County of San Diego

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Commission on State Mandates

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Heather Halsey
Executive Director
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980 Ninth Street, Suite 300
Sacramento, CA 95814

VIA CSM DROPBOX

Re: Rebuttal Comments of Test Claimant San Diego County on Test Claim 14-TC-03, San Diego Regional Water Quality Control Board Order No. R9-2013-0001

Dear Ms. Halsey:

Test Claimant, San Diego County ("County"), respectfully submits this rebuttal ("Rebuttal") to the response ("Response") of the State Water Resources Control Board ("State Water Board"), the San Diego Regional Water Quality Control Board ("San Diego Water Board"), and the Department of Finance (collectively, "State") concerning Test Claim 14-TC-03, San Diego Regional Water Quality Control Board Order No. R9-2013-0001 ("Test Claim").[1]

The Test Claim asserts that certain provisions (the "Challenged Permit Provision") of San Diego Regional Water Quality Control Board Order No. R9-2013-0001 (the "2013 Permit") are unfunded state mandates for which a subvention of funds is required pursuant to Article XIII B, section 6 of the California Constitution ("Section 6"). The 2013 Permit regulates the County, and other permittees' municipal separate storm sewer systems ("MS4"), and is the fifth MS4 permit issued to the County over the last 3 decades.

[1] Cal. Code Regs., tit. 2, § 1183.3. The Department of Finance filed comments deferring to the State Water Resources Control Board and Regional Water Quality Control Board on matters other than the County's fee authority. The State and San Diego Water Boards' comment letter also includes the comments of the Department of Finance on the issue of fee authority. For this reason, this Rebuttal references "Response" to refer to the Response of the State and San Diego Water Boards, but also generally to the arguments set forth in Department of Finance's response.

Section 6 requires the state to provide a subvention of funds to local agencies whenever 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. The purpose of Section 6 is "to protect the tax revenues of local governments from state mandates that would require expenditures of such revenues."[2]

The State's Response contends that the County is not entitled to reimbursement of any of the costs of complying with the Challenged Permit Provisions, claiming that they do not impose a "new program" or "higher levels of service," that they are mandated by federal law, that they are not unique to local government, and that the County has authority to impose non-tax charges to pay the costs of the Challenged Permit Provisions.

Each of these contentions is meritless. This Rebuttal addresses the Response's general comments in Section I, the specific comments in Section II, and the funding-related comments in Section III. As demonstrated in the Test Claim and in this Rebuttal, the Challenged Permit Provisions create new programs or higher levels of service and are imposed under state law. Federal law does not impose or compel the state to impose the Challenged Permit Provisions. The 2013 Permit generally, and the Challenged Permit Provisions specifically, are directed only at local government entities, and the County lacks authority to impose non-tax charges to pay the costs of the Challenged Permit Provisions. For these reasons, the Challenged Permit Provisions constitute unfunded state mandates requiring a subvention of funds pursuant to Section 6.

REBUTTAL COMMENTS

I. GENERAL REBUTTAL COMMENTS

Contrary to the State's general response comments, the Challenged Permit Provisions constitute new programs or higher levels of service and no exception from the subvention requirement of Section 6 applies.

A. ***Department of Finance v. Commission on State Mandates***

The State argues that the California Supreme Court decision in *Department of Finance v. Commission on State Mandates*[3] is distinguishable from the issues in the present Test Claim. *Dept. of Finance*, however, directly addresses two issues raised by

[2] *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.

[3] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749 ("*Dept. of Finance*").

this Test Claim which are specific to state mandated programs in MS4 permits, including the Challenged Permit Provisions.

1. The Federal Mandates Exception and the "True Choice" Principle.

First, *Dept. of Finance* addressed and rejected the same claim made by the State here, that MS4 permit terms, such as the Challenged Permit Provisions, were mandated by federal law.[4] The California Supreme Court stated the issue this way:

> The question here is how to apply that [federal mandates] exception when federal law requires a local agency to obtain a permit, authorizes the state to issue the permit, and provides the state discretion in determining which conditions are necessary to achieve a general standard established by federal law, and when state law allows the imposition of conditions that exceed the federal standard.[5]

After considering a line of cases addressing the federal mandates issue, the California Supreme Court distilled and articulated the following principle:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[6]

In particular, the Court noted that in the case of MS4 permits, "the State was not compelled by [the maximum extent practicable standard] to impose any particular requirement. Instead, … the [State] had discretion to fashion requirements which it determined would meet the [Clean Water Act's] maximum extent practicable standard."[7]

2. Deference to the State's Findings and Burden of Proof

Second, *Dept. of Finance* addressed the State's claim that findings in the 2013 Permit should be entitled to deference.[8] The State claims that unlike the MS4 permit at

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[4] See Response at pp. 20-24, 30-32, 40-41, 43-50, 52.
[5] *Dept. of Finance, supra*, 1 Cal.5th at 763.
[6] *Dept. of Finance, supra*, 1 Cal.5th at 765.
[7] *Id.* at 768.
[8] See Response at pp. 20-22.

issue in *Dept. of Finance*, the 2013 Permit found "that each of the [C]hallenged [P]ermit [Provisions] was ***necessary*** to comply with the federal requirement that MS4 permits impose controls that reduce the discharge of pollutants to the M[aximum] E[xtent] P[racticable], and were based entirely on federal authority."[9]

The MS4 permit in *Dept. of Finance* did not contain findings regarding the role of federal law, but the California Supreme Court nevertheless considered the same argument the State makes here and rejected it as follows:

> Had the Regional Board found, when imposing the disputed permit conditions, that those conditions were the only means by which the maximum extent practicable standard could be implemented, deference to the board's expertise in reaching that finding would be appropriate.[10]

The California Supreme Court flatly rejected the same arguments made here and held that without a "case-specific … local factual" finding based on the board's "technical experience" that the Challenged Permit Provisions were the ***only means*** by which the MEP standard could be implemented, the State's findings are not entitled to deference by this Commission or by any court.[11]

In the end, if the State seeks to rely on the federal mandates exception to the general subvention requirement, then the State "bears the burden of demonstrating that it applies."[12] Without a federal law or regulation that imposes the Challenged Permit Provisions those conditions are state mandates. General standards, such as the maximum extent practicable standard do not impose any specific federal mandates.[13] Without technical, "case specific … local factual" findings that the Challenged Permit Provisions are the "only means by which the maximum extent practicable standard could be implemented," deference to the State's findings is inappropriate.[14]

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[9] Response at p. 3 (emphasis in original), see also pp. 20-24, 30-32, 40-41, 43-50, 52.

[10] *Dept. of Finance, supra*, 1 Cal.5th at 768.

[11] *Ibid.*

[12] *Id.* at 769.

[13] *Id.* at 765.

[14] *Id.* at 768-769.

B. The Challenged Permit Provisions Impose New Programs or Higher Levels of Service.

The State claims that the Challenged Permit Provisions are not new for two reasons, both of which are unsupported by the law.

1. The 2013 Permit Imposes a New Program

The State contends that there can be no "new" program in the 2013 Permit because the County has been "permitted under the NPDES program implementing storm water programs for more than two decades[.]"[15] The County does not contest that it has been a stormwater program permittee for decades. However, the Challenged Permit Provisions are "new" because the County was not previously required to institute them, even by previously issued MS4 permits.[16]

The State's argument fails to recognize what constitutes a "program" under Section 6. The term "program" is not defined in Section 6, but the California Supreme Court defined it as "programs that carry out the governmental function of providing services to the public, or … impose unique requirements on local governments…"[17] The very nature of a *municipal* separate storm sewer (MS4) is to provide governmental services to the public.[18] The 2013 Permit imposes requirements on thirty-nine (39) local governments who own or operate MS4s.[19] By requiring the County to develop water quality improvement plans, develop BMP design manuals, conduct residential inspections, rehabilitate streams, retrofit infrastructure, improve receiving water quality, implement projects to reduce pollutants in the stormwater, and undertake other similar activities, the 2013 Permit requires the County to provide services to the public, in addition to the mere operation of its MS4. Each of these required activities provides a service to the public within the meaning of "program" articulated by the California Supreme Court.

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[15] Response at p. 18.

[16] See Test Claim at pp. 5-12, 5-21, 5-32, 5-40, 5-45, 5-48, 5-50-52; see also *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189 (a "program is 'new' if the local governmental entity had not previously been required to institute it").

[17] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[18] 40 C.F.R. § 122.26(b)(8) (defining MS4, in part, as "a conveyance or system of conveyances … *owned or operated* by a State, city, town, borough, *county*, parish, district, association or *other public body* …"), emphasis added.

[19] The 2013 Permit as adopted in 2013, named twenty-one (21) local government entities as permittees. The 2013 Permit was amended twice in 2015. These amendments added eighteen new permittees, all of which are local governmental entities.

The State's argument also misses the key point of the Test Claim, which is that the Challenged Permit Provisions were not included in previous MS4 permits issued to the County, and that is why they are "new."[20] Similar or less exhaustive activities may have been included in prior permits, including the 2007 Permit; however, the County successfully challenged those requirements in a test claim in 2007.[21] The state appealed the Commission's determination on the 2007 Test Claim, which was affirmed by the Third District Appellate Court, and is subject to a pending petition for review at the California Supreme Court.[22] By seeking reimbursement for the Challenged Permit Provisions, the County reiterates that these enhanced requirements are reimbursable state mandates but also emphasizes that the original activities challenged in the 2007 Test Claim remain reimbursable state mandated activities.

The County's Test Claim set forth in detail how each of the Challenged Permit Provisions constituted a new program.[23]

2. The 2013 Permit Mandates a Higher Level of Service

As the State notes, it mandates a higher level of service when its action mandates an increase in the level of service in a program.[24] It goes on, however, to assert erroneously that the Challenged Permit Provisions do not mandate a higher level of service because: (a) equivalent provisions are applicable to non-municipal NPDES permittees, and (b) the Challenged Permit Provisions are merely "refinements of existing requirements, most of which are a result of the iterative process expressly contemplated by federal law."[25] These arguments are flawed for the following reasons.

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[20] See Test Claim at pp. 5-12, 5-21, 5-32, 5-40, 5-45, 5-48, 5-50-52 (describing previous MS4 permits and their requirements).

[21] See Commission on State Mandates Statement of Decision ("Statement of Decision), Test Claim 07-TC-09.

[22] *Department of Finance v. Commission on State Mandates* ("*San Diego County")* (2017) 18 Cal.App.5th 661 petition for review filed (Jan. 26, 2018).

[23] *Ibid*.

[24] See Response at p. 18; see also *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[25] Response at p. 18,

a. <u>The 2013 Permit Imposes Unique Requirements on Local Government</u>.

The 2013 Permit, which is the only state action at issue in this Test Claim, does not apply to any non-municipal entities.[26] This is not a situation where the state's action imposes requirements on all public and non-public entities alike, such as requiring increased workers' compensation benefit payments.[27] Here, of the 39 current permittees under the amended 2013 Permit ***all 39*** are local governmental entities.[28] Non-governmental entities that require NPDES permits are regulated by *different* permits. This is especially notable here because the 2013 Permit requires the County (and other permittees) to exercise its police power (e.g., the JRMP requires escalated enforcement actions), its land use power (e.g., BMP Design Manual, hydromodification management requirements, etc.), its taxing power, and other uniquely municipal powers to fulfill the Challenged Permit Provisions. Non-municipal entities do not have these powers and *cannot* be regulated under the 2013 Permit as currently written. It is irrelevant to Section 6 that separate actions by the state may impose similar, but very different, requirements on non-municipal entities.

b. <u>The 2013 Permit's Challenged Permit Provisions Do Not Reallocate Existing Obligations or Existing Resources</u>.

Second, the Challenged Permit Provisions are not "merely refinements of existing requirements" or a "loss of flexibility" as the State argues.[29] The 2013 Permit imposes significant *additional* burdens on the County, *in addition to* the operation of the MS4, as set forth in detail in Section II of this Rebuttal and in the Test Claim. Importantly, the "iterative" process does not *ipso facto* mandate every new and increasingly specific provision in an MS4 Permit.[30]

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[26] Statement of Decision Test Claim 07-TC-09 at 37 ("the permit carries out the governmental function of providing public services, and also imposes unique requirements on local agencies is San Diego County to implement a state policy that does not apply generally to all residents and entities in the state").

[27] See, e.g., *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 49.

[28] See 2013 Permit, as amended by San Diego Water Board Order No. R9-2015-0100 at cover page.

[29] Response at p. 18, citing *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176; *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1288; and *Department of Finance v. Commission on State Mandates* (*Kern High School District*) (2003) 30 Cal.4th 727, 748.

[30] *Dept. of Finance, supra*, 1 Cal.5th at 768 ("It is simply not the case that, because

The State's reliance on *County of Los Angeles* is misplaced. In *County of Los Angeles, supra,* 110 Cal.App.4th at 1194, a state mandate to add a course in police training to "an already existing framework of training" was not considered to be a higher level of service because the agencies were directed "to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training."

Similarly, in *County of Sonoma*, the court determined that the statute at issue reallocated property tax revenues for public education, which were a shared state and local responsibility.[31] For this reason, there was no evidence that the statute increased costs on local government. Here, however, the 2013 Permit does not reallocate tax revenues already dedicated to the Challenged Permit Provisions, or even to stormwater management programs more broadly. The Challenged Permit Provisions impose new programs or higher levels of service, which requires the County to appropriate *additional* financial resources compared to previous MS4 permit requirements.

The State also relies on the case of *Kern High School District, supra,* 30 Cal.4th at 748, to assert that reallocation of grant funds does not constitute a reimbursable state mandate.[32] Unlike in *Kern High School District,* the state has not provided grant funds to the County to pay for the MS4 program or for any previous MS4 permit requirement and does not merely reallocate state-provided funds.

In *San Jose*, the court determined that a statute authorizing counties to charge cities for certain costs of booking persons into county jails was not a state mandate because counties were responsible for county jails before the state passed the statute.[33] For purposes of Section 6, counties were not considered agents of the state and their actions were not subject to the subvention requirements of Section 6.[34] Here, however, the San Diego Regional Water Quality Control Board is an agent of the State for purposes of Section 6, fatally distinguishing *San Jose* from this Test Claim and

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a condition was in the Permit, it was, ipso facto, required by federal law."). See also, See Commission on State Mandates Statement of Decision ("Statement of Decision) Statement of Decision, Test Claim 07-TC-09 at p. 49 ("Under the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly.").

[31] *County of Sonoma, supra,* 84 Cal.App.4th at 1283

[32] See Response at p. 19.

[33] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1811-1812.

[34] *Ibid.*

discrediting the State's claim that a shift of responsibilities from the state to local agencies is a prerequisite for subvention.[35]

As set forth in detail in the Test Claim and this Rebuttal, the 2013 Permit imposes new programs and higher levels of service on the County.

C. No Exception to the Subvention Requirement Applies Here.

Not only does the 2013 Permit impose new programs and higher levels of service on the County, none of the three exceptions cited by the State excuses the state from reimbursing the County for the costs of those state mandates. The State bears the burden of proving any exception to its subvention requirements.[36] It has failed to meet this burden.

1. The Challenged Permit Provisions Are Not Required by Federal Law

None of the three federal laws cited by the State "compels the [S]tate to impose, or itself imposes" the Challenged Permit Provisions.[37]

a. The Maximum Extent Practicable Standard Does Not Impose or Compel the Challenged Permit Provisions.

The State argues that it imposed the Challenged Permit Provisions because they were "necessary" to satisfy the federal "maximum extent practicable" standard, and that, unlike in *Dept. of Finance*, the San Diego Water Board "made specific findings that the [2013] Permit was based on federal law in every section of the Permit and the Fact Sheet under the factual circumstances presented" and that these findings should be afforded deference by the Commission.[38] The California Supreme Court considered and rejected these arguments in *Dept. of Finance*.[39]

First, as set forth in Section I.A.1, above, the maximum extent practicable standard does not impose or compel the State to impose any particular permit provision. The State ultimately agrees that the "San Diego Water Board exercised its discretion" in imposing the Challenged Permit Provisions.[40] According to the California Supreme Court, "the

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[35] See Response at pp. 18-19.
[36] *Dept. of Finance, supra*, 1 Cal.5th at 769.
[37] *Id.* at 765; see also Response at pp. 20-24.
[38] Response at pp. 20-22, emphasis in original.
[39] *Dept. of Finance, supra*, 1 Cal.5th at 768.
[40] Response at p. 20 ("the San Diego Water Board exercised it discretion").

State was not compelled by [the maximum extent practicable standard] to impose any particular requirement. Instead, … the [State] had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard."[41] It is this exercise of discretion that makes the Challenged Permit Provisions *state* rather than *federal* mandates.

Second, the findings cited by the State do not satisfy the standard for deference articulated by the California Supreme Court.[42] To be afforded deference, the San Diego Water Board was required to find, based on case-specific facts and its "technical experience," that the Challenged Permit Provisions were the ***only means*** by which the MEP standard could be implemented[.]"[43] None of the findings are case-specific or rely on any "technical experience" entrusted to the San Diego Water Board. Most notably, none of the findings conclude that the Challenged Permit Provisions were the "***only means***" by which the MEP standard could be implemented. As a result, the State's general findings are not entitled to deference under *Dept. of Finance*.

The State also argues that "the appropriate focus is whether the permit conditions, as a whole, exceed the MEP standard."[44] This argument was also made and rejected in *Dept. of Finance:*

> The State argues the Commission failed to account for the flexibility in the CWA's regulatory scheme, which conferred discretion on the State and regional boards in deciding what conditions were necessary to comply with the CWA. In exercising that discretion, those agencies were required to rely on their scientific, technical, and experiential knowledge. Thus, the State contends the Permit itself is the best indication of what requirements would have been imposed by the EPA if the Regional Board had not done so, and the Commission should have deferred to the board's determination of what conditions federal law required.
>
> We disagree that the Permit itself demonstrates what conditions would have been imposed had the EPA granted the Permit. In issuing the Permit, the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required.

[41] *Dept. of Finance, supra*, 1 Cal.5th at 768
[42] See Response at p. 21.
[43] *Dept. of Finance, supra*, 1 Cal.5th at 768.
[44] Response at p. 21.

> It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law.[45]

Relying on this language from the California Supreme Court, the Third Appellate Court also rejected the same argument by the State in the test claim challenging the 2007 Test Claim, saying, "It is simply not the case that, because a condition was in the Permit, it was, *ipso facto*, required by federal law."[46]

The State bears the burden of proving the federal mandates exception applies.[47] The maximum extent practicable standard does not compel or require the State to compel the Challenged Permit Provisions.[48] The State failed to meet its burden of proof to receive deference to its general and factually unsupported findings.[49] The State has failed to demonstrate that the federal mandates exception applies here.[50]

b. <u>EPA's Adoption of Similar Provisions Does Not Impose or Compel the Challenged Permit Provisions</u>.

The State argues that MS4 permits issued by the EPA require "either equivalent or substantially similar provisions" to the Challenged Permit Provisions and that this inclusion "demonstrates that the State effectively administered federal requirements concerning permit requirements."[51] This argument is erroneous.

The State cites a single permit containing a single permit term that is vastly different from and lacking the specificity of the Challenged Permit Provisions. There is

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[45] *Dept. of Finance, supra,* 1 Cal.5th at 768.

[46] *San Diego County, supra,* 18 Cal.App.5th at 678.

[47] *Dept. of Finance, supra,* 1 Cal.5th at 769.

[48] *Id.* at 768.

[49] *Ibid.*

[50] The State also misstates standards regarding the State's *legal authority* to impose permit conditions as the test for determining whether a particular permit condition was imposed pursuant to *state or federal legal authority*. Response at p. 22, citing *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1389; *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883. The California Supreme Court and Third Appellate District Court rejected this approach as entirely inappropriate. *Dept. of Finance, supra,* 1 Cal.5th at 768-769; *San Diego County, supra,* 18 Cal.App.5th at 680.

[51] Response at p. 23.

no evidence in the Response that EPA incorporates anything substantially similar to the Challenged Permit Provisions in the MS4 permits it issues.[52]

c. <u>The "Effectively Prohibit" and TMDL Consistency Requirements Do Not Impose or Compel the Challenged Permit Provisions</u>.

The State contends that the 2013 Permit implements two federal requirements: (1) that local agencies effectively prohibit non-stormwater discharges into their MS4s[53] (the "Effectively Prohibit" requirement), and (2) that permits must contain water quality based effluent limitations consistent with the assumptions and requirements of any applicable wasteload allocation (the "TMDL Consistency" requirement).[54] These contentions are inaccurate, and the Effectively Prohibit and TMDL Consistency requirements do not mandate the Challenged Permit Provisions.

First, general standards in federal law, such as the maximum extent practicable standard, and the similarly general Effectively Prohibit requirement, do not impose or compel the state to impose any specific permit terms.[55]

Second, the County does not allege that the 2013 Permit's Effectively Prohibit requirement is a state mandate. The Effectively Prohibit requirement is contained in Provision A.1.b of the 2013 Permit. Provision A.1.b is not one of the Challenged Permit Provisions.[56]

Third, the State's Response asserts that by implementing the Challenged Permit Provisions, the County "effectively prohibit[s] non-stormwater discharges."[57] This assertion is not supported by the text of the 2013 Permit, which states that the Effectively Prohibit requirement is met "through the implementation of Provision E.2," the "Illicit Discharge Detection and Elimination" provision.[58]

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[52] See further comments at Sections II.C.2, II.D.2, II.G.2, and II.H.2 in this Rebuttal.

[53] Response at p. 24, citing 33 U.S.C. § 1342(p)(3)(ii).

[54] Response at p. 24, citing 40 CFR § 122.44(d)(1)(vii)(B).

[55] *Dept. of Finance, supra*, 1 Cal.5th at 768.

[56] See Test Claim at pp. 5-9 (Provision A.2), 5-13 (Provision A.3.b), 5-22 (Provisions B and F), 5-37 (Provisions E.3.c.(2), E.3.d and F.2.b), 5-41 (Provision E.5.c), 5-46 (Provision E.5.e), 5-49 (Provision F.2.a), 5-51 (Provision F.3.a)

[57] Response at p. 24.

[58] 2013 Permit, Provision A.1.b.

Fourth, the federal laws relied on by the State are all requirements federal law imposes on the *state*, not on local government.[59] Under CWA Section 303, the *state* is required to identify waters which do not meet water quality standards; the *state* is then required to rank those water bodies by priority; the *state* must develop TMDLs for those water bodies with wasteload allocations ("WLAs") assigned to existing and future point sources of pollution as water quality based effluent limitations ("WQBELs").[60]

Federal law does not require the state to incorporate WLAs into an MS4 permit as strict numeric limits.[61] Federal regulations only require that NPDES permit terms are "***consistent with the assumptions and requirements of any available wasteload allocations*** for the discharge prepared by the State and approved by EPA[.]"[62] The state exercises its discretion when it incorporates WLAs from a TMDL into a permit as numeric effluent limits.[63]

Neither the Effectively Prohibit or TMDL Consistency requirements require the Challenged Permit Provisions or compel the state to require the Challenged Permit Provisions. Indeed, established case law demonstrates that inclusion of the "TMDL-Related Mandates" as that term is defined in the Test Claim are discretionary.[64]

2. The Challenged Permit Provisions Impose Requirements Unique to Local Agencies

The State contends that the 2013 Permit is not imposed uniquely on local government because the "substantive actions required by the permit's provisions are by no means unique to this class of permittee" and "numerous provisions of the 2013 Permit are 'laws of general applicability'" and apply to "private industry" as well as other state and federal government agencies.[65] These contentions are entirely meritless.

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[59] Response at p. 24.

[60] 33 U.S.C. § 1313(d). 40 C.F.R. § 130.2 subd. (h).

[61] 40 C.F.R. § 122.44(d)(1)(vii)(B).

[62] *Ibid.* (emphasis added).

[63] *Divers' Environmental Conservation Organization v. State Water Resources Control Board* (2006) 145 Cal.App.4th 246, 256, 269 (EPA "has repeatedly expressed a preference for … BMPs, rather than … technology-based or water quality-based numerical limitations. … it is now clear that in implementing numeric water quality standards … permitting agencies are not required to do so solely by means of a corresponding numeric WQBEL").

[64] Test Claim at p. 5-18; *Divers, supra,* 145 Cal.App.4th at 269.

[65] Response at pp. 24-25.

The proper focus of the inquiry into whether requirements are unique to local agencies must be on the executive order at issue – here, the 2013 Permit – not into the "laws of general applicability" that underlie the 2013 Permit.[66] This Commission has already determined that MS4 permits issued to the County impose unique requirements on local agencies.[67] As set forth in Section I.B.1, above, the 2013 Permit and its Challenged Permit Provisions apply only to 39 specific municipal separate storm sewer systems. Unlike the workers' compensation benefits statute that applied to all employers in *City of Richmond*,[68] and like the fire protection requirements that constituted "a peculiarly governmental function in *Carmel Valley Fire Protection Dist.*,[69] the Challenged Permit Provisions are directed at the County's provision of a ***peculiarly public service***: the collection and conveyance of storm waters to protect public health and property – *including* the health and property of industrial and commercial properties. Failure to do so exposes a municipality to inverse condemnation claims, which cannot be brought against private entities.[70] The Challenged Permit Provisions require the County to exercise its ***peculiarly municipal authority*** in specific ways.

Not only does private industry lack the authority to comply with the 2013 Permit and its Challenged Permit Provisions, private industries subject to NPDES permits are not required to undertake activities similar to the Challenged Permit Provisions. They are not required, for example, to develop, implement, update or provide annual reports on Water Quality Improvement Plans – only municipalities must do this,[71] to incorporate minimum low impact development (LID) and other BMP requirements into local plans – only municipalities must develop these plans,[72] to conduct residential inspections – only municipalities must do this,[73] to retrofit and rehabilitate streams – only municipalities must do this,[74] to update the JRMP – only municipalities must do this,[75] or implement any of the other Challenged Permit Provisions.

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[66] Statement of Decision, Test Claim 07-TC-09 at p. 36 ("The only issue before the Commission is whether the permit in this test claim constitutes a program.").

[67] Statement of Decision, Test Claim 07-TC-09 at pp. 36-37.

[68] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1199.

[69] *Carmel Valley Fire Prot. Dist. v. State of California* (1997) 190 Cal.App.3d 521.

[70] See *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722.

[71] 2013 Permit, Provisions B and F.

[72] 2013 Permit, Provisions E.3.c.(2), E.3.d, and F.2.b.

[73] 2013 Permit, Provision E.5.c.

[74] 2013 Permit, Provision E.5.e.

[75] 2013 Permit, Provision F.2.a.

The 2013 Permit is imposed uniquely on local government.

3. The County Does Not Have Authority to Levy Service Charges, Fees, or Assessment Sufficient to Pay for the Challenged Permit Provisions

The County lacks authority to levy service charges, fees, or assessments sufficient to pay for the Challenged Permit Provisions. The County responds in full to the State's Response comments in Section III, below, and incorporates the rebuttal in Section III into this Section I.C.3.

II. SPECIFIC REBUTTAL COMMENTS

The State's response to the specific Challenged Permit Provisions reasserts the flawed arguments described in Section I above, and fails for the reasons set forth in that Section. In addition, the Response is further flawed for the following reasons.

A. Receiving Water Limitations (Provision A.2).

Provision A.2 of the 2013 Permit requires the County to strictly comply with the limitation that its discharges not cause or contribute to a violation of water quality standards in any receiving waters (the "Receiving Water Limitations Mandate"). The State Water Board admits that it "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 that it] may also utilize flexibility under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges."[76] In 2013, the Ninth Circuit applied the principles of contract interpretation to render the State Water Board-developed Receiving Water Limitations Mandate separately and strictly enforceable.[77] Federal law thus does not require the strict compliance with water quality standards independent from the Receiving Water Limitations Mandate. Because the Receiving Water Limitations Mandate creates new programs or higher levels of service and is imposed under state, not federal, law, subvention is required under Section 6.

1. The Receiving Water Limitations Mandate Is a New Program or Higher Level of Service

The State contends the Receiving Water Limitations Provision is not "new" because the general Receiving Water Limitations Provision, which prohibits discharges

[76] State Water Resources Control Board, Order No. WQ 2015-0075, at p. 11.
[77] *NRDC v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194 ("*NRDC*").

from causing or contributing to exceedances of water quality objectives without regard to the County's implementation of BMPs, has been included in permits since 1999 and has always required strict compliance.[78] This contention disregards the state's own variable treatment of the receiving water limitations language over time and even within the Response itself.

As noted above, EPA has repeatedly expressed a preference for regulating stormwater discharges through implementing BMPs rather than through imposing numerical limitations.[79] Consistent with this preference, the State Water Board adopted a 2001 Order, that discussed the propriety of requiring strict compliance with water quality standards and the maximum extent practicable standard and determined, "[w]e will not generally require 'strict compliance' with Water Quality Standards … and we will continue to follow an iterative approach, which seeks compliance over time."[80] In its Response, the State admits that "[t]he State Water Board explained in 2001 that the precedential receiving water limitations language ***requires less than strict compliance.***"[81]

In 2013, the Ninth Circuit reinterpreted the receiving water limitations language as requiring strict compliance.[82] In 2015, the State Water Board reinterpreted its 2001 Order in light of case law, including the 2013 *NRDC* case, and stated that the 2001 Order did *not* actually allow participation in an iterative approach to constitute compliance with water quality standards over time rather than strict compliance with water quality standards.[83]

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[78] Response at p. 27 ("Since 1999, the State Water Board consistently has expected receiving water limitations to be complied with … [t]he iterative process … does not provide any sort of 'safe harbor'").

[79] See, e.g., *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-1167 ("… 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 … to provide for the attainment of Water Quality Standards.' … the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion.")

[80] State Water Resources Control Board, Order No. 2001-15, *In the Matter of the petitions of Building Industry Assoc. of San Diego County and Western State Petroleum Assoc.* (2001) at pp. 7-8.

[81] Response at p. 31, citing State Water Board Order 2001-15 at p. 3 (emphasis added).

