monitoring – effluent and ambient – for compliance is without support in the relevant regulations. The relevant law is clear that the permitting authority is required to incorporate monitoring and reporting requirements sufficient to determine compliance with the permit conditions.<sup>191</sup> In contrast, nothing in the Clean Water Act or the regulations states that requiring wet weather receiving water monitoring is beyond the authority of the permitting agency.<sup>192</sup> Further, accepting such a constrained interpretation of the Clean Water Act’s monitoring requirements would undermine storm water permitting assessment. Excluding wet weather receiving water monitoring would preclude storm water dischargers from assessing the impacts of their discharges on waters of the United States during the events for which they are primarily being permitted—storm events. We find nothing in the text or preamble of the federal regulations to support a narrow interpretation of monitoring to exclude wet weather receiving monitoring.

To the extent Permittee Petitioners are arguing that the MEP standard, applied at the outfall, constrains the permitting authority’s discretion to require monitoring beyond the outfall, we also find no support in the law for that proposition. We have already stated that we will continue to require compliance with water quality standards in MS4 permits. Wet weather receiving water monitoring is fundamental to assessing the effects of storm water discharges on water quality and determining the trends in water quality as Permittees implement control

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compliance with the Los Angeles MS4 Order generally as summarized in the Fact Sheet. (See Los Angeles MS4 Order, Att. F, Fact Sheet, pp. F-144-F-149.) Further, the Los Angeles Water Board considered monitoring costs-related comments on earlier drafts of the Los Angeles MS4 Order, and, in a number of cases, where presented with an argument that a cost related to a particular monitoring requirement was not commensurate with the benefits to be received from that requirement, made revisions to the requirement. (See, e.g., Administrative Record, section 8, RB-AR19653-19654, RB-AR19666, RB-AR19674, RB-AR19681.)

<sup>190</sup> The Los Angeles Water Board provided its rationale for the receiving water monitoring requirements in the Fact Sheet of the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att. F, Fact Sheet, F-113-F-137.)

<sup>191</sup> See 33 U.S.C. § 1318(a)(2); 40 C.F.R. § 122.26(d)(2)(i)(F). While we do not interpret these requirements to mean that each and every permit condition must have a corresponding monitoring and reporting requirement, neither do we see any constraints on the water boards’ authority to establish monitoring and reporting requirements.

<sup>192</sup> Permittee Petitioners reference language in the federal regulations concerning “effluent and ambient monitoring” (40 C.F.R. § 122.44(d)(1)(vi)(C)(3)) and appear to be using the phrase as support for their argument. That section is inapposite as it applies to situations where a State has not established a water quality objective for a pollutant present in the effluent and instead establishes effluent limitations on an indicator parameter for the pollutant of concern.



measures. Compliance may be determined at the outfall – for example, where a permittee determines that the discharge does not exceed an applicable WQBEL or receiving water limitation – but outfall monitoring alone cannot provide the broader data related to trends in storm water discharge impacts on the receiving water. Accordingly, receiving water monitoring is a legal and reasonable component of the monitoring and reporting program. Further, because Permittees are responsible for impacts to the receiving waters resulting from their MS4 discharges, Permittees may be required to participate in monitoring not only in receiving waters within their jurisdiction but also in monitoring all receiving waters that their discharges impact.

We will make no revisions to the Monitoring and Reporting provisions of the Order.

#### **F. Joint Responsibility**

In the extensive and interconnected system regulated by the Los Angeles MS4 Order, discharges originating from one Permittee's MS4 frequently commingle with discharges from other Permittees' MS4s within or outside of the Permittee's jurisdiction. Permittee Petitioners argue that the Los Angeles MS4 Order improperly ascribes responsibility to all Permittees with commingled discharges where those commingled discharges exceed a WQBEL or cause or contribute to exceedances of receiving water limitations. Specifically, Permittee Petitioners take issue with the fact that the Los Angeles MS4 Order ascribes "joint responsibility"<sup>193</sup> to the co-Permittees without a showing that a particular Permittee has in fact discharged the pollutant causing or contributing to the exceedance.

The Los Angeles Water Board counters that the joint responsibility regime is consistent with the intent of the Clean Water Act and further that it does not compel a Permittee to clean up the discharge of another Permittee. The Los Angeles Water Board points to two provisions for this latter proposition. First, even with joint responsibility, Permittees that have commingled MS4 discharges need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators.<sup>194</sup> Second, even where joint responsibility is presumed, a Permittee may subsequently counter the presumption of joint responsibility by

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<sup>193</sup> "Joint responsibility" is the term used in the Los Angeles MS4 Order. (See Los Angeles MS4 Order, Part II.K.1, p. 23 ("Joint responsibility" means that the Permittees that have commingled MS4 discharges are responsible for implementing programs in their respective jurisdictions, or within the MS4 for which they are an owner and/or operator, to meet the water quality-based effluent limitations and/or receiving water limitations assigned to such commingled MS4 discharges.") As defined by the Los Angeles Water Board and as discussed below, this term does not have the same meaning and scope as the legal doctrine of "joint liability.")

<sup>194</sup> Los Angeles MS4 Order, Parts II.K.1, pp. 23-24, VI.A.4.a., p. 41; 40 C.F.R. § 122.26(a)(3)(vi); see also, *id.*, Part VI.E.2.b.ii., p. 142 (stating in the context of TMDL requirements that, where discharges are commingled and assigned a joint WLA, "each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.")

affirmatively demonstrating that its MS4 discharge did not cause or contribute to the relevant exceedances.<sup>195</sup>

Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order and the challenges inherent in designing a monitoring program that could parse out responsibility for each individual Permittee, we find that a joint responsibility regime is a reasonable approach to assigning initial responsibility for an exceedance. The Los Angeles MS4 Order provisions addressing TMDLs also appropriately take a joint responsibility approach, given that the wasteload allocations from which the WQBELs and other TMDL-specific limitations are derived are most frequently expressed as joint allocations shared by all MS4 dischargers in the watershed. We further agree with the Los Angeles Water Board that the regime is one that is permissible under applicable law. The Clean Water Act contemplates that MS4 permits may be issued on a system-wide or jurisdiction-wide basis<sup>196</sup> and the federal regulations anticipate the need for inter-governmental cooperation.<sup>197</sup> Further, the United States Court of Appeal, Ninth Circuit, recently stated in *Natural Resources Defense Council v. County of Los Angeles* (2013) 725 F.3d 1194 that the permitting authority has wide discretion concerning the terms of a permit, including the manner in which permittees share liability.<sup>198</sup>

Yet, we also find that joint responsibility in an MS4 Order is only appropriate if the ultimate responsibility for addressing an exceedance rests with those permittees that actually cause or contribute to the exceedance in question. The re-issued Los Angeles MS4 Order contains additional specificity and monitoring, beyond that contained in the 2001 Los Angeles MS4 Order, to document compliance and the presence or absence of an individual municipality's contribution of pollutants to the storm water. For this reason, the general reasoning of the Ninth Circuit's 2013 *Natural Resources Defense Council v. County of Los Angeles* decision finding liability based solely on the presence of pollutants above water quality standards in the receiving waters is of limited forward-looking importance. Generally, in the context of MS4 permits, we do not sanction joint responsibility to the extent that that joint

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<sup>195</sup> *Id.*, Part VI.E.2., pp.141-42; see also *id.*, Part II.K.1, pp. 23-24.

<sup>196</sup> 33 U.S.C. § 1342(p)(3)(B)(i).

<sup>197</sup> See 40 C.F.R. §§ 122.26(d)(2)(i)(D), 122.26(d)(2)(iv), 122.26(d)(2)(vii).

<sup>198</sup> *Natural Resources Defense Council v. County of Los Angeles* (9<sup>th</sup> Cir. 2013) 725 F.3d 1194, 1205, fn. 16, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135. The Ninth Circuit went on to find that, based on the specific language of the 2001 Los Angeles MS4 Order, the Permittees were jointly liable for exceedances detected by mass emissions monitoring.

responsibility would require each Permittee to take full responsibility for addressing violations, regardless of whether, and to what extent, each permittee contributed to the violation.<sup>199</sup>

The Los Angeles MS4 Order does not impose such a joint responsibility regime where each Permittee must take full responsibility for addressing other Permittees' violations. In addition to clearly stating that permittees are responsible only for their contribution to the commingled discharges, the Los Angeles MS4 Order provides that Permittees may affirmatively show that their discharge did not cause or contribute to an exceedance. Joint responsibility, as applied by the Los Angeles MS4 Order, is thus consistent with our expectation that ultimate responsibility for addressing an exceedance rests with those Permittees that actually cause or contribute to the exceedance and consistent with the regulatory direction that co-permittees need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators.

While the result is that the burden rests on the Permittee to demonstrate that its commingled discharge is not the source of an exceedance, rather than on the Los Angeles Water Board to demonstrate that a Permittee's commingled discharge is causing or contributing to the exceedance, the result is not contrary to law. The Los Angeles Water Board has the initial burden to show that a violation of the Los Angeles MS4 Order has occurred,<sup>200</sup> but the Board can do so by establishing an exceedance of a limitation by jointly responsible Permittees and need not identify the exact source of the exceedance. This scheme represents a reasonable policy approach to a complicated compliance question where the Permittees are more closely familiar than the Los Angeles Water Board with their outfalls and their discharges in the extensive and interconnected MS4 network.

We are, however, concerned that the Los Angeles MS4 Order's treatment of the joint responsibility issue is too narrow. The Los Angeles Water Board addresses the issue of joint responsibility primarily in the context of compliance with the TMDL requirements of the Order. Commingled discharges pose the same questions of assigning responsibility where receiving water limitations are exceeded in water bodies receiving MS4 discharges from multiple jurisdictions, but where the pollutant is not addressed by a TMDL. A similar approach to

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<sup>199</sup> In a "joint and several liability" scheme, a plaintiff may collect his or her entire damages from any one defendant, and the defendants must then rely on principles of indemnity or contribution to apportion ultimate liability amongst themselves. (See *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d 578, 586-590.) Because the Los Angeles MS4 Order's joint responsibility scheme does not equate to joint liability, and because we do not find such liability appropriate from a policy perspective, we do not address Petitioners' legal arguments as to whether joint or joint and several liability in the storm water context would be consistent with applicable law.

<sup>200</sup> See e.g. *Sackett v. E.P.A.* (9<sup>th</sup> Cir. 2010) 622 F.3d 1139 rev'd on other grounds *Sackett v. E.P.A.* (2012) 132 S. Ct. 1367.

assigning responsibility for addressing the exceedances is appropriate there. We will add new language to the Los Angeles MS4 Order mirroring Part VI.E.2.b., but applying the principles more generally.

We also take this opportunity to emphasize that all MS4 permits should be drafted to avoid one potential, but likely unintended, result arising from *Natural Resources Defense Council v. County of Los Angeles*. The broadest reading of the Ninth Circuit's holding following remand from the U.S. Supreme Court would assign joint liability to all Permittees for any exceedance at a monitoring location designated for the purpose of compliance determination, even if the particular pollutant is not typically found in storm water and has a likely alternative source such as an industrial discharger or waste water treatment plan. Providing municipalities an opportunity to demonstrate that they did not contribute to a pollutant present in receiving waters above standards will prevent this outcome.

We shall amend Part VI.B. as follows:

## **B. Monitoring and Reporting Program (MRP) Requirements**

- 1.** Dischargers shall comply with the MRP and future revisions thereto, in Attachment E of this Order or may, in coordination with an approved Watershed Management Program per Part VI.C, implement a customized monitoring program that achieves the five Primary Objectives set forth in Part II.A. of Attachment E and includes the elements set forth in Part II.E. of Attachment E.

### **2. Compliance Determination for Commingled Discharges**

- a. For commingled discharges addressed by a TMDL, a Permittee shall demonstrate compliance with the requirements of Part E as specified at Part E.2.b.**
- b. For commingled discharges not addressed by a TMDL, a Permittee shall demonstrate compliance with the requirements of Part V.A as follows:**
  - i. Pursuant to 40 CFR section 122.26(a)(3)(vi), each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.**
  - ii. Where Permittees have commingled discharges to the receiving water, or where Permittees' discharges commingle in the receiving water, compliance in the receiving water shall be determined for the group of Permittees as a whole unless an individual Permittee demonstrates that its discharge did not cause or contribute to the exceedance, pursuant to subpart iv. below.**

- iii. For purposes of compliance determination, each Permittee is responsible for demonstrating that its discharge did not cause or contribute to an exceedance of the receiving water limitation in the target receiving water.
- iv. A Permittee may demonstrate that its discharge did not cause or contribute to an exceedance of a receiving water limitation in one of the following ways:
  - (1) Demonstrate that there was no discharge from the Permittee's MS4 into the applicable receiving water during the relevant time period;
  - (2) Demonstrate that the discharge from the Permittee's MS4 was controlled to a level that did not cause or contribute to the exceedance in the receiving water;
  - (3) Demonstrate that there is an alternative source of the pollutant that caused the exceedance, that the pollutant is not typically associated with MS4 discharges, and that the pollutant was not discharged from the Permittee's MS4; or
  - (4) Demonstrate that the Permittee is in compliance with the Watershed Management Programs provisions under VI.C.

**G. Separation of Functions in Advising the Los Angeles Water Board**

Petitioners Cities of Duarte and Huntington Park (Duarte and Huntington Park) argue that their rights to due process of law were violated when the same attorneys advised both the Los Angeles Water Board staff and the Board itself in the course of the proceedings to adopt the Los Angeles MS4 Order. We disagree and reaffirm our position that permitting actions do not require the water boards to separate functions when assigning counsel to advise in development and adoption of a permit.

A water board proceeding to adopt a permit, including an NPDES permit, waste discharge requirements, or a waiver of waste discharge requirements, is an adjudicative proceeding subject to the Administrative Procedure Act's administrative adjudication statutes in Government Code section 11400 et seq.<sup>201</sup> Section 11425.10, part of the "Administrative Adjudication Bill of Rights," provides that "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions with the agency . . . ." <sup>202</sup> In accordance with

<sup>201</sup> See Cal. Code Regs., tit. 23, § 648, subd. (b).

<sup>202</sup> Gov. Code, § 11425.10, subd. (a)(4). Subdivision (a)(4) references section 11425.30, which addresses disqualification of a presiding officer that has served as "investigator, prosecutor, or advocate" in the proceeding or its preadjudicative stage or is subject to "the authority, direction, or discretion" of a person who has served in such roles.

this directive, the water boards separate functions in all enforcement cases, assigning counsel and staff to prosecute the case, and separate counsel and staff to advise the board.

In a permitting action, water board counsel have an advisory role, not an investigative, prosecutorial, or advocacy role. Permitting actions are not investigative in nature and there is no consideration of liability or penalties that would make the action prosecutorial in nature. Further, while both counsel and staff are expected to develop recommendations for their boards, the role of counsel and staff is not to act as an advocate for one particular position or party concerning the permitting action, but to advise the board as neutrals, with consideration of the legal, technical, and policy implications of all options before the board. In the case of counsel, such consideration and advice includes not just legal evaluation of the substantive options for permitting but also of procedural issues such as admissibility of the evidence, conduct of the hearing, and avoidance of board member conflicts. Because counsel and staff are advisors to the board rather than advocates for a particular position, the same counsel may advise staff in the course of development of the permit and the board in the adoption proceedings.

A primary purpose of separation of functions in adjudicatory proceedings is the need to prevent improper ex parte communications.<sup>203</sup> The exceptions to the ex parte communications rules further support the position that counsel advising board staff may also advise the board itself. While section 11430.10 of the Government Code generally prohibits communications concerning issues in a pending administrative proceeding between the presiding officer and an employee of the agency that is a party,<sup>204</sup> one exception provides that a communication “for the purpose of assistance and advice to the presiding officer,” in this case the board, “from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage” is permissible. Even if board counsel could be considered an advocate in the proceeding, another provision (specifically referencing the water boards) excepts the communication from the general ex parte communications rules. A communication is not an ex parte communication if:

- (c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative hearing that is nonprosecutorial in character:

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<sup>203</sup> See *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4<sup>th</sup> 1, 9-10.

<sup>204</sup> Government Code section 11430.10 prohibits communications between an employee that is a “party” to a pending proceeding and the presiding officer. We disagree that Los Angeles Water Board staff, as an advisor to the Board, was a “party” to the proceedings for adoption of the Los Angeles MS4 Order, but, even if staff could be considered a party, the cited exceptions to the ex parte communications rules would apply.

...  
(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.<sup>205</sup>

The fact that communications that would otherwise be considered prohibited *ex parte* communications are specifically permitted in non-prosecutorial adjudicative proceedings of the water boards further supports the position that the water boards are not obligated by law to separate functions in permitting actions.

We acknowledge that there may be some unique factual circumstances under which a permitting proceeding could violate due process or the Administrative Procedure Act because board counsel either acted or gave the appearance of acting as a prosecutor or advocate. Duarte and Huntington Park point to a writ of mandate issued by the Los Angeles Superior Court in 2010,<sup>206</sup> holding that a 2006 proceeding to incorporate provisions of the Santa Monica Bay Beaches TMDL into the 2001 Los Angeles MS4 Order was not fairly conducted because Los Angeles Water Board counsel had acted as an advocate for Board staff, directly examining Board staff witnesses, cross-examining witnesses called by permittees, objecting to questions asked by permittees, and making a closing argument on behalf of Board staff, while simultaneously advising the Board. The proceedings to adopt the Los Angeles MS4 Order did not follow the type of adversarial structure that led the Superior Court to find a violation of separation of functions in the 2006 proceedings.<sup>207</sup> Further, nothing in the conduct of the Los Angeles Water Board attorneys in the Los Angeles MS4 Order proceedings leads us to find that they acted as advocates for a particular position or party, rather than as advisors to the Board.

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<sup>205</sup> Gov. Code, § 11430.30. We note that the Law Revision Commission comments on section 11430.30, subdivision (c), state that “[s]ubdivision (c) applies to nonprosecutorial types of administrative adjudications, such as . . . proceedings . . . setting *water quality protection . . . requirements*.” (Emphasis added.) The notes further state that “[t]he provision recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for any agency to adhere to the restrictions of [ex parte communications], given limited staffing and personnel.” (25 Cal.L.Rev.Comm. Reports 711 (1995).) We agree that the lengthy and complex nature of permitting proceedings, and the limited staffing resources of the water boards, caution against an expansive interpretation of separation of functions in non-prosecutorial adjudications.

<sup>206</sup> *County of Los Angeles v. State Water Resources Control Board* (Super. Ct., Los Angeles Co. (June 2, 2010, Minute Order) No. BS122724) (Administrative Record, section 10.II, RB-AR23665-23667.)

<sup>207</sup> We also note that, although the writ directed that petitioners were entitled to a new hearing “in which the same person does not act as both an advocate before the Board and an advisor to the Board,” the writ had no direct bearing on the separate proceedings to adopt the Los Angeles MS4 Order. In any case, as discussed, Board attorneys did not act as advocates in the proceedings to adopt the Los Angeles MS4 Order.

The two specific cases pointed to by Duarte and Huntington Park – advice by Board counsel to Board member Mary Ann Lutz regarding recusal due to ex parte communications and advice to the Board generally on the lack of a cost-benefit analysis requirement in federal law – may be contrary to the legal position held by Duarte and Huntington Park, but there is nothing in the record to suggest that the advice was driven by biased advocacy for a Board staff position.<sup>208</sup> In the absence of such evidence, we find no reason to depart from the general rule that separation of functions is not required in a permitting proceeding<sup>209</sup> and find that Los Angeles Water Board counsel acted in accordance with applicable laws in advising Board staff and the Board itself.

#### **H. Signal Hill's Inclusion in the Order**

The City of Signal Hill (Signal Hill) argues that the Los Angeles Water Board acted contrary to relevant law when it issued the system-wide Los Angeles MS4 Order that included Signal Hill, even though Signal Hill had submitted an application for an individual permit.<sup>210</sup> We disagree.

Signal Hill points out that the federal regulations allow an operator of an MS4 to choose between submitting an application jointly with one or more other operators for a joint permit or individually for a distinct permit.<sup>211</sup> However, the choice of application does not necessarily dictate the type of permit that the permitting authority ultimately deems appropriate. The permitting authority in turn has discretion to determine if the permit should be issued on a

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<sup>208</sup> See Administrative Record, section 7, RB-AR18309-18316, RB-AR18397-18400 (Transcript of Proceedings on Oct. 4, 2012), section 7, RB-AR18892-18894 (Transcript of Proceedings on Oct. 5, 2012).

<sup>209</sup> Although *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4<sup>th</sup> 731 concerned an enforcement proceeding and therefore is not on point for our legal determination above, we take note of the direction by the California Supreme Court that separation of functions in an administrative tribunal should not be expanded beyond its appropriate scope: “In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular . . . [and where proper procedure is followed and in the absence of a specific demonstration of bias or unacceptable risk of bias] we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions.” (*Morongo Band of Mission Indians, supra*, at pp. 741-742.)

<sup>210</sup> Signal Hill was one of several permittees under the 2001 Los Angeles MS4 Order that elected not to submit an application jointly with the other permittees for the renewed permit. The other parties have not challenged their inclusion under the Los Angeles MS4 Order. The Los Angeles Water Board rejected Signal Hill's application as incomplete; however, our determination that the Los Angeles Water Board had the discretion to issue the system-wide Los Angeles MS4 Order is not dependent on that fact.

<sup>211</sup> 40 C.F.R. § 122.26(a)(3)(iii). Signal Hill has also cited regulations applicable to Small MS4s at 40 Code of Federal Regulations sections 122.30 through 122.37. These regulations are not applicable here because the Los Angeles Water Board has designated the Greater Los Angeles County MS4, which includes the incorporated cities and the unincorporated areas of Los Angeles County within coastal watersheds, as a large MS4 pursuant to 40 Code of Federal Regulations section 122.26(b)(4).



jurisdictional or system-wide basis.<sup>212</sup> While the federal regulations do not specifically state that, in exercising that discretion, the permitting authority may override the permit applicant's preference for an individual permit, nothing in the regulations constrains its authority to do so. Section 122.26(a)(3)(iii) of 40 Code of Federal Regulations does not require the permitting authority to take any specific action in response to the submission of an individual application. And sections 122.26(a)(3)(ii) and 122.26(a)(3)(iv) provide that the permitting authority "may issue" system-wide or distinct permits. The preamble to the regulations similarly contemplates wide discretion for the permitting authority to choose system-wide permits, including a permit that would allow an entire system in a geographical region to be designated under one permit.<sup>213</sup> Particularly because the option of a system-wide permit would be significantly frustrated if MS4 operators were allowed to opt out at their discretion, the most reasonable reading of the regulations is that the permitting authority, not the applicant, makes the ultimate decision as to the scope of the permit that will be issued. Accordingly, we find that the Los Angeles Water Board had the discretion under the relevant law to issue the Los Angeles MS4 Order with Signal Hill as a permittee.

We also find that the Los Angeles Water Board's decision regarding Signal Hill was appropriately supported by findings in the Order and in the Fact Sheet.<sup>214</sup> Finding C of the Los Angeles MS4 Order, as well as discussion in the Fact Sheet,<sup>215</sup> establishes that the Los Angeles Water Board found a system-wide permit to be appropriate for a number of reasons, including that Permittees' MS4s comprise a large interconnected system with frequently commingled discharges, that the TMDLs to be implemented apply to the jurisdictional areas of multiple Permittees, that the passage of Assembly Bill 2554<sup>216</sup> in 2010 provided a potential means for funding collaborative water quality improvement plans among Permittees, and that the results of an online survey conducted by Los Angeles Water Board staff showed that the

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<sup>212</sup> 33 U.S.C. § 1342(p)(3)(B)(i); 40 C.F.R. § 122.26(a)(1)(v), (a)(3)(ii), (a)(3)(iv).

<sup>213</sup> See 55 Fed. Reg. 47990, 48039-48043 (preamble to the Phase I regulations noting that section 122.26(a)(3)(iv) would allow an entire system in a geographical region to be designated under one permit and further discussing that sections 122.26(a)(1)(v) and (a)(3)(ii) allow the permitting authority broad discretion in issuing system-wide permits).

<sup>214</sup> *Topanga Assn., supra*, 11 Cal.3d at 515.

<sup>215</sup> Los Angeles MS4 Order, Part II.C., pp. 14-15; *id.*, Att. F, Fact Sheet, pp. F-15-F-18.

<sup>216</sup> Assembly Bill No. 2554, Chapter 602, an act to amend sections 2 and 16 of the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), relating to the Los Angeles County Flood Control District, Sept. 30, 2010 (Administrative Record, section 10.VI.C., RB-AR29172-29179). The Bill allows the Los Angeles County Flood Control District to assess a property-related fee or charge, subject to voter approval in accordance with proposition 218, for storm water and clean water programs.

majority of Permittees favored either a single MS4 permit for Los Angeles County or several watershed-based permits.

Signal Hill points out that the reasons enumerated by the Los Angeles Water Board as grounds for issuance of a system-wide permit did not preclude the Los Angeles Water Board from issuing an individual permit to the City of Long Beach (Long Beach).<sup>217</sup> The Los Angeles Water Board has provided the rationale for distinguishing Signal Hill and Long Beach in its October 15, 2013 Response. The Los Angeles Water Board explains that Long Beach has had an individual permit for more than a decade and that, unlike Signal Hill, it was not permitted under the 2001 Los Angeles MS4 Order. The Board's decision to issue a separate permit to Long Beach was originally the result of a settlement agreement that resolved litigation on the MS4 permit issued by the Los Angeles Water Board in 1996, and Long Beach has a proven track record in implementing the individual permit while cooperating with Permittees under the Los Angeles MS4 Order.<sup>218</sup> We find that the Los Angeles Water Board reasonably distinguished between Long Beach and the Permittees under the Los Angeles MS4 Order in making determinations as to individual permitting. We will not reverse its determination but we will add a brief statement reflecting that reasoning to the Fact Sheet.

We shall amend section III.D.1.a. at page F-18, Attachment F, Fact Sheet, as follows:

The Regional Water Board determined that the cities of Signal Hill and Downey, the five upper San Gabriel River cities, and the LACFCD are included as Permittees in this Order. **In making that determination, the Regional Water Board distinguished between the permitting status of those cities and the permitting status of the City of Long Beach at this time because the City of Long Beach has a proven track record in implementing an individual permit and developing a robust monitoring program under that individual permit, as well as in cooperation with other MS4 dischargers on watershed based implementation. While all other incorporated cities with discharges within the coastal watersheds of Los Angeles County, as well as Los Angeles County and the Los Angeles County Flood Control District, are permitted under this Order,** individually tailored permittee requirements are provided in this Order, where appropriate.

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<sup>217</sup> Signal Hill is located in the geographical middle of Long Beach and is entirely surrounded by that city.

<sup>218</sup> Los Angeles Water Board, October 15, 2013 Response, p. 25, fn. 78.

### III. CONCLUSION

Based on the above discussion, we conclude as follows:

1. Although we are not bound by federal law or state law to require compliance with water quality standards in municipal storm water permits, we will not depart from our prior precedent regarding compliance with water quality standards. The regional water boards shall continue to require compliance with receiving water limitations in municipal storm water permits through incorporation of receiving water limitations provisions consistent with State Water Board Order WQ 99-05.
2. However, we find that municipal storm water dischargers may not be able to achieve water quality standards in the near term and therefore that it is appropriate for municipal storm water permits to incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.
3. We find that the WMP/EWMP provisions of the Los Angeles MS4 Order, with minor revisions that we incorporate herein, are an appropriate alternative to immediate compliance with receiving water limitations. The WMP/EWMP provisions are ambitious, yet achievable, and include clear and enforceable deadlines for the achievement of receiving water limitations and a rigorous and transparent process for development and implementation of the WMPs/EWMPs.
4. We find that the WMP/EWMP provisions do not violate anti-backsliding requirements.
5. We find that the WMP/EWMP provisions do not violate antidegradation requirements; however, we find that the antidegradation findings made by the Los Angeles Water Board are too cursory and revise those findings consistent with the federal and state antidegradation policies.
6. We find that issuance of time schedule orders is appropriate where a final receiving water limitations deadline set in the WMP/EWMP or a final TMDL-related deadline is not met; however we find that the WMP/EWMP compliance schedule need not otherwise be structured as an enforcement order.
7. We clarify the WMP/EWMP provisions to make it clear that final compliance with receiving water limitations and final WQBELs and other TMDL-specific limitations must be verified through monitoring.

8. We clarify the WMP/EWMP provisions to make it clear that Permittees may request extensions of deadlines incorporated into the WMPs/EWMPs except those final deadlines established in a TMDL. However, any deadline extensions must be approved by the Executive Officer after public review and comment.
9. In order to add greater rigor and accountability to the process of achieving receiving water limitations, we revise the WMP/EWMP provisions to add that the Permittees must comprehensively evaluate new data and information and revise the WMPs/EWMPs, including the supporting reasonable assurance analysis, by June 30, 2021, for approval by the Executive Officer.
10. We find that the storm water retention approach is a promising approach to achieving receiving water limitations, but also find that the Administrative Record does not support a finding that the approach will necessarily lead to achievement of water quality standards in all cases. We revise the WMP/EWMP provisions to clarify that, in the case of implementation of an EWMP with the storm water retention approach, if compliance with a final WQBEL or other TMDL-specific limitation is not in fact achieved in the drainage area, a Permittee will be considered in compliance with the relevant limitation only if the Permittee continues to adaptively manage the EWMP to achieve ultimate compliance with the WQBEL or other TMDL limitation.
11. We find reasonable the WMP/EWMP provisions that allow permittees to be deemed in compliance with receiving water limitations during the planning and development phase of the WMP/EWMP. We revise the WMP/EWMP provisions to state that, if a Permittee fails to meet one of the deadlines, the Permittee may still develop a WMP/EWMP for approval by the Los Angeles Water Board or its Executive Officer; however, the Permittee will not be deemed in compliance with receiving water limitations or WQBELs and other TMDL-specific limitations during the subsequent WMP/EWMP development period.
12. We recognize that the Los Angeles MS4 Order WMP/EWMP compliance path alternative may not be appropriate in all MS4 permits. In order to provide guidance to regional water boards preparing Phase I MS4 permits, we lay out several principles to be followed in drafting receiving water limitations compliance alternatives: Phase I MS4 permits should (1) continue to require compliance with water quality standards in accordance with our Order WQ 99-05; (2) allow compliance with TMDL requirements to constitute compliance with receiving water limitations; (3) provide for a compliance

alternative that allows permittees to achieve compliance with receiving water limitations over a period of time as described above; (4) encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements; (5) encourage the use of green infrastructure and the adoption of low impact development principles; (6) encourage the use of multi-benefit regional projects that capture, infiltrate, and reuse storm water; and (7) require rigor, accountability, and transparency in identification and prioritization of issues in the watershed, in proposal and implementation of control measures, in monitoring of water quality, and in adaptive management of the program. We expect the regional water boards to follow these principles unless the regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.

13. We recognize that the success of the WMP/EWMP approach depends in large part on the steps that follow adoption of the provisions, including the development and approval of rigorous WMPs/EWMPs and the implementation and appropriate enforcement of the programs once approved. We direct the Los Angeles Water Board to periodically report specific information to the State Water Board regarding implementation of the WMPs/EWMPs, including on-the-ground structural control measures completed, monitoring data evaluating the effectiveness of such measures, control measures proposed to be completed and proposed funding and schedule, trends in receiving water quality related to storm water discharges, and compliance and enforcement data.
14. We find that the Los Angeles Water Board acted in a manner consistent with the law when establishing numeric WQBELs. We further find that the development of numeric WQBELs was a reasonable exercise of the Los Angeles Water Board's policy discretion, given its experience in developing the relevant TMDLs and the significance of storm water impacts in the region. However, we find that numeric WQBELs are not necessarily appropriate in all MS4 permits or for all parameters in any single MS4 permit.
15. We find that the Los Angeles Water Board's choice of BMP-based WQBELs, to be proposed by the Permittee in the WMP/EWMP to address USEPA-established TMDLs was reasonable.

16. We find that the Los Angeles Water Board did not act contrary to federal law when it prohibited the discharge of non-storm water “through the MS4 to receiving water” instead of “into” the MS4. Regardless of the exact wording of the prohibition, the standard that applies to non-storm water is the requirement of “effective prohibition.” However, the Los Angeles Water Board also has authority to regulate any dry weather discharges from the MS4s under the applicable TMDLs.
17. We find that the monitoring and reporting provisions of the Los Angeles MS4 Order are consistent with applicable law and reasonable.
18. We find that assigning joint responsibility for commingled discharges that cause exceedances is not contrary to applicable law. Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order, the joint responsibility regime also constitutes a reasonable policy choice. The Los Angeles MS4 Order specifically allows a permittee to avoid joint responsibility by demonstrating that its commingled discharge is not the source of an exceedance.
19. We find that representation of the Los Angeles Water Board and the Los Angeles Water Board staff by the same attorneys in the proceedings to adopt the Los Angeles MS4 Order was lawful and reasonable.
20. We find that the Los Angeles Water Board acted in a manner consistent with applicable law and reasonably when it issued a system-wide permit that included Signal Hill.

Addressing the water quality impacts of municipal storm water is a complex and difficult undertaking, requiring innovative approaches and significant investment of resources. We recognize and appreciate the commendable effort of the Los Angeles Water Board to come up with a workable and collaborative solution to the difficult technical, policy, and legal issues, as well as the demonstrated commitment of many of the area’s MS4 dischargers and of the environmental community to work with the Los Angeles Water Board in the development and implementation of the proposed solution. We also recognize the extensive work that interested persons from across the state, including CASQA, have invested in assisting us in understanding how the watershed-based alternative compliance approach developed by the Los Angeles Water Board may inform statewide approaches to addressing achievement of water quality requirements. While storm water poses an immediate water quality problem, we believe that a rigorous and transparent watershed-based approach that emphasizes low impact development, green infrastructure, multi-benefit projects, and capture, infiltration, and reuse of storm water is

a promising long-term approach to addressing the complex issues involved. We must balance requirements for and enforcement of immediate, but often incomplete, solutions with allowing enough time and leeway for dischargers to invest in infrastructure that will provide for a more reliable trajectory away from storm water-caused pollution and degradation. We believe that the Los Angeles MS4 Order, with the revisions we have made, strikes that balance at this stage in our storm water programs, but expect that we will continue to revisit the question of the appropriate balance as the water boards' experience in implementing watershed-based solutions to storm water grows.

#### IV. ORDER

IT IS HEREBY ORDERED that the Los Angeles MS4 Order is amended as described above in this order. The Los Angeles Water Board is directed to prepare a complete version of the Los Angeles MS4 Order (including any necessary non-substantive conforming corrections), post the conformed Los Angeles MS4 Order on its website, and distribute it as appropriate.

#### CERTIFICATION


The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held June 16, 2015.

AYE: Chair Felicia Marcus  
Vice Chair Frances Spivy-Weber  
Board Member Tam M. Doduc  
Board Member Steven Moore  
Board Member Dorene D'Adamo

NAY: None

ABSENT: None

ABSTAIN: None

  
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Jeanine Townsend  
Clerk to the Board

**ATTACHMENT 4**

**Comparison Between the Requirements 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  
Storm Water Permit**

A table comparing the Tentative Order's requirements with the requirements of other pertinent documents.