[82] *NRDC v. County of Los Angeles*, *supra*, 725 F.3d 1194.

[83] State Water Resources Control Board, Order No. 2001-15, *In the Matter of the petitions of Building Industry Assoc. of San Diego County and Western State Petroleum*

The 2013 Permit, as amended in 2015, still contains the Receiving Water Limitations Mandate, and now, as the State admits, "newly requiring strict compliance" with water quality standards.[84] Further, according to the State, all of the Challenged Permit Provisions are designed or intended to implement the Receiving Water Limitations Mandate.[85]

Federal law does not require strict compliance with the Receiving Water Limitations Mandate. The State Water Board, in reliance on the 2013 *NRDC* case, reinterpreted its previous Orders to mandate strict compliance with the receiving water limitations language and imposed strict compliance with the Receiving Water Limitations Mandates on the County for the first time. The Receiving Water Limitations Mandates constitute new programs or higher levels of service under Section 6.

2. The Receiving Water Limitations Mandate Is a State Mandate, Not a Federal Mandate

The State next contends that the Receiving Water Limitations Mandate is required by federal law to satisfy the maximum extent practicable standard and urges this Commission to defer to findings of the San Diego Water Board that the Receiving Water Limitations Mandate is necessary to meet the maximum extent practicable standard and to achieve water quality standards.[86] The State also contends that inclusion of similar language in one EPA-issued permit supports the San Diego Water Board's finding.[87] These contentions are meritless.

First, as the State Water Board itself recognizes, strict compliance with the Receiving Water Limitations Mandate is discretionary under federal law.[88]

Assoc. (2001) at pp. 11-12 ("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 … prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements. … [T]he iterative process … does not provide a 'safe harbor' to MS4 dischargers").

[84] Response at p. 31.

[85] See Response at pp. 20-22, 40-41, 43, 45, 47.

[86] Response at p. 30.

[87] Response at p. 46.

[88] State Water Board, Order No. 2015-0075 at pp. 11-12 ("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"); see also Response at p. 30 (noting that the State Water Board considered whether to allow a safe harbor and declined to do so). See also Section II.A.1, above.

Second, the California Supreme Court has held that the general maximum extent practicable standard does not impose or compel the state to impose any specific permit term.[89] Similarly, the general "water quality standards" relied on by the State do not impose or compel the state to impose any specific permit term, including the Receiving Water Limitations Mandates.[90]

Third, the San Diego Water Board's finding that the Receiving Water Limitations Mandate is necessary to meet the maximum extent practicable standard is not entitled to deference because it does not satisfy the standard for deference under *Dept. of Finance*. The California Supreme Court has held that without a "case-specific" factual finding, based on the board's "technical experience" that the Challenged Permit Provisions were the ***only means*** by which the MEP standard could be implemented, the state's findings are not entitled to deference by this Commission or by any court.[91] The state's findings do not satisfy the "only means" standard and are not entitled to deference.

Finally, the State's reliance on a single EPA-issued permit, does not amount to a federal requirement of strict compliance with the Receiving Water Limitations Mandate, especially when later-issued permits, approved by EPA include a safe harbor.[92]

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[89] *Dept. of Finance, supra*, 1 Cal.4th at 768 ("the Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.").

[90] Not only does the State erroneously contend that federal law compels the WQIP Mandates because the "objective of the WQIP is to achieve water quality standards … through implementation of the iterative process … which satisf[ies] the [maximum extent practicable] standard[,]" the State contradicts its previous assertions in Section V.A of the Response, by claiming that the 2013 Permit "does not require strict compliance with water quality standards." Although irrelevant to the federal mandates issue, it cannot be the case that the same iterative process provides a "safe harbor" from the strict application of water quality standards and fails to provide a safe harbor from the strict application of the same general standards.

[91] *Dept. of Finance, supra*, 1 Cal.5th at 765, 768-769.

[92] See, e.g., State of Washington, Phase I Municipal Stormwater Permit, National Pollutant Discharge Elimination System and State Waste Discharge General Permit for Discharges from Large and Medium Municipal Separate Storm Sewer Systems, issued Aug. 1, 2012, as modified Aug. 19, 2016, at Conditions S4.A, S4.B (comparable Receiving Water Limitations Mandate but qualified with "The required response to such discharges is defined in section S4.F, below), S4.F (providing that "[a] Permittee remains in compliance with S4 despite any discharges prohibited by S4.A or S4.B, when the Permittee undertakes the following response toward long-term water quality improvement…"). The Washington State Phase I General MS4 Permit is attached to this

3. No Other Mandates Exception Applies

The State contends that a subvention is not required for reasons rebutted in Section I, above.[93] The County incorporates its rebuttal here.

Because the state exercised its discretion under state law authority to require strict compliance with the Receiving Water Limitations Mandates and no exception from Section 6 applies, the County is required to reimburse the County for the cost of complying with the Receiving Water Limitations Mandate.

B. Numeric Effluent Limitations and Related TMDL Provisions (Provisions A.3.b and Attachment E.)

Provision A.3.b of the 2013 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[,]" and to conduct monitoring and reporting (the "TMDL-Related Mandates").[94] Specifically, the TMDL-Related Mandates require compliance with wasteload allocation as interim and final numeric limits, without regard for what BMPs the County implements and without regard to how effective those BMPs are. Federal law does not require the inclusion of *numeric limitations*, strict compliance with wasteload allocations, or the related monitoring and reporting requirements. Because these TMDL-Related Mandates are new programs or higher levels of service and are imposed under state, not federal, law, subvention is required under Section 6.

1. The TMDL-Related Mandates Are State Mandates, Not Federal Mandates

The State contends that the TMDL-Related Mandates are federal mandates because federal law requires "any NPDES permit, not just MS4 permits, [to] include effluent limits 'consistent with the assumptions and requirements of any available wasteload allocations.'"[95] Central to this contention is the State's "disagreement" that inclusion of numeric effluent limitations exceeds federal law where the San Diego Water Board determined that they are necessary to assure compliance with the federal water

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Rebuttal as Attachment 1.

[93] Response at p. 32.

[94] 2013 Permit, Provision A.3.b; see also Test Claim at p. 5-18.

[95] Response at p. 34, citing 40 C.F.R. § 122.44(d)(vii)(B).

quality standards in the receiving waters."[96] The State's contentions and disagreements with the law, however, are incorrect.

Federal law itself is clear that numeric effluent limitations are not *required* in an NPDES permit in order for that permit to be *consistent* with the assumptions and requirements of available wasteload allocations.[97] The State's citation to an EPA 2014 supplemental guidance document ("2014 EPA Memorandum") does not change this conclusion.[98] Indeed, the 2014 EPA Memorandum itself only "***recommends*** that the NPDES permitting authority ***exercise its discretion*** to include clear, specific, and measurable permit requirements, and where feasible, numeric effluent limitations[.]"[99]

EPA's *recommendation* and support for the inclusion of numeric effluent limitations does not constitute a *mandate* for purposes of Section 6. Further, even if EPA's recommendation to include numeric limits could be considered a mandate, that recommendation does not mandate strict compliance with *numeric wasteload allocations* as the numeric limitations – as EPA itself admits, "numeric [water quality based effluent limits] may include *other types* of numeric limits on pollutant discharges by specifying parameters such as on-site stormwater retention volume or percentage or amount of effective impervious cover …"[100]

The State misstates the law and the 2014 EPA Memorandum by asserting that the requirement for NPDES permits to "contain effluent limits and conditions consistent with

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[96] As noted in Section I.A.2, above, the 2013 Permit's finding of "necessity" supporting the state's "authority" to impose the Challenged Permit Provisions falls far short of the "only means" finding required for deference.

[97] 40 C.F.R. 122.44(d)(1)(vii)(B); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165 (concluding that federal law "unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)"); *Divers Environmental, supra*, 145 Cal.App.4th at 256 (EPA "has repeatedly expressed a preference for [regulating storm water permits] by the way of BMPs, rather than by way of imposing either technology-based or water quality based numerical limitations … it is now clear that in implementing numeric water quality standards … permitting agencies are not required to do so solely by means of a corresponding numeric WQBEL").

[98] Response at p. 35, citing EPA Memorandum, Nov. 26, 2014 (*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*).

[99] Response at p. 35, citing 2014 EPA Memorandum at p. 4 (emphasis added).

[100] See Response at p. 35, citing 2014 EPA Memorandum at p. 4 (emphasis added).

the assumptions and requirements of any available wasteload allocation" requires strict compliance with numeric wasteload allocations. "Effluent limits" are not necessarily "numeric" effluent limitations but can be BMP-based limitations.[101] "Numeric effluent limitations" are not limited to "wasteload allocations" but can be stormwater retention volumes or amount of effective impervious cover.[102] The state acted under state law authority when it imposed the TMDL-Related Mandates in the 2013 Permit.

2. The TMDL-Related Mandates Are a New Program or Higher Level of Service

The State contends that the TMDL-Related Mandates do not constitute a new program or higher level of service because TMDL requirements were "in prior permits" and the "objective" underlying TMDL requirements (i.e., to produce discharges that do not cause or contribute to exceedances of water quality standards) is separately enforceable against the County.[103] These contentions have no merit for purposes of Section 6.

First, the specific TMDL-Related Mandates at issue in the Test Claim were never included in a prior permit.[104] The State does not and cannot dispute this. Thus, the specific TMDL-Related Mandates are "new" requirements in the 2013 Permit. Even if unrelated TMDL requirements were in prior permits, the inclusion of the TMDL-Related Mandates at issue here creates "higher level of service" required under the TMDL "program."

Second, as the State recognizes, "TMDLs are not self-executing, but instead rely on subsequently issued permits to impose requirements on dischargers[.]"[105] Thus, before the TMDL-Related Mandates were incorporated into the 2013 Permit, the County was not required to strictly comply with the numeric wasteload allocations set forth in that TMDL. General standards set forth in federal law, such as the "maximum extent

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[101] See *Defenders of Wildlife, supra,* 191 F.3d at 1165; *Divers Environmental, supra,* 145 Cal.App.4th at p. 256.

[102] See Response at p. 35, fn. 207, citing 2014 EPA Memorandum at p. 4.

[103] Response at p. 36.

[104] See Test Claim at p. 5-21. The State's recognition that the "alternative compliance option" provides an avenue for the County to be "deemed in compliance" with certain 2013 Permit Provisions, including the TMDL-Related Mandates further demonstrates that the State exercised its discretion under state law in requiring strict compliance with numeric wasteload allocations.

[105] Response at p. 33.

practicable" standard or the prohibition against discharges causing or contributing to a violation of water quality standards do not impose any specific requirements.[106]

The state newly incorporated the TMDL-Related Mandates into the 2013 Permit, which imposed those mandates on the County for the first time. The TMDL-Related Mandates constitute new programs or higher levels of service under Section 6.

3. No Other Mandates Exception Applies

The State contends that it is not required to reimburse the County for the costs of implementing the TMDL-Related Mandates because the County has fee authority, is not required to use tax funds and because the bacteria TMDL identifies Caltrans and agricultural discharges as contributing sources for bacteria, making the TMDL-Related Mandates not uniquely applicable to local government. These contentions have no merit. The County responds in full to these arguments in Sections III (regarding fee authority and use of tax funds) and Section I.B (regarding unique applicability to local government). The County further notes that the TMDL-Related Mandates create jurisdiction-wide programmatic requirements that are not benefitting any particular person or group of persons, and that it must use tax funds to pay for the costs.[107] Finally, although Caltrans and agricultural dischargers may be identified as contributing to the bacterial impairment in the TMDL, the 2013 Permit does not apply to Caltrans or any agricultural discharger.[108]

Because the state exercised its discretion under state law authority to impose the TMDL-Related Mandates as new programs or higher levels of service and no exception from Section 6 applies, the state is required to reimburse the County for the cost of complying with the numeric effluent limitations and other TMDL-Related Mandates in the 2013 Permit.

C. Water Quality Improvement Plans (Provisions B and F).

Provisions B and F of the 2013 Permit require the County to develop, implement, update, and provide annual reports on 7 different Water Quality Improvement Plans ("WQIPs") (collectively, the "WQIP Mandates"): one for each of the 7 Watershed Management Areas in the County's jurisdiction. Federal law does not, and previous MS4 permits issued to the County did not, require the development, implementation, or annual reporting on WQIPs for each Watershed Management Area. Because the requirements to

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[106] *Dept. of Finance, supra,* 1 Cal.5th at 768.

[107] See Test Claim at pp. 5-13 through 5-22, 6-3, Declaration of Jon Van Rhyn at ¶ 8.b.

[108] Statement of Decision, Test Claim 07-TC-09 at p. 36.

develop, implement, update and report on 7 WQIPs are new programs or higher levels of service and are imposed under state, not federal, law, subvention is required under Section 6.

1. The WQIP Mandates Are a New Program or Higher Level of Service

The State contends that the WQIP Mandates do not impose a new program or higher level of service because "the concept of a WQIP, its substance, and its accompanying reporting provisions are not new to the 2013 Permit."[109] The State further contends that the 2007 Permit "precursor" to the WQIP was called a Watershed Urban Management Program, which had reporting requirements and included an "iterative process to achieve compliance with water quality standards over time."[110] None of these contentions is accurate.

First, the State never contends in this section that the WQIP Mandate is not a "program" or "service" for purposes of Section 6.

Second, the State claims that the WQIP Mandates are not "new" but instead claims they contain "further specificity or refinement of 2007 Permit requirements."[111] Specifically, the State admits that Provisions B.2.a, b., c.(1) and c.(2) in the 2013 Permit impose more specific and refined requirements than the Provisions E.2.e, f, and c in the 2007 Permit.

The County agrees that certain requirements in the WQIP impose more specific and nuanced requirements than the 2007 Permit, which is precisely why those requirements impose higher levels of service under Section 6. This Commission determined those same Provisions in the 2007 Permit to be unfunded state mandates on the grounds that the "federal regulations authorize but do not require the specificity" required by the Watershed Urban Runoff Management Program.[112] The 2013 Permit's additional specificity – above and beyond the 2007 Permit – is likewise an unfunded state mandate.

Provision E.2.c in the 2007 Permit, for example, which the State claims is a "precursor" to Provisions B.2.a, B.2.b, B.2.c.(1) and B.2.c.(2), contains six sentences, which state, in full:

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[109] Response at p. 38.
[110] *Ibid.*
[111] Response at p. 39.
[112] Statement of Decision, Test Claim 07-TC-09, p. 74.

> 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.[113]

[113] Provisions E.2.e and E.2.f are similarly brief, stating as follows:

> 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

In comparison, Provision B.2.a, B.2.b, and B.2.c contain, in part, the following more specific requirements as part of developing the WQIP:

- Consideration of adopted TMDLs; sensitive or highly valued receiving waters; receiving water limitations of Provision A.2; known historical versus current physical, chemical, and biological water quality conditions; physical, chemical, and biological receiving water monitoring data, including but not limited to data describing chemical constituents, water quality parameters, toxicity identification evaluations for receiving water column and sediment, trash impacts; bioassessments, and physical habitat; evidence of erosional impacts due to accelerated flows; and potential improvements in the overall condition of the Watershed Management Area that can be achieved.[114]

- Consideration of the discharge prohibitions of Provision A.1 and effluent limitations of Provision A.3, stormwater and non-stormwater monitoring data; locations of MS4 outfalls that discharge to receiving waters; locations of MS4 outfalls that are known to persistently discharge non-stormwater to receiving waters likely causing or contributing to impacts on receiving water beneficial uses; locations of MS4 outfalls known to discharge pollutants in stormwater causing or contributing to impacts on receiving water beneficial uses; and the potential improvements in the quality of discharges from the MS4 that can be achieved.[115]

- For each priority water quality condition, provision of the following information: the beneficial use(s) associated with the priority water quality condition; the geographic extent of the priority water quality condition; the temporal extent of the priority water quality condition; an assessment of the adequacy of and data gaps in the monitoring data, including spatial and temporal variation.[116]

Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

[114] 2013 Permit, Provision B.2.a.(2)-(9), compared with 2007 Permit Provisions E.2.f, and E.2.c.

[115] 2013 Permit, Provision B.2.b.(1) through (6), compared with 2007 Permit, Provisions E.2.c and E.2.e.

[116] 2013 Permit, Provision B.2.c.(1)(a) through (c), (e), compared with 2007 Permit, Provisions E.2.c and E.2.f.

- Provision of the rationale for selecting a subset of the water quality conditions identified as the highest priorities.[117]

These more specific requirements in the 2013 Permit constitute a higher level of service above and beyond the requirements in the 2007 Permit's Watershed Urban Runoff Management Program. And, like the allegedly "precursor" Watershed Urban Runoff Management Program requirements, the WQIP Mandates are unfunded state mandates.

Further, the State completely disregards the entirely new requirements for implementing and reporting in Provisions B.2.d through B.5 and F, which require the County to undertake, in part, the following significant specific efforts:

- to identify sources of pollutants;[118]
- to identify strategies for improving water quality, including structural and non-structural BMPs, incentives, retrofitting projects, rehabilitation projects, and jurisdictional strategies for each co-permittee within a Watershed Management Area;[119]
- to develop goals and schedules for improving water quality;[120]
- to develop and incorporate an integrated monitoring and assessment program;[121]
- to implement specific steps when engaging in the iterative approach to adapt the WQIP.[122]

The State dismisses these new programs as being part of a WQIP "concept" in the 2007 Permit's Watershed Urban Management Plan.[123] The Watershed Urban Management Plan "concept," however, does not mandate the type and specificity of tasks required in the 2013 Permit's WQIP Mandates. These "new" requirements may be considered "new" WQIP "programs" or "higher levels of service" in an existing

[117] 2013 Permit, Provision B.2.c.(2), compared with 2007 Permit, Provision E.2.c.
[118] 2013 Permit, Provision B.2.d.
[119] 2013 Permit, Provisions B.2.e and B.3.b.
[120] 2013 Permit, Provision B.3.a.
[121] 2013 Permit, Provision B.4.
[122] 2013 Permit, Provision B.5. See also Test Claim at pp. 5-34 through 5-36 for additional new requirements which the State disregards in its Response.
[123] Response at pp. 38-39.

Watershed Urban Runoff Management Plan – either way, the WQIP Mandates are state mandates and fall within the reimbursement requirement of Section 6.[124]

2. The WQIP Mandates are State, Not Federal Mandates

The State next contends that the WQIP Mandates are required by federal law and that the findings of the San Diego Water Board demonstrate that WQIPs are necessary to meet the maximum extent practicable standard and to achieve water quality standards.[125] Neither of these contentions is accurate.

First, the State erroneously contends that the WQIP Mandates "are based entirely on federal law," citing to three federal regulations: 40 C.F.R. §§ 122.26(d)(2)(iv) and 122.26(a)(3)(ii), (v).[126] The California Supreme Court expressly rejected any reliance on permit application requirements in the first regulation (40 C.F.R. ¶ 122.26(d)(2)(iv)) as imposing or compelling the state to impose any specific permit provision.[127] The other two regulations are entirely discretionary in nature, stating that a permit "may" be issued "system-wide covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or … distinct[ly] for appropriate categories of discharges within a large or medium municipal separate storm sewer system"[128] and that "permits … may specify different conditions relating to different

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[124] In a footnote, the State argues that because the County proposed the WQIP in the permit application in accordance with federal requirements, the County should be avoid paying for the programs it actually proposed. Response at p. 40, fn. 235. This argument was expressly rejected by the California Supreme Court, determining that the requirement to propose practices and procedures in a permit application does not equate with a requirement that those proposal be included in the permit. *Dept. of Finance, supra,* 1 Cal.5th at 771-772 ("while the [permittees] were required to include a description of practices and procedures in their permit application, the issuing agency has discretion whether to make those practices conditions of the permit."). This Commission also rejected the State's arguments made during a challenge of the 2007 Permit, stating, "The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants are required by law to submit the NPDES permit application in the form of a Report of Waste Discharge [citation] Submitting it is not discretionary[.]"

[125] Response at pp. 40-41.

[126] Response at p. 40, fn. 240-241.

[127] *Dept. of Finance, supra,* 1 Cal.5th at 771-772 (holding that 40 C.F.R. § 122.26(d)(2)(iv) only requires a permit application "to include a description of practices and procedures" while "the issuing agency has discretion whether to make those practices conditions of the permit.").

[128] 40 C.F.R. § 122.26(a)(3)(ii).

discharges covered by the permit[.]"[129] The California Supreme Court has held that "if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated."[130] Here, the federal laws that the State relies on do not specifically require the WQIP Mandates and only allow the state to exercise its *discretion* to impose system-wide requirements.

Second, the California Supreme Court has held that the general maximum extent practicable standard does not impose or compel the state to impose any specific permit term.[131] Similarly, the general "water quality standards" relied on by the state do not impose or compel the state to impose any specific permit term, including the WQIP Mandates.[132]

Third, the State cites to a single EPA-issued permit, claiming it required the development, implementation, assessment and upgrading of a "Stormwater Management Program (SWMP) Plan.[133] This single permit, however, does not impose requirements with the type of specificity the WQIP Mandates challenged in the present Test Claim.[134] The State has pointed to no EPA-issued permits containing the types of requirements in the WQIP Mandates, which undermines the requirement that the WQIP Mandates are federally required.

Finally, the State claims that the San Diego Water Board found that the WQIP is necessary to meet the maximum extent practicable standard, and that finding is entitled to deference.[135] The cited finding, however, merely recites that the WQIP "is the backbone

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[129] 40 C.F.R. § 122.26(a)(3)(v).

[130] *Dept. of Finance, supra,* 1 Cal.5th at 765.

[131] *Dept. of Finance, supra*, 1 Cal.4th at 768 ("the Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.").

[132] Not only does the State erroneously contend that federal law compels the WQIP Mandates because the "objective of the WQIP is to achieve water quality standards … through implementation of the iterative process … which satisf[ies] the [maximum extent practicable] standard[,]" the State contradicts its previous assertions in Section V.A of the Response, by claiming that the 2013 Permit "does not require strict compliance with water quality standards." Although irrelevant to the federal mandates issue, it cannot be the case that the same iterative process provides a "safe harbor" from the strict application of water quality standards and fails to provide a safe harbor from the strict application of the same general standards.

[133] Response at p. 41.

[134] See Response at p. 41, fn. 243.

[135] Response at p. 41.

of the Regional MS4 Permit requirements."[136] It does not satisfy the standard for deference under *Dept. of Finance* because it is not a technical, "case specific … local factual" finding that the WQIP Mandates are the "only means by which the maximum extent practicable standard could be implemented."[137]

Because the state exercised its discretion under state law authority to impose the WQIP Mandates as new programs or higher levels of service and no exception from Section 6 applies, the state is required to reimburse the County for the cost of developing, implementing, updating, and reporting on the WQIP.

D. Hydromodification Management BMP and BMP Design Manual Update Requirements in the JRMP (Provision E.3.c.(2), E.3.d, and F.2.b).

Provisions E.3.c.(2), E.3.d, and F.2.b of the 2013 Permit (the "BMP Planning Mandates") require the County to develop and implement standards and programs and imposes those standards and programs on "Priority Development Projects," as defined in the 2013 Permit. The BMP Planning Mandates thus require the County to develop and update a BMP Design Manual,[138] which must include, in part, BMPs designed to manage hydromodification generally,[139] and specifically to avoid critical sediment yield areas resulting from development.[140]

The Response separates its response to the BMP Planning Mandates into two sections, apparently because the State misread the Test Claim as seeking reimbursement for the costs of implementing hydromodification management BMPs on County projects. This is not what the Test Claim says. The Test Claim seeks reimbursement for the costs of developing the standards and programs, not for complying with those standards on its own projects. For this reason, this Rebuttal treats the Hydromodification Management and BMP Design Manual Requirements together and refers to them collectively as "BMP Planning Mandates".

Because the mandate that the County exercise its land use authority to develop and implement specific standards on "Priority Development Projects" and to develop and update a BMP Design Manual are new programs or higher levels of service and are imposed under state, not federal, law, subvention is required under Section 6.

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[136] *Ibid.*, citing 2013 Permit, at p. F-42.
[137] *Dept. of Finance, supra,* 1 Cal.5th at 768.
[138] 2013 Permit, Provision E.3.d.
[139] 2013 Permit, Provision E.3.c.
[140] 2013 Permit, Provision E.3.c.(2)(b).

1. The BMP Planning Mandates Are New Programs or Higher Levels of Service

The County contends that the BMP Planning Mandates were required as "minimum requirements" or "comparable" requirements in previous permits and that any "minor modification to incorporate" the BMP Planning Mandates "cannot convert a Permit requirement into a new program [or] … constitute a higher level of service."[141] These contentions are meritless.

First, the State cites only to the "MEP" standard in the 2001 Permit as requiring the hydromodification management component of the BMP Planning Mandates.[142] The MEP standard, however, does not impose any specific requirements.[143] Thus, the 2001 Permit did not impose any requirement relating to a hydromodification management plan.[144] The 2007 Permit required the County to collaborate in the development and implementation of a hydromodification management plan.[145] It did not, however, contain any requirements related to critical sediment yield.[146]

Second, the requirement to develop a hydromodification management plan in the 2007 Permit has been determined to be a state mandate subject to subvention.[147]

Finally, the State admits that the hydromodification management plan will require modifications to incorporate the BMP Planning Mandates.[148] The requirement to modify that plan to incorporate the BMP Planning Mandates is also a state mandate subject to subvention.[149]

2. The BMP Planning Mandates Are State, Not Federal Mandates

The State next contends that the BMP Planning Requirements are based entirely on federal law and are necessary to implement 40 C.F.R. § 122.26(d)(2)(iv)(A)(2) and the

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[141] Response, at pp. 42, 45.
[142] Response, at p. 42.
[143] *Dept. of Finance, supra*, 1 Cal.5th at 768.
[144] See, Test Claim at p. 5-40.
[145] See, Test Claim at p. 5-40.
[146] See, Test Claim at p. 5-40.
[147] Statement of Decision, 07-TC-09 at p. 51 ("The requirement is thus a state mandate subject to subvention").
[148] See Response, at p. 43, citing2013 Permit, at p. F-92.
[149] See *ibid.*

maximum extent practicable standard.[150] The State also contends that the San Diego Water Board's findings that the BMP Planning Requirements were "necessary" to implement the maximum extent practicable standard are entitled to deference,[151] and that the inclusion of plan update requirements in one EPA-issued permit supports that finding.[152] Finally, the State contends that the County proposed the BMP Planning requirements and exercised "the true choice" between various means to comply.[153] All of these contentions are meritless.

First, the California Supreme Court expressly rejected any reliance on permit application requirements in the federal regulations as imposing or compelling the state to impose any specific permit provision.[154] The only federal regulation cited by the State in support of its contentions, 40 C.F.R. §§ 122.26(d)(2)(iv)(A)(2), addresses the required contents of a permit application. The State cites no federal law that imposes the BMP Planning Requirements.

Second, the California Supreme Court has held that the general maximum extent practicable standard does not impose or compel the state to impose any specific permit term.[155]

Third, the State cites no finding that satisfies the standard for deference.[156] The California Supreme Court has held that without a case-specific factual finding, based on the board's "technical experience" that the Challenged Permit Provisions were the ***only means*** by which the MEP standard could be implemented, the state's findings are not entitled to deference by this Commission or by any court. The state's findings do not satisfy the "only means" standard and are not entitled to deference.

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[150] Response at pp. 43, 45. 40 C.F.R. § 122.26(d)(2)(iv)(A)(2) provides, in part, that a permit application must include "[a] proposed management program [that] covers the duration of the permit."

[151] Response at pp. 44-45.

[152] Response at p. 46.

[153] Response at p. 44.

[154] *Dept. of Finance, supra*, 1 Cal.5th at 771-772 (holding that 40 C.F.R. § 122.26(d)(2)(iv) only requires a permit application "to include a description of practices and procedures" while "the issuing agency has discretion whether to make those practices conditions of the permit.").

[155] *Dept. of Finance, supra*, 1 Cal.4th at 768 ("the Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.").

[156] *Dept. of Finance, supra*, 1 Cal.5th at 768.

Fourth, as with the same single permit cited by the State, discussed under Section II.C.2, above, the single EPA issued permit does not support the State's contention here, especially when EPA issued a permit the same year that did not include any hydromodification management plan requirements, much less a requirement to develop and update a BMP Design Manual.[157] Each of these contentions is meritless.

Finally, the California Supreme Court rejected the same argument raised by the State here, that the County's permit application somehow limited its discretion or denied it a true choice.[158]

3. No Other Mandates Exceptions Apply

The State finally contends that any costs associated with the BMP Planning Mandates are *de minimis*, that the County only incurs costs when it voluntarily undertakes a Priority Development Project, and that the County has fee authority to pay for the costs of implementing the BMP Planning Mandates.[159]

The costs associated with the BMP Planning Mandates are not *de minimis*. The Declaration of Jon Van Rhyn, submitted with the Test Claim demonstrates costs of more than $100,000 per year to comply with the BMP Planning Mandates.[160] Although "*de minimis*" costs are not defined, costs in the hundreds of thousands of dollars are not *de minimis*.

As noted above, the County is not seeking reimbursement for costs incurred in its own Priority Development Projects.

Finally, the County has addressed the fee authority issue in Sections I.C and III, and incorporates that rebuttal here.

Because the state exercised its discretion under state law authority to impose the BMP Planning Mandates as new programs or higher levels of service and no exception from Section 6 applies, the state is required to reimburse the County for the cost of developing and implementing standards and programs for the BMP Planning Mandates.

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[157] See Boise/Garden City Area MS4 Permit, US EPA Permit No. IDS-027561, issued December 12, 2012, attached to this Rebuttal as Attachment 2.

[158] *Dept. of Finance, supra,* 1 Cal.5th at 771-772; see also Response at p. 44.

[159] Response at pp. 44, 46.

[160] Test Claim, p. 6-5, Declaration of Jon Van Rhyn, ¶ 8.d.