## PERMITS COMPARISON (DRAFT)

*Comparison Between the Requirements of Tentative Order No. 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order No. 90-42), and Previous Drafts of the San Diego Municipal Storm Water Permit*

### Conclusions

1. **Urban runoff causes or contributes to the impairment of every known impaired water body in the San Diego Region** (i.e., every 303(d) listed water body in the Region is impaired, at least in part, because of urban runoff).
2. **During the past 10 years (the period during which the Copermittees have been subject to Order No 90-42), water quality in the Region has continued to decline.** The decline is the result of the increasing urban runoff pollution associated with the growth of the Region (i.e., increasing urban development and human population).
3. **The continued degradation of the Region's receiving waters is evidence that current efforts to control urban runoff are not working** (i.e., current Copermittee Urban Runoff Management Programs under Order No. 90-42 are either inadequate or ineffective). In other words, we are losing the battle against urban runoff pollution.
4. **More must be done to reduce urban runoff pollutants if the beneficial uses (e.g., fishing, swimming, aquatic habitat, etc.) of the Region's receiving waters are to be protected.**
5. **Tentative Order No. 2001-01 (the proposed renewal of Order No 90-42) is the answer.** If properly implemented, Tentative Order 2001-01 will significantly "slow the current rate" of water quality degradation in San Diego. Furthermore, the Tentative Order has the potential to "improve" the quality of San Diego receiving waters over the long term (i.e., 10-20 years).
6. **Tentative Order No. 2001-01 is the product of an evolving development process that has included the release of two previous drafts and spanned more than six years.** The Tentative Order incorporates the SDRWQCB's responses to over 200 pages of public comments on the 1995 and 1998 drafts of the permit.
7. **Because Order No. 90-42, the interim drafts, and Tentative Order No. 2001-01 are all based on the same 1990 federal regulations, the underlying objectives and essential requirements of these documents are all "fundamentally the same".** In other words, Tentative Order No. 2001-01 is not a "new" permit. It has the same underlying objectives and requirements as Order No. 90-42, the "early" first round permit to which the Copermittees have been subject for the past ten years.

8. Although fundamentally very similar, Tentative Order 2001-01 will require Copermittees to do more and to expend a greater level of effort than is currently required under Order No. 90-42.
9. Relative to Order No. 90-42, the requirements of Tentative Order No. 2001-01 are significantly expanded in that they are more numerous, more specific/detailed, and more stringent than the requirements in Order No. 90-42. The SDRWQB believes that the expanded requirements are justified and necessary in light of the declining quality of the Region's receiving waters.
10. Approximately 80% of the requirements contained in Tentative Order No 2001-01 are also contained in the second draft of the permit released October 1998. This means approximately 80% of the permit requirements have been known to the Copermittees (and available for their review and implementation) for at least two years.
11. The remaining 20% of the requirements in the Tentative Order are "new", meaning that they have been added within the past two years. If 80% of the permit has been known for at least two years, then theoretically, the Copermittees have had the recent 51 day review period (ending Nov 30, 2000) to assimilate the new remaining 20% of the permit<sup>1</sup>.
12. Greater than 40% of the requirements contained in Tentative Order No 2001-01 are also contained in the Copermittee's current first round permit, Order No. 90-42. This means that at least 40% of the Tentative Order's requirements have been known to the Copermittees for the past ten years. Accordingly, a Copermittee that is currently in compliance with Order No. 90-42 will have at least 40% of the Tentative Order's requirements already met and fully implemented during the past ten years.
13. Of the 80% of the Tentative Order's requirements that have been known to the Copermittees for at least two years, half (or 50% of 80%) have been known to the Copermittees for no less than 10 years and half have been known for no less than two years.
14. Approximately 60% of the requirements in Tentative Order 2001-01 are based solely on the 1990 federal NPDES Storm Water Regulations. The remaining 40% of the requirements in the Tentative Order "exceed the federal regulations". Requirements that "exceed the federal regulations" are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.
15. The 40% of the requirements in Tentative Order 2001-01 which "exceed the federal regulations" are based almost exclusively on (1) guidance documents

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<sup>1</sup> Current law requires a 45 day comment period.

developed by USEPA<sup>2</sup>; and (2) SWRCB's orders describing statewide precedent setting decisions on MS4s permits<sup>3</sup>.

16. The SDRWQCB is authorized to include requirements in the Tentative Order which "exceed the federal regulations" under both section 402(p)(3)(iii) of the Clean Water Act, as well as section 13377 of the California Water Code. In the course of carrying out its mission, the SDRWQCB is authorized to require any more stringent controls it deems necessary to protect the beneficial uses of receiving waters, address specific local problems (e.g., beach closures), implement water quality control plans, or prevent nuisance.
17. Taken as a whole, the requirements contained in Tentative Order 2001-01 represent the SDRWQCB's interpretation/definition of MEP for the San Diego Region. MEP, or the maximum extent practicable, is the technology-based standard established by Congress for municipal dischargers of urban runoff (i.e., MS4 dischargers).
18. The inclusion in a renewal MS4 permit (e.g., Order No. 2001-01) of requirements that are more stringent than those in an initial MS4 permit is supported by USEPA<sup>4</sup> and the SWRCB<sup>5</sup>. Over time it is expected that subsequent MS4 permits will require an increasing level of effort on the part of the municipalities that is commensurate with the need to protect beneficial uses. This is particularly appropriate where the initial permit was an "early" permit.
19. SDRWQCB has Ample Legal Authority to Adopt Tentative Order No. 2001-01. Each of the requirements contained in Tentative Order is solidly grounded in the Clean Water Act, the California Water Code, the federal storm water regulations, USEPA guidance documents on MS4 permits, and SWRCB Orders relating to MS4 permits.

### Comparison Table

The attached table, showing the development process of Tentative Order No. 2001-01, is provided to call attention to the similarities and differences between the requirements of

<sup>2</sup> Environmental Protection Agency. 1992. Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002.

<sup>3</sup> In Orders WQ 98-01 and 99-05, the SWRCB prescribed specific precedent setting Receiving Water Limitations language to be included in all future MS4 permits. On October 5, 2000 the SWRCB made its final decision to uphold the LARWQCB's adoption of Standard Urban Storm Water Mitigation Plans (SUSMPs) requirements for new development in MS4 permits.

<sup>4</sup> U.S. Environmental Protection Agency. 1996. Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits. 61 FR 43761.

<sup>5</sup> On October 5, 2000 the SWRCB made its final decision to uphold the LARWQCB's adoption of Standard Urban Storm Water Mitigation Plans (SUSMPs) for new development in MS4 permits.

Tentative Order No. 2001-01 and the current San Diego Municipal Storm Water Permit (Order No. 90-42). Additionally the table compares both the existing and proposed permits, as well as the two previous drafts, to the 1990 federal NPDES Storm Water Regulations for Phase I (federal regulations)<sup>6</sup>.

The orders, regulations, and drafts are presented in the table chronologically so that the evolution of the Tentative Order's requirements is evident over time. The differences and similarities between the various documents can be observed in the table by noting the number of "X's" in each column. An "X" indicates that a given requirement is included in the document; while a "-" means that the requirement is missing.

Order No. 90-42 was the first document included in the table to be issued (in July of 1990), and has the least number of requirements. As the table indicates, Order 90-42 was an "early" permit, in that it was released prior to the November 1990 promulgation of the Federal NPDES storm water regulations. Although Order No. 90-42 contained the "essentials" of the 1990 regulations, the requirements were written in very broad generic and often vague terms. Broad generic terms were incorporated into the permit for the purpose of providing the maximum amount of flexibility to the Coopermittees in implementing the new requirements (flexibility was, in fact, the stated reason for issuing the permit in advance of the final regulations).

When the federal regulations were issued by the United States Environmental Protection Agency (USEPA) in November of 1990, they were significantly more detailed and contained more requirements than Order No. 90-42. **The federal regulations, which implement and clarify the federal statute, specify the minimum fundamental or essential requirements that must be contained in all municipal storm water permits.** For this reason, the existing, proposed, and previous drafts of San Diego Municipal Storm Water permit are based on, and grounded in, the federal regulations. It is to the federal regulations that each of the documents in the table should be ultimately compared. To enhance understanding and clarify the federal regulations, USEPA's intent in drafting the regulations was expanded upon in the "Preamble" to the federal regulations and in several guidance documents (which provide further detail and insight on USEPA intent). These supporting documents have also been relied upon in developing the requirements of the Tentative Order and its previous drafts.

#### Five Fundamental Requirements of an MS4 Permit

When distilled down to its essence, the federal regulations direct that municipalities implement an Urban Runoff Management Program that, at a minimum, includes the five following fundamental requirements:

<sup>6</sup> The 1990 final phase I NPDES federal storm water regulations, codified at 40CFR 122.26, implement and interpret section 402(p) of the Clean Water Act. Section 402(p) is the section of the Clean Water Act that requires municipalities to obtain an NPDES permit for their discharges of storm water. The 1987 amendments to the Clean Water Act added section 402(p). The Clean Water Act is the 1976 federal statute which requires NPDES permits to regulate point source discharges of pollutants to waters of the United States.

1. Prohibit non-storm water discharges into MS4s.
2. Implement best management practices (BMPs) to reduce pollutant discharges into MS4s to the maximum extent practicable (MEP).
3. Ensure that discharges from the MS4 do not cause or contribute to an exceedance of water quality objectives in receiving waters.
4. Identify (actively find) and eliminate sources of illicit discharges.
5. Enforce local ordinances and permits.

### Need for Increased Permit "Specificity"

The table below demonstrates the increase in permit specificity over time. There are several important reasons for the increase in the specificity of the permit language, which are discussed below.

#### 1. Copermittees Requested Increased Specificity; Tentative Order 2001-01 provides Increased Specificity

Copermittees have repeatedly requested that the SDRWQCB define the minimum levels of actions/efforts required on their parts to keep them in minimum compliance with Order No. 90-42. As previously explained, the early permit was purposely written in broad terms to provide maximum flexibility the Copermittees. For example, Order No. 90-42 directs the Copermittees to develop and implement a comprehensive Urban Runoff Management Program, but unlike the Tentative Order, provides very little direction or detail on what that program must contain, and even less direction on minimum levels of effort required for compliance. As a result, many Copermittees frequently ask the SDRWQCB to provide direction and specificity on these topics. Tentative Order No. 2001-01 directly responds to this request by specifying minimum required program components, as well as the minimum elements of each component. These types of definitions require specific language, rather than broad directives, since they convey all of the activities expected of the Copermittees. In this way, the Tentative Order defines the minimum level of effort needed for compliance. A permit which describes each of the activities to be conducted will be greater in length and detail than a permit that does not. Although responsive to the Copermittees' request, much of the specifics provided in the Tentative Order had already been provided to the Copermittees over ten years ago in the form of the federal regulations.

#### 2. Copermittees Requested that MEP be Defined; Tentative Order 2001-01 Defines MEP

Maximum Extent Practicable or MEP is the technology-based standard established by Congress in the Clean Water Act (section 402(p)(3)(B)(iii)) that municipal dischargers of storm water must meet. Technology-based standards establish the level of pollutant

reductions that dischargers must achieve, typically by treatment or by a combination of treatment and source control BMPs. In this case, municipal dischargers are required to reduce the discharge of pollutants into and from their MS4s to the MEP. The MEP standard therefore provides specificity about the minimum amount of effort needed for permit compliance. MEP considers economics and is generally, but not necessarily, less stringent than BAT<sup>7</sup>. A definition of MEP is not provided either in the statute or in the regulations. Instead, the definition of MEP is dynamic and is intended to be defined over time by the following process: municipalities propose their definition of MEP by way of their Urban Runoff Management Programs. The total collective and individual activities conducted pursuant to their Urban Runoff Management Programs become their "proposal" for MEP, as it applies both to their overall management program and level of effort, as well as to any specific activity (e.g., what is MEP for street sweeping, or MEP for sanitary sewer maintenance?).

In a memorandum dated February 11, 1993 entitled "Definition of Maximum Extent Practicable," Elizabeth Jennings, Senior Staff Counsel for the SWRCB writes "...to achieve the MEP standard, municipalities must employ whatever best management practices (BMPs) are technically feasible (i.e., are likely to be effective) and are not cost prohibitive". She goes on to state, in part, "...The final determination regarding whether a municipality has reduced pollutants to the maximum extent practicable can only be made by the Regional or State Water Boards, and not by the municipal discharger."

Tentative Order No. 2001-01 defines MEP in the San Diego Region. The overall program scope and level of effort specified in the Tentative Order's Urban Runoff Management Programs is the SDRWQCB's interpretation of MEP. By defining the minimum standard, the SDRWQCB has eliminated much of the guesswork and uncertainty previously associated with permit compliance.

3. Copermittees Provided Substantial Comments on Previous Drafts; Tentative Order No. 2001-01 Responds to All Comments Received

Tentative Order No. 2001-01 is detailed in its requirements in part due to the extended reissuance process it has undergone. Drafts of the San Diego Municipal Storm Water Permit have been released for public comment twice before (in 1995 and 1998). During the course of development, the SDRWQCB has asked for and received a significant number of comments on previous drafts (informally during individual discussions and collective meetings, as well as formally in more than 200 pages of written comments). Each comment has been carefully reviewed and considered. The language in Tentative Order No. 2001-01 incorporates the SDRWQCB's responses to all comments received prior to its release on October 11, 2000.

Over the years and in a variety of forums, both the Copermittees and the public have generally sought more clarification and detailed explanations of permit requirements.

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<sup>7</sup> BAT, or best available technology, is the technology-based standard established by Congress for industrial dischargers of storm water.

Many of the comments received on earlier drafts have contained specific requests for the SDRWQCB to provide additional clarification or specificity on a variety of permit requirements.

In response to these comments, the level of detail of the Tentative Order has increased over time. This evolution can be seen in the attached table by the increasing number of requirements in each subsequent issuance of the Tentative Order (note totals at end of table). Tentative Order 2001-01 provides the additional clarification and increased specificity requested, while seeking to address the entire scope and variety of issues raised during the lengthy public participation process. One consequence of an extended development process and repeated requests for greater specificity, is that overall volume of the permit has also increased proportionately over the years. It may be interesting to note that many of the "very recently received" comments on Tentative Order 2001-01 continue to request additional clarification on specific requirements.

#### 4. Greater Specificity Will Facilitate Assessment Of Copermittee Compliance

Assessing Copermittee compliance with Order No. 40-42 has been challenging and resource intensive. There are many reasons for this including the following:

- Storm water permits are based on BMPs and lack numeric effluent limits
- MEP, the technology based standard for MS4 permits, had not been defined
- Order No. 90-42 was an "early" permit with broad vague language
- Order No. 90-42 lacked other "measurable" performance standards
- Storm water management is a developing field (most other discharges regulated by the SDRWQCB are well defined)

With respect to assessing permit compliance, a storm water permit's lack of numeric effluent limitations is a distinct disadvantage. This is because compliance (or noncompliance) with numeric effluent limitations is one of the most important tools used by the regional boards in their overall assessment of a discharger's compliance. The comparison of routine effluent monitoring data to the numeric effluent limitations specified in the permit provides an accurate and effective measure of permit compliance.

In contrast, assessing compliance with Order No. 90-42, a BMP-based "early" storm water permit, has proven complex and subjective. When effluent limits are absent, the inclusion of greater specificity is made all the more necessary. Reliance on BMPs, as opposed to numeric effluent limits, demands specification of those programs and activities that are relied upon to reduce pollution. To assess compliance with the early permit, the SDRWQCB has utilized a variety of other tools, with varying degrees of effectiveness (See "Status of Copermittee Compliance", Attachment 16).

Tentative Order 2001-01 now contains detailed narrative descriptions of its requirements that represent the SDRWQCB's definition of MEP. Such detailed requirements remove ambiguity by clearing spelling out the SDRWQCB's minimum expectations. In summary,



the increased specificity of the Tentative Order will greatly enhance a Copermittee's, the SDRWQCB's, or other interested party's ability to assess permit compliance.

### Need For Increased Permit "Stringency" - - Exceeding the Federal Regulations

There has also been an increase in number of and stringency of permit requirements over time. As can be seen in the table below, Order No. 2001-01 requires considerably more of Copermittees than does Order No. 90-42. Furthermore, in some respects, the requirements of Tentative Order No. 2001-01 exceed the minimum requirements as specified in the federal regulations. The need for increased stringency and to exceed the federal regulations is discussed below.

#### 1. Continuing Water Quality Degradation Requires Increased Stringency

The increasing impairment of our Region's waters due to urban runoff (as discussed on page 5 of the Fact Sheet/Technical Report, provided as Attachment 7 of Agenda Item 5) demands increased stringency in municipal storm water permits. The population and urban development of our Region has expanded dramatically since Order No. 90-42 was issued ten years ago, and the resulting water quality problems have mirrored this expansion. The closure or posting of local beaches has become all too familiar. Urban runoff now directly causes or contributes to all of the known receiving water quality impairments in the San Diego Region. The importance of water quality to our region's tourism industry and way of life has caused an increase in public outcry against urban runoff contamination and beach closures. Urban runoff issues are now a common site on our Region's newspaper headlines and governing body agendas. Legislation at the state level regarding water quality (such as AB 411) is being generated within our Region due in large part to the Region's pronounced urban runoff water quality issues.

The continued degradation of the Region's receiving water is evidence that the current collective efforts of the Copermittees to control urban runoff are either ineffective or inadequate. More must be done to reduce urban runoff pollution if the beneficial uses of the Region's receiving waters are to be protected. The more stringent requirements of the Tentative Order are needed to address these problems and the increased attention and expectations that accompany them.

#### 2. Tentative Order Reflects a Decade of Evolving Technology

Versions of the San Diego Municipal Storm Water Permit have also become increasingly stringent due to the advancing progress in urban runoff management and technology which has occurred over time. Tentative Order No. 2001-01, and its requirements, reflect a 10 year evolution in the field of urban runoff management. Information on the impacts of urban runoff, as well as how to minimize these impacts, have greatly expanded since the existing Municipal Storm Water Permit for San Diego was first issued in 1990. In 1990, very few reference materials were available to Copermittees. Today there is a large and growing body of excellent resources available.