E. Residential Inventory and Inspection Program (Provision E.5.a, E.5.c.(1)(a), E.5.c.(2)(a), and E.5.c.(3).

Provisions E.5.a, E.5.c.(1)(a), E.5.c.(2)(a), and E.5.c.(3) of the 2013 Permit (collectively, the "Residential Program Mandates") require the County to maintain and update a watershed-based inventory of existing development that may discharge a pollutant load to and from the MS4. 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 requires the County to inspect the existing development included on the inventory at minimum intervals and for specific occurrences. Federal law does not, and previous MS4 permits issued to the County did not, require the Residential Program Mandates. Because the requirements to maintain and update an inventory and map, and conduct inspections of properties on the inventory are new programs or higher levels of service and are imposed under state, not federal, law, subvention is required under Section 6.

1. The Residential Program Mandates Are a New Program or Higher Level of Service.

The State contends that the Residential Program Mandates do not create new programs or higher levels of service for all the reasons that the County has rebutted in Section I, above.[161] The County incorporates its rebuttal here.

The State then admits that the Residential Program Mandates "build upon existing program elements," but cites to program elements for *development projects* rather than *existing development.*[162] The Residential Program Mandates constitute new programs or higher levels of service for the reasons set forth in the Test Claim, which the State's Response does not address.[163] The County incorporates those provisions here.

Finally, rather than providing more "flexibility" as the State claims, the Residential Program Mandates impose additional inventory, mapping, and inspection obligations that require the County to provide higher levels of service within its jurisdiction. The cost of the increased level of service is set forth in the Declaration of Jon Van Rhyn, in an amount of more than $2,000,000.[164]

The Residential Program Mandates are new programs or higher levels of service requiring subvention under Section 6.

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[161] Response at p. 46.
[162] Response at p. 46.
[163] Test Claim at pp. 5-41 through 5-44.
[164] Test Claim at pp. 6-5 through 6-6, Declaration of Jon Van Rhyn at ¶ 8.e.

2. The Residential Program Mandates Are a State, Not a Federal, Mandate

The State again contends that the Residential Program Mandates are required by 40 C.F.R. § 122.26(d)(2)(iv) and the general "maximum extent practicable" standard, and urges the Commission to defer to findings that fail to meet the standard for deference established by the California Supreme Court in *Dept. of Finance*.[165] These contentions are meritless.

First, the California Supreme Court expressly rejected any reliance on permit application requirements in the federal regulation as imposing or compelling the state to impose any specific permit provision.[166] The only federal regulation cited by the State in support of its contentions, 40 C.F.R. §§ 122.26(d)(2)(iv), addresses the required contents of a permit application. The State cites no federal law that imposes the Residential Program Mandates.

Second, the California Supreme Court has held that the general maximum extent practicable standard does not impose or compel the state to impose any specific permit term.[167]

Third, the State cites no finding that satisfies the standard for deference.[168] Here, the State relies on findings that the Residential Program Mandates are "essential" and "effectively address pollutant flows from existing development."[169] The California Supreme Court, however, has held that without a case-specific factual finding, based on the board's "technical experience," that the Challenged Permit Provisions were the ***only means*** by which the MEP standard could be implemented, the state's findings are not entitled to deference by this Commission or by any court.[170] The state's findings do not satisfy the "only means" standard and are not entitled to deference.

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[165] Response at p. 47.

[166] *Dept. of Finance, supra,* 1 Cal.5th at 771-772 (holding that 40 C.F.R. § 122.26(d)(2)(iv) only requires a permit application "to include a description of practices and procedures" while "the issuing agency has discretion whether to make those practices conditions of the permit.").

[167] *Dept. of Finance, supra*, 1 Cal.4th at 768 ("the Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.").

[168] *Dept. of Finance, supra,* 1 Cal.5th at 768.

[169] Response at p. 47.

[170] *Dept. of Finance, supra,* 1 Cal.4th at 768.

3. No Other Mandates Exception Applies

The State again contends that the costs to comply with the Residential Program Mandates are *de minimis* and that the County has fee authority.[171] Notably, the State argues that residential inspection fees can be considered fees for doing business and that the County has "*authority to charge"* fees regardless of Proposition 218. These contentions are meritless for all the reasons set forth in Section I.C, above, which the County incorporates here.

First, the costs associated with the Residential Program Mandates are not *de minimis*. The Declaration of Jon Van Rhyn, submitted with the Test Claim demonstrates costs of more than $2,000,000 to comply with the new Residential Program Mandates.[172] Although "*de minimis*" costs are not defined, costs in the millions of dollars are not *de minimis*.

Second, the State argues elsewhere in more detail, that a fee to fulfill the residential inspection requirement in Provision E.5.c of the 2013 Permit, imposed unilaterally by the County, would not violate Proposition 218, based on the holding of *Apartment Assn of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 844-845.[173] This position is entirely unfounded. In *Apartment Assn*, there was no violation of Proposition 218 because the fee was imposed on landlords in their capacity as business owners, not as property owners and ceased when the business operation ceased. The Challenged Permit Provisions related to the residential inspection requirements do not attach to residences operated as businesses, but only to residences used as residences. A fee imposed on a residence *as a residence* is a quintessential property-related fee.[174]

Because the state exercised its discretion under state law authority to impose the Residential Program Mandates as new programs or higher levels of service and no exception from Section 6 applies, the state is required to reimburse the County for the costs to maintain and update an inventory and map, and conduct inspections.

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[171] Response at p. 47.

[172] Test Claim, p. 6-5, Declaration of Jon Van Rhyn, ¶ 8.d.

[173] Response at p. 27, fn. 159.

[174] *Id.* at p. 838 ("the city is correct that article XIII D only restricts fees imposed directly on property owners in their capacity as such. The inspection fee is not imposed solely because a person owns property. Rather, it is imposed because the property is being rented. It ceases along with the business operation, whether or not ownership remains in the same hands. For that reason, the city must prevail.").

F. Retrofit and Rehabilitation of Exhibiting Development and Streams (Provision E.5.e.1, E.5.e.2).

Provision E.5.e of the 2013 Permit requires the County to develop a program to retrofit areas of existing development and to rehabilitate streams, channels, and habitats in areas of existing development (collectively, the "Retrofit and Rehab Mandates"). Federal law does not, and previous MS4 permits issued to the County did not, require the Retrofit and Rehab Mandates. Because the requirements to develop retrofitting and rehabilitation programs are new programs or higher levels of service and are imposed under state, not federal, law, subvention is required under Section 6.

1. The Retrofit and Rehab Mandates Are New Programs or Higher Levels of Service

The County contends that the Retrofit and Rehab Mandates do not create new programs or higher levels of service for all the reasons that the County has rebutted in Section I, above.[175] The County incorporates its rebuttal here.

The State then admits that the Retrofit and Rehab Mandates create a new program, stating "that the challenged provisions … require the Copermittee to develop a program of strategies to facilitate the implementation of these types of projects."[176] This constitutes an admission that the Retrofit and Rehab Mandates require the County to "*develop a program of strategies to facilitate the implementation of these types of projects*." The Retrofit and Rehab Mandates create a new program for purposes of Section 6 and require subvention.[177]

2. The Retrofit and Rehab Mandates Are State, Not Federal, Mandates

The State admits that federal regulations "do not explicitly require" the Retrofit and Rehab Mandates.[178] Despite this admission, the State claims that they "flow from the requirements to control pollutants in discharges to the MEP standard and to effectively prohibit non-stormwater discharges to the MS4, and urges the Commission to defer to findings that fail to meet the standard for deference established by the California Supreme Court in *Dept. of Finance*.[179] These contentions are meritless.

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[175] Response at p. 46.

[176] Response at p. 48.

[177] The State also contends the Retrofit and Rehab Mandates are not new programs or higher levels of service for all the reasons.

[178] Response at p. 48.

[179] Response at p. 47.

First, the California Supreme Court has held that the general maximum extent practicable standard does not impose or compel the state to impose any specific permit term.[180] The same reasoning applies to the "effectively prohibit" requirement as set forth in greater detail in Section I.C.1.c, above.

Second, the State cites no finding that satisfies the standard for deference.[181] Here, the State relies on a finding that the Retrofit and Rehab Mandates are "necessary to address stormwater discharges from existing development that may cause or contribute to a condition of pollution or a violation of water quality standards."[182] The California Supreme Court has held that, without a case-specific factual finding based on the board's "technical experience" that the Challenged Permit Provisions were the *only means* by which the MEP standard could be implemented, the state's findings are not entitled to deference by this Commission or by any court.[183] The state's findings do not satisfy the "only means" standard and are not entitled to deference.

3. No Other Mandates Exception Applies

The State asserts that the costs to comply with the Retrofit and Rehab Mandates are *de minimis* and that the County has fee authority for all the reasons rebutted in Section I, above.

The costs associated with the Retrofit and Rehab Mandates are not *de minimis*. The Declaration of Jon Van Rhyn, submitted with the Test Claim demonstrates costs of more than $110,000 to plan and develop a retrofit and stream rehabilitation program over two fiscal years.[184] Although "*de minimis*" costs are not defined, costs of a hundred thousand dollars are not *de minimis*.

Because the state exercised its discretion under state law authority to impose the Retrofit and Rehab Mandates as new programs or higher levels of service and no exception from Section 6 applies, the state is required to reimburse the County for the costs to plan and develop a retrofit and stream rehabilitation program.

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[180] *Dept. of Finance, supra*, 1 Cal.4th at 768 ("the Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.").

[181] *Dept. of Finance, supra,* 1 Cal.5th at 768.

[182] Response at p. 49, citing 2013 Permit, Finding 17.

[183] *Dept. of Finance, supra,* 1 Cal.4th at 768.

[184] Test Claim, p. 6-6, Declaration of Jon Van Rhyn, ¶ 8.f.

G. Jurisdictional Runoff Management Plan Update (Provision F.2.a).

Provision F.2.a of the 2013 Permit requires the County to undertake five updates to the Jurisdictional Runoff Management Program ("JRMP") document (the "JRMP Mandate"). Federal law does not, and previous MS4 permits issued to the County did not, require the JRMP Mandates. Because the requirements to update the JRMP are new programs or higher levels of service and are imposed under state, not federal, law, subvention is required under Section 6.

1. The JRMP Mandate Is a New Program or Higher Level of Service

The State contends that the requirement to undertake five specific updates to the JRMP does not create a new program or higher level of service because requirements to prepare and update a JRMP were included in prior permit and the additional specificity required by the five updates alone "cannot convert a requirement into an "unfunded mandate."[185] These contentions are meritless.

First, the State admits that the five required updates are new requirements in the 2013 Permit.[186] It is thus irrelevant that prior permits required updated JRMPs, because the update requirements in prior permits did not include the JRMP Mandates at issue here.[187]

Second, *City of Richmond* does not hold that additional specificity cannot convert a requirement into an unfunded mandate.[188] *City of Richmond* addressed the issue of whether a state mandate was unique to local government. It relied on the case of *Carmel Valley Fire Protection District*, which did address the issue of "additional specificity" and determined that an "executive order requir[ing] updated equipment for the fighting of fires" constituted a higher level of service.[189] As in *Carmel Valley Fire Protection District*, the requirement to update the JRMP, in order to "guide … runoff management

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[185] Response at p. 50, citing *City of Richmond, supra*, 64 Cal.App.4th at pp. 1195-1196.

[186] Response at p. 50 ("the prior permit did not include the listing of five specific elements.").

[187] Further, as set forth in the following section, this Commission determined that the requirements of the prior permits were unfunded state mandates.

[188] Response at p. 50.

[189] *City of Richmond, supra*, 64 Cal.App.4th at p. 1196.

efforts and aid … in tracking runoff management program implementation," creates a higher level of service under Section 6 and is subject to subvention.[190]

2. The JRMP Mandate Is a State, Not a Federal, Mandate

The State next contends that the JRMP Mandate are necessary to implement 40 C.F.R. § 122.26(d)(2)(iv) and the maximum extent practicable standard.[191] It argues that updates to the JRMP are "essential to … achieving federal water quality standards through the iterative process," noting that the EPA "anticipates storm water management programs will evolve" and that EPA "envisions application of the MEP standard as an iterative process … to provide for attainment of water quality standards."[192] The State also urges the Commission to defer to findings that the 2013 Permit Provision "are exclusively based on federal law and necessary to achieve the MEP standard[,]" and contends that the inclusion of storm water management plan update requirements in one EPA-issued permit supports that finding.[193] These contentions are meritless.

First, the California Supreme Court expressly rejected any reliance on permit application requirements in the federal regulation as imposing or compelling the state to impose any specific permit provision.[194] The only federal regulation cited by the State in support of its contentions, 40 C.F.R. §§ 122.26(d)(2)(iv), addresses the required contents of a permit application. The State cites no federal law that imposes the JRMP Mandate.

Second, the California Supreme Court has held that the general maximum extent practicable standard does not impose or compel the state to impose any specific permit term.[195] The same reasoning applies to general references in the federal register to an "iterative process" that "will evolve" to "provide for the attainment of water quality standards."

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[190] Response at p. 50, citing 2007 Permit, Provision D.1.c.

[191] Response at pp. 50-51.

[192] Response at p. 51, fn. 288.

[193] Response at p. 51.

[194] *Dept. of Finance, supra*, 1 Cal.5th at 771-772 (holding that 40 C.F.R. § 122.26(d)(2)(iv) only requires a permit application "to include a description of practices and procedures" while "the issuing agency has discretion whether to make those practices conditions of the permit.").

[195] *Dept. of Finance, supra*, 1 Cal.4th at 768 ("the Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.").

Third, the State cites no finding that satisfies the standard for deference.[196] The California Supreme Court has held that without a case-specific factual finding, based on the board's "technical experience" that the Challenged Permit Provisions were the ***only means*** by which the MEP standard could be implemented, the state's findings are not entitled to deference by this Commission or by any court. The state's findings do not satisfy the "only means" standard and are not entitled to deference.

Fourth, as with the same single permit cited by the State discussed under Section II.C.2, above, a single EPA issued permit does not support the State's contention, especially when EPA issued a permit the same year that included a stormwater management program, but *did not mandate* updates to the program document, stating instead, that "Permittees may request changes to any [stormwater management program] action or activity[.]"[197]

3. No Other Mandates Exception Applies

The State finally contends that any costs associated with the JRMP Mandate are *de minimis*, and that the County has fee authority to pay for the costs of implementing the JRMP Update Mandate.[198]

The costs associated with the JRMP Mandate are not *de minimis*. The Declaration of Jon Van Rhyn, submitted with the Test Claim demonstrates costs of more than $242,000 to comply with the JRMP Update Mandate.[199] Although "*de minimis*" costs are not defined, costs in the hundreds of thousands of dollars are not *de minimis*.

Finally, the County has addressed the fee authority issue in Section I.C, above, and incorporates that rebuttal here.

Because the state exercised its discretion under state law authority to impose the JRMP Mandate as a new program or higher level of service and no exception from Section 6 applies, the state is required to reimburse the County for the cost of developing and implementing standards and programs for the JRMP Mandate.

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[196] *Dept. of Finance, supra*, 1 Cal.5th at 768.

[197] See Boise/Garden City Area MS4 Permit, US EPA Permit No. IDS-027561, at II.D.2, issued December 12, 2012.

[198] Response at p. 51.

[199] Test Claim, p. 6-5, Declaration of Jon Van Rhyn, ¶ 8.d.

H. Requirement to Appear Before San Diego Water Board (Provision F.3.a).

Provision F.3.a of the 2013 Permit requires the County to appear before the San Diego Water Board on request of the San Diego Water Board and provide progress reports on WQIP implementation and jurisdictional runoff management programs (the "Appearance Mandates"). Federal law does not, and previous MS4 permits issued to the County did not, require the Appearance Mandates. Because the requirement to appear before the San Diego Water Board on request are new programs or higher levels of service and are imposed under state, not federal, law, subvention is required under Section 6.

1. The Appearance Mandate Is a New Program or Higher Level of Service

The State contends that the Appearance Mandate does not impose a new program or higher level of service for all the reasons rebutted in Section I.B, above. The County incorporates its rebuttal here.

The State also contends that the Appearance Mandate does not impose a new program or higher level of service because a reporting requirement was included in the 2007 permit pursuant to 40 C.F.R. section 122.41(h).[200] This section of the federal regulations, however, sets out specific conditions applicable to all permits and imposes, in part, a "duty to provide information … [and] to furnish … copies of records required to be kept" (the "duty to provide information"). This duty to provide information is repeated, nearly verbatim, in the 2007 Permit[201] and 2013 Permit.[202]

The Test Claim, however, does not allege or seek reimbursement for the duty to provide information in the 2013 Permit. The Appearance Mandate is separate from the duty to provide information and appears in a separate Provision, at Provision F.3.a. As set forth in the Test Claim, the Appearance Mandate imposes requirements above and beyond the "duty to provide information" in 40 C.F.R. section 122.41(h) and the 2007 and 2013 Permits.[203]

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[200] Response at p. 52.
[201] 2007 Permit, Attachment B, Provision 5(a).
[202] 2013 Permit, Attachment B, Provision 1.h.
[203] Test Claim at pp. 5-51 through 5-52.

2. The Appearance Mandate Is a State, Not a Federal, Mandate

The State next contends that the State Water Board's general finding that the Appearance Mandate is "necessary to achieve the MEP and based entirely on federal law" is entitled to deference.[204] The State also contends that the inclusion of an in-person annual reporting requirement in one EPA-issued permit supports that finding.[205] Finally, the State contends 40 C.F.R. section 122.41(h) imposes an in-person appearance requirement.[206] These contentions are meritless.

First, the State cites no finding that satisfies the standard for deference.[207] The California Supreme Court has held that without a case-specific factual finding, based on the board's "technical experience" that the Challenged Permit Provisions were the ***only means*** by which the MEP standard could be implemented, the state's findings are not entitled to deference by this Commission or by any court. The state's findings do not satisfy the "only means" standard and are not entitled to deference.

Second, the California Supreme Court has held that the general maximum extent practicable standard does not impose or compel the state to impose any specific permit term.[208]

Third, as with the same single permit cited by the State under Section II.C.2, above, the single EPA issued permit does not support the State's contention, especially when EPA issued a permit the same year that did not include any in-person meeting requirements.[209]

Finally, as noted above, 40 C.F.R. section 122.41(h) sets out specific conditions applicable to all permits and imposes, in part, a "duty to provide *information* … [and] to furnish … *copies of records* required to be kept[.]" (Emphasis added). The Appearance Mandate is separate from the requirement in 40 C.F.R. section 122.41(h), which is included in Attachment B, Provision 1.h of the 2013 Permit. The Appearance Mandates

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[204] Response at p. 52.
[205] Response at p. 52.
[206] Response at p. 52.
[207] *Dept. of Finance, supra*, 1 Cal.5th at 768.
[208] *Dept. of Finance, supra*, 1 Cal.4th at 768 ("the Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.").
[209] See Boise/Garden City Area MS4 Permit, US EPA Permit No. IDS-027561, issued December 12, 2012.

imposes requirements above and beyond the "duty to provide information" in 40 C.F.R. section 122.41(h) and the 2013 Permit, as set forth in the Test Claim.[210]

3. No Other Mandates Exception Applies

The State finally contends that any costs associated with the Appearance Mandate are *de minimis*, and that the County has fee authority to pay for the costs of implementing the JRMP Update Mandate.[211]

The costs associated with the Appearance Mandate are not *de minimis*. The Declaration of Jon Van Rhyn, submitted with the Test Claim recognizes that actual costs are unknown but are estimated to exceed $1,000 per appearance.[212] Although "*de minimis*" costs are not defined, costs in the thousands of dollars over time are not *de minimis*.

Finally, the County has addressed the fee authority issue in Section I.C, above, and incorporates that rebuttal here.

Because the state exercised its discretion under state law authority to impose the JRMP Update Mandate as a new program or higher level of service and no exception from Section 6 applies, the state is required to reimburse the County for the cost of developing and implementing standards and programs for the Appearance Mandate.

III. FUNDING-BASED REBUTTAL COMMENTS

The purpose of Section 6 "is to protect the tax revenues of local government from state mandates that would require expenditure of such revenues."[213] If a "local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service" then costs are not mandated by the state for purposes of Section 6.[214] Article XIII C of the California Constitution, however, defines virtually any revenue-generating device enacted by a local government to be a **tax** requiring voter approval, unless it falls within certain enumerated exceptions.[215]

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[210] Test Claim at pp. 5-51 through 5-52.

[211] Response at pp. 51.

[212] Test Claim, p. 6-7, Declaration of Jon Van Rhyn, ¶ 8.h.

[213] *County of Fresno, supra*, 53 Cal.3d at 487; *Redevelopment Association, supra*, 55 Cal.App.4th at 984-985.

[214] Gov. Code, § 17556, subd. (d).

[215] Cal. Const., art. XIII C § 1(e).

Thus, a service charge, fee, or assessment is a tax unless it satisfies one of the following exemptions:

> (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***.
> …
> (7) ***Assessments and property-related fees*** imposed in accordance with the provisions of Article XIII D.[216]

Stated alternatively, a local government does not have authority to levy non-tax charges, fees, or assessments (collectively, "charge") under Section 6 unless, in relevant part, either:

(1) the charge
  (a) confers a "special benefit," "privilege" or "service" on those paying the charge that is not conferred on those not paying; and
  (b) does not exceed the reasonable cost to the local government of conferring the benefit or privilege; or
(2) property owners
  (a) receive a "public service" directly related to their property ownership; and
  (b) approve by a majority vote the imposition or increase of the property-related fee or charge.[217]

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[216] Cal. Const., art. XIII C, § 1(e).

[217] Cal. Const., art. XIII C, § 1(e). "Fees or charges for sewer, water, and refuse collection services" are excepted from the voter approval requirement of Article XIII D of the California Constitution. Stormwater fees are not excepted from Article XIII D. (*Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351 (striking down a fee enacted to fund the city's stormwater program based on the impervious area of each parcel as a measure of the degree to which property contributed runoff to the drainage facility and requiring voter approval pursuant to Article XIII D).

The State contends, without any support, that the County "can levy fees[,]" that "Proposition 26 specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes[,]" and that the County has the ability to charge fees or assessments to cover development program costs."[218] Nowhere does the State demonstrate how the Challenged Permit Programs confer a special benefit, privilege, or service on those who would pay the charge that is not conferred on those not paying or identify any particular property owner who receives a service from the Challenged Permit Provisions as a consequence of their property ownership or development.[219]

Contrary to the State's unsupported assertions, the County does not have authority to levy non-property related charges ((1) above) because the Challenged Permit Provisions do not confer a special benefit, privilege, or service on any particular person, making it impossible for the County to allocate the cost of the Challenged Permit Provisions to particular persons.[220] The Challenged Permit Provisions require the County to develop programs and perform activities throughout its jurisdiction. As the State itself repeatedly asserts, the programs are intended to improve the overall water quality of receiving waters, which provides a benefit to all persons within the County's jurisdiction.[221]

Not only do none of the Challenged Permit Provisions provide a specific benefit, the State does not and cannot identify a particular group of payors who would benefit

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[218] Response at p. 26.

[219] In a footnote, the State argues that a fee to fulfill the residential inspection requirement in Provision E.5.c of the 2013, imposed unilaterally by the County, would not violate Proposition 218, based on the holding of *Apartment Assn of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 844-845. Response at p. 27, fn. 159. See Section II.E.3 for a rebuttal of this argument.

[220] See Test Claim at pp. 5-52 through 5-53.

[221] Response at p. 21, citing 2013 Permit, Fact Sheet, p. F-30 ("the requirements of this Order … are necessary to reduce the discharge of pollutants to the MEP and to protect water quality"); Response at p. 30, citing 2013 Permit, Finding 31.a (the Receiving Water Limitations Provision, Provision A.2 "was necessary to satisfy the MEP standard"); Response at p. 36 ("the purpose of the TMDLs is to address identified impairments for waters not meeting water quality standards."); Response at p. 40, citing 2013 Permit Provision A.4 ("implementation of the WQIP embodies the iterative process determined to satisfy the MEP standard"); Response at p. 43 (the hydromodification management requirements in Provision E.3.c.(2) are "necessary to implement the MEP"); Response at pp. 45, 47, 48, 50, 52 (same).

from the Challenged Permit Provisions in a way that non-payors would not benefit.[222] As set forth in more detail in the Test Claim,[223] because the benefits and services provided by implementing the Challenged Permit Provisions extend to all persons in the County's jurisdiction, the County cannot develop or implement a service charge or fee that allocates the costs to specific individuals who receive a unique benefit from the Challenged Permit Provisions.[224]

To the extent the State asserts, without any support, that the costs of the Challenged Permit Provisions constitute a "public service" directly related to property ownership ((2) above), the County does not have authority to impose a fee without approval from those property owners.[225] Voter approval is thus a condition precedent to the County's authority to impose any property-related fee for the Challenged Permit Provisions. The County therefore lacks authority to impose property-related fees for purposes of Section 6.

The State contends that even though Articles XIII C and XIII D of the California Constitution require voter approval before the County can impose a property-related fee, this does not mean the County lacks authority.[226] The State points to six cities that have received voter approval for such fees.[227] This contention is meritless and has already

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[222] Compare Cal. Const., art. XIII C, § 1(e)(1) and (e)(2) with Response at p. 25-27.

[223] Test Claim at p. 5-52 through 5-53.

[224] The State also asserts, without any support, that the cost of the Challenged Permit Provisions is *de minimis*. The Declaration of Jon Van Rhyn, submitted with the Test Claim demonstrates costs of more than $250,000,000 per year to implement the Challenged Permit Provisions. Although "*de minimis*" costs are not defined, costs in the millions of dollars are not *de minimis*.

[225] The verbs "levy" and "impose" are interchangeable. *See, e.g., Howard Jarvis Taxpayers' Ass'n, supra,* 40 Cal.App.4th at 1373 (stating that "impose" is synonymous with "levy," which means to impose, levy, or collect a tax, tribute, fine, or other payment); *Dare v. Lakeport City Council*, 12 Cal. App.3d 864, 868 (1970) (using the word "impose" to refer to a tax, fee, or burden imposed by ordinance or other legislative action). *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 57 ("local governments may levy and spend"); *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761,1770 (t]he phrase "to impose" is generally defined to mean to establish or apply by authority or force, as in "to impose a tax.". . . As applicable here, the phrase refers to the *creation* of a condition or fee by authority of local government; it is not synonymous with the act of *complying* with that condition or fee.")

[226] Response at pp. 26-27, citing *Connell v .Sup. Ct.* (1997) 59 Cal.App.4th 3821, 398 and *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 812.

[227] Response at pp. 26-27.

been rejected by this Commission.[228] In rejecting the same argument the State makes here, the Commission found 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. … Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owner. … Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the 'authority,' i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program.[229]

Just as this Commission has rejected the State's reliance on *Connell*, the State's reliance on *Clovis* is misplaced.[230] The school district in *Clovis* was authorized to unilaterally collect health fees, but voluntarily chose not to do so.[231] The school district was not required to obtain voter approval prior to collecting the health fees. Here, the County collection of property-related fees is not a unilateral decision; it is subject to voter approval under Section 6.

Further, if the Commission were to accept the State's position that the County has "authority" to impose fees despite the voter approval requirement of Proposition 218, it will effectively eliminate the purpose of Section 6. The State will always argue that it has no duty to fund its mandates on local government when local government can submit a fee to the voters. Such a result is entirely contrary to the purpose of Section 6.

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[228] Statement of Decision, Test Claim 07-TC-09 at p. 106 (The Commission finds that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners.").

[229] Statement of Decision, Test Claim 07-TC-09 at pp. 106-107.

[230] Response at pp. 26-27.

[231] *Clovis, supra*, 188 Cal.App.4th at 810.

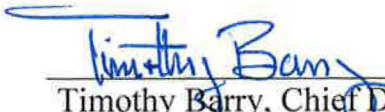
The Challenged Provisions in the 2013 Permit constitute state mandated new programs or higher levels of service unique to local governments for which the County lacks authority to levy charges sufficient to pay the costs of the mandated programs and services.

CONCLUSION

For the foregoing reasons, each of the Challenged Permit Provisions is an unfunded state mandate requiring a subvention of funds pursuant to Section 6.

DECLARATION

Pursuant to Title 2, Section 1183.3 of the California Code of Regulations, I certify that this Rebuttal is true and complete to the best of my personal knowledge or information or belief and further declare that all documents attached to this Rebuttal are true and correct copies of court decisions and administrative decisions cited in the Rebuttal and not otherwise cited in the Test Claim or Response as those decisions are available through Westlaw and from publicly available sources.



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ATTACHMENTS TO REBUTTAL IN SUPPORT OF TEST CLAIM 14-TC-03
State Court Decisions

1. *Dare v. Lakeport City Council*, 12 Cal. App.3d 864, 868 (1970)
2. *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 57
3. *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761,1770

Administrative Decisions

4. State of Washington, Phase I Municipal Stormwater Permit, National Pollutant Discharge Elimination System and State Waste Discharge General Permit for Discharges from Large and Medium Municipal Separate Storm Sewer Systems, issued Aug. 1, 2012, as modified Aug. 19, 2016
5. Boise/Garden City Area MS4 Permit, US EPA Permit No. IDS-027561, issued December 12, 2012.

Attachment 1

12 Cal.App.3d 864, 91 Cal.Rptr. 124

DICK DARE et al., Plaintiffs and Appellants,
v.
LAKEPORT CITY COUNCIL et al., Defendants and Respondents

Civ. No. 27449.
Court of Appeal, First District, Division 1, California.
November 9, 1970.

SUMMARY

Plaintiffs, the proponents of an initiative petition to amend a city ordinance by adding provisions fixing the maintenance fees to be charged domestic consumers and commercial users for the operation of a sewage system, sought by superior court mandate proceedings to compel the city council to accept and take proper action on the petition. The superior court entered judgment denying mandate. (Superior Court of Lake County, Lincoln F. Mahan, Judge. *)

On appeal, the judgment was affirmed. The Court of Appeal pointed out that the imposition and collection of fees for the use of facilities of a municipal sewer district must reasonably be considered a taxation function and held that the initiative process is not available to amend that portion of a municipal ordinance providing for the city council's determination of the manner of fixing charges for the connection and use of sewer facilities.