The Tentative Order takes advantage of this increased knowledge and the passage of time, by including additional requirements which have been proven effective or which are necessary to protect receiving waters from increasing urban runoff pollution. The result of the technology evolution is a longer and more detailed, but also more effective, permit.

### 3. Increased Stringency is Supported by USEPA and SWRCB

The increased specificity included in the Tentative Order is in large part derived from USEPA's guidance as provided in its *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems*<sup>8</sup> and its *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*.<sup>9</sup> Where the Tentative Order is more stringent than the federal regulations, the stringency is frequently based on the recommendations of the Guidance Manual. USEPA's guidance and the 1999 Phase II Storm Water regulations indicate that MS4 permits are to increase in stringency when reissued, especially where beneficial uses of receiving waters are not being protected.

The Interim Permitting Approach also supports increased specificity in storm water permits, recommending that municipal storm water permits use "best management practices (BMPs) in first-round storm water permits, and **expanded or better-tailored BMPs in subsequent permits**, where necessary, to provide for the attainment of water quality standards. In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate" (emphasis added). It is important to note that the SWRCB cited USEPA's Interim Permitting Approach as support for its recent tentative decision which upheld the increased specificity of numeric sizing criteria requirements for post-construction BMPs as appropriate requirements in municipal storm water permits. This SWRCB decision supporting Standard Urban Storm Water Mitigation Plans (SUSMPs) demonstrates the SWRCB's general recognition of the need for increased requirements in municipal storm water permits.

The SWRCB's decision to require MS4 discharges to meet water quality standards also supports increased specificity in municipal storm water permits. In Orders WQ 98-01 and 99-05, the SWRCB prescribed specific precedent setting Receiving Water Limitations language to be included in all future MS4 permits. This language specifically requires that MS4 dischargers meet water quality standards and allows for the use of narrative BMPs (increasing in stringency and implemented in an iterative process) as the mechanism by which water quality standards can be met. The idea of an iterative process

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<sup>8</sup> U.S. Environmental Protection Agency. 1992. *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems*. EPA 833-B-92-002.

<sup>9</sup> U.S. Environmental Protection Agency. 1996. *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*. 61 FR 43761.

of increasingly stringent BMP implementation is consistent with the concept of increasingly stringent MS4 permits. For example, increasingly stringent BMP implementation is required for discharges to impaired water bodies; likewise, increasingly stringent MS4 permits are required for regions with numerous water bodies impaired by urban runoff.

The SWRCB clearly expresses its intent that MS4 permits should increase in stringency in a manner similar to increasingly stringent BMP implementation when it states in a recent memorandum "[...] because most MS4 discharges enter impaired water bodies, there is a real need for permits to include stringent requirements to protect those water bodies. As total maximum daily loads (TMDLs) are developed, it is likely that MS4s will have to participate in pollutant load reductions, and the MS4 permits are the most effective vehicles for those reductions."

In summary, Tentative Order No. 2001-01 is consistent with USEPA and SWRCB support for increasing stringency in MS4 permits as necessary to protect the beneficial uses of the Region's receiving waters from further impairment.

#### **Tentative Order 2001-01 Is Fundamentally The Same As Order No. 90-42**

The "early" permit and each of the drafts of the renewal permit as well as the federal regulations (from which the essential requirements are derived) all have the same basic objective, namely, to reduce pollutants in urban runoff discharges to receiving waters. As shown in the table below, each of the documents also contain each of the fundamental underlying requirements specified in the federal regulations.

From a broad brush perspective, (even though differing substantially in level of detail and number of pages), each version of the Order is fundamentally the same. Tentative Order No. 2001-01 is not a "new" permit. It has the same underlying objective and contains the same essential ingredients as Order No. 90-42, the "early" permit to which the Copermitees have been subject for the past ten years.

The comparisons table clearly shows that the number, specificity, and stringency of permit requirements has increased over time throughout the permit development process. Perhaps more importantly however, the table also demonstrates that the most fundamental requirements, as specified in the federal regulations, have remained the same through time and that each are contained in Order No. 90-42, in the Tentative Order, and in both of the previous drafts.

Furthermore because the language contained in Order No. 90-42 and the federal regulations is quite broad, the basic requirements typically encompass or embody the more enhanced requirements of Tentative Order No. 2001-01 and previous drafts. For example, with regards to requirements for enforcement by the Copermitees, Order No. 90-42 simply states "Pursue enforcement actions as necessary to ensure compliance [...]." Though this statement is relatively broad, it embodies the more specific requirements of Tentative Order No. 2001-01, such as the Tentative Order's requirements

to "enforce ordinances and permits as necessary [at construction, industrial, and commercial sites] to maintain compliance with the Order." In a reciprocal manner, most of the requirements of Tentative Order No. 2001-01 are embodied in Order No. 90-42 and the federal NPDES storm water regulations. Footnotes to the table are occasionally provided to exhibit these types of circumstances.

The similarity of the various order, drafts, and regulations included in the table can also be observed when the number of requirements in each document are tallied. For example, roughly 80% of the Tentative Order's requirements were also present in the 1998 draft of the San Diego Municipal Storm Water Permit. Even the requirements of Order No. 90-42 encompass roughly 40% of the requirements of Tentative Order No. 2001-01. This exhibits the similarity in the requirements of the various documents covered in the table, and also demonstrates that the majority of the requirements of Tentative Order No. 2001-01 have been presented for public review prior to the public release of the Tentative Order.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Prohibition of Various Types of Discharges (Section A., page 8 of Tentative Order No. 2001-01)	Prohibit discharges into and from municipal separate storm sewer systems (MS4s) causing pollution, contamination, or nuisance	X	X	X	X	X
	Prohibit discharges from MS4s causing exceedances of water quality objectives	X	X	X	X	X
	Prohibit discharges into and from MS4s containing pollutants which have not been reduced to maximum extent practicable (MEP)	X	X	X	X	X
	Prohibit post-development runoff from new development which is greater in peak rate or velocity than pre-development runoff from the same site	-	-	X	X	X
	Prohibit discharges of post-development runoff into a Clean Water Act section 303(d) water body containing any pollutant (for which the water body is already impaired) in levels exceeding predevelopment levels (for those same pollutants)	-	-			X
	Prohibit discharges from MS4s as required by Basin Plan Prohibitions	X	N/A	X	X	X
Prohibitions of Non-Storm Water Discharges (Section B., page 9 of Tentative Order No. 2001-01)	Prohibit non-storm water discharges, except de minimis discharges	X	X	X	X	X
	Prohibit de minimis discharges if source of pollutants or require BMPs for the discharges	X	X	X	X	X
	For de minimis discharges not prohibited, submit information on discharge not prohibited and what BMPs will be required	-	-	X	X	X
	Require BMPs for non-emergency fire fighting flows which are significant sources of pollutants	-	X	X	X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Prohibit non-prohibited non-storm water discharges with pollutants which can't be reduced to MEP	X	X	X	X	X
Receiving Water Limitations (Section C., page 10 of Tentative Order No. 2001-01)	Prohibit discharges causing violation of water quality standards	X	X	X	X	X
	If exceedance of water quality standards occurs, implement control measures stop exceedance	X	X	-	X	X
	If exceedance of water quality standards occurs, notify SDRWQCB of exceedance and submit report to SDRWQCB of measures to be taken	X	-	-	X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	If exceedance of water quality standards occurs, revise urban runoff management program and monitoring program, and implement the programs	-	-	-	X	X
Legal Authority (Section D., page 10 of Tentative Order No. 2001-01)	Establish, maintain, and enforce legal authority to control pollutant discharges into and from MS4	X <sup>10</sup>	X <sup>11</sup>	X	X	X
	Establish legal authority which authorizes Copermittee to control pollutant discharges from industrial and construction activities into MS4	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to prohibit all illicit discharges	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to prohibit and eliminate illicit connections	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to control discharge of spills, dumping, or disposal of materials other than storm water into MS4	X	X	X	X	X

<sup>10</sup> Much of the language in Order No. 90-42 regarding the Copermittees' attainment of legal authority is very broad. It states "Enact legislation and ordinances as necessary to ensure compliance with the stormwater management program and the implementation plans." SDRWQCB interprets this language as requiring the establishment of legal authority to control all pollutant discharges into and from the MS4. Therefore, all requirements regarding the attainment of legal authority for the purpose of controlling pollutant discharges into and from the MS4 are "checked" in the Order No. 90-42 column.

<sup>11</sup> The Federal NPDES regulations require Copermittees to operate pursuant to legal authority which enables them to "[R]equire compliance with conditions in ordinances, permits, contracts, and orders" (40 CFR 122.26(d)(2)(i)(E)). Therefore, the Federal NPDES regulations require the Copermittees to have legal authority to comply with requirements in orders from the SDRWQCB. Accordingly, legal authority requirements necessary to ensure compliance with SDRWQCB orders are "checked" in the Federal NPDES Regulations column.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Establish legal authority which authorizes Copermittee to require compliance with Copermittee ordinances, permits, contracts, or orders	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to utilize enforcement mechanisms	X	X	X <sup>12</sup>	X	X
	Establish legal authority which authorizes Copermittee to control pollutants from one portion of shared MS4 to another through interagency agreements	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to carry out inspections, surveillance, and monitoring necessary to determine compliance	X	X	X	X	X
	Establish legal authority which authorizes Copermittee to require the use of BMPs	X	X	X	X	X
	Provide certified statement that Copermittee has adequate legal authority	-	-	X	X	X
	Provide certified statement that identifies responsibilities of each municipal department which conducts urban runoff activities	-	-	X	-	X
	Provide certified statement citing urban runoff related ordinances and how they are enforceable	-	-	X	-	X
	Provide certified statement describing how ordinances are implemented and appealed	-	-	X	-	X

<sup>12</sup> The 1995 Draft requires legal authority to be obtained which authorizes the Copermittee to "[R]equire compliance with conditions in ordinances, permits, contracts, or orders." Legal authority to "require compliance" is analogous to legal authority to "enforce." Therefore, the requirement to "establish legal authority which authorizes Copermittee to utilize enforcement mechanisms" is "checked" in the 1995 Draft column.



Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Provide certified statement describing issuance of administrative orders and injunctions or use of court system for enforcement actions	-	-	-	-	X
<b>Technology Based Standards</b> (Section E., page 12 of Tentative Order No. 2001-01)	BMPs shall be implemented to reduce pollutants discharges into and from the MS4 to the MBP	X	X	X	X	X
	Pollutant discharges into and from the MS4 from industrial activity owned by the Copermittee shall be reduced to BAT/BCT	-	X	X	X	X
	Pollutant discharges into and from the MS4 from construction activity owned by the Copermittee shall be reduced to BAT/BCT	-	X	X	X	X
<b>Urban Runoff Management Plan</b> (Section F., page 13 of Tentative Order No. 2001-01)	Implement urban runoff management plan to reduce discharge of pollutants into and from MS4	X	X	X	X	X
<b>Land-Use Planning for New Development and Significant Redevelopment</b> (Section F.1., page 13 of Tentative Order No. 2001-01)	Reduce pollutant discharges from new development and redevelopment to the MBP	X	X	X	X	X
	Utilize urban planning to minimize discharge of pollutants in urban runoff	X	X	X	X	X
	Minimize short and long-term impacts on receiving water quality from new development and redevelopment	-	-	-	-	X
	Incorporate water quality and watershed principles into General Plan	-	-	-	-	X
	Modify development project approval processes	-	-	X	X	X
	Include conditions of approval in local permits for new development	-	-	X	X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Revise environmental review processes and CEQA initial study checklists	-	-	-	X	X
	Conduct education efforts focused on new development and redevelopment	-	-	-	-	X
	Educate municipal staff on requirements for new development and redevelopment	-	-	X	X	X
	Educate project applicants, contractors, developers, property owners, etc. on requirements for new development and redevelopment	-	-	X	X	X
Land-Use Planning for New Development and Significant Redevelopment (SUSMPs) (Section F.1.b(2), page 15 of Tentative Order No. 2001-01)	Develop Standard Urban Storm Water Mitigation Plans to reduce pollutants and runoff flows from priority development project categories	-	-	-	X	X
	Implement post-construction BMPs for new development and redevelopment	-	X	X	X	X
	Require structural post-construction BMPs to meet design criteria and performance standards	-	-	X	X	X
	Require structural post-construction BMPs for priority development project categories to meet numeric sizing criteria	-	-	-	-	X
	Develop procedure for pollutants of concern to be identified for new development projects	-	-	-	-	X
	Develop a process by which SUSMPs will be implemented	-	-	-	-	X
	Develop a program to manage waivers from SUSMPs	-	-	-	-	X
	Require protection of groundwater resources when BMPs with the primary function of infiltration are used	-	-	-	-	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Construction (Section F.2., page 21 of Tentative Order No. 2001-01)	Reduce pollutant discharges from construction sites	X	X	X	X	X
	Require implementation of pollution prevention methods at construction sites	-	X <sup>13</sup>	X	X	X
	Update grading ordinances	-	-	-	X	X
	Modify construction and grading approval processes	-	-	-	X	X
	Include conditions of approval in local grading and construction permits to ensure pollutant discharges are reduced to MEP	-	-	X	X	X
	Inventory all construction sites	X <sup>14</sup>	X	-	X	X
	Prioritize construction sites for construction oversight activities	-	X <sup>15</sup>	-	X	X
	Require implementation of designated minimum BMPs at each construction site	X	X	X	X	X

<sup>13</sup> The Preamble to the Federal NPDES regulations states "[I]n implementing these regulations, EPA and the States will strive to achieve environmental results in a cost effective manner by placing high priority on pollution prevention activities [...]." For this reason, SDRWQCB interprets Federal NPDES regulation requirements for implementation of control measures to include requirements for implementation of pollution prevention control measures. Accordingly, all requirements regarding pollution prevention are "checked" in the Federal NPDES Regulations column.

<sup>14</sup> The language in Order No. 90-42 regarding requirements for pollutant source inventories is very broad. It states "The permittees shall inventory [...] major sources of pollutants such as industrial and military and other federal facilities, airports, highways, shopping centers, and large parking areas." Staff interprets this language to apply to all land-use areas within each Copermittee's jurisdiction, including construction, municipal, industrial, commercial, and residential areas. Therefore, all requirements regarding pollutant source inventories are "checked" in the Order No. 90-42 column.

<sup>15</sup> The Federal NPDES regulation requirements for prioritization are broad. They state "Proposed management programs shall describe priorities for implementing controls." SDRWQCB interprets this language to apply to all land-use areas within each Copermittee's jurisdiction, including construction, municipal, industrial, commercial, and residential areas. Therefore, all requirements regarding prioritization are "checked" in the Federal NPDES Regulation column.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Require implementation of additional BMPs at construction sites tributary to Clean Water Act section 303(d) water bodies	X	X	X	X	X
	Inspect construction sites for compliance with ordinances and permits	-	X	X	X	X
	Establish inspection frequencies for construction sites based on their prioritization	-	X	X	X	X
	Inspect high priority construction sites weekly (or monthly if SWPPP has been reviewed and is found to have been implemented)	-	-	-	-	X
	Inspect medium and low priority construction sites twice during the wet season	-	-	-	-	X
	Inspect construction sites as needed during the dry season	-	-	-	-	X
	Enforce ordinances and permits at all construction sites	X <sup>16</sup>	X	X	X	X
	Provide notification to SDRWQCB of non-compliant sites	X <sup>17</sup>	X	X	X	X
	Conduct education efforts focused on construction	-	X	X	X	X
	Educate municipal staff on requirements for construction	-	-	X	X	X
	Educate project applicants, contractors, developers, property owners, etc. on requirements for construction	-	X	X	X	X

<sup>16</sup> The language in Order No. 90-42 regarding enforcement is very broad. It states "[P]ursue enforcement actions as necessary to ensure compliance with the stormwater management programs and the implementation plans." SDRWQCB interprets this language to apply to all areas within each Copermittee's jurisdiction, including construction, municipal, industrial, commercial, and residential areas. Therefore, all requirements regarding enforcement are "checked" for Order No. 90-42.

<sup>17</sup> Order No. 90-42 requires reporting of all instances of non-compliance.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Municipal (Section F.3.a., page 24 of Tentative Order No. 2001-01)	Reduce pollutant discharges from municipal areas and activities	X	X	X	X	X
	Reduce impacts on receiving waters from operating and maintaining public streets, roads, and highways	-	X	X	X	X
	Assure that flood management projects assess water quality impacts	-	X	X	X	X
	Implement control measures for discharges of pollutants from municipal waste storage facilities	-	X	X	X	X
	Require implementation of pollution prevention methods for municipal areas and activities	-	X	X	X	X
	Inventory all municipal areas and activities which generate pollutants	X	-	-	-	X
	Prioritize municipal areas and activities for oversight	-	X	-	-	X
	Require implementation of designated minimum BMPs for each municipal area or activity	-	X	X	X	X
	Require implementation of additional BMPs for municipal areas and activities tributary to Clean Water Act section 303(d) water bodies	-	X	X	X	X
	Implement a schedule of maintenance activities at all structural controls designed to reduce pollutant discharges to or from the MS4	X <sup>18</sup>	X	X	X	X

<sup>18</sup> The language in Order No. 90-42 regarding maintenance of the MS4 is broad. It states "Permittees shall, at all times, properly maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by a permittee to achieve compliance with the conditions of this Order." Staff interprets this language to apply to consistent periodic maintenance of the entire MS4. Therefore, all requirements regarding maintenance of the MS4 are "checked" for Order No. 90-42.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Implement a schedule of maintenance for the MS4	X	X	X	X	X
	Inspect and remove waste accumulated in the MS4	X	-	X	X	X
	Perform additional MS4 cleaning as necessary	-	-	X	X	X
	Keep records of cleanings and quantity of material removed	-	-	-	X	X
	Dispose of MS4 waste properly	-	-	-	X	X
	Eliminate waste discharges during maintenance and cleaning	-	-	-	X	X
	Implement BMPs to reduce contribution of pollutants associated with the application, storage, and disposal of pesticides, herbicides, and fertilizers	-	X	X	X	X
	Inspect high priority municipal areas and activities annually	-	-	-	-	X
	Enforce storm water ordinance for all municipal areas and activities	X	X	X	X	X
Industrial (Section F.3.b., page 27 of Tentative Order No. 2001-01)	Reduce pollutants in runoff from industrial sites	X	X	X	X	X
	Require implementation of pollution prevention methods at industrial sites	-	X	X	X	X
	Inventory all industrial sites	X	X	X	X	X
	Prioritize industrial sites for oversight	-	X	X	X	X
	Require implementation of designated minimum BMPs for each industrial site	X	X	X	X	X
	Require implementation of additional BMPs for industrial sites tributary to Clean Water Act section 303(d) water bodies	-	X	X	X	X
	Require monitoring program for runoff from high priority industrial sites	-	X	-	X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Inspect industrial sites for compliance with ordinances and permits	-	X	X	X	X
	Establish inspection frequencies for industrial sites based on their prioritization	-	X	X	X	X
	Inspect high priority industrial sites annually (or biannually if SWPPP has been reviewed and is found to have been implemented)	-	-	-	-	X
	Enforce ordinances at all industrial sites	X	X	X	X	X
	Provide notification to SDRWQCB of non-compliant sites	X	X	X	X	X
<b>Commercial</b> (Section F.3.c., page 30 of Tentative Order No. 2001-01)	Reduce pollutants in runoff from commercial sites	X	X	X	X	X
	Require implementation of pollution prevention methods at commercial sites	-	X	X	X	X
	Inventory all high priority commercial sites	X	-	X	X	X
	Require implementation of designated minimum BMPs for each commercial site	X	X	X	X	X
	Require implementation of additional BMPs for commercial sites tributary to Clean Water Act section 303(d) water bodies	X	X	X	X	X
	Inspect high priority commercial sites as needed	-	-	X	-	X
	Enforce ordinances at all commercial sites	X	X	X	X	X
<b>Residential</b> (Section F.3.d., page 31 of Tentative Order No. 2001-01)	Reduce pollutants in runoff from residential areas and activities	X	X	X	X	X
	Require implementation of pollution prevention methods for residential areas and activities	-	X	X	X	X
	Inventory all high priority residential areas and activities	X	-	-	X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Require implementation of designated minimum BMPs for high priority residential areas and activities	X	X	X	X	X
	Require implementation of additional BMPs for residential areas and activities tributary to Clean Water Act section 303(d) water bodies	X	X	X	X	X
	Enforce ordinances for all residential areas and activities	X	X	X	X	X
Education (Section F.4., page 32 of Tentative Order No. 2001-01)	Implement a education program to increase knowledge of MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions	-	X	X	X	X
	Implement education program to measurably change behavior of target communities	-	-	-	X	X
	Educate municipal departments and personnel	-	X	X	X	X
	Educate construction site owners and developers	-	X	X	X	X
	Educate industrial owners and operators	-	-	X	X	X
	Educate commercial owners and operators	-	-	X	X	X
	Educate residential community, general public, school children	-	-	X	X	X
	Educate quasi-governmental agencies	-	-	-	-	X
Illicit Discharge Detection and Elimination (Section F.5., page 34 of Tentative Order No. 2001-01)	Seek and eliminate illicit discharges and connections	X	X	X	X	X
	Conduct dry weather field screening of MS4 outfalls to detect illicit discharges and connections	X	X	X	X	-
	Conduct dry weather analytical monitoring of MS4 outfalls	-	-	-	-	X



Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Follow-up on potential illicit discharges or connections based on dry weather analytical monitoring	-	X	X	X	X
	Establish criteria to identify where follow-up investigations appropriate	-	-	X	X	X
	Eliminate detected illicit discharges and connections	X	X	X	X	X
	Enforce ordinances, orders, and other legal authority to prevent and eliminate illicit discharges and connections	X	X	X	X	X
	Prevent and respond to sewage spills (including from private laterals) and other spills	X	X	X	X	X
	Develop and implement a mechanism to be notified of all sewage spills from private laterals	-	-	-	-	X
	Facilitate public reporting of illicit discharges and connections through operation of a public hotline	-	X	X	X	X
	Facilitate proper management and disposal of used oil, toxic materials, and other household hazardous wastes	-	X	X	X	X
	Implement controls and measures to limit infiltration of seepage from sanitary sewers to MS4s	-	X	X	X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Public Participation (Section F.6., page 35 of Tentative Order No. 2001-01)	Incorporate public participation into urban runoff management plan	-	X	-	X	X
Assessment of Urban Runoff Management Program Effectiveness (Section F.7., page 36 of Tentative Order No. 2001-01)	Develop and implement long-term strategy for assessing effectiveness of the urban runoff management program	X	X	X	X	X
	Assess status of compliance	-	-	-	-	X
Fiscal Analysis (Section F.8., page 36 of Tentative Order No. 2001-01)	Develop a strategy to conduct a fiscal analysis of the urban runoff management program	-	-	-	-	X
	Conduct fiscal analysis annually	X	X	X	X	X
Watersheds (Section J., page 41 of Tentative Order No. 2001-01)	Develop and implement a watershed urban runoff management program	-	X <sup>19</sup>	-	X	X
	Collaborate with other Copermittees in watershed and identify and mitigate highest priority water quality issues in the watershed	-	-	-	X	X
	Create a map of each watershed	-	-	-	X	X
	Assess water quality of all receiving waters in each watershed	-	X <sup>20</sup>	-	X	X
	Identify and prioritize water quality problems in each watershed caused by MS4 discharges	-	-	-	X	X

<sup>19</sup> The Federal NPDES regulations state "Proposed programs may impose controls on a [...] watershed basis [...]" (40 CFR 122.26(d)(2)(iv)).

<sup>20</sup> The Federal NPDES regulations require an assessment of the quality of receiving waters (40 CFR 122.26(d)(1)(iv)(C)). If the urban runoff management program were to be conducted on a watershed basis, the water quality assessment would also be conducted on a watershed basis.

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	Develop a time schedule of short and long-term recommended watershed activities	-	-	-	X	X
	Identify Copermittees and corresponding responsibilities for each watershed	-	-	-	X	X
	Develop a mechanism for public participation in watershed process	-	-	-	X	X
	Implement a watershed based education program	-	-	-	-	X
	Develop a mechanism to facilitate watershed-based land use planning between Copermittees	-	-	-	-	X
	Develop an implementation schedule for collaborative watershed-based land use planning	-	-	-	-	X
	Assess long-term effectiveness of watershed urban runoff management program	-	X <sup>21</sup>	-	X	X
Reporting (Sections H., I., L., and M., pages 36 - 44 of Tentative Order No. 2001-01)	Submit description of urban runoff management program	X	X	X	X	X
	Document all urban runoff activities and submit annually	X	X	X	X	X
	Submit description of watershed urban runoff management program	-	X <sup>22</sup>	-	X	X
	Document all watershed urban runoff activities and submit annually	-	X	-	X	X
	Submit report on dry weather monitoring results	X	X	X	X	X
	Submit monitoring report annually	X	X	X	X	X
<sup>21</sup> If an urban runoff management program is conducted on a watershed basis, the Federal NPDES regulations would require an assessment of the effectiveness of the watershed urban runoff management program.						
<sup>22</sup> If an urban runoff management program is conducted on a watershed basis, a description of the watershed urban runoff management program would be required.						

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
	All reports shall be signed and certified	X	X	X	X	X
Copermittee Collaboration (Section N., page 44 of Tentative Order No. 2001-01)	Collaborate with other Copermittees to address common issues, promote consistency, and coordinate activities		X	X	X	X
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement between the Copermittees	X	X	X	X	X
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement which provides a management structure for designation of joint responsibilities	X		X	X	X
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement which designates fiscal responsibilities of Copermittees	X			X	
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement which provides a management structure for decision-making				X	X
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement which provides a management structure for watershed activities					X
	Execute and submit a memorandum of understanding, joint powers authority, or other formal agreement which provides a management structure for information management				X	X
	Jointly develop a standardized format for reports				X	X

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
<b>Principal Permittee</b> (Section O., page 45 of Tentative Order No. 2001-01)	Serve as a liaison between Copermitees and SDRWQCB	X	-	-	X	X
	Designate Principal Permittee	X	-	-	X	X
	Ensure coordination of permit activities among Copermitees	X	-	-	X	X
	Integrate individual Copermitee documents	X	-	-	X	X
<b>Non-Compliance</b> (Section R.1., page 49 of Tentative Order No. 2001-01)	Report all instances of non-compliance	X	X	X	X	X
<b>Monitoring</b> (Attachment B of Tentative Order No. 2001-01)	Develop a monitoring program	X	X	X	X	X
	Develop storm water monitoring program	X	X	X	X	X
	Develop urban runoff monitoring program	X	-	-	-	X
	Develop receiving water monitoring program	X	-	X	X	X
	Develop a report that summarizes previous monitoring results	X	-	-	-	X
	Develop a report that recommends future monitoring activities	-	-	-	-	X
	Estimate annual pollutant load of cumulative discharges	-	X	X	X	X
	Conduct urban stream bioassessment monitoring	-	-	-	-	X
	Conduct long-term mass loading monitoring	X	-	X	X	X
	Conduct coastal storm drain monitoring	-	-	-	-	X
	Conduct ambient bay, lagoon, and coastal receiving water monitoring	-	-	X	X	X
	Conduct toxic hot spot monitoring	-	-	X	X	X
	Conduct dry weather field screening	X	X	X	X	X
	Conduct dry weather analytical monitoring	-	-	-	-	X
Develop map of MS4	X	X	X	X	X	

Requirement Category	Requirements	Order No. 90-42 (July, 1990)	Federal NPDES Regulations (November, 1990)	1995 Draft (May, 1995)	1998 Draft (October, 1998)	Tentative Order No. 2001-01 (October, 2000)
Total Number of Requirements (estimate)	187	77	108	121	150	185
Total Number of Pages		33 (+ 3)		39 (+31)	26 (+17)	50 (+30)

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STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001-15

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In the Matter of the Petitions of

**BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY  
AND  
WESTERN STATES PETROLEUM ASSOCIATION**

For Review Of Waste Discharge Requirements Order No. 2001-01  
for Urban Runoff from San Diego County  
[NPDES No. CAS0108758]

Issued by the  
California Water Quality Control Board,  
San Diego Region

*SWRCB/OCC FILES A-1362, A-1362(a)*

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BY THE BOARD:

On February 21, 2001, the San Diego Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 2001-01 (permit) to the County of San Diego (County), the 18 incorporated cities within the County, and the San Diego Unified Port District. The permit covers storm water discharges from municipal separate storm sewer systems (MS4) throughout the County. The permit is the second MS4 permit issued for the County, although the first permit was issued more than ten years earlier.<sup>1</sup>

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<sup>1</sup> NPDES permits generally expire after five years, but can be extended administratively where the Regional Water Board is unable to issue a new permit prior to the expiration date. As the record in this matter amply demonstrates, the Regional Water Board engaged in an extensive process of issuing draft permits, accepting comments, and holding workshops and hearings since at least 1995.



The permit includes various programmatic and planning requirements for the permittees, including construction and development controls, controls on municipal activities, controls on runoff from industrial, commercial, and residential sources, and public education. The types of controls and requirements included in the permit are similar to those in other MS4 permits, but also reflect the expansion of the storm water program since the first MS4 permit was adopted for San Diego County 11 years ago.<sup>2</sup>

On March 23, 2001, the State Water Resources Control Board (State Water Board or Board) received petitions for review of the permit from the Building Industry Association of San Diego County (BIA) and from the Western States Petroleum Association (WSPA).<sup>3</sup> The petitions are legally and factually related, and have therefore been consolidated for purposes of review.<sup>4</sup> None of the municipal dischargers subject to the permit filed a petition, nor did they file responses to the petitions.

## **I. BACKGROUND**

MS4 permits are adopted pursuant to Clean Water Act section 402(p). This federal law sets forth specific requirements for permits for discharges from municipal storm sewers. One of the requirements is that permits “shall require controls to reduce the discharge of pollutants to the maximum

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<sup>2</sup> For a discussion of the evolution of the storm water program, consistent with guidance from the United States Environmental Protection Agency (U.S. EPA), see Board Order WQ 2000-11.

<sup>3</sup> On March 23, the State Water Board also received brief letters from the Ramona Chamber of Commerce, the North San Diego County Association of Realtors, the San Diego County Apartment Association, the National Association of Industrial and Office Properties, and the California Building Industry Association. All of these letters state that they are “joining in” the petition filed by BIA. None of the letters contain any of the required information for petitions, which is listed at Cal. Code of Regs., tit. 23, section 2050. These letters will be treated as comments on the BIA petition. To the extent the authors intended the letters be considered petitions, they are dismissed.

<sup>4</sup> Cal. Code of Regs., tit. 23, section 2054.

extent practicable [MEP].” States establish appropriate requirements for the control of pollutants in the permits.

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of numeric effluent limitations, and the expectation that the level of effort to control urban runoff will increase over time.<sup>5</sup> We pointed out that urban runoff is a significant contributor of impairment to waters throughout the state, and that additional controls are needed. Specifically, in Board Order WQ 2000-11 (hereinafter, LA SUSMP order), we concluded that the Los Angeles Regional Water Board acted appropriately in determining that numeric standards for the design of BMPs to control runoff from new construction and redevelopment constituted controls to the MEP.<sup>6</sup>

The San Diego permit incorporates numeric design standards for runoff from new construction and redevelopment similar to those considered in the LA SUSMP order.<sup>7</sup> In addition, the permit addresses programmatic requirements in other areas. The LA SUSMP order was a precedential decision,<sup>8</sup> and we will not reiterate our findings and conclusions from that decision.<sup>9</sup>

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<sup>5</sup> Board Order WQ 2000-11.

<sup>6</sup> As explained in that Order, numeric design standards are not the same as numeric effluent limitations. While BIA contends that the permit under review includes numeric effluent limitations, it does not. A numeric design standard only tells the dischargers how much runoff must be treated or infiltrated; it does not establish numeric effluent limitations proscribing the quality of effluent that can be discharged following infiltration or treatment.

<sup>7</sup> The San Diego permit also includes provisions that are different from those approved in the LA SUSMP Order, but which were not the subject of either petition. Such provisions include the inclusion of non-discretionary projects. We do not make any ruling in this Order on matters that were not addressed in either petition.

<sup>8</sup> Government Code section 11425.60; State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.

<sup>9</sup> BIA restates some of the issues this Board considered in the LA SUSMP order. For instance, BIA contends that it is inappropriate for the permit to regulate erosion control. While this argument was not specifically addressed in our prior Order, it is obvious that the most serious concern with runoff from construction is the potential for increased erosion. It is absurd to contend that the permit should have ignored this impact from urban runoff.

The petitioners make numerous contentions, mostly concerning requirements that they claim the dischargers will not be able to, or should not be required to, comply with. We note that none of the dischargers has joined in these contentions. We further note that BIA raises contentions that were already addressed in the LA SUSMP order. In this Order, we have attempted to glean from the petition issues that are not already fully addressed in Board Order Board Order WQ 2000-11, and which may have some impact on BIA and its members. WSPA restated the contentions it made in the petition it filed challenging the LA SUSMP order. We will not address those contentions again.<sup>10</sup> But we will address whether the Regional Water Board followed the precedent established there as it relates to retail gasoline outlets.<sup>11</sup>

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<sup>10</sup> On November 8, 2001, following the October 31 workshop meeting that was held to discuss the draft order, BIA submitted a “supplemental brief” that includes many new contentions raised for the first time. (Interested persons who were not petitioners filed comments on the draft order asking the State Water Board to address some of these.) The State Water Board will not address these contentions, as they were not timely raised. (Wat. Code § 13320; Cal. Code of Regs., tit. 23, § 2050(a).) Specific contentions that are not properly subject to review under Water Code section 13320 are objections to findings 16, 17, and 38 of the permit, the contention that permit provisions constitute illegal unfunded mandates, challenges to the permit’s inspection and enforcement provisions, objections to permit provisions regarding construction sites, the contention that post-construction requirements should be limited to “discretionary” approvals, the challenge to the provisions regarding local government compliance with the California Environmental Quality Act, and contentions regarding the term “discharge” in the permit. BIA did not meet the legal requirements for seeking review of these portions of the permit.

<sup>11</sup> On November 8, 2001, the State Water Board received eight boxes of documents from BIA, along with a “Request for Entry of Documents into the Administrative Record.” BIA failed to comply with Cal. Code of Regs., tit. 23, section 2066(b), which requires such requests be made “prior to or during the workshop meeting.” The workshop meeting was held on October 31, 2001. The request will therefore not be considered. BIA also objected in this submittal that the Regional Water Board did not include these documents in its record. The Regional Water Board’s record was created at the time the permit was adopted, and was submitted to the State Water Board on June 11, 2001. BIA’s objection is not timely.

## II. CONTENTIONS AND FINDINGS<sup>12</sup>

**Contention:** BIA contends that the discharge prohibitions contained in the permit are “absolute” and “inflexible,” are not consistent with the standard of “maximum extent practicable” (MEP), and financially cannot be met.

**Finding:** The gist of BIA’s contention concerns Discharge Prohibition A.2, concerning exceedance of water quality objectives for receiving waters: “Discharges from MS4s which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited.” BIA generally contends that this prohibition amounts to an inflexible “zero contribution” requirement.