* Assigned by the Chairman of the Judicial Council. (Opinion by Elkington, J., with Molinari, P. J., and Sims, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b)
Municipal Corporations § 253(0.5)--Initiative--Scope of Power:Streets § 460--Sewers--Assessments.
Permitting the exercise of initiative powers to amend a city ordinance so as to impose a flat monthly charge on private residences for the operation of the city's sewerage system, and to base a commercial user's maintenance fee on water consumption, would necessarily defeat the intent of Health & Saf. Code, § 5471, that the sewer district's governing body "prescribe" and "revise" the charges for its sewer facilities and services.

[See **Cal.Jur.2d, Rev.,** Drains and Sewers, § 3; **Am.Jur.,** Municipal Corporation (1st ed § 565).]

(2)
Highways, Streets, and Bridges § 460--Sewers--Assessments:Taxation § 2(1)--Definitions.
Taxes are burdens imposed by legislative power on persons or property to raise money for public purposes, and the imposition and collection of fees for the use of facilities of a municipal sewer district must be considered a taxation function.

(3)
Highways, Streets, and Bridges § 460--Sewers--Assessments.
The power of municipal sewer districts to assess and collect taxes for sewer facilities is derived from the state Constitution (art. XI, § 12), pursuant to which the Legislature, by Health & Saf. Code, § 5471, has enabled the legislative body of a municipal sewer district to prescribe, revise and collect fees, tolls, rates, rentals or other charges for services and facilities furnished by it.

(4)
Municipal Corporations § 253(1)--Initiative--Scope of Power-- Application of Rules:Highways, Streets, and Bridges § 460--Sewers--Assessments.
The initiative process is not available to amend a portion of a municipal ordinance providing for the city council's determination of the manner of fixing charges for the connection and use of sewer facilities.

COUNSEL
Crump, Bruchler & Crump for Plaintiffs and Appellants.
W. J. Harpham for Defendants and Respondents.

ELKINGTON, J.

Appellants were proponents of an initiative petition filed with the Lakeport City Council which was the governing body of Lakeport Municipal Sewer District No. 1. The petition concededly met the requirements of Elections Code sections 4000-4023 and 5150-5162. Upon advice of its counsel that the petition's object was not a proper

subject of the initiative process the city council "refused" the petition. Its proponents then sought by superior court mandate proceedings to compel the city council to accept, and thereafter take proper action on, the petition. Following a trial, the superior ***866** court found against the proponents and entered judgment denying mandate. It is from that judgment that the instant appeal is taken.

Lakeport is what is commonly known as a general law city; it does not function under a municipal charter. Lakeport Municipal Sewer District No. 1 is a regularly organized municipal sewer district, governed, as stated, by the Lakeport City Council. The sewer district contains within its boundaries all of Lakeport and some outside territory.

The city council had enacted Ordinance No. 427, "Providing for and establishing the method of prescribing rules, regulations, rates, payment and collection of the various service charges for the operation of the sewerage system thereof, and fixing the penalty for the violation thereof." As relevant the ordinance provided: "Section V. Maintenance Fees: The City Council shall prescribe by Resolution, the charges, times and manner of collection, of all sewer maintenance fees.

"The City Council may by Resolution, classify, or define various kinds of domestic sewage in accordance with their relative effects upon the operation of the sewerage system, and may provide for varying maintenance charges, in accordance with the relative difficulty or cost to the District of acceptance and treatment thereof.

"Section VI. Uniformity of Rules. All rules, fees, charges, or regulations provided for by this Ordinance shall be uniform throughout the District. ..."

([1a]) The initiative petition would have amended Ordinance 427 by adding the following paragraphs:

"(A) The maintenance fee to be collected from each domestic user shall be based upon the minimum water usage for which the City bills each domestic consumer, that is, it may be more or less than 100% of the minimum water billing per residence, or per residence structure as the case may be, and in any event it shall be a flat monthly charge for all private residences.

"(B) The maintenance fee to be collected from each commercial user shall be based upon the water consumption of such commercial user, as shown by the water meter of such consumer; and may be equal to or a percentage, whether more or less than 100% of the water billing for such user for the same period.

"(C) In each case where no metered water is supplied to a commercial user, at the option of the user, his water supply may be metered at his cost, or the District may provide for determining the fee based on the nearest like metered user. ***867**

"(D) In all cases in which a commercial user's water consumption, or a substantial portion thereof, does not produce sewage, he shall be entitled to a hearing thereon, and credit for the portion of the water consumption not resulting in sewage. The procedures, rules and regulations for such hearings and determinations shall be prescribed by resolution."

The principal issues presented to this court seem to resolve themselves to the question whether Ordinance 427, sections V and VI, and the proposed initiative amendment are, or would be, an ordinance "providing for tax levies."

California's Constitution, article IV, section 23 (the substance of which was formerly found in article IV, section 1, repealed 1966), provides that the *referendum* power does not lie to "statutes providing for tax levies or appropriations for usual current expenses of the State." Article IV, section 25 (also formerly part of article IV, section 1), provides: "Initiative and referendum powers may be exercised by the electors of each city or county under procedure that the Legislature shall provide." The Legislature has so provided. Election Code sections 4000-4023 and 4050-4057 respectively establish such procedures for municipal initiative and referendum elections. (See also Election Code sections 3700-3721, 3750-3754, 5150-5162, and 5200-5203 relating to counties and districts.)

However, *Geiger v. Board of Supervisors*, 48 Cal.2d 832, 836 [313 P.2d 545], and *Hunt* v. *Mayor & Council of Riverside*, 31 Cal.2d 619, 623-630 [191 P.2d 426], have held respectively that county and municipal referendum powers cannot affect ordinances providing for "tax levies."

Although the foregoing authorities deal generally with *referendum* powers it is also the law that the *initiative* process does not lie with respect to statutes and ordinances "providing for tax levies."

In *Myers v. City Council of Pismo Beach*, 241 Cal.App.2d 237 [50 Cal.Rptr. 402], while a city council was considering "An ordinance imposing a tax upon the privilege of transient [room] occupancy" an initiative petition was filed proposing an ordinance "prohibiting the city council from levying a room occupancy tax." The city council refused to consider the petition and mandate proceedings followed. The District Court of Appeal reversed a superior court decision giving effect to the petition. It stated (pp. 243-244):

"(1) A proposed initiative ordinance cannot be used as an indirect or backhanded technique to invoke the referendum process against a tax ordinance of a general law city, such as Pismo Beach. It will be recalled that the last paragraph of the proposed initiative ordinance provides: 'Any ordinance conflicting with any of the provisions of this ordinance either in whole or in part is herewith repealed.' Thus if the vote at the special election on the proposed ***868** initiative ordinance were effective to make it a valid ordinance, the result would be to repeal Ordinance No. 114 passed by the city council on the evening of March 8, 1965, imposing a 4 percent room occupancy tax. Hence a type of referendum technique would have been discovered by which to attack and nullify a tax ordinance of a city like Pismo Beach which is governed by general laws. But article IV, section 1, of the California Constitution, expressly provides that the referendum powers therein reserved to the people do not extend to 'tax levies or appropriations for the usual current expenses of the State. ...' The same exception applies to the political subdivisions of the state that are governed by general laws as distinguished from charters (see *Geiger v. Board of Supervisors, supra*). Thus the electors of Pismo Beach, which city derives its powers from the general laws, have no referendum power when it comes to repealing a tax ordinance. That which the electors have no power to do directly, they obviously cannot do indirectly.

"(2) Such a proposed initiative ordinance, even if approved by a vote of the electors, cannot be used as a means of tying the hands of the city council and depriving it of the right and duty to exercise its discretionary power in a taxation matter such as is here involved. ..."

([2]) The imposition and collection of fees for the use of the facilities of Lakeport Municipal Sewer District No. 1 must reasonably be considered a taxation function. "Taxes" are defined as burdens imposed by legislative power on persons or property to raise money for public purposes. (*Yosemite Lbr. Co.* v. *Industrial Acc. Com.*, 187 Cal. 774, 783 [204 P. 226, 20 A.L.R. 994]; *Jones-Hamilton Co. v. Franchise Tax Bd.*, 268 Cal.App.2d 343, 348 [73 Cal.Rptr. 896].) And it has been expressly held that a *monthly sewage rate* imposed by a municipal ordinance for the connection and use of sewers is a *tax*, impost and toll. (*City of Madera* v. *Black*, 181 Cal. 306, 310-311 [184 P. 397]; see also *County of Los Angeles v. Southern Cal. Gas Co.*, 184 Cal.App.2d 169, 180 [7 Cal.Rptr. 471].) And both *assessment*, i.e., "the process of ascertaining and adjusting the shares respectively to be contributed by several persons toward a common beneficial object according to the benefit received" (Black's Law Dictionary (4th ed.), p. 149), and *collection*, are included in "the operation called levying the tax. The words are so used in the [C]onstitution." (*City of San Luis Obispo v. Pettit*, 87 Cal. 499, 503 [25 P. 694].)

([3]) The power of municipal sewer districts to assess and collect such taxes is derived from the state Constitution. Article XI, section 12, of that document states that the Legislature may vest in public or municipal corporations "the power to assess and collect taxes." Pursuant to that power the Legislature, by Health and Safety Code section 5471, has enabled the ***869** legislative body of a municipal sewer district to "prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, ..."

([1b]) It is worthy of note that the initiative powers here contended for by appellants would necessarily defeat the intent of section 5471 that the sewer district's governing body "prescribe" and "revise" the charges for its sewer facilities and services.

([4]) We note further the holding of the California Supreme Court in *Simpson v. Hite*, 36 Cal.2d 125, 134 [222 P.2d 225], that "The initiative or referendum is not applicable where 'the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential. ...'" The taxing power "is probably the most vital and essential attribute of the government." (*Watchtower*

Bible & Tract Soc. v. County of Los Angeles, 30 Cal.2d 426, 429 [182 P.2d 178].) The maintenance of sewer districts by their governing bodies must also be considered a vital governmental function.

The authorities we have cited impel us to hold, and we do hold, that the initiative process is not available to amend that portion of a municipal ordinance which provides that the city council shall determine the manner of fixing charges for the connection and use of sewer facilities.

It becomes unnecessary to resolve appellant's secondary contention relating to the eligibility of voters within the sewer district, but without the City of Lakeport, to vote on an initiative election.

The judgment is affirmed.

Molinari, P. J., and Sims, J., concurred. ***870**

Attachment 2

50 Cal.3d 51, 785 P.2d 522, 266 Cal.Rptr. 139

CITY OF SACRAMENTO et al., Plaintiffs and Appellants,
v.
THE STATE OF CALIFORNIA et al., Defendants and Respondents

No. S006188.
Supreme Court of California
Jan 29, 1990.

SUMMARY

A city and a county filed claims with the State Board of Control seeking subvention of the costs imposed on them by Stats. 1978, ch. 2, which extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. The board denied the claims, ruling that Stats. 1978, ch. 2, did not enact a state-mandated program for which reimbursement was required under Cal. Const., art. XIII B. On mandamus the trial court overruled the board and found the cost reimbursable, and the Court of Appeal affirmed. On remand, the board determined the amounts due on the claims originally submitted; however, the Legislature failed to appropriate the necessary funds for disbursement. The city then commenced a class action against the state on behalf of all local governments in the state. The complaint sought injunctive and declaratory relief barring enforcement of Stats. 1978, ch. 2, in the absence of state subvention; a writ of mandate directing that past, current, and/or future subvention funds be appropriated and disbursed, and/or that the Employment Development Department pay local agencies' past, current, and future unemployment insurance contributions from its own budget; and damages for past failures to reimburse. The trial court granted summary judgment for the state. (Superior Court of Sacramento County, No. 331607, Darrel W. Lewis, Judge.) The Court of Appeal, Third Dist., No. C002265, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the trial court did not err in granting summary judgment for the state on the ground that the local costs of providing unemployment insurance coverage were not subject to subvention under Cal. Const., art. XIII B, or parallel statutes (Rev. & Tax. Code, former §§ 2207, 2231, subd. (a); Gov. Code, §§ 17514, 17561, subd. (a)). The state had not compelled provision of new or increased "service to the public" at the local level, nor had it imposed a state policy "uniquely" on local governments. However, the court held, Stats. 1978, ch. 2, implemented a federal "mandate" within the meaning of Cal. Const., art. XIII B, and prior statutes restraining local taxation; thus, subject to superseding constitutional ceilings on taxation by state and local governments, an agency governed by Stats. 1978, ch. 2, may tax and spend as necessary to meet the expenses required to comply with that legislation. (Opinion by Eagleson, J., with Lucas, C. J., Mosk, Broussard, Panelli and Kennard, JJ., concurring. Separate concurring and dissenting opinion by Kaufman, J., concurring in the judgment.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Property Taxes § 7.5--Constitutional Provisions; Statutes and Ordinances--Real Property Tax Limitation--Exemptions for Federally Mandated Costs.
To the extent that a "federally mandated" cost is exempt from prior statutory limits on local taxation, Cal. Const., art. XIII A, restricting the assessment and taxing powers of state and local governments, eliminates the exemption insofar as it would allow levies in excess of the constitutional ceiling.

(2)
State of California § 7--Actions--Reimbursement to Local Governments for Unemployment Insurance Costs--Exhaustion of Remedies.
A class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B, was not barred by any failure of plaintiffs to exhaust their remedies. The city and a county had filed timely claims for reimbursement of expenses incurred, to comply with Stats. 1978, ch. 2. When the State Board

of Control initially denied the claims, the city and the county pursued judicial remedies, culminating in a Court of Appeal opinion concluding that reimbursement was required. The board then upheld the claims. Insofar as the Legislature thereafter declined to appropriate the necessary funds for disbursement, the city and the county were authorized to bring an enforcement action.

(3a, 3b)
State of California § 7--Actions--Reimbursement to Local Governments for Unemployment Insurance Costs--Remedies Available.
Cal. Const., art. XIII, § 32, precluding any suit to enjoin or impede collection of a tax, did not bar a class action brought by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B. The state contended that the only remedy open to the city was to pay its unemployment "taxes" and then seek a "refund" under the "exclusive" procedures set forth in the Unemployment Insurance Code. However, the city was not challenging, directly or indirectly, the validity or application of the unemployment insurance law as such, or the propriety of any "tax" assessed thereunder; rather, it claimed that all its costs of affording unemployment compensation to its employees were subject to a statutory and constitutional subvention that the state refused to make. For the same reasons, the city's claim for reimbursement for past expenses was not barred.

(4)
Constitutional Law § 40--Distribution of Governmental Powers--Between Branches of Government--Judicial Power.
Under the separation of powers doctrine, the Legislature cannot be compelled to appropriate or authorize the disbursement of specific funds.

[See **Am.Jur.2d,** Constitutional Law, § 316.]

(5a, 5b, 5c)
Judgments § 81--Res Judicata--Collateral Estoppel--Public-interest Exception--Reimbursement to Local Governments for Unemployment Insurance Costs.
In a class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B, the state was not collaterally estopped from litigating the reimbursement issue. The city and a county had previously brought an action against the state, culminating in a Court of Appeal opinion concluding that reimbursement was required. The Legislature then declined to appropriate the necessary funds for disbursement. Even if the formal prerequisites for collateral estoppel were present, the public-interest exception to that doctrine governed, since strict application of the doctrine would foreclose any reexamination of the earlier holding, and the consequences of any error transcended those that would apply to mere private parties.

(6)
Judgments § 81--Res Judicata--Collateral Estoppel--Questions of Law.
Generally, collateral estoppel bars a party to a prior action, or one in privity with him, from relitigating issues finally decided against him in the earlier action. However, when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed.

(7)
State of California § 7--Actions--Reimbursement to Local Governments for Unemployment Insurance Costs--Summary Judgment--Effect of Failure of Moving Party to Challenge Prior Summary Adjudication of Issues.
In a class action by a city, on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by

the state of local compliance costs was required under Cal. Const., art. XIII B, the trial court did not lack the power to grant summary judgment for the state on the authority of a newly decided California Supreme Court case. The trial court had previously granted the city's motion for summary adjudication of issues, and the state had failed to seek timely mandamus review of that prior, contrary order. However, failure to challenge a summary adjudication order by the discretionary avenue of writ review cannot foreclose a party from asserting subsequent changes in law that render such a pretrial order incorrect.

(8)
Judgments § 68--Res Judicata--Identity of Parties--Class Action--Where Prior Action Involved Individual Claims.
In a class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B, res judicata did not preclude examination of an earlier Court of Appeal opinion, in an action by the city and a county, concluding that reimbursement was required. The issues presented in the current action were not limited to the validity of any finally adjudicated individual claims; rather, they encompassed the question of the state's subvention obligations in general under Stats. 1978, ch. 2.

(9a, 9b)
State of California § 11--Fiscal Matters--Reimbursement to Local Governments--State-mandated Programs--Unemployment Insurance Costs.
In a class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state was required under Cal. Const., art. XIII B, the trial court did not err in granting summary judgment for the state on the ground that the local costs of providing such coverage were not subject to subvention under Cal. Const., art. XIII B, or parallel statutes (Rev. & Tax. Code, former §§ 2207, 2231, subd. (a); Gov. Code, §§ 17514, 17561, subd. (a)). The state had not compelled provision of new or increased "service to the public" at the local level, nor had it imposed a state policy "uniquely" on local governments. The phrase, "To force programs on local governments," in the voters' pamphlet relating to Cal. Const., art. XIII B, § 6, confirmed that the intent underlying that section was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.

[See **Cal.Jur.3d,** State of California, § 78.]

(10)
State of California § 11--Fiscal Matters--Reimbursement to Local Governments--State-mandated Programs.
The concepts of reimbursable state-mandated costs in Cal. Const., art. XIII B, requiring that the state reimburse local governments for the costs of state-mandated new programs or higher levels of service, and Rev. & Tax. Code, former §§ 2207, 2231, are identical.

(11a, 11b, 11c)
State of California § 11--Fiscal Matters-- Reimbursement to Local Governments--Federally Mandated Programs--Unemployment Insurance Costs.
Stats. 1978, ch. 2, extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations, implemented a federal "mandate" within the meaning of Cal. Const., art. XIII B, and prior statutes restricting local taxation; thus, subject to superseding constitutional ceilings on taxation by state and local governments, an agency governed by Stats. 1978, ch. 2, may tax and spend as necessary to meet the expenses required to comply with that legislation. In enacting Stats. 1978, ch. 2, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses; the alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. (Disapproving, insofar as it is inconsistent with this analysis, the decision in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258].)

(12)
Constitutional Law § 11--Construction of Constitutions--Liberality and Flexibility.
Constitutional enactments must receive a liberal, practical commonsense construction that will meet changed conditions and the growing needs of the people. While a constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words, the literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers.

(13)
State of California § 11--Fiscal Matters--Reimbursement to Local Governments--Federally Mandated Programs.
In determining whether a program is federally mandated, to exempt its cost from a local government's statutory taxation limit (Rev. & Tax. Code, § 2271), and to exclude any appropriation required to comply with the mandate from the constitutional spending limit of the affected entity (Cal. Const., art. XIII B, § 9, subd. (b)), the result will depend on the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. The courts and the Commission on State Mandates must respect the governing principle of Cal. Const., art. XIII B, § 9, subd. (b): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.

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EAGLESON, J.

In response to changes in federal law, chapter 2 of the Statutes of 1978 (hereafter chapter 2/78) extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. Here we consider whether, in chapter 2/78, the state "mandate[d] a new program or higher level of service" on the local agencies, and must therefore reimburse local compliance costs under article XIII B of the California Constitution and related statutes.

We conclude that the state is *not* required to reimburse the chapter 2/78 expenses of local governments. The obligations imposed by chapter 2/78 fail to meet the "program" and "service" standards for mandatory subvention we recently set forth in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202] (hereafter *County of Los Angeles*). Chapter 2/78 imposes no "unique" obligation on local governments, nor does it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, must therefore be reversed.

However, our holding does not leave local agencies powerless to counter the fiscal pressures created by chapter 2/78. Though provisions of the Revenue and Taxation Code limit local property tax levies, and article XIII B itself places spending limits on both state and local governments, "costs mandated by the federal government" are expressly excluded from these ceilings. Chapter 2/78 imposes such "federally mandated" costs, because it was adopted by the state under federal coercion tantamount to compulsion. Hence, subject to overriding limitations on taxation rates (see, e.g., Cal. Const., art. XIII A), both state and local governments may levy and spend for their chapter 2/78 coverage obligations without reduction of the fiscal limits applicable to other needs and services.

I. Facts.

In 1972, and again in 1973, the Legislature enacted comprehensive schemes for local property tax relief. Though frequently amended thereafter, these statutes retained three principal features. First, they placed a limit on the local property tax rate. Second, they required the *state* to reimburse local governments for their costs resulting from state laws "which mandate ... new program[s] or ... increased level[s] of service" at the local level. Finally, they allowed local governments to

exceed their property taxation limits to fund certain other nondiscretionary expenses, including "costs mandated by the federal government." (Stats. 1972, ch. 1406, § 14.7, pp. ***58** 2961-2967; Stats. 1973, ch. 358, § 3, pp. 783-790; Rev. & Tax. Code, §§ 2206, 2260 et seq., 2271; former §§ 2164.3, 2165, 2167, 2169, 2207, 2231; Gov. Code, § 17500 et seq.)

Since adoption of the Social Security Act in 1935, federal law has provided powerful incentives to enactment of unemployment insurance protection by the individual states. In current form, the Federal Unemployment Tax Act (hereafter FUTA) (26 U.S.C. § 3301 et seq.) assesses an annual tax upon the gross wages paid by covered private employers nationwide. The tax rate, which has varied over the years, stands at 6.2 percent for calendar year 1990. (26 U.S.C. §§ 3301(1), 3306.) However, employers in a state with a federally "certified" unemployment insurance program may credit their contributions to the state system against up to 90 percent of the federal tax (currently computed at 6 percent for this purpose). (*Id.*, §§ 3302-3304.) A "certified" state program also qualifies for federal administrative funds. (42 U.S.C. §§ 501-503.)

California enacted its unemployment insurance system "on the eve of the adoption of the Social Security Act" in 1935 (*Steward Machine Co.* v. *Davis* (1937) 301 U.S. 548, 587-588 [81 L.Ed. 1279, 1291-1292, 57 S.Ct. 883, 109 A.L.R. 1293]; see Stats. 1935, ch. 352, § 1 et seq., p. 1226 et seq.) and has sought to maintain federal compliance ever since. Every other state has also adopted an unemployment insurance plan in response to the federal stimulus.

In 1976, Congress enacted Public Law number 94-566 (hereafter Public Law 94-566). Insofar as pertinent here, Public Law 94-566 amended FUTA to require for the first time that a "certified" state plan include coverage of the employees of public agencies. (Pub.L. No. 94-566 (Oct. 20, 1976) § 115(a), 90 Stat. 2670; 26 U.S.C. §§ 3304(a)(6)(A), 3309(a); see 26 U.S.C. § 3306(c)(7).) States which did not alter their unemployment compensation laws accordingly faced loss of the federal tax credit and administrative subsidy.

The Legislature thereafter adopted chapter 2/78 to conform California's system to Public Law 94-566. Among other things, chapter 2/78 effectively requires the state and all local governments, beginning January 1, 1978, to participate in the state unemployment insurance system on behalf of their employees. (Stats. 1978, ch. 2, §§ 12, 24, 31, 36.5, 58-61, pp. 12-14, 16, 18, 24-27; Unemp. Ins. Code, §§ 135, subd. (a), 605, 634.5, 802-804.)

In November 1979, the voters adopted Proposition 4, adding article XIII B to the state Constitution. ([1]) **(See fn. 1.)** Article XIII B - the so-called "Gann limit" - restricts the amounts state and local governments may ***59** appropriate and spend each year from the "proceeds of taxes." (§§ 1, 3, 8, subds. (a)-(c).) [1] In language similar to that of earlier statutes, article XIII B also requires state reimbursement of resulting local costs whenever, after January 1, 1975, "the Legislature or any state agency mandates a new program or higher level of service on any local government, ..." (§ 6.) Such mandatory state subventions are excluded from the local agency's spending limit, but included within the state's. (§ 8, subds. (a), (b).) Finally, article XIII B excludes from either the state or local spending limit any "[a]ppropriations required for purposes of complying with mandates of the courts *or the federal government* which, *without discretion*, require an expenditure for additional services or which *unavoidably* make the providing of existing services more costly." (§ 9, subd. (b) [hereafter section 9(b)], italics added.)

1 Article XIII B is to be distinguished from article XIII A, which was adopted as Proposition 13 at the June 1978 election. Article XIII A imposes a direct constitutional limit on state and local power to *adopt and levy taxes*. Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend for public purposes. Moreover, to the extent "federally mandated" costs are exempt from prior *statutory* limits on local *taxation* (see *ante*, at pp. 57-58), article XIII A eliminates the exemption insofar as it would allow levies in excess of the constitutional ceiling.
All further section references are to article XIII B of the California Constitution, unless otherwise indicated.

The City of Sacramento (City) and the County of Los Angeles (County) filed claims with the State Board of Control (Board) (see Rev. & Tax. Code, former § 2250 et seq.; see now Gov. Code, § 17550 et seq.) seeking state subvention of the costs imposed on them by chapter 2/78 during 1978 and portions of 1979. The Board denied the claims, ruling that chapter 2/78 was an enactment required by federal law and thus was not a reimbursable

state mandate. On mandamus (Code Civ. Proc., § 1094.5; Rev. & Tax. Code, former § 2253.5; see now Gov. Code, § 17559), the Sacramento Superior Court overruled the Board and found the costs reimbursable. The court ordered the Board to determine the amounts of the City's and the County's individual claims, and also to adopt "parameters and guidelines" to be applied in determining "these ... and other claims" arising under chapter 2/78. (Rev. & Tax. Code, former § 2253.2; see now Gov. Code, §§ 17555, 17557.) [2]

2 The claims for reimbursement were originally premised entirely on Revenue and Taxation Code section 2201 et seq. While the City's and the County's mandamus petitions were pending in superior court, article XIII B was adopted. The City and the County amended their petitions to include article XIII B as an additional basis for relief, and the case proceeded accordingly.

In *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258] (hereafter *Sacramento I*), the Court of Appeal affirmed. Among other things, the court concluded (pp. 194-199) that chapter 2/78 ***60** imposed *state*-mandated costs reimbursable under section 6 of article XIII B, since the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "[*mandate*] ... of the *federal* government" under section 9(b). (Italics added.) We denied hearing.

On remand, the Board determined the amounts due on the claims originally submitted by the City and the County. As required by the judgment, the Board also adopted "parameters and guidelines" for reimbursement of chapter 2/78 costs to all affected local agencies. However, during the 1984 session of the Legislature, no bills were introduced for reimbursement of pre-1984 costs, and bills to fund costs in and after 1984 failed passage.

From and after the decision in *Sacramento I*, the City paid "under protest" its quarterly billings from the Employment Development Department (EDD) for unemployment compensation. Each payment included a claim for refund of unemployment taxes pursuant to Unemployment Insurance Code section 1176 et seq. EDD responded to the refund claims by referring the City to its statutory subvention remedies.

Accordingly, in July 1985, the City began returning its quarterly billings unpaid. It thereupon commenced the instant class action in Sacramento Superior Court on behalf of all local governments in the state. Named as defendants were the State of California, the Governor, EDD, the state Controller and Treasurer, and the Legislature. The complaint sought (1) injunctive and declaratory relief barring enforcement of chapter 2/78 in the absence of state subvention; (2) a writ of mandate directing that past, current, and future subvention funds be appropriated and disbursed, and/or that EDD pay local agencies' past, current, and future unemployment-insurance contributions from its own budget; and (3) damages for past failures to reimburse.

Shortly after this suit was filed, the Legislature appropriated some chapter 2/78 funds for fiscal year 1984-1985 (Stats. 1985, ch. 1217, §§ 12, 17, subd. (b), pp. 4148, 4150), and it subsequently authorized limited funds in the 1986 Budget Act (Stats. 1986, ch. 186, § 2.00, p. 1006). On defendants' demurrer, the trial court later dismissed plaintiffs' claims for reimbursement for these post-1984 periods. [3] Thereafter, the trial court certified the suit as a class action and granted plaintiffs' motion for summary adjudication of issues based on *Sacramento I*. ***61**

3 The trial court also sustained the Legislature's demurrer without leave to amend and dismissed the Legislature as a party defendant. The Court of Appeal affirmed the dismissal in a separate proceeding. (See *City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393 [231 Cal.Rptr. 686].)

While the case remained pending at the trial level, we decided *County of Los Angeles*. There we held that article XIII B, and earlier subvention statutes, requires state reimbursement *only* when the state compels local governments to provide new or upgraded "programs that carry out the governmental function of providing *services to the public*, or ..., to implement a state policy, [the state] impose[s] *unique* requirements on local governments [that] do not apply generally to all residents and entities in the state." (43 Cal.3d at p. 56, italics added.)

Defendants in this case thereupon moved for summary judgment, urging that extension of unemployment insurance coverage to public employees satisfied neither reimbursement standard set forth in *County of Los*

Angeles. The trial court agreed and awarded summary judgment.

The Court of Appeal reversed on two independent grounds. First, the court ruled that defendants were collaterally estopped by *Sacramento I* to relitigate the reimbursability of chapter 2/78 costs. Second, the court found that chapter 2/78 imposed "unique requirements" on local governments, within the meaning of *County of Los Angeles*, since the legislation was aimed solely at local agencies and subjected them to obligations from which they were previously exempt.

II. Jurisdiction; Plaintiffs' Exhaustion of Remedies.

([2]) After we granted review, we asked the parties and amici curiae[4] to brief whether the current suit is jurisdictionally barred by any failure of plaintiffs to exhaust their remedies (see *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291-295 [109 P.2d 942, 132 A.L.R. 715]), or for any other reason. If so, the summary judgment for defendants against all plaintiffs was proper notwithstanding the merits of the subvention claim. In that event, the judgment of the Court of Appeal must be reversed without consideration of the substantive issues raised by the appeal.