BIA advances numerous arguments regarding the alleged inability of the dischargers to comply with this prohibition and the impropriety of requiring compliance with water quality standards in municipal storm water permits. These arguments mirror arguments made in earlier petitions that required compliance with water quality objectives by municipal storm water permittees. (See, e.g., Board Orders WQ 91-03, WQ 98-01, and WQ 99-05.) This Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. We adopted an iterative procedure for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving

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<sup>12</sup> This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.) We make no determination as to whether we will address the same or similar issues when raised in future petitions.

waters. The language in the permit in Receiving Water Limitation C.1 and 2 is consistent with the language required in Board Order WQ 99-05, our most recent direction on this issue.<sup>13</sup>

While the issue of the propriety of requiring compliance with water quality objectives has been addressed before in several orders, BIA does raise one new issue that was not addressed previously. In 1999, the Ninth Circuit Court of Appeals issued an opinion addressing whether municipal storm water permits must require “strict compliance” with water quality standards.<sup>14</sup> (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The court in *Browner* held that the Clean Water Act provisions regarding storm water permits do not require that municipal storm-sewer discharge permits ensure strict compliance with water quality standards, unlike other permits.<sup>15</sup> The court determined that: “Instead, [the provision for municipal storm water permits] *replaces* the requirements of [section 301] with the requirement that municipal storm-sewer dischargers ‘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.3d at 1165.) The court further held that the Clean Water Act does grant the permitting agency discretion to determine what pollution controls are appropriate for municipal storm water discharges. (*Id.* at 1166.) Specifically, the court stated that U.S.

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<sup>13</sup> In addition to Discharge Prohibition A.2, quoted above, the permit includes Receiving Water Limitation C.1, with almost identical language: “Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited.” Receiving Water Limitation C.2 sets forth the iterative process for compliance with C.1, as required by Board Order WQ 99-05.

<sup>14</sup> “Water quality objectives” generally refers to criteria adopted by the state, while “water quality standards” generally refers to criteria adopted or approved for the state by the U.S. EPA. Those terms are used interchangeably for purposes of this Order.

<sup>15</sup> Clean Water Act § 301(b)(1)(C) requires that most NPDES permits require strict compliance with quality standards.

EPA had the authority either to require “strict compliance” with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time. (*Id.*) The court in *Browner* upheld the EPA permit language, which included an iterative, BMP-based approach comparable to the language endorsed by this Board in Order WQ 99-05.

In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA’s permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA’s general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

It is true that the holding in *Browner* allows the issuance of municipal storm water permits that limit their provisions to BMPs that control pollutants to the maximum extent practicable (MEP), and which do not require compliance with water quality standards. For the reasons discussed below, we decline to adopt that approach. The evidence in the record before us is consistent with records in previous municipal permits we have considered, and with the data we have in our records, including data supporting our list prepared pursuant to Clean Water Act section 303(d). Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their

beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require “strict compliance” with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.<sup>16</sup> The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.<sup>17</sup>

We have reviewed the language in the permit, and compared it to the model language in Board Order WQ 99-05. The language in the Receiving Water Limitations is virtually identical to the language in Board Order WQ 99-05. It sets a limitation on discharges that cause or contribute to violation of water quality standards, and then it establishes an iterative approach to complying with the limitation. We are concerned, however, with the language in Discharge Prohibition A.2, which is

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<sup>16</sup> Exceptions to this general rule are appropriate where site-specific conditions warrant. For example, the Basin Plan for the Lake Tahoe basin, which protects an outstanding national resource water, includes numeric effluent limitations for storm water discharges.

<sup>17</sup> While BIA argues that the permit requires “zero contribution” of pollutants in runoff, and “in effect” contains numeric effluent limitations, this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for storm water similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.

challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.<sup>18</sup>

BIA also objects to Discharge Prohibition A.3, which appears to require that treatment and control of discharges must always occur prior to entry into the MS4: “Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited.”<sup>19</sup> An NPDES permit is properly issued for “discharge of a pollutant” to waters of the United States.<sup>20</sup> (Clean Water Act § 402(a).) The Clean Water Act defines “discharge of a pollutant” as an “addition” of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges “from municipal storm sewers.”

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<sup>18</sup> The iterative approach is not necessary for all Discharge Prohibitions. For example, a prohibition against pollution, contamination or nuisance should generally be complied with at all times. (See, Discharge Prohibition A.1.) Also, there may be discharge prohibitions for particularly sensitive water bodies, such as the prohibition in the Ocean Plan applicable to Areas of Special Biological Significance.

<sup>19</sup> Discharge Prohibition A.1 also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occurs “in waters of the state.” Therefore, it is interpreted to apply only to discharges to receiving waters.

<sup>20</sup> Since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect “waters of the state,” rather than being limited to “waters of the United States.” In general, the inclusion of “waters of the state” allows the protection of groundwater, which is generally not considered to be “waters of the United States.”



We find that the permit language is overly broad because it applies the MEP standard not only to discharges “from” MS4s, but also to discharges “into” MS4s. It is certainly true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board’s concern, stated in its response, that there may be instances where MS4s use “waters of the United States” as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges “into” an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.<sup>21</sup> It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.

**Contention:** State law requires the adoption of wet weather water quality standards, and the permit improperly enforces water quality standards that were not specifically adopted for wet weather discharges.

**Finding:** This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions. In arguing that the permit violates state law, BIA states that because the permit applies the water quality

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<sup>21</sup> There are other provisions in the permit that refer to restrictions “into” the MS4. (See, e.g., Legal Authority D.1.) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate controls for discharges into their system. For example, the federal regulations require that MS4s have a program “to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system . . .” (40 C.F.R. § 122.26(d)(2)(iv)(D).)

objectives that were adopted in its Basin Plan, and those objectives were not specifically adopted for wet weather conditions only, the Regional Water Board violated Water Code section 13241. These allegations appear to challenge water quality objectives that were adopted years ago. Such a challenge is clearly inappropriate as both untimely, and because Basin Plan provisions cannot be challenged through the water quality petition process. (See Wat. Code § 13320.) Moreover, there is nothing in section 13241 that supports the claim that Regional Water Boards must adopt separate wet weather water quality objectives. Instead, the Regional Water Board's response indicates that the water quality objectives were based on all water conditions in the area. There is nothing in the record to support the claim that the Regional Water Board did not in fact consider wet weather conditions when it adopted its Basin Plan. Finally, Water Code section 13263 mandates the Regional Water Board to implement its Basin Plan when adopting waste discharge requirements. The Regional Water Board acted properly in doing so.

BIA points to certain federal policy documents that authorize states to promulgate water quality standards specific to wet-weather conditions.<sup>22</sup> Each Regional Water Board considers revisions to its Basin Plan in a triennial review. That would be the appropriate forum for BIA to make these comments.

**Contention:** BIA contends that the permit improperly classifies urban runoff as “waste” within the meaning of the Water Code.

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<sup>22</sup> These documents do not support the claim that U.S. EPA and the Clinton Administration indicated that the absence of such regulations “is a major problem that needs to be addressed,” as claimed in BIA’s Points and Authorities, at page 18.

**Finding:** BIA challenges Finding 2, which states that urban runoff is a waste, as defined in the Water Code, and that it is a “discharge of pollutants from a point source” under the federal Clean Water Act. BIA contends that the legislative history of section 13050(d) supports its position that “waste” should be interpreted to exclude urban runoff. The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act. In discussing the definition of “waste,” this document discusses its broad application to “current drainage, flow, or seepage into waters of the state of harmful concentrations” of materials, including eroded earth and garbage.

As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit. (At page 3.) It is also undisputed that urban runoff contains “waste” within the meaning of Water Code section 13050(d), and that the federal regulations define “discharge of a pollutant” to include “additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man.” (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of “waste” and “pollutant,” and not the runoff itself.<sup>23</sup> The finding does create some confusion, since there are discharge prohibitions that have been incorporated into the permit that broadly prohibit the discharge of “waste” in certain circumstances.

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<sup>23</sup> The Regional Water Board is appropriately concerned not only with pollutants in runoff but also the volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff. (See Board Order WQ 2000-11, at page 5.)

(See Attachment A to the permit.) The finding will therefore be amended to state that urban runoff contains waste and pollutants.

**Contention:** BIA contends that the Regional Water Board violated California Environmental Quality Act (CEQA).

**Finding:** As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits.<sup>24</sup> BIA contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting “any waste discharge requirement” pursuant to Chapter 5.5 (§§ 13370 et seq., which applies to NPDES permits).<sup>25</sup> BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847. That case upheld the State Water Board’s view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant only to state law. The case did not concern an NPDES permit, and does not support BIA’s argument.

**Contention:** WSPA contends that the Regional Water Board did not follow this Board’s precedent for retail gasoline outlets (RGOs) established in the LA SUSMP order.

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<sup>24</sup> Water Code section 13389; see, e.g., Board Order WQ 2000-11.

<sup>25</sup> The exemption does have an exception for permits for “new sources” as defined in the Clean Water Act, which is not applicable here.

**Finding:** In the LA SUSMP order, this Board concluded that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. We also noted that, in light of the small size of many RGOs and the proximity to underground tanks, it might not always be feasible or safe to employ treatment methodologies. We directed the Los Angeles Regional Water Board to mandate that RGOs employ the BMPs listed in a publication of the California Storm Water Quality Task Force. (*Best Management Practice Guide – Retail Gasoline Outlets* (March 1997).) We also concluded that RGOs should not be subject to the BMP design standards at this time. Instead, we recommended that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. The LA SUSMP order did not preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

The permit adopted by the Regional Water Board did not comply with the directions we set forth in the LA SUSMP order for the regulation of RGOs. The permit contains no findings specific to the issues discussed in our prior order regarding RGOs, and includes no threshold for inclusion of RGOs in SUSMPs. Instead, the permit requires the dischargers to develop and implement SUSMPs within one year that include requirements for “Priority Development Project Categories,” including “retail gasoline outlets.” While other priority categories have thresholds for their inclusion in SUSMPs, the permit states: “Retail Gasoline Outlet is defined as any facility engaged in selling gasoline.”<sup>26</sup>

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<sup>26</sup> Permit at F.1.b(2)(a)(x).

The Regional Water Board responded that it did follow the directions in the LA SUSMP order. First, it points to findings that vehicles and pollutants they generate impact receiving water quality. But the only finding that even mentions RGOs is finding 4, which simply lists RGOs among the other priority development project categories as land uses that generate more pollutants. The Regional Water Board staff also did state some justifications for the inclusion of RGOs in two documents. The Draft Fact Sheet explains that RGOs contribute pollutants to runoff, and opines that there are appropriate BMPs for RGOs. The staff also prepared another document after the public hearing, which was distributed to Board Members prior to their vote on the permit, and which includes similar justifications and references to studies.<sup>27</sup> The LA SUSMP order called for some type of threshold for inclusion of RGOs in SUSMPs. The permit does not do so. Also, justifications for permit provisions should be stated in the permit findings or the final fact sheet, and should be subject to public review and debate.<sup>28</sup> The discussion in the document submitted after the hearing did not meet these criteria. There was some justification in the “Draft Fact Sheet,” but the fact sheet has not been finalized.<sup>29</sup> In light of our concerns over whether SUSMP sizing criteria should apply to RGOs, it was incumbent on the Regional Water Board to justify the inclusion of RGOs in the permit findings or in a final fact sheet, and to consider an appropriate threshold, addressing the concerns we stated. The Regional Water Board also responded that when the dischargers develop the SUSMPs, the dischargers

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<sup>27</sup> See “Comparison Between Tentative Order No. 2001-01 SUSMP Requirements and LARWQCB SUSMP Requirements (as Supported by SWRCB Order WQ 2000-11).”

<sup>28</sup> See 40 C.F.R. sections 124.6(e) and 124.8.

<sup>29</sup> U.S. EPA regulations require that there be a fact sheet accompanying the permit. (40 C.F.R. § 124.8.) The record contains only a draft fact sheet, which was never published or distributed in final form. The Regional Water Board should finalize the fact sheet, accounting for any revisions made in the final permit, and publish it on its web site as a final document.

might add specific BMPs and a threshold as directed in the LA SUSMP order. But the order specifically directed that any threshold, and the justification therefore, should be included in the permit. The Regional Water Board did not comply with these directions.

### **III. CONCLUSIONS**

Based on the discussion above, the Board concludes that:

1. The Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable. The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges “from” the municipal sewer system, and for discharges “to” waters of the United States, but not for discharges “into” the sewer system.

2. The Regional Water Board was not required to adopt wet-weather specific water quality objectives.

3. The Regional Water Board inappropriately defined urban runoff as “waste.”

4. The Regional Water Board did not violate the California Environmental Quality Act.

5. The permit will be revised to delete retail gasoline outlets from the Priority Development Project Categories for Standard Urban Storm Water Mitigation Plans. The Regional Water Board may consider adding retail gasoline outlets, upon inclusion of appropriate findings and a threshold describing which outlets are included in the requirements.

#### IV. ORDER

IT IS HEREBY ORDERED that the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems in San Diego County (Order No. 2001-01) are revised as follows:

1. Part A.3: The words “into and” are deleted.
2. Part C.2: Throughout the first paragraph, the words “, Part A.2, and Part A.5 as it applies to Prohibition 5 in Attachment A” shall be inserted following “Part C.1.”
3. Finding 2: Revise the finding to read: **URBAN RUNOFF CONTAINS “WASTE” AND “POLLUTANTS”**: Urban runoff contains waste, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the quality of the waters of the State.
4. Part F.1.b(2)(a): Delete section “x.”

In all other respects the petitions are dismissed.

#### CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 15, 2001.

AYE:           Arthur G. Baggett, Jr.  
                  Peter S. Silva  
                  Richard Katz

NO:

ABSENT:

ABSTAIN:



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Maureen Marché  
Clerk to the Board

# U.S. Environmental Protection Agency NPDES Permit Writers' Manual



U.S. Environmental Protection Agency  
Office of Wastewater Management, Water Permits Division  
State and Regional Branch

EPA-833-K-10-001 <sup>7-922</sup> September 2010



be found in the *EPA Great Lakes Water Quality Initiative Technical Support Document for the Procedure to Determine Bioaccumulation Factors*<sup>8</sup> ([No link—see the endnote for ordering instructions](#)).

When establishing additional monitoring or special studies, permit writers must ensure that any requirements related to the study (e.g., special sampling or analytical procedures) are specified in the appropriate permit condition. In addition, permit writers should establish a reasonable schedule for completion and submission of the study or monitoring program. If the anticipated timeline is longer than one year, an interim progress report during the study is advisable.

### 9.1.2 Best Management Practices (BMPs)

In general, BMPs are actions or procedures to prevent or reduce the discharge of pollution to waters of the United States. Title 40 of the *Code of Federal Regulations* (CFR) section 122.2 includes the following in the definition of BMPs:

- Schedules of activities.
- Prohibitions of practices.
- Maintenance procedures.
- Treatment requirements.
- Operating procedures and practices to control
  - Plant site runoff.
  - Spillage or leaks.
  - Sludge or waste disposal.
  - Drainage from raw material storage areas.

#### 9.1.2.1 When to Use BMPs

Clean Water Act (CWA) section 304(e) authorizes EPA to require BMPs as part of effluent limitations guidelines and standards (effluent guidelines) to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage that it determines are associated with or ancillary to the industrial manufacturing or treatment process and can contribute significant amounts of pollutants to navigable waters. Where effluent guidelines require specific control measures, including BMPs or development of a BMP plan, permit writers must include such requirements in permits. In addition, CWA section 402(p)(3)(B)(iii) states that permits for discharges from municipal storm sewers must require controls, including management practices, to reduce the discharge of pollutants. Finally, CWA sections 402(a)(1) and (2) give the permitting authority the ability to include BMPs in permits on a case-by-case basis to carry out the provisions of the CWA.

The NPDES regulations at § 122.44(k) track the statutory provisions cited above. This section of the regulations provides that permits must contain BMPs (when applicable) to control or abate the discharge of pollutants when any of the following are true:

- They are authorized under CWA section 304(e).
- They are authorized under CWA section 402(p) for the control of stormwater discharges.
- Numeric effluent limitations are infeasible.
- The practices are necessary to achieve effluent limitations and standards or carry out the purpose and intent of the CWA.

Circumstances under which numeric effluent limitations might be infeasible include the following:

- Regulating a pollutant for which limited treatability or aquatic impact data are available to allow development of numeric TBELs or WQBELs.
- Regulating discharges when the types of pollutants vary greatly over time.

In addition, a permit writer should consider using BMPs under any of the following circumstances:

- When chemical analyses are inappropriate or impossible.
- When there is a history of leaks and spills or when housekeeping is sloppy.
- When a complex facility lacks data for a pollutant or pollutants.

### 9.1.2.2 BMPs in NPDES Permits

Permit writers include BMP requirements in permits using two approaches: (1) site-, process-, or pollutant-specific BMPs, or (2) a requirement to develop a BMP plan. Site-, process-, or pollutant-specific BMPs might be appropriate in the case of an individual permit where a permit writer has the opportunity to review the circumstances at the facility. On the other hand, it might not be appropriate to include site-, process-, or pollutant-specific BMPs as conditions in a general permit, a permit for a particularly complex facility, or a permit for a facility with operations not familiar to the permit writer. Instead, complicated facilities and discharges covered under a general permit could be required to develop a BMP plan that requires the permittee to determine appropriate BMPs on the basis of circumstances at its facility.

#### Specific BMPs

Specific BMPs are designed to address conditions particular to a type of facility or to a specific site, process, or pollutant. Specific BMPs might be used in a permit when

- They are needed to address ancillary activities that could result in the discharge of pollutants to waters of the United States.
- Numeric effluent limitations for a specific process are otherwise infeasible and BMPs serve as effluent limitations for that process.
- They are required to supplement and ensure compliance with effluent limitations in the permit.

To select a specific BMP, the permit writer could

- Review the industry profiles or the specific facility to determine the applicable and appropriate management practices.
- Evaluate whether the BMP would help to achieve effluent limitations or other environmental objectives for that facility.
- Use information from other permits, pollution prevention sources, and EPA guidance documents to identify applicable and appropriate BMPs.