4 Amicus curiae briefs were filed on behalf of plaintiffs by (1) the League of California Cities, the Association of California Water Agencies, and the Fire District Association of California, and (2) the County of Los Angeles and the County Supervisors Association of California.

However, we find no failure to exhaust which would bar us from reaching the merits. Defendants concede plaintiffs exhausted all administrative remedies provided by the statutes governing subvention of state-mandated costs. The concession appears correct, at least as to the City and the County. These two agencies filed timely claims for reimbursement of expenses incurred to comply with chapter 2/78. When the Board initially denied the claims, the City and the County pursued judicial remedies culminating in ***62** *Sacramento I*. By direction of the judgment in *Sacramento I*, the Board ultimately upheld the City's and County's 1979 claims, determined their amount, and adopted "parameters and guidelines" for statewide reimbursement that were later included in the Board's government-claims report to the Legislature. (Rev. & Tax. Code, former §§ 2253.2, 2255, subd. (a).)

These procedures exhausted the City's and the County's administrative and judicial avenues, short of this suit, to obtain redress on the claims adjudicated in *Sacramento I*. Insofar as the Legislature thereafter declined to appropriate the necessary funds for disbursement by the Controller, the City and the County were authorized to bring an enforcement action. (Rev. & Tax. Code, former § 2255, subd. (c); Gov. Code, § 17612, subd. (b); *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 72 [222 Cal.Rptr. 750]; see *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 548-549 [234 Cal.Rptr. 795].)[5]

5 In 1986, the Legislature repealed sections 2250-2255 of the Revenue and Taxation Code. (Stats. 1986, ch. 879, §§ 37-48, p. 3047.) The Board's functions have been transferred to the Commission on State Mandates (Commission), but the procedures for administrative and judicial determination of subvention disputes remain functionally similar. (Gov. Code, §§ 17500 et seq., 17600 et seq.)

([3a]) Defendants urge, however, that plaintiffs essentially are seeking resolution of a "tax" question - the validity *vel non* of their unemployment tax contributions - but have failed to satisfy the special procedures applicable to such cases. Defendants insist that because article XIII, section 32, of the California Constitution broadly precludes any suit to enjoin or impede collection of a tax (e.g., *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 838-841 [258 Cal.Rptr. 161, 771 P.2d 1247]; *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213 [242 Cal.Rptr. 334, 745 P.2d 1360]; *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 279-284 [165 Cal.Rptr. 122, 611 P.2d 463]), plaintiffs' claims for declaratory and injunctive relief are barred.

The only remedy constitutionally open to plaintiffs, defendants assert, is to pay their unemployment "taxes" and then seek a "refund" under the "exclusive" procedures set forth in the Unemployment Insurance Code. (Unemp. Ins. Code, §§ 1176 et seq., 1241, subd. (a).) Insofar as plaintiffs' complaint *does* seek reimbursement for past contributions, defendants suggest, plaintiffs have not correctly pursued the Unemployment Insurance Code procedures.

We question, but do not decide, whether a *public entity's* contributions to the state unemployment insurance system

can ever constitute a "tax" subject ***63** to article XIII, section 32. Even if so, defendants' claim lacks merit under the circumstances presented here.

"The policy behind [article XIII,] section 32 is to allow revenue collection to continue during [tax] litigation so that essential public services dependent on the funds are not unnecessarily disrupted. [Citation.] ...." (*Pacific Gas & Electric Co., supra*, 27 Cal.3d at p. 283.) The administrative "refund" procedures established by the unemployment insurance law are designed to ensure initial examination of unemployment tax disputes by the agency with specific expertise in that area.

However, plaintiffs attempt no challenge, direct or indirect, to the validity or application of the unemployment insurance law as such, or to the propriety of any "tax" assessed thereunder. Nor have plaintiffs bypassed the agency or procedures established to decide such disputes.

Rather, plaintiffs claim that *all* their costs of affording unemployment compensation to their employees are subject to a statutory and constitutional *subvention* which the state refuses to make. It is incidental that these costs happen to include what might be characterized as a "tax." As the subvention statutes require, plaintiffs City and County have pursued all available remedies before the agency (formerly the Board, now the Commission) created to decide *subvention* issues; that agency has upheld their submitted claims in full, but the necessary appropriations have been withheld.

Under these circumstances, the Legislature has concluded that a local entity should be forced to continue incurring the unfunded costs subject to "refund." Rather, the entity is expressly authorized to bring suit to declare such an unfunded mandate *unenforceable*. (Rev. & Tax. Code, former § 2255, subd. (c); Gov. Code, § 17612, subd. (b).) [6]

6 Indeed, when the City filed protective claims for "refund" with EDD in the wake of *Sacramento I*, that agency consistently disclaimed authority to decide the subvention issue presented and "suggest[ed]" that the City pursue its remedies before the Commission.

The importance of such a remedy stems from the fundamental legislative prerogative to control appropriations. ([4]) Under the separation of powers doctrine, the Legislature cannot be compelled to appropriate or authorize the disbursement of specific funds. (*Mandel* v. *Myers* (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935].) Since the Legislature will have demonstrated its refusal to fund a particular mandate by the time a mandamus action is filed, the literal "tax refund" process urged by defendants may often be meaningless.

([3b]) Insofar as plaintiffs also seek reimbursement for past expenses, similar considerations dictate that the governing statutes are those created ***64** to resolve subvention problems rather than garden-variety disputes over the unemployment insurance tax. [7] We find nothing in the language, history, or purpose of article XIII, section 32, or of the unemployment insurance law, which bars the instant complaint. We therefore have jurisdiction to decide whether chapter 2/78 constitutes a reimbursable mandate.

7 As we note above, courts are powerless to compel appropriations *per se*. However, that fact does not render a prayer for reimbursement of *past* costs wholly meaningless. California courts have previously recognized judicial power to fashion other appropriate reimbursement remedies. (See, e.g., *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d at pp. 550-552; also cf. *Mandel, supra*, 29 Cal.3d at pp. 535-537, 539-552.) Such power is especially important where subvention is constitutionally compelled.

III. Collateral Estoppel; Res Judicata.

([5a]) However, *plaintiffs* claim that because *Sacramento I* "finally" decided whether chapter 2/78 constitutes a reimbursable state mandate, the *state* and its agents are collaterally estopped from relitigating the issue here. The Court of Appeal agreed that the doctrine of collateral estoppel applies. Under the circumstances, we are not persuaded.

([6]) Generally, collateral estoppel bars the party to a prior action, or one in privity with him, from relitigating issues finally decided against him in the earlier action. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 874 [151 Cal.Rptr. 285, 587 P.2d 1098].) "... But when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.] ...." (*Consumers Lobby Against Monopolies*

v. Public Utilities Com. (1979) 25 Cal.3d 891, 902 [160 Cal.Rptr. 124, 603 P.2d 41].)

([5b]) Even if the formal prerequisites for collateral estoppel are present here, the public-interest exception governs. Whether chapter 2/78 costs are reimbursable under article XIII B and parallel statutes constitutes a pure question of law. The *state* was the losing party in *Sacramento I*, and also the only entity legally affected by that decision. Thus, strict application of collateral estoppel would foreclose any reexamination of the holding of that case. The state would remain bound, and no other person would have occasion to challenge the precedent.

Yet the consequences of any error transcend those which would apply to mere private parties. If the result of *Sacramento I* is wrong but unimpeachable, taxpayers statewide will suffer unjustly the consequences of the state's continuing obligation to fund the chapter 2/78 costs of local agencies. On the other hand, if the state fails to appropriate the funds to meet this ***65** obligation, and chapter 2/78 therefore cannot be enforced (Rev. & Tax. Code, former § 2255, subd. (c); Gov. Code, § 17612, subd. (b)), the resulting failure to comply with federal law could cost California employers millions.[8] ([7]) **(See fn. 9.)**, ([5c]) Under these circumstances, neither stare decisis nor collateral estoppel can permanently foreclose our ability to examine the reimbursability of chapter 2/78 costs.[9]

8 For these reasons, this case is distinguishable from *Slater v. Blackwood* (1975) 15 Cal.3d 791 [126 Cal.Rptr. 225, 543 P.2d 593], cited by the Court of Appeal. *Slater*, a suit between private parties, held only that the "injustice" exception to the rule of collateral estoppel cannot be based *solely* on an intervening change in the law. (P. 796.) Here, as we note, overriding public-interest issues are involved.

9 By the same token, the state has not ignored available remedies or otherwise "waived" its right to argue the issues presented by this appeal. The state immediately raised the applicability of *County of Los Angeles* to this suit once our decision therein became final.
Plaintiffs claim the instant trial court had no power to grant summary judgment for defendants on authority of *County of Los Angeles*. Plaintiffs assert that because defendants failed to seek timely mandamus review of the prior, contrary order granting summary adjudication of issues in *plaintiffs*' favor, the issues decided by the earlier order must be "deemed established." (See Code Civ. Proc., § 437c, subd. (f).) We disagree. Failure to challenge a summary adjudication order by the *discretionary* avenue of writ review cannot foreclose a party from asserting *subsequent* changes in law which render such a pretrial order incorrect.

([8]) As below, plaintiffs also argue that reconsideration of *Sacramento I* is precluded by res judicata. They suggest that the prior litigation resolved not only the *legal issues* presented by this appeal, but all *claims* among the current parties as well.

Of course, res judicata and the rule of final judgments bar us from disturbing individual claims or causes of action, on behalf of specific agencies, which have been finally adjudicated and are no longer subject to review. (Code Civ. Proc., § 1908 et seq.; *Slater, supra*, 15 Cal.3d at p. 796; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810 [122 P.2d 892].) However, the issues presented in the current action are not limited to the validity of any such finally adjudicated individual claims. Rather, they encompass the question of defendants' subvention obligations *in general* under chapter 2/78. We therefore conclude that defendants may contend in this lawsuit that chapter 2/78 is not a reimbursable state mandate.[10] We turn to the merits of that issue. ***66**

10 Plaintiffs imply that because the original claims by the City and the County were filed decided as statutory "test claims" (Rev. & Tax. Code, former §§ 2218, 2253.2; see now Gov. Code, §§ 17555, 17557), the "cause of action" adjudicated therein encompasses *all* claims by *all* local agencies for *all* years. However, the obvious purpose of the statutory "test claim" procedure is to resolve the *legal issue whether particular state legislation creates a reimbursable mandate*, not to adjudicate every individual claim for reimbursement which may thereafter accrue. The "test claim" result has *precedential* effect for all subsequent claims, but res judicata effect only for the individual claims which were actually adjudicated.

IV. "New Program" or "Increased Service"?

([9a]) As before, defendants urge that by extending unemployment insurance coverage to local government employees, the Legislature did not mandate a "new program" or an "increased" or "higher level of service" on local governments. Thus, they assert, the local costs of providing such coverage are not subject to subvention under article XIII B, section 6, or parallel statutes. (Rev. &

Tax. Code, former §§ 2207, 2231, subd. (a); Gov. Code, §§ 17514, 17561, subd. (a).) The trial court granted summary judgment for defendants on this basis. Contrary to the conclusions reached by the Court of Appeal, the trial court's ruling was correct.

Our analysis is controlled by our decision in *County of Los Angeles*. There we determined that a general increase in workers' compensation benefits did not, when applied to local governments, constitute a reimbursable state mandate under article XIII B.

In so holding, we focused on the particular language of article XIII B, section 6, which requires state subvention of a local government's costs of any "new program" or "increased level of service" imposed upon it by the state. We dismissed the notion that, by employing the quoted phrases, the voters intended *all* local costs resulting from compliance with state law to be subject to mandatory reimbursement. Rather, we explained, "[t]he concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. ..." (43 Cal.3d at p. 56.)

Under these circumstances, we reasoned, the electorate must have intended the undefined terms "new program" and "increased level of service" to carry their "commonly understood meanings ... - programs that carry out the governmental function of providing *services to the public*, or laws which, to implement a state policy, impose *unique requirements* on local governments and do not apply generally to all residents and entities in the state." (43 Cal.3d at p. 56, italics added.)

Local governments' costs of complying with a general statewide increase in the level of workers' compensation benefits do not qualify under these standards, we concluded. As we noted, "... [w]orkers' compensation is not a program administered by local agencies to provide service to the public. ([10]) **(See fn. 11.)** Although local agencies must provide benefits to ***67** their employees ..., they are indistinguishable in this respect from private employers. ..." (43 Cal.3d at p. 58.) [11]

11 While our discussion centered on the meaning of section 6 of article XIII B, it relied heavily on the legislative history of parallel provisions of the 1972 and 1973 property tax relief statutes. When article XIII B was adopted in November 1979, the Revenue and Taxation Code already required state subvention of local "[c]osts mandated by the state," defined as "any increased costs which a local agency is required to incur as a result of ... [¶] [a]ny law enacted after January 1, 1973, which mandates a *new program* or an *increased level of service* of an existing program." (Rev. & Tax. Code, former §§ 2207 [italics added], 2231, subd. (a).) However, a further statutory definition of "increased level of service" to include any state mandate "which makes necessary expanded or additional costs to a county, city and county, city, or special district" had been repealed in 1975. (*County of Los Angeles*, 43 Cal.3d at p. 55; see Rev. & Tax. Code, former § 2231, subd. (e), repealed by Stats. 1975, ch. 486, § 6, p. 999.) We found the repealer significant to the limited meaning of the statutory term "increased level of service" as later incorporated in article XIII B. (43 Cal.3d at pp. 55-56.) Our implicit conclusion, which we now make explicit, was that the statutory and constitutional concepts of reimbursable state-mandated costs are identical.

([9b]) Similar considerations apply here. By requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased "service to the public" at the local level. Nor has it imposed a state policy "unique[ly]" on local governments. Most private employers in the state already were required to provide unemployment protection to their employees. Extension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies "indistinguishable in this respect from private employers."

Plaintiffs nonetheless suggest there are several bases for reaching a different result here than in *County of Los Angeles*. None of the asserted distinctions has merit.

Plaintiffs first note the proponents' declaration in the voters' pamphlet that the purpose of article XIII B, section 6, was to prevent the state from "forcing" unfunded programs on local agencies. Plaintiffs invoke this pamphlet language for the proposition that any new cost "forced" on local governments by state law is subject to subvention.

The claim is directly contrary to our holding in *County of Los Angeles*. As we explained, "[i]n ... context, the [pamphlet] phrase 'to force *programs* on local governments' confirms that the intent underlying section 6 [of article XIII B] was to require reimbursement to local agencies for the costs involved in carrying out *functions peculiar to government*, not for expenses incurred by local agencies as an *incidental impact* of laws that apply generally to all state residents and entities. ... [¶] The language of section 6 is far too vague to support an inference that ... each time the Legislature ***68** passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. ..." (43 Cal.3d at pp. 56-57, italics added.) [12]

12 Indeed, our reasoning here was expressly foreshadowed in *County of Los Angeles*. There we observed: "The Court of Appeal reached a different conclusion in [*Sacramento I*], with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as ... whether the expense was a 'state mandated cost,' rather than as whether the provision of an employee benefit was a 'program or service' within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved." (43 Cal.3d at p. 58, fn. 10.)

Plaintiffs next urge the Court of Appeal's premise - that chapter 2/78 did impose a "unique" requirement on local agencies within the meaning of *County of Los Angeles*, since it applied only to them, and compelled costs to which they were not previously subject. Plaintiffs cite our recent decision in *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318]. There we held, inter alia, that by requiring each local school district to contribute part of the expense of educating its handicapped students in state-run schools - a cost previously absorbed entirely by the state - the Legislature created a "*new* program" subject to subvention under article XIII B, section 6. As we observed, "although the schools for the handicapped have been operated by the state for many years, the program was *new insofar as [the local districts] are concerned* ...." (P. 835, italics added.)

Lucia Mar is inapposite here. The education of handicapped students was clearly a traditional governmental "service to the public," and it qualified as a "program" on that basis. This function had long been performed by the state, and the only issue was whether the belated shifting of the program's costs to local governments made it "new" for subvention purposes. A negative answer to that question would have undermined a central purpose of article XIII B, section 6 - to prevent the state's transfer of the *cost of government* from *itself* to the local level.

Here, the issue is whether costs *unrelated* to the provision of public services are *nonetheless* reimbursable costs of government, because they are imposed on local governments "unique[ly]," and not merely as an incident of compliance with general laws. State and local governments, and non-profit corporations, had previously enjoyed a special *exemption* from requirements imposed on most other employers in the state and nation. Chapter 2/78 merely eliminated the exemption and made these previously exempted entities subject to the general rule. By doing so, it may have imposed a requirement "new" to local agencies, but that requirement was not "unique." ***69**

The distinction proposed by plaintiffs would have an anomalous result. The state could avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors *at the same time*. However, if it chose to proceed by stages, extending such obligations first to private entities, and only later to local governments, it would have to pay. This was not the intent of our recent decision.

Next, plaintiffs complain that the new costs imposed on local governments by chapter 2/78 are too great to be deemed "incidental" within the meaning of *County of Los Angeles*. However, our decision did not use the word "incidental" to mean merely "insignificant in amount." Rather, we declared that the state need not reimburse local governments for expenses *incidentally imposed* upon them by laws of general application. In *County of Los Angeles*, we assumed that the expenses imposed *in common* on the private and public sectors by such a general law - as by the across-the-board increase in workers' compensation benefits there at issue - might be substantial. Notwithstanding this possibility, we found

the voters did not intend to require a state subsidy of the public sector in such cases. (43 Cal.3d at pp. 56-58.)

Finally, plaintiffs and their amici curiae urge us to overrule *County of Los Angeles*. They insist that our "program" and "unique requirement" limitations conflict with the language and purpose of article XIII B. First, they note that *nonreimbursable* state-mandated costs are expressly listed in subdivisions (a) through (c) of article XIII B, section 6.[13] Under the maxim *inclusio unius est exclusio alterius*, they reason, further exceptions may not be implied. Second, they assert, our limiting construction allows the state to "force" many costly but unfunded requirements on local governments, which the latter must absorb without relief from their own article XIII B spending limits. This, they aver, cannot have been the voters' intent.

13 Article XIII B, section 6, provides that the state shall provide a subvention of funds to reimburse a local agency for costs incurred by the agency "[w]henever the [state] mandates [on the agency] a new program or higher level of service ..., except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

These arguments misapprehend both the language of article XIII B, section 6, and our *County of Los Angeles* holding. Our reasoning in that case is not inconsistent with subdivisions (a) through (c) of section 6. Those paragraphs simply exclude certain state-imposed costs *even if they would otherwise be reimbursable under the "new program" or "increased service"* ***70** *standards*. Subdivisions (a) through (c) do not purport to define what constitutes a "new program" or "increased level of service."

Moreover, the "program" and "service" standards developed in *County of Los Angeles* create no undue risk that the state will impose expensive unfunded obligations against local agencies' article XIII B spending limits. On the contrary, our standards require reimbursement whenever the state freely chooses to impose on local agencies *any* peculiarly "governmental" cost which they were not previously required to absorb.

On the other hand, as we explained in *County of Los Angeles*, extension of the subvention requirements to costs "incidentally" imposed on local governments would require the Legislature to assess the fiscal effect on local agencies of each law of general application. Moreover, it would subject much general legislation to the supermajority vote required to pass a companion local-government revenue bill. Each such necessary appropriation would, in turn, cut into the *state's* article XIII B spending limit. (§ 8, subd. (a).) We concluded that nothing in the language, history, or apparent purpose of article XIII B suggested such far-reaching limitations on legitimate state power. (43 Cal.3d at pp. 56-58.)

We remain persuaded by this reasoning.[14] We decline to overrule *County of Los Angeles*. Under the teaching of that case, we hold that chapter 2/78 imposes no local costs which must be reimbursed pursuant to article XIII B, section 6, and parallel statutes.

14 Nor do we agree that subvention depends on whether the "benefit" of a state-imposed local requirement falls principally at the state or local level. Attempts to apply such a "benefit" test to the myriad of individual cases could easily produce debates bordering on the metaphysical. Nothing in the language or history of article XIII B, or prior subvention statutes, suggests an intent to force such debates upon the Legislature each time it considers legislation affecting local governments.

V. "Federal" Mandate?

([11a]) This case proceeded through the Court of Appeal solely on the issue whether chapter 2/78 constitutes a reimbursable "state mandate," as defined in *County of Los Angeles*. After we granted review, and in the public interest, we also decided to reexamine a related holding contained in *Sacramento I* - that chapter 2/78 does not qualify as a "federal" mandate.

Proper application of the "federal mandate" concept has important implications beyond subvention. A "cost mandated by the federal government" is exempt from a local government's statutory taxation limit. (Rev. & Tax. Code, § 2271.) Moreover, an appropriation required to comply with a ***71** federal mandate is excluded from the

constitutional spending limit of any affected entity, state or local (Cal. Const., art. XIII B, § 9 (b)). Accordingly, we requested supplemental briefs on this question. [15]

15 For the reasons expressed in part III, *ante*, our consideration of this issue is not foreclosed by principles of collateral estoppel.

After due consideration, we reject *Sacramento I's* premise. We conclude that chapter 2/78 does impose "costs mandated by the federal government," as described in article XIII B and parallel statutes. [16]

16 In *Sacramento I*, both the parties and the Court of Appeal assumed that if a cost was "federally mandated," it was therefore *not* a "state mandated" cost subject to subvention. In other words, it was assumed, an expense could not be both "state mandated" and "federally mandated," even if imposed by the state under federal compulsion. It was in this context that *Sacramento I* addressed the "federal mandate" issue. (See also *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d at p. 543.) We here express no view on the question whether "federal" and "state" mandates are mutually exclusive for purposes of state subvention, but leave that issue for another day. We decide only that, insofar as an expense is "federally mandated," as described in the state Constitution and statutes, it is exempt from the pertinent taxation and spending limits.

Article XIII B, section 9(b), defines federally mandated appropriations as those "required for purposes of complying with mandates of ... the federal government which, *without discretion*, require an expenditure for additional services or which *unavoidably make the providing of existing services more costly*." (Italics added.)

As in *Sacramento I*, plaintiffs argue that the words "without discretion" and "unavoidably" require clear *legal* compulsion not present in Public Law 94-566. Defendants respond, as before, that the consequences of California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse. [17] In *Sacramento I*, the Court of Appeal adopted plaintiffs' narrow view. On reflection, we disagree.

17 Ironically, the local agencies here argue *against* a "federal mandate," with the state in opposition to that view. An anti-"federal mandate" position seems directly contrary to the local agencies' interests, since its acceptance would mean the agencies are not eligible for exemptions from their pertinent taxing and spending limits. However, all parties appear still bound by the premise of *Sacramento I* that if a cost is "federally mandated," it is ineligible for state subvention. As noted above (see fn. 16, *ante*), we do not decide that issue here.

Though section 9(b) seems plain on its face, we find a latent ambiguity in context. At the time article XIII B was adopted, United States Supreme Court decisions construing the Tenth Amendment *severely limited* federal power to dictate policy or programs to the sovereign states or their subdivisions. [18] Indeed, by its early ruling that federal unemployment insurance ***72** laws did not violate state sovereignty insofar as they merely employed a "carrot and stick" to induce state compliance (*Steward Machine Co.* v. *Davis, supra*, 301 U.S. 548, 585-593 [81 L.Ed. 1279, 1290-1294]), the high court helped set the stage for two generations of pervasive federal regulation by this indirect means. [19]

18 The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

19 The traditional categorical-aid provisions of the Social Security Act (e.g., 42 U.S.C. §§ 301 et seq. [old-age assistance], 601 et seq. [aid to needy families with dependent children], 1201 et seq. [aid to the blind], 1351 et seq. [aid to the permanently and totally disabled]), and statutes concerned with occupational safety and health (e.g., 29 U.S.C. § 651 et seq.), highways and mass transit (e.g., 23 U.S.C. § 101 et seq.), education (e.g., 20 U.S.C. § 241a et seq.), and air and water pollution (e.g., 33 U.S.C. §§ 1251 et seq., 1311 et seq.; 42 U.S.C. § 7401 et seq.) are but a few examples of federal laws imposing greater or lesser degrees of inducement to state and local compliance with federal policies and programs.

Just three years before article XIII B was adopted, the court struck down, on Tenth Amendment grounds, Congress's effort to extend the minimum-wage and maximum-hour requirements of the Fair Labor Standards Act directly to local government employees. (*National League of Cities v. Usery* (1976) 426 U.S. 833 [49 L.Ed.2d 245, 96 S.Ct. 2465].) Overruling earlier authority (see

Maryland v. *Wirtz* (1968) 392 U.S. 183 [20 L.Ed.2d 1020, 88 S.Ct. 2017]), the court held in *Usery, supra*, that constitutional principles of federalism prohibit Congress from using its otherwise "plenary" commerce power against the "States as States," so as to interfere with the essential "attributes of [state government] sovereignty." (426 U.S. at pp. 840-855 [49 L.Ed.2d at pp. 250-260].) Accordingly, said the court, Congress could not "force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. ..." (*Id.*, at p. 855 [49 L.Ed.2d at p. 259].)

Usery dealt with federal efforts to regulate sovereign units of government as employers. However, the court's rationale obviously applied with equal or greater force to direct federal regulation of state and local governments *as governments*. Under *Usery's* reasoning, it seems manifest that Congress's direct power to require or prohibit substantive governmental policies or programs by state or local agencies was greatly curtailed. Such power would interfere impermissibly with "integral governmental functions" and essential "attributes of [state] sovereignty. [20] ***73**

20 *Hodel v. Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264 [69 L.Ed.2d 1, 101 S.Ct. 2352] later implicitly confirmed this premise. There, Virginia mine operators challenged a federal surface-mining regulatory scheme on grounds it displaced state authority and sovereignty. The federal law imposed minimum federal standards, to be enforced by federal or state officials at the state's choice, and allowed states to take over regulation by imposing equal or higher standards of their own. (30 U.S.C. §§ 1201 et seq., 1251-1254.) The court upheld the program, noting it regulated private persons, not the "States as States. " Moreover, said the court, since states were not ordered to adopt their own surface-mining standards, "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. [Citations.] .... " (452 U.S. at pp. 286-288 [69 L.Ed.2d at pp. 22-24].)

After article XIII B's adoption, both the result and the reasoning of *Usery* were overruled in *Garcia v. San Antonio Metro. Transit Auth.* (1985) 469 U.S. 528 [83 L.Ed.2d 1016, 105 S.Ct. 1005]. In *Garcia*, a five-justice majority concluded that the political structure of the federal system, rather than rigid categories of inviolable state "sovereignty," constitutes state and local governments' primary protection against Congress's overreaching efforts to regulate them. (Pp. 547-555 [83 L.Ed.2d at pp. 1031-1037].)

However, this later development does not alter two crucial facts extant when article XIII B was enacted. First, the power of the federal government to impose its direct regulatory will on state and local agencies was *then* sharply in doubt. Second, in conformity with this principle, the vast bulk of cost-producing federal influence on government at the state and local levels was by inducement or incentive rather than direct compulsion. [21] That remains so to this day.

21 The United States Constitution includes specific limitations on the subject-matter jurisdiction of state and local governments (art. I, § 10), imposes certain direct obligations and restrictions on the "States as States" (e.g., art. I, § 2, cls. 1, 4; art. I, § 3, cls. 1, 2; art II, § 1, cl. 2; art. IV, §§ 1, 2, cls. 1, 2; Amends. XIV, XV), and grants Congress power to prevent denial of certain constitutional rights by the states (Amends. XIII, XIV, XV). Obviously, however, these provisions account for only a minute portion of the costs incurred by state and local governments as a result of federal programs and regulations.

Thus, if article XIII B's reference to "federal mandates" were limited to strict legal compulsion by the federal government, it would have been largely superfluous. [22] ([12]) It is well settled that "constitutional ... enactments must receive a liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people. [Citations.] ...." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281].) While "[a] constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words[,] [citation] [, t]he literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers. [Citations.]" (*Ibid.*)

22 For this reason, federal cases cited by plaintiffs and their amici curiae for the proposition that Public Law 94-566 is not "coercive " (e.g., *County of Los Angeles, Cal. v. Marshall* (D.C. Cir. 1980) 631 F.2d 767 [203 App.D.C. 185]; *State, etc.* v. *Marshall* (1st. Cir. 1980) 616 F.2d 240) are inapposite. Those decisions applied

Tenth Amendment principles to determine whether Public Law 94-566 was constitutionally valid. Had Public Law 94-566 been struck down on this ground, it would *not* have resulted in local costs to which the "federal mandate" provisions of article XIII B might extend. Thus, applying the Tenth Amendment cases to determine whether a cost is "federally mandated " for purposes of article XIII B presents a problem in circular reasoning.

([11b]) As the drafters and adopters of article XIII B must have understood, certain regulatory standards imposed by the federal government ***74** under "cooperative federalism" schemes are coercive on the states and localities in every practical sense. The instant facts amply illustrate the point. Joint federal-state operation of a system of unemployment compensation has been a fundamental aspect of our political fabric since the Great Depression. California had afforded federally "certified" unemployment insurance protection to its workers for over 40 years by the time Public Law 94-566, chapter 2/78, and article XIII B were adopted. Every other state also operated such a system. If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.

Plaintiffs and their amici curiae suggest California could have chosen to terminate its own unemployment insurance system, thus leaving the state's employers faced only with the federal tax. However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends.

Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of article XIII B. [23] ***75**

23 The dissent cites two older cases for the premise that in antidebt and antispending measures, the exception recognized for "mandatory" costs and expenditures has traditionally been limited to obligations imposed by law. Neither cited decision is dispositive or persuasive here.

County of Los Angeles v. Byram (1951) 36 Cal.2d 694 [227 P.2d 4], and the cases therein cited, concern the constitutional provision (Cal. Const., former art. XI, § 18, see now art. XVI, § 18 (hereafter section 18)) which prohibits local governments, absent voter approval, from incurring debts or liabilities which exceed in any year the income or revenue provided for such year. Section 18 is *absolute on its face* and, unlike article XIII B, it contains *no express exception* for mandatory expenses. Though sometimes founded on contorted linguistic analyses (see, e.g., *City of Long Beach* v. *Lisenby* (1919) 180 Cal. 52, 56 [179 P. 198]), the *implied* exceptions to section 18, as recognized in *Byram* and other cases, arise from a rule of necessity and despite the absolute constitutional language. Such implied exceptions must, of course, be narrowly confined.

On the other hand, *County of Los Angeles v. Payne* (1937) 8 Cal.2d 563 [66 P.2d 658], also cited by the dissent, construed former Political Code section 3714, which limited a local government's annual expenditures to its previously adopted budget. Section 3714 *did* contain an express exception for "mandatory expenses *required by law*." (Italics added.) *Payne's* adherence to the explicit terms of the statutory exception is hardly remarkable.

In contrast with the measure considered in *Byram*, article XIII B and the Revenue and Taxation Code *do* expressly exempt "federally mandated " expenses from the pertinent taxation and appropriations limits. Unlike the measure construed in *Payne*, neither article XIII B nor the Revenue and Taxation Code expressly limit their exemptions to obligations " required by law." Article XIII B uses the broader terms "unavoidably " and "without discretion," suggesting recognition by the drafters and voters that forces beyond strict legal compulsion may produce expenses that are realistically involuntary. The Revenue and Taxation Code explicitly includes coercive federal "carrot and stick" requirements within the federally "mandated" costs exempt from statutory property tax limits. (Rev. & Tax. Code, § 2206.)

Unlike the *Sacramento I* court, we deem significant the Legislature's persistent agreement with our construction. In 1980, after the adoption of article XIII B, it amended the statutory definition of "costs mandated by the federal government" to provide that these include "costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific

federal program or service requirements would result in *substantial monetary penalties* or *loss of funds* to *public or private persons* in the state. ...“ (Rev. & Tax. Code, § 2206, italics added; Stats. 1980, ch. 1256, § 3, p. 4247.)

In *Sacramento I*, the Court of Appeal declined to apply this statutory amendment ”retroactively“ to article XIII B. (156 Cal.App.3d at pp. 197-198.) The Legislature immediately responded. In 1984 statutes enacted for the express purpose of ”implement[ing]“ article XIII B (see Gov. Code, § 17500), the Legislature reiterated its 1980 definition. (*Id.*, § 17513; Stats. 1984, ch. 1459, § 1, p. 5114.)[24]

24 Plaintiffs suggest that by reenacting this language in the wake of *Sacramento I*, the Legislature ”acquiesced“ in the Court of Appeal's narrow definition of ”costs mandated by the federal government.“ We are not persuaded. *Sacramento I* did not *construe* the statutory language; it simply found a postdated statute *irrelevant* to the proper interpretation of article XIII B. By later readopting its expanded definition in statutes designed to ”implement“ article XIII B, the Legislature expressed its disagreement with *Sacramento I*, not its acquiescence. Contrary to the implications of *Sacramento I*, legislative efforts to resolve ambiguities in constitutional language are entitled to serious judicial consideration. (See authorities cited *ante*.)

Plaintiffs contend that these statutory pronouncements deserve little interpretive weight since, among other things, they are ”internally inconsistent.“ Plaintiffs stress the proviso in Revenue and Taxation Code, section 2206, and in Government Code, section 17513, that the phrase ”' [c]osts mandated by the federal government' does *not* include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the *option* of the state, local agency, or school district.“ (Italics added.)

We see no fatal inconsistencies. The first clause of the proviso merely confirms, as article XIII B itself specifies, that program funds voluntarily provided by another unit of government may not be excluded from the ***76** spending limits of recipient local agencies. (Compare art. XIII B, §§ 8, subd. (b), 9(b).) The second clause isolates a concern which we share - that state or local governments might otherwise claim ”federally mandated costs “ even where participation in a federal program, or compliance with federal ” standards,“ is a matter of true choice. (Cf., e.g., *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d at pp. 542-544.)[25]

25 In the *Carmel Valley* case, the state claimed, among other things, that local costs of purchasing protective clothing and equipment for firefighters, as required by regulations under the California Occupational Safety and Health Act, constituted a nonreimbursable ”federal mandate “ because the California standards merely ”implemented“ federal law. However, the evidence was contrary; a letter from the federal Occupational Safety and Health Administration disclaimed federal jurisdiction over California's political subdivisions and stated that state and federal standards were independent. (190 Cal.App.3d at pp. 543-544.) Examination of the pertinent statutory scheme reinforces the view that compliance with federal standards in this area is ”optional“ with the state. Other than loss of limited federal administrative funds (29 U.S.C. § 672(g)), the only sanction for California's decision not to maintain a federally approved occupational safety and health system is that federal standards, administered by federal personnel, will then prevail within the state. (*Id.*, § 667(b)-(h).)

Given the variety of cooperative federal-state-local programs, we here attempt no final test for ”mandatory“ versus ”optional“ compliance with federal law. ([13]) A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of article XIII B, section 9(b): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.

([11c]) For reasons expressed above, we are satisfied under these standards that chapter 2/78 did implement a federal ”mandate“ within the meaning of article XIII B and prior statutes restricting local taxation. Hence, subject to superseding constitutional ceilings on taxation by state and local governments, an agency governed by chapter 2/78 may tax and spend as necessary to meet the expenses required to comply with that legislation. To the

extent *Sacramento I* is inconsistent with our analysis, that decision is disapproved.

VI. Conclusion.

We have concluded that chapter 2/78 is a "federal mandate" which exempts affected state and local agencies from pertinent limits on their power to tax, appropriate, and spend. However, local governments' expenses ***77** of complying with chapter 2/78 are not subject to compulsory state subvention, because chapter 2/78 imposed no new or increased "program or service," and no "unique" requirement, on local agencies. The contrary judgment of the Court of Appeal is reversed.

Lucas, C. J., Mosk, J., Broussard, J., Panelli, J., and Kennard, J., concurred.

KAUFMAN, J.,

Concurring and Dissenting.

I concur in the judgment. Given this court's decision in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202], I am compelled to agree that the obligation imposed on local governments by the 1978 state unemployment insurance legislation is not a "new program or higher level of service" within the meaning of article XIII B, section 6, of the California Constitution, and that for this reason the state is not constitutionally obligated to provide a subvention of funds to reimburse the unemployment insurance costs of local governments. I respectfully dissent, however, from the additional conclusion, stated in part V of the majority opinion, that these unemployment insurance costs are "mandates of ... the federal government" and therefore exempt from the state and local government appropriation limits of article XIII B and from property taxation limits imposed by statute. In reaching this additional conclusion the majority decides an issue not raised by the parties and completely outside the scope of this action. As so often happens when a court reaches beyond the confines of the case before it to render a gratuitous advisory opinion, the majority decides the issue incorrectly.

All too frequently in recent years (see, e.g., *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 345, fn. 1 [256 Cal.Rptr. 543, 769 P.2d 399]) this court, in its misguided zeal to provide enlightenment, has reached out to decide an issue not tendered by the parties. The majority's failure to exercise proper judicial restraint in the instant case is another example of this trend and one I find particularly disturbing since it violates a fundamental and venerable tenet of judicial practice - i.e., "A court will not decide a constitutional question unless such construction is absolutely necessary." (*Estate of Johnson* (1903) 139 Cal. 532, 534 [73 P. 424]; accord, *People* v. *Williams* (1976) 16 Cal.3d 663, 667 [128 Cal.Rptr. 888, 547 P.2d 1000]; *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65 [195 P.2d 1].) The federal mandate issue which the majority here decides, because it turns on the proper construction of article XIII B, section 9, of our state Constitution, is a constitutional issue. Using this case to resolve that issue is, to my mind, indefensible.

To see just how far the majority has wandered from the issues essential to the proper resolution of this case, one need only point out that this action ***78** was not brought to settle a dispute about taxation or appropriation limits, nor has this court been informed that any such dispute exists. Rather, this action was brought to enforce the holding in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258] (*Sacramento I*), that the state is constitutionally obligated to reimburse the unemployment insurance costs of local governments. The governmental entities litigating this proceeding have not sought a judicial determination of the 1978 unemployment insurance legislation's effect on their statutory or constitutional taxing or spending limits, nor have they raised any issue regarding whether unemployment insurance costs are federally mandated for any purpose. The federal mandate issue was first injected into the case by this court when we requested additional briefing on the questions whether the unemployment insurance costs of local governments are federally mandated under article XIII B, section 9, of the state Constitution and, if so, whether this conclusion necessarily exempts the state from any obligation it might otherwise have to reimburse local governments for these costs.

The majority's federal mandate discussion does not even provide an alternative ground for the holding denying reimbursement of local governments' unemployment insurance costs, for the majority purports to decide

whether unemployment insurance costs are federally mandated without deciding whether resolution of this issue has any bearing on entitlement to reimbursement (see maj. opn., *ante*, p. 71, fn. 16). The majority's only justification for deciding whether unemployment insurance costs are federally mandated is that the issue has " important implications" inasmuch as federally mandated costs are "exempt from a local government's statutory taxation limit (Rev. & Tax. Code, § 2271) " and "from the constitutional spending limit of any affected entity, state or local (Cal. Const., art. XIII B, § 9(b))." (Maj. opn., *ante*, pp. 70-71.) But the present case is an inappropriate vehicle for deciding these weighty issues since neither the state nor the local entities have any reason to contest the other's exemptions from spending or taxation limits. In other words, the parties now before us are not adverse on these issues and so have not defined and argued opposing points of view with the vigor and thoroughness essential to proper judicial resolution of complex legal questions, particularly those of constitutional magnitude. Those who might have argued in favor of including unemployment insurance costs in the taxing and spending limits - for example, the proponents of the initiative measure by which article XIII B was enacted - are not represented in this proceeding.

Were the issue properly presented in this case, I would conclude that the unemployment insurance costs are not federally mandated. The text of a constitution "should be construed in accordance with the natural and ordinary meaning of its words." (***79** *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281].) The language at issue here excludes from the definition of " appropriations subject to limitation" those appropriations " required for purposes of complying with *mandates* of the courts or the federal government which, *without discretion, require* an expenditure for additional services or which *unavoidably* make the providing of existing services more costly. " (Cal. Const., art. XIII B, § 9, subd. (b), italics added.)

The meaning of this language is clear; to look beyond the text for some other meaning is both unnecessary and improper under accepted rules of constitutional interpretation. (See *State Board of Education* v. *Levit* (1959) 52 Cal.2d 441, 462 [343 P.2d 8]; *People v. Knowles* (1950) 35 Cal.2d 175, 182-183 [217 P.2d 1].) A "mandate" is "an order, command [or] charge." (*Xth Olympiad Com. v. American Olym. Assn.* (1935) 2 Cal.2d 600, 604 [42 P.2d 1023]; see also, *Morris* v. *County of Marin* (1977) 18 Cal.3d 901, 908 [136 Cal.Rptr. 251, 559 P.2d 606] ["mandatory duty" is "an obligatory duty which a governmental entity is required to perform"]; *Bridgman v. American Book Co.* (1958) 12 Misc.2d 63, 66 [173 N.Y.S.2d 502, 506] ["mandate" is "a command, order or direction ... which a person is bound to obey"].) The mandates to which the constitutional provision at issue refers are those "of the courts or the federal government." The coercive force of court mandates is, of course, the force of law. That "mandates of ... the federal government" are similarly limited to those obligations imposed by force of federal law is shown not only by the term "mandate" itself but also by the terms "without discretion " and " unavoidably," which plainly exclude any form of inducement using political or economic pressure rather than legal compulsion.

Laws limiting governmental appropriations and indebtedness have traditionally exempted two categories of expenditures: those required to meet emergencies and those required to satisfy duties or mandates imposed by law. (See, e.g., *County of Los Angeles v. Byram* (1951) 36 Cal.2d 694, 698-700 [227 P.2d 4]; *County of Los Angeles* v. *Payne* (1937) 8 Cal.2d 563, 569-575 [66 P.2d 658]; *State* v. *City Council of City of Helena* (1939) 108 Mont. 347 [90 P.2d 514, 516]; *Raynor v. King County* (1940) 2 Wn.2d 199 [97 P.2d 696, 707].) The latter category has been interpreted as including only those obligations compelled by force of law, as opposed to economic or political necessity or expedience. (See *County of Los Angeles v. Byram, supra*, at pp. 698-700; *County of Los Angeles* v. *Payne, supra*, at pp. 573-574.) Article XIII B of the California Constitution follows the pattern of other similar laws; it provides exemptions for emergency appropriations in section 3, subdivision (c), and for legal duties or "mandates" in section 9, subdivision (b). I see no basis for concluding that the term "mandate," which in the context of government debt and appropriation limitations has traditionally ***80** meant a duty imposed by force of law, has suddenly acquired a novel and more expansive meaning in section 9. On the contrary, the drafters of section 9 appear to have taken pains to avoid any such interpretation.

As stated in *Sacramento I*, "The concept of federal mandates ... is defined in section 9 of article XIII B. Subdivision (b) of that section excludes

from a governmental entity's appropriation limit '[a]ppropriations required for purposes of complying with mandates of ... the federal government which, *without discretion, require* an expenditure' by the governmental entity. (Italics added.) As contemplated by article XIII B, section 9, a federal mandate is one pursuant to which the federal government imposes a cost upon a governmental entity, and the entity has *no discretion* to refuse the cost. Chapter 2 [the 1978 unemployment insurance legislation] was not a federal mandate within this constitutional definition, as the State had the discretion to participate or not in the federal unemployment insurance system. " (*Sacramento I, supra*, 156 Cal.App.3d 182, 197, italics in original.) Giving the constitutional language its usual and ordinary meaning, I agree with the Court of Appeal that federal law "mandates" an expenditure only if the expenditure is legally compelled, and not if the federal law merely provides economic or political inducements, no matter how powerful or coercive. Since it is undisputed that the state was under no legal compulsion to enact the 1978 unemployment insurance legislation, the burdens of that legislation are not " mandates of ... the federal government."

In support of its contrary conclusion, the majority reasons as follows: (1) when article XIII B of the California Constitution was drafted and enacted, the Tenth Amendment to the United States Constitution had been construed to prohibit Congress from imposing costs on state and local governments; (2) as a result, virtually all federal laws imposing costs on state and local governments did so through "carrot and stick" incentive programs rather than by direct legal compulsion; and (3) the exemption for "mandates of ... the federal government" must be construed to encompass at least some of these incentive programs because otherwise it would be almost entirely superfluous. I find each of these points highly questionable, if not demonstratively unsound.

First, the Tenth Amendment has never been interpreted as entirely prohibiting the federal government from imposing costs on state and local government. Rather, *National League of Cities v. Usery* (1976) 426 U.S. 833 [49 L.Ed.2d 245, 96 S.Ct. 2465] defined an exception to the broad sweep of Congress's commerce clause authority. Under this exception, "traditional governmental functions" of state and local governments were protected from direct and intrusive federal regulation. (426 U.S. at p. 852 [49 L.Ed.2d at pp. 257-258].) As explained in *Garcia v. San Antonio Metro. Transit* ***81** *Auth.* (1985) 469 U.S. 528, 538-547 [83 L.Ed.2d 1016, 1025-1032, 105 S.Ct. 1005], the result was an inconsistent patchwork of decisions upholding or striking laws depending on whether the regulated activities were perceived by the court as being traditionally associated with state or local government or constituting " attributes of state sovereignty." Thus, a significant number of laws imposing costs on state and local governments survived Tenth Amendment scrutiny even before the decision in *Garcia v. San Antonio Metro. Transit Auth., supra*. (See, e.g., *EEOC v. Wyoming* (1983) 460 U.S. 226 [75 L.Ed.2d 18, 103 S.Ct. 1054] [holding state and local government employee retirement policies subject to federal age discrimination regulations]; see generally, Skover, *"Phoenix Rising" and Federalism Analysis* (1986) 13 Hastings Const.L.Q. 271, 286-288.) More importantly, however, I see no reason to assume that the drafters of article XIII B intended that the federal mandate exemption would have broad application, encompassing a large number of federal programs. Rather, construing the exemption narrowly seems entirely consistent with the probable intent of those who drafted the provision.

The test proposed by the majority for identifying those incentive programs which qualify as "mandates of ... the federal government" will require an extensive factual inquiry into the practical consequences of noncompliance with the federal law. It will be burdensome to apply and its outcome will be difficult to predict. Besides being wholly unnecessary to resolution of this case, and violating the probable intent of the voters who enacted article XIII B of the California Constitution, [1] the majority's discussion of the federal mandate issue is certain to generate more difficulties than it resolves. ***82**

1 Those voters no doubt will be upset to learn that their tax dollars will be dissipated in litigation to determine such metaphysical questions as whether a decision to participate in a federal program was "truly voluntary."

Attachment 3

23 Cal.App.4th 1761, 29 Cal.Rptr.2d 26

PONDEROSA HOMES,
INC., Plaintiff and Appellant,
v.
CITY OF SAN RAMON et al.,
Defendants and Respondents.

No. A060955.
Court of Appeal, First District, Division 3, California.
Apr 8, 1994.

SUMMARY

A city council granted a developer tentative subdivision map approval for a residential development. In connection with this approval, the city imposed certain conditions, which included a requirement that the developer pay a specified traffic mitigation fee per residential unit. After the city gave final subdivision map approval to the final phase of the developer's project, the developer filed an action against the city and city council, challenging the traffic mitigation fee. The developer sought declaratory relief, damages for inverse condemnation and violation of its civil rights, a refund of fees paid under protest, and a writ preventing imposition of the fees. The devel-oper filed a motion for summary adjudication of issues, and the trial court denied the motion on the ground that the developer had failed to over come the city's affirmative defenses based on the running of the statute of limitations as to each cause of action. The city then moved for judgment on the pleadings on the ground that the causes of action were barred by the applicable statutes of limitations, and the trial court granted the motion. (Superior Court of Contra Costa County, No. C9105569, John F. Van De Poel, Judge.)

The Court of Appeal affirmed, holding that the trial court properly granted the motion for judgment on the pleadings. The limitations period with respect to the state law claims began to run on the date the city council gave the developer's project tentative subdivision map approval and the city imposed the fee condition, rather than when the developer paid an installment on the fees. Gov. Code, § 66020, subd. (d), states that an action to challenge the imposition of fees may be filed "within 180 days after the date of the imposition." "To impose" generally means to establish or apply by authority or force, and under Gov. Code, § 66020, subd. (h), the imposition of fees occurs "when they are imposed or levied." The fact that Gov. Code, § 66020, distinguishes between the time of tentative map approval and the time of "imposition of fees" does not imply that the latter takes place when the fees are paid. The court also held that granting the motion for judgment on the pleadings was proper with respect to the civil rights claim. The limitations period for the civil rights claim under 42 U.S.C. § 1983 was one year (Code Civ. Proc., § 340, subd. (3)), and that period also ran from the date of the imposition of the fees. Claims under 42 U.S.C. § 1983 are ripe for adjudication when the government agency has arrived at a definitive position on an issue that inflicts an actual, concrete injury. (Opinion by Merrill, J., with White, P. J., and Werdegar, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Pleading § 92--Motion for Judgment on the Pleadings--Timing of Motion-- Standard of Review.
A motion for judgment on the pleadings may be made either prior to trial or at trial, on the same grounds as could be urged by a general demurrer. Like a demurrer, the motion is confined to the face of the pleading under attack, and the plaintiff's allegations are accepted as true. The standard of review is the same as on a judgment following the sustaining of a demurrer.

[See 6 **Witkin,** Cal. Procedure (3d ed. 1985) Proceedings Without Trial, §§ 262, 263.]

(2)
Limitation of Actions § 78--Pleading--Avoidance of Statute--Pleading of Excuse or Tolling.
When a complaint shows on its face or on the basis of judicially noticeable facts that the cause of action is barred by the applicable statute of limitations, the plaintiff must plead facts that show an excuse, tolling, or some other basis for avoiding the statutory bar.

(3)
Pleading § 92--Motion for Judgment on the Pleadings--Evidence.
In an action by a developer against a city council and the city, based on the city's imposition of a traffic

mitigation fee as a condition of approval of the developer's subdivision map, the trial court, in granting the city's motion for judgment on the pleadings, was entitled to rely solely on the developer's petition and complaint, together with the statements of undisputed facts submitted by the parties, as to which they waived their rights to have a determination at trial. These facts were properly considered by the trial court in making its determination that each of the developer's challenges to the traffic mitigation fee was barred by an applicable statute of limitations.

(4)
Zoning and Planning § 17--Enactment of Zoning Plans and Regulations-- Subdivision Maps--Challenge to Traffic Mitigation Fees --Limitations as Bar--State Law Claims.
In an action by a developer against a city council and the city, based on the city's imposition of a traffic mitigation fee as a condition of approval of the developer's subdivision map, the trial court properly granted the city's motion for judgment on the pleadings, on the ground that each cause of action under state law was barred by the statute of limitations. The limitations period began to run on the date the city council gave tentative subdivision map approval and the city imposed the fee condition, rather than when the developer paid an installment on the fees. Gov. Code, § 66020, subd. (d), states that an action to challenge the imposition of fees may be filed "within 180 days after the date of the imposition." "To impose" generally means to establish or apply by authority or force, and under Gov. Code, § 66020, subd. (h), the imposition of fees occurs "when they are imposed or levied." The fact that Gov. Code, § 66020, distinguishes between the time of tentative map approval and the time of "imposition of fees" does not imply that the latter takes place when the fees are paid. Such an interpretation does not contradict Gov. Code, § 66020, subd. (a), which does not establish that no cause of action can arise until the fee has been paid, but requires a tender of payment or guarantee of payment when protesting the fees.

[See 4 **Witkin,** Summary of Cal. Law (9th ed. 1987) Real Property, § 44.]

(5)
Zoning and Planning § 16--Enactment of Zoning Plans and Regulations-- Residential Housing Development--Protest Against Imposition of Local Fees-- Limitations.
Gov. Code, § 66020, subd. (a) (protest against imposition of local fees on residential housing development; time limits), requires either a tender of payment or a satisfactory guarantee of future payment at the time of any protest of the imposition of a fee. Under Gov. Code, § 66020, subd. (d), it is just such a protest that must be filed either at the time of approval or conditional approval of the development, or "within 90 days after the date of the imposition of the fees." Thus, Gov. Code, § 66020, subd. (a), requires that there be a tender of payment or a guarantee at the time of any protest of "the imposition of any fees"; Gov. Code, § 66020, subd. (d), in turn requires that the protest be made within 90 days of "the imposition of the fees," that a protest be made prior to filing an action to attack the imposition of the fees, and that any action be brought "within 180 days after the date of the imposition." The statutory scheme ensures that a protesting developer tenders or bonds for the required fee at the time of protest, and that a protest be made before the developer's cause of action accrues.

(6)
Zoning and Planning § 17--Enactment of Zoning Plans and Regulations-- Subdivision Maps--Challenge to Traffic Mitigation Fees--Limitations as Bar-- Civil Rights Claims.
In an action by a developer against a city council and the city, based on the city's imposition of a traffic mitigation fee as a condition of approval of the developer's subdivision map, the trial court properly granted the city's motion for judgment on the pleadings as to the developer's civil rights claim, on the ground that it was barred by the statute of limitations. The limitations period for the civil rights claim under 42 U.S.C. § 1983 was one year (Code Civ. Proc., § 340, subd. (3)), and the one-year period ran from the date of the imposition of the fees. Claims under 42 U.S.C. § 1983 are ripe for adjudication when the government agency has arrived at a definitive position on an issue that inflicts an actual, concrete injury. This occurred when the local agency actually imposed the fee requirement on the developer, but the developer's petition and complaint were filed more than one year after the imposition of the fees. The developer's claims were subject to the statute of limitations, since there was no dispute as to the city's power to impose the fee, and to condition approval of the subdivision map on payment. The developer only challenged the amount of the fee, and the manner in which it was imposed.

COUNSEL

Hugh L. Isola, Russell J. Hanlon, Thomas P. Murphy and Berliner Cohen for Plaintiff and Appellant.

Byron Athan, City Attorney, Matteoni, Saxe & Nanda and Allan R. Saxe for Defendants and Respondents.

MERRILL, J.

Ponderosa Homes, Inc. (Ponderosa), appeals from a judgment in favor of respondents, the City of San Ramon (the City) and the San Ramon City Council (the City Council), entered upon the granting of respondents' motion for judgment on the pleadings. The issues raised on the motion and on this appeal are the date upon which the applicable statute of limitations commenced running, and which statute of limitations is applicable to each cause of action. Ponderosa contends that no statute of limitations had run, and therefore the trial court erred in granting the motion for judgment on the pleadings. We disagree and therefore affirm the judgment. ***1765**

I. Factual and Procedural Background

The following facts are taken from the pleadings and the stipulation of agreed facts submitted by the parties.

On April 26, 1988, the City Council granted Ponderosa tentative subdivision map approval for a 452-unit residential development. In connection with this tentative subdivision map approval, the City imposed a number of conditions. As relevant to this case, these conditions included (1) a requirement that Ponderosa improve and widen Dougherty Road, with City reimbursement through "Traffic Mitigation Fee" credits for up to $584,000 in costs associated with upgrading the road to "modern arterial standards"; and (2) a requirement that Ponderosa pay, among other fees, a traffic mitigation fee of $3,200 per residential unit "upon submittal of plans or issuance of permits."

At the time it approved Ponderosa's tentative subdivision map, the City had a dual traffic mitigation fee which required payment of $3,200 per unit for projects such as Ponderosa's, located in the Dougherty and Tassajara Valleys, but only $1,500 per unit for projects elsewhere in the City. On July 26, 1988, the City Council replaced this dual traffic mitigation fee arrangement with a single city-wide fee of $2,177 per unit. Ponderosa did not object to imposition of the $3,200 traffic mitigation fee at the time of the tentative subdivision map approval.

The City Council granted Ponderosa final subdivision map approval for its project in phases. The City approved the first phase on October 26, 1988, for 77 lots; and the second phase on July 31, 1989, for 57 lots. Traffic impact fees attributable to the first two phased final maps in the amounts of $246,400 and $182,400, respectively, were credited against the work required of Ponderosa in upgrading Dougherty Road. These amounts represented payment of the traffic mitigation fee of $3,200 per unit multiplied by the number of units finally approved.

On October 6, 1989, Davidon Five Star Corp. (Davidon), a competing developer of another residential subdivision across the road from Ponderosa's development, filed a petition for writ of mandamus and complaint for declaratory relief in superior court (Davidon Five Star Corp. v. The City of San Ramon et al. (Super. Ct. Contra Costa County, 1989, No. C89-04200)). Davidon's action challenged the City's imposition of the $3,200 fee to its project, asserting that the fee was void as an illegal special tax and violated the due process and takings clauses of the United States and California Constitutions. At the time the City gave tentative subdivision map approval ***1766** for Davidon's project, the City's traffic mitigation fee in effect was $2,117. Following a ruling by the superior court on October 22, 1990, that the City's imposition of the $3,200 fee on Davidon was unlawful, the parties to that action entered into a settlement agreement and a stipulation for entry of judgment setting the traffic impact fee at $2,117 per residential unit.

On June 25, 1991, the City gave final subdivision map approval to the third phase of Ponderosa's project, consisting of 44 lots. In compliance with the condition imposed at the time of tentative subdivision map approval, Ponderosa paid a traffic impact fee in the total amount of $140,800, based on the formula of $3,200 per unit. For the first time, Ponderosa lodged an objection to payment of the $3,200 traffic mitigation fee. Thereafter, Ponderosa paid all further installments of the traffic mitigation fee under protest, in accordance with the provisions of Government Code sections 66020 and 66021. [1]

1 All further statutory references are to the Government Code unless otherwise indicated.

On December 4, 1991, Ponderosa filed the petition and complaint in this case, challenging the $3,200 per unit traffic mitigation fee, and seeking injunctive relief, a refund of fees paid under protest, and damages for inverse condemnation and alleged violation of its civil rights. Each cause of action in Ponderosa's complaint set forth a different legal theory for challenging the traffic mitigation fee.

The first cause of action sought a declaration that the fee was an illegal tax in excess of the reasonable cost of providing traffic improvements, in violation of both the provisions of the Government Code providing authority to impose special taxes, and article XIII of the California Constitution. The third cause of action alleged that the City's imposition of the $3,200 traffic mitigation fee constituted a taking of property without due process of law and an inverse condemnation without just compensation.[2] In the fourth cause of action, Ponderosa alleged deprivation of its civil rights under 42 United States Code section 1983. The fifth cause of action sought a refund pursuant to sections 66020 and 66021 of fees paid under protest, alleging that the City had failed to identify the public facilities for which the fee was charged, and had failed to show any relationship between the need for traffic improvements, the amount of the fee, the uses to which it would be put, and the cost of public improvements attributable to Ponderosa's development. Finally, the sixth cause of action sought a writ of mandate or prohibition preventing the imposition of the traffic mitigation fees.

2 The second cause of action was settled by the parties prior to this appeal.

On November 5, 1992, Ponderosa filed a motion for summary adjudication in its favor. The trial court denied Ponderosa's motion on the grounds ***1767** that it had failed to overcome the City's affirmative defenses based on the running of the statute of limitations as to each cause of action. The court found that the applicable limitation period as to each cause of action commenced on April 26, 1988, upon tentative subdivision map approval; and that Ponderosa had thereafter failed to timely file its petition and complaint.

The City gave Ponderosa written notice of its intent to make an oral motion for judgment on the pleadings. On December 7, 1992, at the outset of trial, the City made a motion for judgment on the pleadings on the grounds that the first, third, fourth, fifth and sixth causes of action of Ponderosa's petition and complaint were barred by an applicable statute of limitations. The trial court granted the motion, finding as follows: "It appears both from the verified petition/complaint and from the Stipulation of Agreed Facts submitted to the court that the first, third, fifth and sixth causes of action are barred by the 180 day limitations period of Government Code § 66020 and that the fourth cause of action is barred by the one year limitations period applicable to a civil rights action brought under 42 U.S.C. § 1983. In making this determination, the court finds that the applicable limitations period as to each aforementioned cause of action commenced on April 26, 1988, upon tentative subdivision map approval." The trial court entered judgment for the City, and this appeal followed.