Specific BMPs frequently are required for certain types of dischargers such as concentrated animal feeding operations (CAFOs), combined sewer overflows (CSOs), and stormwater discharges.

## BMP Plans

The *Guidance Manual for Developing Best Management Practices*<sup>9</sup> <[www.epa.gov/npdes/pubs/owm0274.pdf](http://www.epa.gov/npdes/pubs/owm0274.pdf)> describes the activities and materials at an industrial or municipal facility that are best addressed by BMPs. The manual also describes how BMPs work and gives examples of types of BMPs.

If a permit writer requires a BMP plan, it is the facility's responsibility to develop, implement, and evaluate the success or shortfalls of its own plan. Often, a BMP committee (i.e., a group of individuals within the plant organization) is responsible for developing the BMP plan and assisting the plant management in implementing and updating the BMP plan.

EPA has identified several recommended components of effective BMP plans and detailed each component in the *Guidance Manual for Developing Best Management Practices*. The minimum suggested components of a general BMP plan are presented below:

- General Provisions
  - Name and location of facility.
  - Statement of BMP policy and objective.
  - Review by plant manager.
- Specific Provisions
  - BMP committee.
  - Risk identification and assessment.
  - Reporting of BMP incidents.
  - Materials compatibility.
  - Good housekeeping.
  - Preventive maintenance.
  - Inspections and records.
  - Security.
  - Employee training.

BMP plans used to supplement effluent limitations or to describe how the discharger plans to meet effluent limitations can be submitted to the regulatory agency or be kept on-site and made available to the permitting authority upon request. A general schedule for BMP plan development can be included in the permit (e.g., complete and submit the plan within six months of permit issuance and begin implementing the plan within nine months of permit issuance).

Exhibit 9-1 presents example permit text for a requirement to develop and implement a BMP plan and should be adapted as necessary to reflect conditions at the individual facility.

### Exhibit 9-1 Example BMP plan requirement

The following is example text for requiring development and implementation of a BMP plan through an NPDES permit. The text should be crafted and changed as necessary to meet the individual facility's needs and the permitting authority's goals. The bracketed text should be updated to be specific to the permit.

#### 1. Implementation.

##### [IF A BMP PLAN DOES NOT EXIST:]

The permittee, must develop and implement a best management practices (BMP) plan that achieves the objectives and the specific requirements listed below. A copy of the plan must be submitted to the U.S. Environmental Protection Agency (EPA) [AND/OR STATE AGENCY] within six months of the effective date of this permit. The plan must be implemented as soon as possible but no later than nine months from the effective date of the permit. The permittee must update and amend the plan as needed.

##### [IF A BMP PLAN ALREADY EXISTS:]

The permittee must during the term of this permit operate the facility in accordance with the BMP plan [CITE EXISTING PLAN] and in accordance with subsequent amendments to the plan. The permittee must amend the plan to incorporate practices to achieve the objectives and specific requirements listed below, and a copy of the amended plan must be submitted to the U.S. Environmental Protection Agency (EPA) [AND/OR STATE AGENCY] within three months of the effective date of this permit. The amended plan must be implemented as soon as possible but not later than six months from the effective date of the permit.

#### 2. Purpose

Through implementation of the BMP plan the permittee must prevent or minimize the generation and the potential for the release of pollutants from the facility to the waters of the United States through normal operations and ancillary activities.

#### 3. Objectives

The permittee must develop and amend the BMP plan consistent with the following objectives for the control of pollutants.

- a. The number and quantity of pollutants and the toxicity of effluent generated, discharged, or potentially discharged at the facility must be minimized by the permittee to the extent feasible by managing each influent waste stream in the most appropriate manner.
- b. Under the BMP plan, and any Standard Operating Procedures (SOPs) included in the plan, the permittee must ensure proper operation and maintenance of the treatment facility as required by § 122.41(e).
- c. The permittee must establish specific objectives for the control of pollutants by conducting the following evaluations.
  1. Each facility component or system must be examined for its waste minimization opportunities and its potential for causing a release of significant amounts of pollutants to waters of the United States because of equipment failure, improper operation, and natural phenomena such as rain or snowfall, etc. The examination must include all normal operations and ancillary activities including material storage areas, plant site runoff, in-plant transfer, process and material handling areas, loading or unloading operations, spillage or leaks, sludge and waste disposal, or drainage from raw material storage. [NOTE THAT ONLY THE APPLICABLE AREAS SHOULD BE INCLUDED IN THE PREVIOUS LIST.]
  2. Where experience indicates a reasonable potential for equipment failure (e.g., a tank overflow or leakage), natural condition (e.g., precipitation), or other circumstances that may result in significant amounts of pollutants reaching surface waters, the program should include a prediction of the direction, rate of flow and total quantity of pollutants that could be discharged from the facility as a result of each condition or circumstance.

#### 4. Requirements

The BMP Plan must be consistent with the objectives in the Objectives section above and the general guidance contained in the publication entitled *Guidance Manual for Developing Best Management Practices (BMPs)*, EPA 833-B-93-004, <[www.epa.gov/npdes/pubs/owm0274.pdf](http://www.epa.gov/npdes/pubs/owm0274.pdf)> or any subsequent revisions to the guidance document. The BMP plan must

- a. Be documented in narrative form, must include any necessary plot plans, drawings or maps, and must be developed in accordance with good engineering practices. The BMP plan must be organized and written with the following structure:
  1. Name and location of the facility.
  2. Statement of BMP policy.
  3. Structure, functions, and procedures of the BMP Committee.
  4. Specific management practices and standard operating procedures to achieve the above objectives, including the following:

### Exhibit 9-1 Example BMP plan requirement (continued)

- a. Modification of equipment, facilities, technology, processes, and procedures.
  - b. Reformulation or redesign of products.
  - c. Substitution of materials.
  - d. Improvement in management, inventory control, materials handling or general operational phases of the facility.
5. Risk identification and assessment.
  6. Reporting of BMP incidents.
  7. Materials compatibility.
  8. Good housekeeping.
  9. Preventative maintenance.
  10. Inspections and records.
  11. Security.
  12. Employee training.
- b. Include the following provisions concerning BMP plan review:
    1. Review by plant engineering staff and the plant manager.
    2. Review and endorsement by the permittee's BMP Committee.
    3. A statement that the above reviews have been completed and that the BMP plan fulfills the requirements set forth in this permit. The statement must include the dated signatures of each BMP Committee member as certification of the reviews.
  - c. Establish specific BMPs to meet the objectives identified in the Objectives section above, addressing each component or system capable of generating or causing a release of significant amounts of pollutants, and identifying specific preventive or remedial measures to be implemented.
  - d. Establish specific BMPs or other measures that ensure that the following specific requirements are met:
    1. Ensure proper management of solid and hazardous waste in accordance with regulations promulgated under the Resource Conservation and Recovery Act (RCRA). Management practices required under RCRA regulations must be referenced in the BMP plan.
    2. Reflect requirements for Spill Prevention, Control, and Countermeasure (SPCC) plans under Clean Water Act (CWA) section 311 and 40 CFR Part 112 and may incorporate any part of such plans into the BMP plan by reference.
    3. Reflect requirements for stormwater control under CWA section 402(p) and the regulations at 40 CFR 122.26 and 122.44, and otherwise eliminate to the extent practicable, contamination of stormwater runoff.

etc.

**[NOTE: SECTION d. ABOVE COULD BE TAILORED TO EACH FACILITY BY THE PERMIT WRITER AND MAY INCLUDE PROCESSES OR AREAS OF THE FACILITY WITH HOUSEKEEPING PROBLEMS, NONCOMPLIANCE, SPILLS/LEAKS, OR OTHER PROBLEMS THAT COULD BE REMEDIATED THROUGH A BMP. IF THERE IS A KNOWN SOLUTION TO THE PROBLEM (E.G., MORE FREQUENT INSPECTIONS, PREVENTIVE MAINTENANCE, ETC.), THIS REMEDY COULD ALSO BE INCLUDED AS A PART OF THE BMP PLAN REQUIREMENTS. TO GATHER IDEAS FOR SUCH REQUIREMENTS, THE PERMIT WRITER MAY WANT TO CONTACT THE PERMITTEE, COMPLIANCE PERSONNEL, FACILITY INSPECTORS, OPERATIONS OFFICE PERSONNEL, AND STATE AGENCY COUNTERPARTS. THE PERMIT WRITER MIGHT ALSO WANT TO CHECK REQUIREMENTS IN OTHER PERMITS AND BMP PLANS FOR SIMILAR FACILITIES.]**

#### 5. Documentation

The permittee must maintain a copy of the BMP plan at the facility and must make the plan available to EPA **[AND/OR STATE AGENCY]** upon request. All offices of the permittee, which are required to maintain a copy of the NPDES permit, must also maintain a copy of the BMP plan.

#### 6. BMP Plan Modification

The permittee must amend the BMP plan whenever there is a change in the facility, or in the operation of the facility, that materially increases the generation of pollutants or their release or potential release to the receiving waters. The permittee must also amend the plan, as appropriate, when plant operations covered by the BMP plan change. Any such changes to the BMP plan must be consistent with the objectives and specific requirements listed above. All changes in the BMP plan must be reported to EPA **[AND/OR STATE AGENCY]** in writing.

#### 7. Modification for Ineffectiveness

If at any time the BMP plan proves to be ineffective in achieving the general objective of preventing and minimizing the generation of pollutants and their release and potential release to the receiving waters and/or the specific requirements above, the permit and/or the BMP plan must be subject to modification to incorporate revised BMP requirements.

### 9.1.2.3 Pollution Prevention in BMPs

BMPs are, by their nature, pollution prevention practices. Traditionally, BMPs have focused on good housekeeping measures and good management techniques that attempt to avoid contact between pollutants and water as a result of leaks, spills, and improper waste disposal. However, on the basis of the authority granted under the regulations, BMPs may include a range of pollution prevention options, including production modifications, operational changes, materials substitution, and materials and water conservation.

When developing BMPs, permit writers should be familiar with the fundamental principles of pollution prevention:

- Pollution should be prevented or reduced at the source, whenever feasible (*Reduce*).
- Pollution that cannot be prevented should be reused or recycled in an environmentally safe manner, whenever feasible (*Reuse-Recycle*).
- Pollution that cannot be prevented or recycled should be treated in an environmentally safe manner, whenever feasible (*Treat*).
- Disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner (*Dispose of*).

When writing an NPDES permit, a permit writer who has familiarity with a certain type of processes might identify pollution prevention practices that are not used at a facility and that would help that facility achieve its pollution prevention goals. Where the pollution prevention practices are necessary to carry out the purposes and intent of the CWA, the permit writer may develop BMPs to implement those practices.

### 9.1.3 Compliance Schedules

The NPDES regulations at § 122.47 allow permit writers to establish schedules of compliance to give permittees additional time to achieve compliance with the CWA and applicable regulations. Schedules developed under this provision must require compliance by the permittee *as soon as possible*, but may not extend the date for final compliance beyond compliance dates established by the CWA. Thus, compliance schedules in permits are not appropriate for every type of permit requirement. Specifically, a permit writer may not establish a compliance schedule in a permit for TBELs because the statutory deadlines for meeting technology standards (i.e., secondary treatment standards and effluent guidelines) have passed. This restriction applies to both existing and new dischargers. Permit writers should note, however, that § 122.29(d)(4) allows a new source or new discharger up to 90 days to *start-up* its pollution control equipment and achieve compliance with its permit conditions (i.e., provides for up to a 90-day period to achieve compliance).

Examples of requirements for which a compliance schedule in an NPDES permit might be appropriate include:

- Pretreatment program development.
- Sludge use and disposal program development and implementation.
- BMP plan development and implementation.
- Effluent limitations derived from new or revised water quality standards.





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FEDERAL REGISTER

Vol. 61, No. 166

Notices

ENVIRONMENTAL PROTECTION AGENCY (EPA)

[FRL-5559-9]

**Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits**

61 FR 43761

**DATE:** Monday, August 26, 1996

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the Environmental Protection Agency (EPA) has issued a policy outlining an interim approach for incorporating water quality-based effluent limitations into storm water permits.

**Background and Purpose**

Due to the nature of storm water discharges, and the typical lack of information on which to base numeric water quality-based effluent limitations (expressed as concentration and mass), EPA has developed an interim permitting approach for National Pollution Discharge Elimination System (NPDES) storm water permits. While this interim permitting approach applies only to EPA, the Agency also encourages authorized States and Tribes to adopt similar policies for storm water permits.

The policy addresses issues related to the type of effluent limitations that are most appropriate for NPDES storm water permits to provide for the attainment of water quality standards. Since the policy only applies to water quality-based effluent limitations, it is not intended to affect technology-based limitations, such as those based on effluent guidelines or the permit writer's best professional judgements, that are incorporated into storm water permits. With this policy, the Office of Water is seeking to fulfill objectives of the 1996-1997 National Water Program Agenda for the Future, including reducing the threat of wet weather discharges to water quality, providing States and local governments with greater flexibility to solve wet weather problems, and identifying and taking appropriate steps to reduce the existing burden of the Storm Water Phase I program.

Numerous parties were involved in preparing this policy. In addition to receiving significant input from the Urban Wet Weather Flows (UWWF) Federal Advisory Committee, EPA also consulted with the States and Regional Storm Water Coordinators. This interim permitting approach may be modified as a result of ongoing policy dialogue with the UWWF Federal Advisory Committee.

**Policy Statement**

In response to recent questions regarding the type of water quality-based effluent limitations that are most appropriate for National Pollutant Discharge Elimination System (NPDES) storm water permits, the Environmental Protection Agency (EPA) is adopting an interim permitting approach for regulating wet weather storm water discharges. Due to the nature of storm water discharges, and the typical lack of information on which to base numeric water quality-

ty-based effluent limitations (expressed as concentration and mass), EPA will use an interim permitting approach for NPDES storm water permits.

The interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards. In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate. This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effluent limitations. Since the policy only applies to water quality-based effluent limitations, it is not intended to affect technology-based limitations, such as those based on effluent guidelines or the permit writer's best professional judgement, that are incorporated into storm water permits.

Each storm water permit should include coordinated and cost-effective monitoring program to gather necessary information to determine the extent to which the permit provides for attainment of applicable water quality standards and to determine the appropriate conditions or limitations for subsequent permits. Such a monitoring program may include, ambient monitoring, receiving water assessment, discharge monitoring (as needed), or a combination of monitoring procedures designed to gather necessary information.

This interim permitting approach applies only to EPA, however, EPA also encourages authorized States and Tribes to adopt similar policies for storm water permits. This interim permitting approach provides time, where necessary, to more fully assess the range of issues and possible options for the control of storm water discharges for the protection of water quality. This interim permitting approach may be modified as a result of the ongoing Urban Wet Weather Flows Federal Advisory Committee policy dialogue on this subject.

**DATES:** The policy was signed by the Assistant Administrator for Water on August 1, 1996.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about the policy, please contact, Bill Swietlik, Storm Water Phase I Matrix Manager, Office of Wastewater Management, at (202) 260-9529 or William Hall, Urban Wet Weather Flows Matrix Manager, Office of Wastewater Management, at (202) 260-1458, or by Internet: hall.william@epamail.epa.gov.

Dated: August 19, 1996.

**Fred Lindsey,**

*Acting Director, Office of Wastewater Management, Designated Federal Official.*

[FR Doc. 96-21671 Filed 8-23-96; 8:45 am]

BILLING CODE 6560-50-P



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FEDERAL REGISTER

Vol. 61, No. 216

Notices

ENVIRONMENTAL PROTECTION AGENCY (EPA)

[FRL-5646-6]

**Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits**

61 FR 57425

**DATE:** Wednesday, November 6, 1996

**ACTION:** Notice.

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To view a specific page, transmit p\* and the page number, e.g. p\*1  
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[\*57425]

**SUMMARY:** Notice is hereby given that the Environmental Protection Agency (EPA) has developed a set of questions and answers to assist municipalities and permitting authorities in implementing its recent policy outlining an interim approach for incorporating water quality-based effluent limitations into storm water permits.

**Background and Purpose**

On August 26, 1996, the EPA published in the **Federal Register** (61 FR 43761) a policy outlining an interim approach for incorporating water quality-based effluent limitations into National Pollution Discharge Elimination System (NPDES) storm water permits. The policy was developed to address the variable nature of storm water discharges, and the typical lack of information on which to base numeric water quality-based effluent limitations (expressed as concentration and mass). The policy addresses issues related to the type of effluent limitations that are most appropriate for NPDES storm water permits to provide for the attainment of water quality standards. Since the policy only applies to water quality-based effluent limitations, it is not intended to affect technology-based limitations, such as those based on effluent guidelines or the permit writer's best professional judgements, that are incorporated into storm water permits.

Based on numerous requests for additional information regarding the implementation of the policy, the EPA has developed the following set of questions and answers. For convenience, the policy is also reprinted below.

**Policy Statement**

In response to recent questions regarding the type of water quality-based effluent limitations that are most appropriate for National Pollutant Discharge Elimination System (NPDES) storm water permits, the Environmental Protection Agency (EPA) is adopting an interim permitting approach for regulating wet weather storm water discharges. Due

to the nature of storm water discharges, and the typical lack of information on which to base numeric water quality-based effluent limitations (expressed as concentration and mass), EPA will use an interim permitting approach for NPDES storm water permits.

The interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards. In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate. This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effluent limitations. Since the policy only applies to water quality-based effluent limitations, it is not intended to affect technology-based limitations, such as those based on effluent guidelines or the permit writer's best professional judgement, that are incorporated into storm water permits. [\*57426]

Each storm water permit should include coordinated and cost-effective monitoring program to gather necessary information to determine the extent to which the permit provides for attainment of applicable water quality standards and to determine the appropriate conditions or limitations for subsequent permits. Such a monitoring program may include, ambient monitoring, receiving water assessment, discharge monitoring (as needed), or a combination of monitoring procedures designed to gather necessary information.