II. Discussion

This appeal is from a decision granting a motion for judgment on the pleadings. The motion was granted solely on the basis of the trial court's decision that each of the relevant causes of action in the complaint was barred by a statute of limitations. The trial court did not reach the substantive merits of the controversy between the parties. Thus, the issue before us is limited to the propriety of the trial court's decision with respect to the running of the applicable statute of limitations.

([1]) A motion for judgment on the pleadings may be made either prior to trial or at trial, on the same grounds as could be urged by a general demurrer. (*Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 99 [214 Cal.Rptr. 561]; 6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 262, pp. 563-564.) Like a demurrer, the motion is confined to the face of the pleading under attack, and the plaintiff's allegations are accepted as true. (*Hughes v. Western MacArthur Co.* (1987) 192 Cal.App.3d 951, 954-955 [237 Cal.Rptr. 738]; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 815, 825 [195 Cal.Rptr. 421]; *Baillargeon v. Department of Water & Power* (1977) 69 Cal.App.3d 670, 675-676 [138 Cal.Rptr. 338]; 6 Witkin, Cal. Procedure, Proceedings Without Trial, *supra*, ***1768** § 263, pp. 564-565.) The standard of review is the same as on a judgment following the sustaining of a demurrer. (*April Enterprises, Inc.*, *supra*, at pp. 815, 825; *Fosgate v. Gonzales* (1980) 107 Cal.App.3d 951, 957 [166 Cal.Rptr. 233]; *Baillargeon*, *supra*, at pp. 675-676.)

([2]) When a complaint shows on its face or on the basis of judicially noticeable facts that the cause of action is barred by the applicable statute of limitations, the plaintiff must plead facts which show an excuse, tolling, or some other basis for avoiding the statutory bar. (*Grange Debris Box & Wrecking Co. v. Superior Court* (1993) 16 Cal.App.4th 1349, 1359-1360 [20 Cal.Rptr.2d 515].) ([3]) In this case, the trial court relied solely on Ponderosa's petition and complaint, together with the statements of undisputed facts submitted by the parties, as to which they waived their rights to have a determination at trial. These facts were properly considered by the trial court in making its determination that each of Ponderosa's challenges to the traffic mitigation fee was barred by an applicable statute of limitations. (*Barker v. Hull* (1987) 191 Cal.App.3d 221, 224, 227 [236 Cal.Rptr. 285].)

Protests against the imposition of fees, dedications or other exactions by a local agency on a residential housing development are governed by section 66020. Section 66020, subdivision (a) provides that any party may protest the imposition of such fees by (1) tendering the required payment in full or providing satisfactory evidence of arrangements to ensure performance of any required condition; and (2) serving written notice on the governing body of the local agency, stating that the payment is made under protest and setting forth the factual and legal grounds for the protest. [3]

3 Section 66020, subdivision (a) provides as follows:
"(a) Any party may protest the imposition of any fees, dedications, reservations, or other exactions imposed on a residential housing development by a local agency by meeting both of the following requirements:
"(1) Tendering any required payment in full or providing satisfactory evidence of arrangements to ensure performance of the conditions necessary to meet the requirements of the imposition.
"(2) Serving written notice on the governing body of the entity, which notice shall contain all of the following information:
"(A) A statement that the required payment is tendered, or that any conditions which have been imposed are provided for or satisfied, under protest.
"(B) A statement informing the governing body of the factual elements of the dispute and the legal theory forming the basis for the protest."

Section 66020, subdivision (d) sets forth a two-tiered limitations period for such a protest. First, a protest must be filed "at the time of approval or conditional approval of the development or within 90 days after the date of the imposition of the fees, dedications, reservations, or other exactions to be imposed on a residential housing development." Once a protest is filed, "an ***1769** action to attack, review, set aside, void, or annul the imposition of the fees" may be filed "within 180 days after the date of the imposition. Thereafter, notwithstanding any other law to the contrary, all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the imposition." Under section 66020, subdivision (g), "[a]pproval or conditional approval of a development" is defined as occurring "when the tentative map, tentative parcel map, or parcel map is approved or conditionally approved ...." Finally, "imposition of fees" occurs "when they are imposed or levied on a specific development." (§ 66020, subd. (h).) [4]

4 The limitations provisions of section 66020 provide in pertinent part as follows:
"(d) A protest filed pursuant to subdivision (a) shall be filed at the time of approval or conditional approval of the development or within 90 days after the date of the imposition of the fees, dedications, reservations, or other exactions to be imposed on a residential housing development. Any party who files a protest pursuant to subdivision (a) may file an action to attack, review, set aside, void, or annul the imposition of the fees, dedications, reservations, or other exactions imposed on a residential housing development by a local agency within 180 days after the date of the imposition. Thereafter, notwithstanding any other law to the contrary, all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the imposition....
"(g) Approval or conditional approval of a development occurs, for the purposes of this section, when the tentative map, tentative parcel map, or parcel map is approved or conditionally approved or when the parcel map is recorded if a tentative map or tentative parcel map is not required.
"(h) The imposition of fees, dedications, reservations, or other exactions occurs, for the purposes of this section, when they are imposed or levied on a specific development."

The trial court found the 180-day period set forth in this statute was applicable to the first, third, fifth and sixth

causes of action of Ponderosa's petition and complaint, and that the one-year statute of limitations for civil rights actions was applicable to the fourth cause of action. In addition, the trial court found that the limitations periods for both statutes commenced to run on April 26, 1988, the date the City gave Ponderosa's project tentative subdivision map approval and imposed the traffic mitigation fee condition. Because Ponderosa did not file its lawsuit until December 4, 1991, each cause of action was barred by an applicable statute of limitations.

([4]) On appeal, Ponderosa argues that the statute did not commence to run until it actually paid the challenged fee. Under Ponderosa's interpretation of the statute, it did not even have to lodge any protest to the traffic mitigation fee condition until three months (ninety days) had passed after it first paid the traffic mitigation fee on a phase of its development project. The key question, therefore, is whether the "imposition of fees" in this case occurred when the City first set the traffic mitigation fees as a condition on its tentative subdivision map approval, or when Ponderosa paid an installment on the fees already required by the City. ***1770**

Ponderosa argues that section 66020 makes an express distinction between "the time of approval or conditional approval of the development," on the one hand, and "the date of the imposition" of the fee on the other, by equating "approval or conditional approval" with tentative subdivision map approval, and "imposition" with the act of imposing or levying a fee on a specific development. Ponderosa urges that because the statute provides that a developer may file a protest *either* at the time of conditional approval *or* within 90 days after imposition of fees, the Legislature must have intended to give developers the option of waiting to file their protest until they actually pay the levied fee. In addition, Ponderosa contends that no cause of action can accrue at all until the challenged fee is paid, because section 66020, subdivision (a) establishes as the two prerequisites for a fee protest both the tender of the required payment in full and written notice that the payment is being tendered under protest.

We disagree with Ponderosa's analysis. The phrase "to impose" is generally defined to mean to establish or apply by authority or force, as in "to impose a tax." (Webster's Third New Internat. Dict. (1970) p. 1136.) There is a logical distinction between the act of imposing something and the act of complying with that which has been imposed. As applicable here, the phrase refers to the *creation* of a condition or fee by authority of local government; it is not synonymous with the act of *complying* with that condition or fee. Just as creation is different from compliance, so is "imposition" of a fee different from payment thereof.

The statutory definition of "imposition of fees" does not contradict this interpretation. Section 66020, subdivision (h) states that "imposition of fees, dedications, reservations, or other exactions occurs ... when they are imposed or levied on a specific development." The statute does not say that imposition occurs "when they are paid or complied with." Although "to levy" may in context mean "to collect," the word refers to the action of the governmental agency, not the action of the party subject to that which is levied. Thus, as with the phrase "to impose," "to levy" does *not* mean "to pay." (Webster's Third New Internat. Dict., *supra*, p. 1301.)

Contrary to Ponderosa's argument, the fact that section 66020 distinguishes between the time of tentative map approval and the time of "imposition of fees" does not imply that the latter takes place when the fees are paid rather than when the local agency first establishes them as a condition on approval. Different agencies and localities may impose fees at different times, and not always at the same time as the development is approved or conditionally approved. Fees may be imposed-that is, required by authority of government-before or after tentative map approval. In this case, the fee ***1771** happened to be imposed at the same time as tentative subdivision map approval. Ponderosa's subsequent payment of the fee in connection with processing the phased final maps simply constituted the satisfaction of the condition already imposed earlier.

Neither does the interpretation of the limitations period adopted by the trial court contradict the language of section 66020, subdivision (a). That subdivision requires that anyone protesting "the imposition of any fees" on a development must first tender any required payment *or* provide "satisfactory evidence of arrangements to ensure performance of the conditions necessary to meet the requirements of the imposition."

Contrary to Ponderosa's contention, this subdivision does not establish that no cause of action can arise under

section 66020-and no statute of limitation can commence to run-until the fee has been paid. ([5]) Instead, subdivision (a) requires *either* a tender of payment *or* a satisfactory guarantee of future payment at the time of any protest of the imposition of a fee. Under subdivision (d), it is just such a protest which must be filed either at the time of approval or conditional approval of the development, *or* "within 90 days after the date of the imposition of the fees." Thus, subdivision (a) requires there to be a tender of payment or a guarantee at the time of any protest of "the imposition of any fees"; subdivision (d) in turn requires that the protest be made within 90 days of "the imposition of the fees," that a protest be made prior to filing an action to attack the imposition of the fees, and that any action be brought "within 180 days after the date of the imposition." The statutory scheme ensures that a protesting developer tenders or bonds for the required fee at the time of protest, and that a protest be made before the developer's cause of action accrues.

Under Ponderosa's interpretation of the statute, a developer may wait to file a protest until three months *after* payment of a *part* of the fees earlier imposed, even though the language of the statute clearly requires tendering (or guaranteeing) of the entire fee at the time of the protest itself. For "imposition of fees" to be equivalent to payment of fees, as Ponderosa contends, that term would have to have been employed differently in subdivisions (a) and (d) of section 66020. One cannot be both required to pay a fee at the time of making a protest, and permitted to wait three months after paying the fee to make the same protest.

There is no merit to Ponderosa's further contention that the trial court's reading of the statute is unfair or unduly burdensome to developers. Under the interpretation adopted by the trial court, a developer would either have to tender payment of the fees imposed *or* provide "satisfactory evidence of ***1772** arrangements to ensure performance of the conditions necessary to meet the requirements of the imposition." (§ 66020, subd. (a)(1).) Thus, the developer would not actually be required to pay the full amount in order to protest as long as it could satisfactorily guarantee future payment.

([6]) With regard to the statute of limitations applicable to Ponderosa's fourth cause of action raising civil rights claims under 42 United States Code section 1983, the limitations period for such an action is one year. (Code Civ. Proc., § 340, subd. (3); *Norco Const., Inc. v. King County* (9th Cir. 1986) 801 F.2d 1143, 1145; *McMillan v. Goleta Water Dist.* (9th Cir. 1986) 792 F.2d 1453, 1456.) This one-year period runs from the same event as that which triggers the running of the one-hundred-eighty-day period set by section 66020, subdivision (d), that is, the imposition of the fees of which Ponderosa complains. Civil rights claims under 42 United States Code section 1983 are ripe for adjudication when the government agency has arrived at a definitive position on an issue that inflicts an actual concrete injury. (*Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 193-194 [87 L.Ed.2d 126, 143-144, 105 S.Ct. 3108]; *St. Clair v. City of Chico* (9th Cir. 1989) 880 F.2d 199, 202-204.) This occurred when the local agency actually imposed the fee requirement on Ponderosa in this case, which was at the time of tentative subdivision map approval. Ponderosa's petition and complaint were filed more than one year after the imposition of the fees at issue. Therefore, this cause of action is also time barred.

Ponderosa cites the case of *Anza Parking Corp. v. City of Burlingame* (1987) 195 Cal.App.3d 855 [241 Cal.Rptr. 175] to argue that there is essen- tially no statute of limitations on claims that a given condition on a land use permit is unconstitutional, void and unlawful. *Anza*, which has never been relied upon by any other appellate court decision on this point, is factually distinguishable from this case. There, the Court of Appeal held that the local agency did not have any subject matter jurisdiction to impose the kind of condition it was attempting to impose, or to interfere with the property rights at issue in that case. In contrast, here there is no dispute that the City has the power to impose a traffic impact mitigation fee and to condition approval of the subdivision map on payment of such a fee. Ponderosa only challenges the amount of the fee imposed here, and the manner in which the City imposed it. Ponderosa's claims are therefore subject to each applicable statute of limitations. (*California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488, 1501 [258 Cal.Rptr. 567].)

Ponderosa raises several substantive issues not addressed by the trial court. Because of our decision that the trial court properly granted the motion for judgment on the pleadings on the basis of the running of each applicable statute of limitations, we need not address any of these issues. ***1773**

The judgment is affirmed.

White, P. J., and Werdegar, J., concurred. ***1774**

Attachment 4

Issuance Date:	August 1, 2012
Effective Date:	August 1, 2013
Expiration Date:	July 31, 2018
1st Modification Date:	January 16, 2015
2nd Modification Date:	August 19, 2016

PHASE I MUNICIPAL STORMWATER PERMIT

National Pollutant Discharge Elimination System and
State Waste Discharge General Permit
for Discharges from
Large and Medium Municipal Separate Storm Sewer Systems

State of Washington
Department of Ecology
Olympia, Washington 98504-7600

In compliance with the provisions of
The State of Washington Water Pollution Control Law
Chapter 90.48 Revised Code of Washington
and
The Federal Water Pollution Control Act
(The Clean Water Act)
Title 33 United States Code, Section 1251 et seq.

Until this permit expires, is modified, or revoked, Permittees that have properly obtained coverage under this permit are authorized to discharge to waters of the state in accordance with the special and general conditions which follow.

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SPECIAL AND GENERAL CONDITIONS

APPENDICES

SPECIAL CONDITIONS

S1. PERMIT COVERAGE AND PERMITTEES

A. Geographic Area of Permit Coverage

This permit covers discharges from Large and Medium Municipal Separate Storm Sewer Systems (MS4s) as established at Title 40 CFR 122.26, except for the Washington State Department of Transportation's MS4s.

For Secondary Permittees required to obtain coverage under this permit, the minimum geographic area of coverage includes the portion of the MS4 which is located within the unincorporated areas of Clark, King, Snohomish, and Pierce Counties and the incorporated areas of the cities of Seattle and Tacoma. The Washington State Department of Ecology (Ecology) may establish additional geographic areas of coverage specific to an individual Secondary permittee.

B. The following cities and counties have submitted a Duty to Reapply-Notice of Intent (NOI) for coverage to Ecology prior to August 19, 2011, and have coverage as Permittees, beginning on the effective date of the permit:

1. The City of Tacoma and the City of Seattle.

2. Clark, King, Pierce, and Snohomish Counties.

C. The following entities have submitted a Duty to Reapply-Notice of Intent (NOI) for coverage to Ecology prior to August 19, 2011, and have coverage as Secondary Permittees, beginning on the effective date of the permit:

1. Port of Seattle, excluding Seattle-Tacoma International Airport.

2. Port of Tacoma.

3. The University of Washington, Seattle; Seattle School District #1; Metropolitan Park District of Tacoma; Washington State Military Department; Tacoma Community College; Washington State Department of Corrections: Larch Corrections Center, and Washington Corrections Center for Women.

D. Unless otherwise noted, the term "Permittee" includes city, county, or town Permittee, port Permittee, Co-Permittee, Secondary Permittee, and New Secondary Permittee.

E. Coverage for New Secondary Permittees

1. Entities meeting the requirements in S1.E.1.a-b, below, are required to apply for and obtain coverage under this Permit. Upon application and coverage the following entities will have coverage under this Permit as New Secondary Permittees.

a. Active drainage, diking, flood control, or diking and drainage districts located in the Cities or unincorporated portions of the Counties listed in S1.B above, which own or operate MS4s serving non-agricultural land uses; and were not covered by the permit prior to August 1, 2013.

b. Other owners or operators of MS4s located in the Cities or unincorporated portions of the Counties listed in S1.B above; and were not covered by the permit prior to August 1, 2013.

2. Application Requirements:

a. Submit a Notice of Intent (NOI) for Coverage under National Pollutant Discharge Elimination System (NPDES) Municipal Stormwater General Permit provided in Appendix 5 and provide public notice of the application for coverage in accordance with WAC 173-226-130. The NOI shall constitute the application for coverage. Ecology will notify applicants in writing of their status concerning coverage under this permit within 90 days of Ecology's receipt of a complete NOI.

b. Each Permittee applying as Co-Permittee shall submit a NOI provided in Appendix 5. The NOI shall clearly identify the areas of the MS4 for which the Co-Permittee is responsible.

F. All MS4s owned or operated by Permittees named in S1.B and located in another city or county area requiring coverage under this permit or either the Western Washington Phase II Municipal Stormwater Permit or the Eastern Washington Phase II Municipal Stormwater Permit are also covered under this permit.

S2. AUTHORIZED DISCHARGES

A. This permit authorizes the discharge of stormwater to surface waters and to ground waters of the state from MS4s owned or operated by each Permittee covered under this permit in the geographic area covered by this permit pursuant to S1.A subject to the following limitations:

1. Discharges to ground waters of the state through facilities regulated under the Underground Injection Control (UIC) program, chapter 173-218 WAC, are not authorized under this permit.

2. Discharges to ground waters not subject to regulation under the federal Clean Water Act are authorized in this permit only under state authorities, Chapter 90.48 RCW, the Water Pollution Control Act.

B. This permit authorizes discharges of non-stormwater flows to surface waters and ground waters of the state from MS4s owned or operated by each Permittee covered

under this permit, in the geographic area covered pursuant to S1.A, only under one or more of the following conditions:

1. The discharge is authorized by a separate National Pollutant Discharge Elimination System (NPDES) or State Waste Discharge permit.

2. The discharge is from emergency firefighting activities.

3. The discharge is from another illicit or non-stormwater discharge that is managed by the Permittee as provided in Special Condition S5.C.8., S6.D.3, or S6.E.3.

These discharges are also subject to the limitations in S2.A.1 and S2.A.2 above.

C. This permit does not relieve entities that cause illicit discharges, including spills of oil or hazardous substances, from responsibilities and liabilities under state and federal laws and regulations pertaining to those discharges.

D. Discharges from MS4s constructed after the effective date of this permit shall receive all applicable state and local permits and use authorizations, including compliance with chapter 43.21C RCW (the State Environmental Policy Act).

E. This permit does not authorize discharges of stormwater to waters within Indian Country or to waters subject to water quality standards of Indian Tribes, including portions of the Puyallup River and other waters on trust or restricted lands within the 1873 Survey Area of the Puyallup Tribe of Indians Reservation, except where authority has been specifically delegated to Ecology by the U.S. Environmental Protection Agency. The exclusion of such discharges from this permit does not waive any rights the State may have with respect to the regulation of the discharges.

S3. RESPONSIBILITIES OF PERMITTEES

A. Each Permittee, Co-Permittee and Secondary Permittee is responsible for compliance with the terms of this Permit for the MS4s that they own or operate.

1. Each Permittee, as listed in S1.B, is required to comply with all conditions of this permit, except for S6. Stormwater Management Program for Secondary Permittees.

2. The Port of Tacoma and the Port of Seattle, are required to comply with all conditions of this permit except for S5. Stormwater Management Program and S6.D. Stormwater Management Program for Secondary Permittees.

3. All Secondary Permittees, except for the Port of Tacoma and the Port of Seattle, are required to comply with all conditions of this permit except for S5. Stormwater Management Program, S6.E. Stormwater Management Program for the Port of Seattle and Port of Tacoma, and S8. Monitoring and Assessment conditions B, C, and D.

B. Permittees may rely on another entity to satisfy one or more of the requirements of this permit. Permittees that are relying on another entity to satisfy one or more or their permit obligations remain responsible for permit compliance if the other entity fails to implement the permit conditions. Where permit responsibilities are shared they shall be documented as follows:

1. Permittees and Co-Permittees that are continuing coverage under this permit shall submit a statement that describes the permit requirements that will be implemented by other entities. The statement must be signed by all participating entities. There is no deadline for submitting such a statement, provided that this does not alter implementation deadlines. Permittees and Co-Permittees may amend their statement during the term of the permit to establish, terminate, or amend their shared responsibilities statement, and submit the amended statements to Ecology.

2. Secondary Permittees shall submit an NOI that describes which requirements they will implement and identify the entities that will implement the other permit requirements in the area served by the Secondary Permittee's MS4. A statement confirming the shared responsibilities, signed by all participating entities, shall accompany the NOI. Secondary Permittees may amend their NOI, during the term of the permit, to establish, terminate, or amend shared responsibility arrangements, provided this does not alter implementation deadlines.

C. Unless otherwise noted, all appendices to this permit are incorporated by this reference as if set forth fully within this permit.

S4. COMPLIANCE WITH STANDARDS

A. In accordance with RCW 90.48.520, the discharge of toxicants to waters of the State of Washington which would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria is prohibited. The required response to such discharges is defined in section S4.F, below.

B. This permit does not authorize a discharge which would be a violation of Washington State Surface Water Quality Standards (chapter 173-201A WAC), Ground Water Quality Standards (chapter 173-200 WAC), Sediment Management Standards (chapter 173-204 WAC), or human health-based criteria in the national Toxics Rule

(Federal Register, Vol. 57, NO. 246, Dec. 22, 1992, pages 60848-60923). The required response to such discharges is defined in section S4.F, below.

C. The Permittee shall reduce the discharge of pollutants to the maximum extent practicable (MEP).

D. The Permittee shall use all known, available, and reasonable methods of prevention, control and treatment (AKART) to prevent and control pollution of waters of the State of Washington.

E. In order to meet the goals of the Clean Water Act, and comply with S4.A, S4.B, S4.C, and S4.D, each Permittee shall comply with all of the applicable requirements of this permit as defined in S3. Responsibilities of Permittees.

F. A Permittee remains in compliance with S4 despite any discharges prohibited by S4.A or S4.B, when the Permittee undertakes the following response toward long-term water quality improvement:

1. A Permittee shall notify Ecology in writing within 30 days of becoming aware, based on credible site-specific information that a discharge from the MS4 owned or operated by the Permittee is causing or contributing to a known or likely violation of Water Quality Standards in the receiving water. Written notification provided under this subsection shall, at a minimum, identify the source of the site-specific information, describe the nature and extent of the known or likely violation in the receiving water, and explain the reasons why the MS4 discharge is believed to be causing or contributing to the problem. For ongoing or continuing violations, a single written notification to Ecology will fulfill this requirement.

2. In the event that Ecology determines, based on a notification provided under S4.F.1, or through any other means, that a discharge from a MS4 owned or operated by the Permittee is causing or contributing to a violation of Water Quality Standards in a receiving water, Ecology will notify the Permittee in writing that an adaptive management response outlined in S4.F.3 below is required unless:

   a. Ecology also determines that the violation of Water Quality Standards is already being addressed by a Total Maximum Daily Load (TMDL) or other enforceable water quality cleanup plan; or

   b. Ecology concludes the MS4 contribution to the violation will be eliminated through implementation of other permit requirements.

3. Adaptive Management Response

   a. Within 60 days of receiving a notification under S4.F.2, or by an alternative date established by Ecology, the Permittee shall review its Stormwater Management Program and submit a report to Ecology. The report shall include:

i. A description of the operational and/or structural Best Management Practices (BMPs) that are currently being implemented to prevent or reduce any pollutants that are causing or contributing to the violation of Water Quality Standards, including a qualitative assessment of the effectiveness of each BMP.

ii. A description of potential additional operational and/or structural BMPs that will or may be implemented in order to apply AKART on a site-specific basis to prevent or reduce any pollutants that are causing or contributing to the violation of Water Quality Standards.

iii. A description of the potential monitoring or other assessment and evaluation efforts that will or may be implemented to monitor, assess, or evaluate the effectiveness of the additional BMPs.

iv. A schedule for implementing the additional BMPs including, as appropriate: funding, training, purchasing, construction, monitoring, and other assessment and evaluation components of implementation.

b. Ecology will, in writing, acknowledge receipt of the report within a reasonable time and notify the Permittee when it expects to complete its review of the report. Ecology will either approve the additional BMPs and implementation schedule or require the Permittee to modify the report as needed to meet AKART on a site-specific basis. If modifications are required, Ecology will specify a reasonable time frame in which the Permittee shall submit and Ecology will review the revised report.

c. The Permittee shall implement the additional BMPs, pursuant to the schedule approved by Ecology, beginning immediately upon receipt of written notification of approval; or, as specified in Appendix 13.

d. The Permittee shall include with each subsequent annual report a summary of the status of implementation, and the results of any monitoring, assessment or evaluation efforts conducted during the reporting period. If, based on the information provided under this subsection, Ecology determines that modification of the BMPs or implementation schedule is necessary to meet AKART on a site-specific basis, the Permittee shall make such modifications as Ecology directs. In the event there are ongoing violations of water quality standards despite the implementation of the BMP approach of this section, the Permittee may be subject to compliance schedules to eliminate the violation under WAC 173-201A-510(4) and WAC 173-226-180 or other enforcement orders as Ecology deems appropriate during the term of this permit.

e. A TMDL or other enforceable water quality cleanup plan that has been approved and is being implemented to address the MS4's contribution to the Water Quality Standards violation supersedes and terminates the S4.F.3 implementation plan.

f. Provided the Permittee is implementing the approved adaptive management response under this section, the Permittee remains in compliance with Condition S4., despite any on-going violations of Water Quality Standards identified under S4.A or B above.

g. The adaptive management process provided under Section S.4.F is not intended to create a shield for the Permittee from any liability it may face under 42 U.S.C. 9601 *et seq*. or RCW 70.105D.

G. Ecology may modify or revoke and reissue this General Permit in accordance with G14 General Permit Modification and Revocation if Ecology becomes aware of additional control measures, management practices or other actions beyond what is required in this permit, that are necessary to:

1. Reduce the discharge of pollutants to the MEP;

2. Comply with the state AKART requirements; or

3. Control the discharge of toxicants to waters of the State of Washington.

S5. STORMWATER MANAGEMENT PROGRAM

A. Each Permittee listed in S1.B shall implement a Stormwater Management Program (SWMP) during the term of this permit. A SWMP is a set of actions and activities comprising the components listed in S5, and additional actions necessary, to meet the requirements of applicable TMDLs pursuant to S7 Compliance with TMDL Requirements, and S8 Monitoring and Assessment.

1. Each Permittee shall prepare written documentation of their SWMP, called the SWMP Plan. The SWMP Plan shall be organized according to the program components in S5.C, or a format approved by Ecology, and shall be updated at least annually for submittal with the Permittee's annual report to Ecology (S9 Reporting Requirements). The SWMP Plan shall be written to inform the public of the planned SWMP activities for the upcoming calendar year, and shall include a description of:

a. Planned activities for each of the program components included in S5.C.

b. Any additional planned actions to meet the requirements of applicable TMDLs pursuant to S7 Compliance with TMDL Requirements.

c. Any additional planned actions to meet the requirements of S8 Monitoring and Assessment.

2. Each Permittee shall track the cost or estimated cost of development and implementation of each component of the SWMP. This information shall be provided to Ecology upon request.

3. Each Permittee shall track the number of inspections, official enforcement actions and types of public education activities as required by the respective program component. This information shall be included in the annual report.

B. The SWMP shall be designed to reduce the discharge of pollutants from MS4s to the MEP, meet state AKART requirements, and protect water quality.

Permittees are to continue implementation of existing stormwater management programs until they begin implementation of the updated stormwater management program in accordance with the terms of this permit, including implementation schedules.

C. The SWMP shall include the components listed below. The requirements of the SWMP shall apply to MS4s, and areas served by MS4s owned or operated by the Permittee. To the extent allowable under state and federal law, all SWMP components are mandatory.

1. Legal Authority

a. Each Permittee shall be able to demonstrate that they can operate pursuant to legal authority which authorizes or enables the Permittee to control discharges to and from MS4s owned or operated by the Permittee.

b. This legal authority, which may be a combination of statute, ordinance, permit, contracts, orders, interagency agreements, or similar means, shall authorize or enable the Permittee, at a minimum, to:

i. Control through ordinance, order, or similar means, the contribution of pollutants to MS4s owned or operated by the Permittee from stormwater discharges associated with industrial activity, and control the quality of stormwater discharged from sites of industrial activity;

ii. Prohibit through ordinance, order, or similar means, illicit discharges to the MS4 owned or operated by the Permittee;

iii. Control through ordinance, order, or similar means, the discharge of spills and disposal of materials other than stormwater into the MS4s owned or operated by the Permittee;

iv. Control through interagency agreements among co-applicants, the contribution of pollutants from one portion of the MS4 to another portion of the MS4;

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

vi. Within the limitations of state law, carry out all inspection, surveillance, and monitoring procedures necessary to determine compliance and non-

compliance with permit conditions, including the prohibition on illicit discharges to the MS4 and compliance with local ordinances.

2. Municipal Separate Storm Sewer System Mapping and Documentation

The SWMP shall include an ongoing program for mapping and documenting the MS4.