This interim permitting approach applies only to EPA, however, EPA also encourages authorized States and Tribes to adopt similar policies for storm water permits. This interim permitting approach provides time, where necessary, to more fully assess the range of issues and possible options for the control of storm water discharges for the protection of water quality. This interim permitting approach may be modified as a result of the ongoing Urban Wet Weather Flows Federal Advisory Committee policy dialogue on this subject.

## Questions and Answers

*Question 1:* Must EPA require that storm water dischargers, industrial or municipal, be subject to numeric water quality-based effluent limitations (expressed as concentration and mass) in order to attain water quality standards (WQS)?

*Answer 1:* No. Although National Pollutant Discharge Elimination System (NPDES) permits must contain conditions to ensure that water quality standards are met, this does not require the use of numeric water quality-based effluent limitations. Under the Clean Water Act (CWA) and NPDES regulations, permitting authorities may employ a variety of conditions and limitations in storm water permits, including best management practices, performance objectives, narrative conditions, monitoring triggers, action levels (e.g., monitoring benchmarks, toxicity reduction evaluation action levels), etc., as the necessary water quality-based limitations, where numeric water quality-based effluent limitations are determined to be unnecessary or infeasible.

### Analysis

A. The Clean Water Act does not require numeric effluent limitations.

Section 301 of the CWA requires that discharger permits include effluent limitations necessary to meet State or Tribal WQS. Section 502 defines "effluent limitation" to mean *any* restriction on quantities, rates, and concentrations of constituents discharged from point sources. The CWA does not say that effluent limitations need be numeric. As a result, EPA and States have flexibility in terms of how to express effluent limitations.

B. EPA's regulations do not always require numeric effluent limitations.

EPA has, through regulation, interpreted the statute to allow for non-numeric limitations (e.g., "best management practices" or BMPs, see 40 CFR 122.2) to supplement or replace numeric limitations in specific instances that meet the criteria specified at 40 CFR 122.44(k). This regulation essentially codifies a court case addressing storm water discharges. *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). In that case, the Court stated that EPA need not establish numeric effluent limitations where such limitations were infeasible.

C. EPA has interpreted the statute and regulations to allow BMPs in lieu of numeric limitations.

EPA has defended use of BMPs as a substitute for numeric limitations in litigation involving storm water discharges (*CBE v. EPA*, 91-70056 (9th Cir.)(brief on merits)) and in correspondence (Letter from Michael Cook, EPA, to Peter

Lehner, NRDC, May 31, 1995). EPA has found that numeric limitations for storm water permits can be very difficult to develop at this time because of the existing state of knowledge about the intermittent and variable nature of these types of discharges and their effects on receiving waters. Some storm water permits, however, currently do contain numeric water quality-based effluent limitations where adequate information exists to derive such limitations.

*Question 2:* Has EPA provided guidance on a methodology for deriving numeric water quality-based effluent limitations?

*Answer 2:* Yes, but primarily for continuous wastewater discharges at low flow conditions in the receiving water, not intermittent wet weather discharges during high flow conditions. Regulations at 40 CFR 122.44(d) specify the requirements under which permitting authorities establish water quality-based effluent limitations when a facility has the "reasonable potential" to cause or contribute to an excursion of numeric or narrative water quality criteria. In addition, EPA guidance in the *Technical Support Document for Water Quality-Based Toxics Control (TSD)* and the *NPDES Permit Writers Training Manual*, supplemented with total maximum daily load (TMDL) and modeling guidance, supports issuing permits that include numeric water quality-based effluent limitations. This guidance was based on crafting numeric water quality-based effluent limitations using TMDLs, or calculations similar to those used in developing TMDLs, and wasteload allocations (WLA) derived through modeling. EPA expects the Urban Wet Weather Flows Federal Advisory Committee (60 FR 21189, May 1, 1995) will review this issue at greater length and may provide recommendations on how to proceed.

*Question 3:* Why can numeric water quality-based effluent limitations be difficult to derive for storm water permits?

*Answer 3:* Storm water discharges are highly variable both in terms of flow and pollutant concentrations, and the relationships between discharges and water quality can be complex. The water quality impacts of storm water discharges are related to the uses designated by States and Tribes in their WQS, the quality of the storm water discharge (e.g., conventional or toxic pollutants conveyed to the receiving water) and quantity of the storm water (e.g., erosion and loss of habitat caused by increased flows and velocity). Uses may be impacted by both water quality and water quantity. Depending on site-specific considerations, some of the water quality impacts of storm water discharges may be more related to the physical effects (e.g., stream bank erosion, streambed scouring, extreme temperature variations, sediment smothering) than the type and amount of pollutants present in the discharge. For municipal storm water discharges in particular, the current use of system-wide permits and a variety of jurisdiction-wide BMPs, including educational and programmatic BMPs, does not easily lend itself to the existing methodologies for deriving numeric water quality-based effluent limitations. These methodologies were designed primarily for process wastewater discharges which occur at predictable rates with predictable pollutant loadings under low flow conditions in receiving waters. Using these methodologies, limitations are typically derived for each specific outfall to be protective of low flows in the receiving water. Because of this, permit writers have not made wide-spread use of the existing methodologies and models for storm water discharge permits. In addition, wet weather modeling is technically more difficult and expensive than the simple dilution models generally used in the permitting process.

*Question 4:* Has EPA previously recognized the technical difficulty in deriving numeric water quality-based [\*57427] effluent limitations for storm water discharges?

*Answer 4:* Yes. EPA recognized the technical difficulty in deriving numeric water quality-based effluent limitations for wet weather discharges in its brief on the merits in *Citizens for a Better Environment (CBE) v. United States Environmental Protection Agency*, 91-70056 (9th Cir.) and in the Great Lakes Water Quality Guidance (58 FR 20841, April 16, 1993).

In the *CBE* case, EPA explained why it was technically infeasible to derive numeric water quality-based effluent limitations for the discharge of metals in storm water into South San Francisco Bay and asserted that a water quality-based effluent limitation could take the form of a narrative statement, such as a BMP, if it was infeasible to derive a numeric limitation. In explaining its arguments in the *CBE* case, EPA cited 40 CFR 122.44(k)(2), which provides that BMPs may be imposed in NPDES permits "to control or abate the discharge of pollutants when \* \* \* [n]umeric effluent limitations are infeasible."

In the Great Lakes Water Quality Guidance, EPA did not extend the method for calculating wasteload allocations, the basis for numeric water quality-based effluent limitations, to storm water or combined sewer overflow (CSO) discharges because the varying nature of these discharges is inconsistent with the assumptions used in developing the guidance. The Great Lakes Water Quality Guidance defers to national guidance and policy on wet weather and does not

seek to establish a separate and distinct set of wet weather requirements. EPA expects the Urban Wet Weather Flows Advisory Committee to provide recommendations about how to address the broader technical issues involved in achieving compliance with WQS in a wet weather context.

*Question 5:* What are the potential problems of using standard methodologies to derive numeric water quality-based effluent limitations for storm water permits?

*Answer 5:* Correctly derived numeric water quality-based effluent limitations provide a greater degree of confidence that a discharge will not cause or contribute to an exceedance of the WQS, because numeric water quality-based effluent limitations are derived directly from the numeric component of those standards. In addition, numeric water quality-based effluent limitations can avoid the expense associated with overly protective treatment technologies because numeric water quality-based effluent limitations provide a more precisely quantified target for permittees. Potential problems of incorporating inappropriate numeric water quality-based effluent limitations rather than BMPs in storm water permits at this time are significant in some cases. Deriving numeric water quality-based effluent limitations for any NPDES permit without an adequate effluent characterization, or an adequate receiving water exposure assessment (which could include the use of dynamic modeling or continuous simulations) may result in the imposition of inappropriate numeric limitations on a discharge. Examples of this include the imposition of numeric water quality criteria as end-of-pipe limitations without properly accounting for the receiving water assimilation of the pollutant or failure to account for a mixing zone (if allowed by applicable State or Tribal WQS). This could lead to overly stringent permit requirements, and excessive and expensive controls on storm water discharges, not necessary to provide for attainment of WQS. Conversely, an inadequate effluent characterization could lead to water quality-based effluent limitations that are not stringent enough to provide for attainment of WQS. This could result because effluent characterization and exposure assessments for discharges with high variability of pollutant concentrations, loadings, and flow are more difficult than with process wastewater discharges at low flows.

*Question 6:* How are water quality-based effluent limitations developed for combined sewer overflow (CSO) discharges?

*Answer 6:* The CSO Control Policy issued by EPA on April 19, 1994 (59 FR 18688) provides direction on compliance with the technology-based and water quality-based requirements of the CWA for communities with combined sewer systems. The CSO Policy provides for implementation of technology-based requirements (expressed as "nine minimum controls") by January 1, 1997.

In addition, under the CSO Policy, communities are also expected to develop long-term control plans that will provide for attainment of WQS through either the "presumption approach" or the "demonstration approach." Under the presumption approach, CSO controls would be presumed to attain WQS if certain performance criteria are met. A program that meets the criteria specified in the CSO policy is presumed to provide an adequate level of control to meet the water quality-based requirements of the CWA, provided the permitting authority determines that such presumption is reasonable based on characterization, monitoring, and modeling of the system, including consideration of sensitive areas. Under the demonstration approach, the permittee would demonstrate that the selected CSO controls, when implemented, would be adequate to meet the water quality-based requirements of the CWA.

The CSO Policy anticipates that it will be difficult in the early stages of permitting to determine whether numeric water quality-based effluent limitations are necessary for CSOs, and, if so, what the limitations should be. For that reason, in the absence of sufficient data to evaluate the need for numeric water quality-based effluent limitations, the Policy recommends that the first phase of CSO permits ("Phase I") contain a narrative requirement to comply with WQS. Further, so-called "Phase II" permits would contain water quality-based effluent limitations, as provided in 40 CFR 122.44(d)(1) and 122.44(k), that may take the form of numeric performance or design standards, such as a certain number of overflow events or a certain percent volume capture. Generally, only after the long-term control plan is in place and after collection of sufficient water quality data (including applicable wasteload allocations developed during a TMDL process) would numeric water quality-based effluent limitations be included in the permit. This would likely occur only after several permitting cycles.

*Question 7:* If BMPs alone are demonstrated to provide adequate water quality protection, are additional controls necessary?

*Answer 7:* No. If the permitting authority determines that, through implementation of appropriate BMPs required by the NPDES storm water permit, the discharges have the necessary controls to provide for attainment of WQS and any technology-based requirements, additional controls need not be included in the permit. Conversely, if a discharger

(municipal or industrial) fails or refuses to adopt and implement adequate BMPs, the permitting authority may have to consider other approaches to ensure water quality protection.

If, however, the permitting authority has adequate information on which to base more specific conditions or limitations, such limitations are to be incorporated into storm water permits, as necessary and appropriate. Such conditions or limitations may include an integrated suite of BMPs, performance objectives, narrative standards, monitoring triggers, numeric water quality-based effluent limitations, [\*57428] action levels, etc. Storm water permits may also need to include additional requirements to receive State or Tribal 401 certifications.

*Question 8:* What is EPA doing to develop information about the linkage between BMPs and water quality and to facilitate a watershed-based approach to storm water permitting?

*Answer 8:* The Agency has cooperative agreements with WERF (Water Environment Research Foundation) and ASCE (American Society of Civil Engineers) to research which BMPs are most effective under which circumstances. The results of this research should provide permitting authorities and permittees with information about how to evaluate the effectiveness of different kinds of BMPs in different circumstances and to select the most appropriate controls to achieve water quality objectives. EPA also has cooperative agreements with the Watershed Management Institute and other organizations to conduct research over the next two to four years that will examine the capability of storm water BMPs to improve receiving water quality and restore/protect the biological integrity of those waters. EPA expects the Urban Wet Weather Flows Federal Advisory Committee to provide recommendations on how to permit storm water discharges on a watershed basis.

*Question 9:* The interim permitting approach states that permits should include monitoring programs to generate necessary information to determine the extent to which permits are providing for the attainment of water quality standards. What types of monitoring should be included and how much monitoring is necessary?

*Answer 9:* The amount and types of monitoring necessary will vary depending on the individual circumstances of each storm water discharge. EPA encourages dischargers and permitting authorities to carefully evaluate monitoring needs and storm water program objectives so as to select useful and cost-effective monitoring approaches. For most dischargers, storm water monitoring can be conducted for two basic reasons: (1) to identify if problems are present, either in the receiving water or in the discharge, and to characterize the cause(s) of such problems; and (2) to assess the effectiveness of storm water controls in reducing contaminants and making improvements in water quality.

Under the NPDES storm water program, large and medium municipal separate storm sewer system permittees are required to conduct monitoring. EPA recommends that each such municipal permittee design the monitoring effort to be supportive of the goals and objectives of its storm water management program when developing such a program for the term of its NPDES permit. To accomplish this, a municipal permittee may use a variety of storm water monitoring tools including receiving water chemistry; receiving water biological assessments (benthic invertebrate surveys, fish surveys, habitat assessments, etc.); effluent monitoring; including chemical, whole effluent and visual examinations; illicit connections screening; and combinations thereof, or other methods. Techniques that assess receiving waters will help to identify the degree to which storm water discharges are contributing to any water quality problems. Techniques that assess storm water discharge characteristics will help to identify potential causes of any identified water quality problems. The municipal permittee, in conjunction with the applicable NPDES permitting authority, should determine which monitoring approaches would be most appropriate given the objectives of the storm water management program. If municipal permittees conduct ambient monitoring, it may be most cost-effective to pool resources with other organizations (including, for example, other municipalities, States, and Tribes) conducting monitoring within the same watershed. This could be best accomplished through a coordinated watershed monitoring strategy.

For industrial storm water dischargers, monitoring may be required under the terms of an NPDES permit for storm water discharges. For those industrial storm water permits that do require monitoring, this is typically done to characterize contaminants that might be found in the industrial runoff and/or to assess the effectiveness of the industrial storm water pollution prevention plan in reducing these contaminants. This typically involves end-of-pipe chemical-specific monitoring. End-of-pipe monitoring may be more appropriate for an industrial facility than for a municipal permittee, given the industrial facility's more discrete site characteristics, which make management strategies such as collection and treatment more feasible. Industries, for the most part, have readily defined storm water conveyances into which runoff flows from discrete drainage areas. Industries may more readily identify and control existing on-site sources of storm water contamination or provide collection and treatment within these discrete drainage areas to control pollutant concentrations in their storm water discharges.

EPA and other organizations are currently working to improve approaches for monitoring storm water and the potential effects upon water quality. These new approaches are called storm water program "environmental indicators." Environmental indicators are designed to be more meaningful monitoring tools that storm water dischargers can use to conduct storm water monitoring for the purposes described above. A manual describing each of the recommended storm water program environmental indicators is being prepared by the Center for Watershed Protection in Silver Spring, Maryland. That manual is expected to be ready by the end of August 1996 and should provide useful information for storm water dischargers contemplating the need to develop a cost-effective, meaningful storm water monitoring program. In addition, EPA expects the Urban Wet Weather Flows Federal Advisory Committee to provide recommendations on how to better monitor storm water and other wet weather discharges using a watershed approach.

*Question 10:* Does this interim permitting approach apply to both storm water discharges associated with industrial activity and storm water discharges from municipal separate storm sewer systems?

*Answer 10:* Yes. The interim permitting approach is applicable to both discharges from municipal separate storm sewer systems and storm water discharges associated with industrial activity (as defined by 40 CFR 122.26(b)(14)). The interim permitting approach would not affect, however, permits that already incorporate appropriately derived numeric water quality-based effluent limitations. Since the interim permitting approach only addresses water quality-based effluent limitations, it also does not affect technology-based effluent limitations, such as those based on effluent limitations guidelines or developed using best professional judgement, that are incorporated into storm water permits. In addition, particularly for some industries, adequate information may already have been collected with which to assess the reasonable potential for a storm water discharge to cause or contribute to an excursion of a WQS, and from which a numeric water quality-based effluent limitation can be (or has been) appropriately derived. An adequate amount of storm water pollutant source information may also exist with which to assess the effectiveness of the industrial storm [\*57429] water control measures in complying with the limitations and in reducing storm water contaminants for protecting water quality.

**DATE:** The policy was signed by the Assistant Administrator for Water on August 1, 1996.

**FOR FURTHER INFORMATION CONTACT:** Copies of the policy with the questions and answers are available by writing the U.S. Environmental Protection Agency, Water Resources Center, Mail Code 4101, 401 M Street, SW, Washington, D.C., 20460, or by calling (202) 260-7786. If you have additional questions about the policy, please contact, Bill Swietlik, Storm Water Phase I Matrix Manager, Office of Wastewater Management, at (202) 260-9529 or William Hall, Urban Wet Weather Flows Matrix Manager, Office of Wastewater Management, at (202) 260-1458, or by Internet at hall.william@epamail.epa.gov.

Dated: October 11, 1996.

**Michael B. Cook,**

*Director, Office of Wastewater Management, Designated Federal Official.*

[FR Doc. 96-28430 Filed 11-5-96; 8:45 am]

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**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 July 21, 2015, I served the:

**TC Filing; and Notice of Complete Test Claim Filing and Schedule for Comments**  
Test Claim

*San Diego Region Water Permit – County of San Diego, 14-TC-03*  
California Regional Water Quality Control Board San Diego Region  
Order No. R9-2013-0001  
County of San Diego, Claimant

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 July 21, 2015 at Sacramento, California.

  
\_\_\_\_\_  
Jill L. Magee  
Commission on State Mandates  
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Sacramento, CA 95814  
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# COMMISSION ON STATE MANDATES

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**Last Updated:** 7/20/15

**Claim Number:** 14-TC-03

**Matter:** San Diego Region Water Permit - County of San Diego

**Claimant:** San Diego County

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