Minimum performance measures:

a. Ongoing Mapping: Each Permittee shall maintain mapping data for the features listed below.

i. Known MS4 outfalls and discharge points.

ii. Receiving waters, other than ground water.

iii. Stormwater treatment and flow control BMPs/facilities owned or operated by the Permittee.

iv. Geographic areas served by the Permittee's MS4 that do not discharge stormwater to surface water.

v. Tributary conveyances to all known outfalls and discharge points with a 24-inch nominal diameter or larger, or an equivalent cross-sectional area for non-pipe systems. For Counties, this requirement applies to urban/higher density rural sub-basins. For Cities, this requirement applies throughout the City. The following attributes shall be mapped:

(1) Tributary conveyance type, material, and size where known

(2) Associated drainage areas

(3) Land uses

vi. Connections between the MS4 owned or operated by the Permittee and other municipalities or other public entities.

vii. All connections to the MS4 authorized or allowed by the Permittee after February 16, 2007.

viii. Existing, known connections over 8 inches in nominal diameter to tributary conveyances mapped in accordance with S5.C.2.a.v. For Counties, this requirement applies to the area of the county within urban/higher density rural sub-basins mapped under the previous permit. For Cities, this requirement applies throughout the City.

b. New Mapping: Each Permittee shall complete the following mapping no later than December 31, 2017.

i. Counties shall map tributary conveyances, as described in S5.C.2.a.v, for any urban/higher density rural sub-basins not mapped under the previous permit.

ii. Counties shall map existing, known connections greater than 8 inches in nominal diameter to tributary conveyances mapped in accordance with S5.C.2.b.i.

iii. Each Permittee shall map existing, known connections equal to 8 inches in nominal diameter to tributary conveyances mapped in accordance with S.5.C.2.

iv. Each Permittee shall map connections between stormwater treatment and flow control BMPs/facilities and tributary conveyances mapped in accordance with S5.C.2. The Permittee shall map all associated emergency overflows.

c. To the extent consistent with national security laws and directives, each Permittee shall make available to Ecology, upon request, available maps depicting the information required in S5.C.2.a and b, above. The required format for mapping is electronic with fully described mapping standards. An example description is available on Ecology's website.

d. Upon request, and to the extent appropriate, Permittees shall provide mapping information to federally recognized Indian Tribes, municipalities, and other Permittees. This permit does not preclude Permittees from recovering reasonable costs associated with fulfilling mapping information requests by federally recognized Indian Tribes, municipalities, and other Permittees.

3. Coordination

The SWMP shall include coordination mechanisms among departments within each jurisdiction to eliminate barriers to compliance with the terms of this permit.

The SWMP shall also include coordination mechanisms among entities covered under a municipal stormwater NPDES permit to encourage coordinated stormwater-related policies, programs and projects within a watershed.

Minimum performance measures:

a. Implement intra-governmental (internal) coordination agreement(s) or Executive Directive(s) to facilitate compliance with the terms of this permit. Permittees shall include a written description of internal coordination mechanisms in the Annual Report, due no later than March 31, 2015.

b. Implement; and within 2 years following the addition of a new Secondary Permittee, establish and implement:

i. Coordination mechanisms clarifying roles and responsibilities for the control of pollutants between physically interconnected MS4s of the Permittee and any other Permittee covered by a municipal stormwater permit.

ii. Coordinating stormwater management activities for shared waterbodies, among Permittees and Secondary Permittees, as necessary to avoid conflicting plans, policies, and regulations.

Permittees shall document their efforts to establish the required coordination mechanisms. Failure to effectively coordinate is not a permit violation provided other entities, whose actions the Permittee has no or limited control over, refuse to cooperate.

4. Public Involvement and Participation

Permittees shall provide ongoing opportunities for public involvement and participation in the Permittee's SWMP and implementation priorities.

Minimum performance measures:

a. Permittees shall create opportunities for the public to participate in the decision-making processes involving the development, implementation and update of the Permittee's SWMP.

b. Each Permittee shall post on their website their SWMP Plan, and the annual report required under S9.A no later than May 31 each year. All other submittals shall be available to the public upon request.

5. Controlling Runoff from New Development, Redevelopment, and Construction Sites

The SWMP shall include a program to prevent and control the impacts of runoff from new development, redevelopment, and construction activities. Refer to Appendix 10 for a list of approved manuals and ordinances. The program shall apply to private and public development, including roads.

Minimum performance measures:

a. Site and subdivision scale requirements:

i. The Minimum Requirements, thresholds, and definitions in Appendix 1, or Minimum Requirements, thresholds, and definitions determined by Ecology to be equivalent to Appendix 1, for new development, redevelopment, and construction sites shall be included in ordinances or other enforceable documents adopted by the local government. Adjustment and variance criteria equivalent to those in Appendix 1 shall

be included. More stringent requirements may be used, and/or certain requirements may be tailored to local circumstances through the use of Ecology approved basin plans or other similar water quality and quantity planning efforts. Such local requirements and thresholds shall provide equal or similar protection of receiving waters and equal or similar levels of pollutant control as compared to Appendix 1.

ii. The local requirements shall include the following requirements, limitations, and criteria that, when used to implement the minimum requirements in Appendix 1, will protect water quality, reduce the discharge of pollutants to the MEP, and satisfy the State requirement under chapter 90.48 RCW to apply AKART prior to discharge:

(1) Site planning requirements

(2) BMP selection criteria

(3) BMP design criteria

(4) BMP infeasibility criteria

(5) LID competing needs criteria

(6) BMP limitations

Permittees shall document how the criteria and requirements will protect water quality, reduce the discharge of pollutants to the maximum extent practicable, and satisfy the state AKART requirements.

Permittees who choose to use the requirements, limitations, and criteria in the Stormwater Management Manual for Western Washington (SWMMWW), or an equivalent manual approved by Ecology, may cite this choice as their sole documentation to meet this requirement.

iii. No later than June 30, 2015, each Permittee shall adopt and make effective a local program that meets the requirements in S5.C.5.a.i through ii, above. The local program adopted to meet the requirements of S5.C.5.a.i through ii shall apply to all applications[1] submitted after June 30, 2015 and shall apply to applications submitted no later than June 30, 2015, which have not started construction[2] by June 30, 2020.

Ecology review and approval of the local manual and ordinances is required. Manuals and ordinances approved under this section are listed

[1] In this context, "application" means, at a minimum, a complete project description, site plan, and, if applicable, SEPA checklist. Permittees may establish additional elements of a complete application.

[2] In this context, "started construction" means, at a minimum, the site work associated with and directly related to the approved project has begun. For example: grading the project site to final grade or utility installation. Simply clearing the project site does not constitute the start of construction. Permittees may establish additional requirements related to the start of construction.

in Appendix 10, Part 2. Permittees shall provide detailed, written justification of any of the requirements which differ from those contained in Appendix 1 of this permit.

The Permittee shall submit draft enforceable requirements, technical standards and manual to Ecology no later than July 1, 2014. Ecology will review and provide written response to the Permittee. If Ecology takes longer than 90 days to provide a written response, the required deadline for adoption and effective date will be automatically extended by the number of calendar days that Ecology exceeds a 90 day period for written response.

In the case of circumstances beyond the Permittee's control, such as litigation or administrative appeals that may result in noncompliance with the requirements of this section, the Permittee shall promptly notify Ecology and submit a written request for an extension.

iv. The program shall include the legal authority to inspect private stormwater facilities and enforce maintenance standards for all new development and redevelopment approved under the provisions of this section.

v. The program shall include a process of permits, site plan review, inspections, and enforcement capability to meet the following standards for both private and public projects, using qualified personnel:

(1) Review all stormwater site plans submitted to the Permittee for proposed development involving land disturbing activity that meet the thresholds in S5.C.5.a.i, above.

(2) Inspect prior to clearing and construction, all permitted development sites that meet the thresholds in S5.C.5.a.i, and that have a high potential for sediment transport as determined through plan review based on definitions and requirements in Appendix 7. As an alternative to evaluating each site according to Appendix 7, Permittees may choose to inspect all construction sites that meet the minimum thresholds in S5.C.5.a.i.

(3) Inspect all permitted development sites involving land disturbing activity that meet the thresholds in S5.C.5.a.i, above, during construction to verify proper installation and maintenance of required erosion and sediment controls. Enforce as necessary based on the inspection.

(4) Inspect all permitted development sites that meet the thresholds in S5.C.5.a.i, upon completion of construction and prior to final approval or occupancy to ensure proper installation of permanent stormwater facilities. Verify that a maintenance plan is completed and responsibility for maintenance is assigned for stormwater

treatment and flow control BMPs/facilities. Enforce as necessary based on the inspection.

(5) Compliance with the inspection requirements in (2), (3) and (4) above shall be determined by the presence of an established inspection program designed to inspect all sites involving land disturbing activity that meet the thresholds in S5.C.5.a.i. Compliance during this permit term shall be determined by achieving at least 80% of scheduled inspections. The inspections may be combined with other inspections provided they are performed using qualified personnel.

(6) The program shall include a procedure for keeping records of inspections and enforcement actions by staff, including inspection reports, warning letters, notices of violations, and other enforcement records. Records of maintenance inspections and maintenance activities shall be maintained.

(7) The program shall include an enforcement strategy to respond to issues of non-compliance.

vi. The Permittee shall make available, as applicable, the "Notice of Intent for Construction Activity" and copies of the "Notice of Intent for Industrial Activity" to representatives of proposed new development and redevelopment. Permittees will continue to enforce local ordinances controlling runoff from sites that are covered by other stormwater permits issued by Ecology.

vii. Each permittee shall ensure that all staff whose primary job duties are implementing the program to Control Stormwater Runoff from New Development, Redevelopment, and Construction Sites, including permitting, plan review, construction site inspections, and enforcement, are trained to conduct these activities. As determined necessary by the Permittee, follow-up training shall be provided to address changes in procedures, techniques or staffing. Permittees shall document and maintain records of the training provided and the staff trained.

b. Low impact development code-related requirements:

i. No later than June 30, 2015, or by an alternative date if established in accordance with S5.C.5.a.iii, Permittees shall review, revise, and make effective their local development-related codes, rules, standards, or other enforceable documents to incorporate and require Low Impact Development (LID) Principles and LID Best Management Practices (BMPs).

The intent of the revisions shall be to make LID the preferred and commonly-used approach to site development. The revisions shall be designed to minimize impervious surfaces, native vegetation loss, and

stormwater runoff in all types of development situations. Permittees shall conduct a similar review and revision process, and consider the range of issues, outlined in the following document: Integrating LID into Local Codes: A Guidebook for Local Governments (Puget Sound Partnership, 2012).

ii. Each Permittee shall submit a summary of the results of the review and revision process in S5.C.5.b.i with the Annual Report due on March 31, 2016. This summary shall include, at a minimum, a list of the participants (job title, brief job description, department represented), the codes, rules, standards, and other enforceable documents reviewed, and the revisions made to those documents which incorporate and require LID Principles and LID BMPs. The summary shall include existing requirements for LID Principles and LID BMPs in development-related codes. The summary of revisions shall be organized as follows:

(1) Measures to minimize impervious surfaces.

(2) Measures to minimize loss of native vegetation.

(3) Other measures to minimize stormwater runoff.

c. Watershed-scale stormwater planning requirements:

The objective of watershed-scale stormwater planning is to identify a stormwater management strategy or strategies that would result in hydrologic and water quality conditions that fully support "existing uses," and "designated uses," as those terms are defined in WAC 173-201A-020, throughout the stream system.

i. No later than October 31, 2013, each County Permittee listed below shall select one watershed from the following list in which to conduct watershed-scale stormwater planning:

- Clark County: Whipple, Salmon
- King County: Bear, May, Soos
- Pierce County: Clover
- Snohomish County: Swamp, North

A permittee may propose an alternative watershed that meets all of the following criteria:

(1) Has a drainage area of at least 10 square miles.

(2) Is partially or wholly within the County Permittee's existing MS4 service area with discharges to the stream.

(3) Has a stream system that has been impacted by development but retains some anadromous fish resources.

(4) Is targeted to accept significant population growth and associated development, and is partially, if not fully, within the urban growth area established under Chapter 36.70A RCW, or a potential future expansion of the urban growth area.

Each County Permittee[3] will notify Ecology in writing of the selected or proposed alternative watershed no later than October 31, 2013. Any proposed alternative watershed is subject to Ecology's review and approval. The required deadlines for submission of a scope of work and a final plan will be automatically extended by the number of calendar days that Ecology exceeds a 60 day period for written response to the alternative watershed proposal.

ii. Each County Permittee shall convene and lead a documented watershed-scale stormwater planning process as described in sections S5.C.5.c.ii through S5.C.5.c.vi below.

A City or County MS4 Permittee within a Phase I County selected basin must fully participate with the stormwater planning process as described below. Permittees may choose to participate in a coordinated Scope of Work and schedule with other Permittees within the selected watershed, or conduct their scope of work independently.

iii. No later than August 13, 2015, each Permittee within the basin selected by King County must submit to Ecology documentation of their proposed approach to coordinate their efforts with other Permittees within the watershed, including:

(1) A list of the municipal stormwater permittees with whom the Permittee will undertake watershed-scale planning under a common scope of work; and description of the coordination and dispute resolution procedures agreed to by all of the Permittees operating under the common scope of work; and

(2) A description of planned coordination and dispute resolution procedures for providing and receiving feedback from Permittees

[3] Ecology approved a selected watershed for all four County Permittees. Clark County chose the Whipple Creek watershed which was one of the options listed in the permit. King County and Pierce County chose to do planning on subsets of watersheds listed in the permit that meet the four criteria identified for alternative watersheds. King County chose a portion of the Bear Creek watershed (excluding the Cottage Lake sub-watershed, Evans Creek, and the area downstream of the confluence with Evans Creek), and Pierce County chose the Spanaway Creek/Lake sub-watershed of the Clover Creek watershed.

Snohomish County proposed a subset of an alternative watershed, Little Bear Creek. Ecology originally approved the entire Little Bear Creek watershed, which meets the four qualifying criteria, but based on the 2014 ruling by the Pollution Control Hearings Board and comments received during the permit modification process, Ecology accepts the originally proposed subset of just that part of Little Bear Creek in Snohomish County.

operating under different scopes of work within the same watershed, including procedures to:

a) Review, provide comment, and revise methods and assumptions to meet S5.C.5.c.iv (1) through (4) below;

b) Review, provide comment, and revise present- and future-condition B-IBI scores, pollutant concentrations, temperature and hydrologic metrics;

c) Share the results of the modeling performed by the Permittee with all other Permittees in the watershed;

d) Adjust the Permittee's proposed changes to development-related codes, rules, standards, plans, and potential future structural stormwater control projects in response to feedback from other Permittees so that the planning objectives, as described in S5.C.5.c above, are projected to be achieved throughout the watershed.

(3) It is not a permit violation if other entities, over whose actions the Permittee has limited or no control, refuse to participate in the coordination plan described in S5.C.5.c.iii.

iv. No later than April 1, 2014 for Permittees in watersheds selected by Clark and Pierce counties, November 4, 2015, for Permittees in the watershed selected by King county, and March 31, 2015, for Permittees in the watershed selected by Snohomish county, the Permittee shall submit a scope of work and a schedule to Ecology for the complete watershed planning process. The scope of work and schedule are subject to Ecology's review and approval. If Ecology takes longer than 90 days to provide a written response, the required deadline for submitting a final watershed-scale stormwater plan to Ecology will be automatically extended by the number of days Ecology exceeds 90 days, but no later than July 30, 2018.

The scope of work and schedule must apply to the geographic extent of the jurisdictions of the Permittees listed under S5.C.5.c.iii (1) above and, at a minimum, describe:

(1) An assessment of existing hydrologic, biologic, and water quality conditions within the selected watershed, and an assessment of the current status of the aquatic community. This assessment may be based on existing data where such data are available. Where such data are not available, or are not sufficient, the scope of work and schedule shall include the collection of such data.

The existing conditions assessment shall, at a minimum, include the following:

a) Water quality conditions as established through sampling during base flows and storm flows for, at a minimum, the following chemical parameters: dissolved copper, dissolved zinc, temperature, and fecal coliform. Permittees shall identify or collect data from locations upgradient and downgradient of stream sections influenced by MS4 discharges.

b) Continuous flow monitoring of the stream to provide the data necessary to calibrate a continuous runoff model to the selected watershed. Permittees shall identify or collect flow monitoring data from locations upgradient and downgradient of stream sections influenced by MS4 discharges.

c) Macroinvertebrate data for the purpose of estimating current Benthic Index of Biotic Integrity (B-IBI) scores and comparing them with the scores predicted by the existing values of the hydrologic metrics in S5.C.5.c.iv(4).

d) The status of the aquatic community, including the presence and distribution of salmonid uses, shall be documented using data from existing sources.

(2) Efforts to compile and/or generate maps of the selected watershed to identify the existing distribution and totals of general soil types, vegetative land cover, impervious land covers, MS4s and non-regulated public stormwater systems (if applicable). Maps must be sufficient to allow construction of a rainfall/runoff model representation of the watershed. Maps must also identify areas within the watershed appropriate for special attention in regard to hydrologic and water quality impacts. For example: headwater wetlands and critical aquifer recharge areas.

(3) How the Permittee will use the existing conditions assessment in S5.C.5.c.iv(1) and the maps described in S5.C.5.c.iv(2), to calibrate a continuous runoff model to reflect the existing hydrologic, water quality, and biologic (as represented by B-IBI score) conditions.

(4) How the Permittee will use the model calibrated in S5.C.5.c.iv(3), to estimate hydrologic changes from the historic condition; and predict the future hydrologic, biologic, and water quality conditions at full build-out under existing or proposed comprehensive land use management plan(s) for the watershed. Future biologic conditions shall be estimated by using a correlation of hydrologic metrics with B-IBI scores for *Puget Sound Lowland*

Streams[4], or other similar correlation if approved by Ecology. Future water quality conditions shall be described through estimation of concentrations of, at a minimum, dissolved copper, dissolved zinc, temperature, and fecal coliform.

(5) How, if the estimation in S5.C.5.c.ii(4) predicts water quality standards will not be met, the Permittee will use the calibrated watershed model to evaluate stormwater management strategies to meet the standards. The same hydrologic metrics and correlated B-IBI scores, and water quality parameters used in S5.C.5.c.ii(4) shall be used to evaluate the effectiveness of strategies.

a) Stormwater management strategies to be evaluated for all jurisdictions in the watershed must include:

- Changes to development-related codes, rules, standards, and plans.
- Potential future structural stormwater control projects consistent with S5.C.6.a.

b) Stormwater management strategies evaluated may also include:

- Basin-specific stormwater control requirements for new development and redevelopment as allowed by Section 7 of Appendix 1.
- Strategies to encourage redevelopment and infill, and an assessment of options for efficient, effective runoff controls for redevelopment projects, such as regional facilities, in lieu of individual site requirements.

(6) How the permittee will create an implementation plan and schedule that includes: potential future actions to implement the identified stormwater management strategies, responsible parties, estimated costs, and potential funding mechanisms.

(7) A public review and comment process, at a minimum, focused on the draft watershed-scale stormwater plan. The public review must allow for public comment from all governmental entities with jurisdiction within the watershed.

v. The watershed-scale stormwater planning process, as documented in the scope of work and schedule, may include an evaluation of strategies to preserve or improve other factors that influence maintenance of the existing and designated uses of the stream. Examples include: channel restoration, in-stream culvert replacement, quality of the riparian zone,

[4] DeGasperi, C.L., Berge, H. B., Whiting, K. R., Burkey, J. J., Cassin, J. L. and Fuerstenberg, R. R. (2009), Linking Hydrologic Alteration to Biological Impairment in Urbanizing Streams of the Puget Lowland, Washington, USA. JAWRA Journal of the American Water Resources Association, 45: 512-533. Doi: 10.1111/j.1752-1688.2009.00306.x

gravel disturbance regime, and presence and distribution of large woody debris.

vi. Each Permittee (or group of Permittees operating under a single scope of work, as described above) must submit a final watershed-scale stormwater plan to Ecology no later than September 6, 2017, for the Clark, Pierce, and Snohomish county efforts, and no later than April 4, 2018, for the King county effort. The plan must summarize results of the modeling and planning process, describe results of the evaluation of strategies under S5.C.5.c.iv(5), and include the implementation plan and schedule developed pursuant to S5.C.5.c.iv(6).

6. Structural Stormwater Controls

Each Permittee shall implement a structural stormwater controls program to prevent or reduce impacts to waters of the state caused by discharges from the MS4. Impacts that shall be addressed include disturbances to watershed hydrology and stormwater pollutant discharges.

The program shall consider impacts caused by stormwater discharges from areas of existing development, including runoff from highways, streets and roads owned or operated by the Permittee, and areas of new development, where impacts are anticipated as development occurs.

Minimum performance measures:

a. The program shall address impacts that are not adequately controlled by the other required actions of the SWMP.

i. The program shall consider the following projects:

(1) New flow control facilities, including LID BMPs.

(2) New treatment (or treatment and flow control) facilities, including LID BMPs.

(3) Retrofit of existing treatment and/or flow control facilities.

(4) Property acquisition for water quality and/or flow control benefits (not associated with future facilities).

(5) Maintenance with capital construction costs ≥ $25,000.

ii. Permittees should consider other projects to address impacts, such as:

(1) Riparian habitat acquisition.

(2) Restoration of forest cover and/ or riparian buffers.

(3) Floodplain reconnection projects on water bodies that are not flow control exempt per Appendix 1.

(4) Capital projects related to the MS4 which implement an Ecology-approved basin or watershed plan.

(5) Other actions to address stormwater runoff into or from the MS4 not otherwise required in S5.C.

iii. Permittees may not use in-stream culvert replacement or channel restoration projects for compliance with this requirement.

iv. The Structural Stormwater Control program may also include a program designed to implement small scale projects that are not planned in advance.

b. Each Permittee's SWMP Plan shall describe the Structural Stormwater Control Program including the following:

i. The Structural Stormwater Control Program goals.

ii. The planning process used to develop the Structural Stormwater Control Program, including:

(1) The geographic scale of the planning process.

(2) Issues and regulations addressed.

(3) Steps in the planning process.

(4) Types of characterization information considered.

(5) Amount budgeted for implementation.

(6) The public involvement process.

(7) A description of the prioritization process, procedures and criteria used to select the Structural Stormwater Control projects.

c. No later than March 31, 2014 each Permittee shall provide a list of planned, individual projects scheduled for implementation during this permit term. This list must include at a minimum the information and formatting specified in Appendix 11. Each Permittee's annual report shall provide an update of this list.

7. Source Control Program for Existing Development

a. The Permittee shall implement a program to reduce pollutants in runoff from areas that discharge to MS4s owned or operated by the Permittee. The program shall include the following:

i. Application of operational and structural source control BMPs, and, if necessary, treatment BMPs/facilities to pollution generating sources associated with existing land uses and activities.

ii. Inspections of pollutant generating sources at commercial and industrial properties to enforce implementation of required BMPs to control pollution discharging into MS4s owned or operated by the Permittee.

iii. Application and enforcement of local ordinances at sites, identified pursuant to S5.C.7.b.ii, including sites with discharges authorized by a separate NPDES permit. Permittees that are in compliance with the terms of this permit will not be held liable by Ecology for water quality standard violations or receiving water impacts caused by industries and other Permittees covered, or which should be covered under an NPDES permit issued by Ecology.

iv. Practices to reduce polluted runoff from the application of pesticides, herbicides, and fertilizer discharging into MS4s owned or operated by the Permittee.

b. Minimum performance measures:

i. Permittees shall enforce ordinance(s), or other enforceable documents, requiring the application of source control BMPs for pollutant generating sources associated with existing land uses and activities.

Permittees shall update and make effective the ordinance(s), or other enforceable documents, as necessary to meet the requirements of this section no later than February 2, 2018.

The requirements of this subsection are met by using the source control BMPs in Volume IV of the Stormwater Management Manual for Western Washington, or a functionally equivalent manual approved by Ecology.

Operational source control BMPs shall be required for all pollutant generating sources. Structural source control BMPs shall be required for pollutant generating sources if operational source control BMPs do not prevent illicit discharges or violations of surface water, ground water, or sediment management standards because of inadequate stormwater controls. Implementation of source control requirements may be done through education and technical assistance programs, provided that formal enforcement authority is available to the Permittee and is used as determined necessary by the Permittee, in accordance with S5.C.7.b.iv, below.

ii. Permittees shall implement a program to identify commercial and industrial properties which have the potential to generate pollutants to the Permittee's MS4. The program shall include a source control inventory which lists businesses and/or properties identified based on the presence of activities that are pollutant generating (refer to Appendix 8). The source control inventory shall also include other pollutant generating

sources, such as mobile or home-based businesses and multifamily properties, which are identified based on complaint response. The Permittee shall update the inventory at least once every 5 years.

iii. Permittees shall implement an inspection program for sites identified pursuant to S5.C.7.b.ii above.

(1) All identified sites with a business address shall be provided, by mail, telephone, electronic communications, or in person, information about activities that may generate pollutants and the source control requirements applicable to those activities. This information may be provided all at one time or spread out over the permit term to allow for some tailoring and distribution of the information during site inspections.

(2) The Permittee shall annually complete the number of inspections equal to 20% of the businesses and/or properties listed in their source control inventory to assure BMP effectiveness and compliance with source control requirements. The Permittee may count follow up compliance inspections at the same site toward the 20% inspection rate. The Permittee may select which sites to inspect each year and is not required to inspect 100% of sites over a 5-year period. Sites may be prioritized for inspection based on their land use category, potential for pollution generation, proximity to receiving waters, or to address an identified pollution problem within a specific geographic area or sub-basin.

(3) Each Permittee shall inspect 100% of sites identified through legitimate complaints.

iv. Each Permittee shall implement a progressive enforcement policy to require sites to come into compliance with stormwater requirements within a reasonable time period as specified below:

(1) If the Permittee determines, through inspections or otherwise, that a site has failed to adequately implement required BMPs, the Permittee shall take appropriate follow-up action(s) which may include: phone calls, reminder letters or follow-up inspections.

(2) When a Permittee determines that a facility has failed to adequately implement BMPs after a follow-up inspection, the Permittee shall take enforcement action as established through authority in its municipal code and ordinances, or through the judicial system.

(3) Each Permittee shall maintain records, including documentation of each site visit, inspection reports, warning letters, notices of violations, and other enforcement records, demonstrating an effort to bring facilities into compliance. Each Permittee shall also

maintain records of sites that are not inspected because the property owner denies entry.

(4) A Permittee may refer non-emergency violations of local ordinances to Ecology, provided, the Permittee also makes a documented effort of progressive enforcement. At a minimum, a Permittee's enforcement effort shall include documentation of inspections and warning letters or notices of violation.

v. Permittees shall train staff who are responsible for implementing the source control program to conduct these activities. The ongoing training program shall cover the legal authority for source control, source control BMPs and their proper application, inspection protocols, lessons learned, typical cases, and enforcement procedures. Follow-up training shall be provided as needed to address changes in procedures, techniques, requirements, or staff. Permittees shall document and maintain records of the training provided and the staff trained.

8. Illicit Connections and Illicit Discharges Detection and Elimination

The SWMP shall include an ongoing program designed to prevent, detect, characterize, trace, and eliminate illicit connections and illicit discharges into the MS4.

Minimum performance measures:

a. The program shall include procedures for reporting and correcting or removing illicit connections, spills and other illicit discharges when they are suspected or identified. The program shall also include procedures for addressing pollutants entering the MS4 from an interconnected, adjoining MS4.

Illicit connections and illicit discharges shall be identified through field screening, inspections, complaints/reports, construction inspections, maintenance inspections, source control inspections, and/or monitoring information, as appropriate.

b. No later than February 2, 2018, each Permittee shall evaluate, and if necessary update, existing ordinances or other regulatory mechanisms to effectively prohibit non-stormwater, illicit discharges, including spills, into the Permittee's MS4.

i. Allowable Discharges: The ordinance or other regulatory mechanism does not need to prohibit the following categories of non-stormwater discharges:

(1) Diverted stream flows

(2) Rising ground waters

(3) Uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(b)(20))

(4) Uncontaminated pumped ground water

(5) Foundation drains

(6) Air conditioning condensation

(7) Irrigation water from agricultural sources that is commingled with urban stormwater

(8) Springs

(9) Uncontaminated water from crawl space pumps

(10) Footing drains

(11) Flows from riparian habitats and wetlands

(12) Non-stormwater discharges authorized by another NPDES or State Waste Discharge permit

(13) Discharges from emergency firefighting activities in accordance with S2 Authorized Discharges

ii. Conditionally Allowable Discharges: The ordinance or other regulatory mechanism, may allow the following categories of non-stormwater discharges only if the stated conditions are met:

(1) Discharges from potable water sources including, but not limited to, water line flushing, hyperchlorinated water line flushing, fire hydrant system flushing, and pipeline hydrostatic test water. Planned discharges shall be de-chlorinated to a total residual chlorine concentration of 0.1 ppm or less, pH-adjusted if necessary, and volumetrically and velocity controlled to prevent resuspension of sediments in the MS4.

(2) Discharges from lawn watering and other irrigation runoff. These discharges shall be minimized through, at a minimum, public education activities (see S5.C.10) and water conservation efforts.

(3) Dechlorinated swimming pool, spa, and hot tub discharges. The discharges shall be dechlorinated to a total residual chlorine concentration of 0.1 ppm or less, pH-adjusted and reoxygenated if necessary, and volumetrically and velocity controlled to prevent resuspension of sediments in the MS4. Discharges shall be thermally controlled to prevent an increase in temperature of the receiving water. Swimming pool cleaning wastewater and filter backwash shall not be discharged to the MS4.

(4) Street and sidewalk wash water, water used to control dust, and routine external building washdown that does not use detergents. The Permittee shall reduce these discharges through, at a

minimum, public education activities (see S5.C.10) and/or water conservation efforts. To avoid washing pollutants into the MS4, Permittees shall minimize the amount of street wash and dust control water used.

(5) Other non-stormwater discharges shall be in compliance with the requirements of a pollution prevention plan reviewed by the Permittee which addresses control of such discharges.

iii. The Permittee shall further address any category of discharges in S5.C.8.b.i or ii above if the discharges are identified as significant sources of pollutants to waters of the State.

c. Each Permittee shall implement an ongoing program designed to detect and identify non-stormwater discharges and illicit connections into the Permittee's MS4. The program shall include the following components:

i. Procedures for conducting investigations of the Permittees MS4, including field screening and methods for identifying potential sources. These procedures may also include source control inspections.

The permittee shall implement a field screening methodology appropriate to the characteristics of the MS4 and water quality concerns. Screening for illicit connections may be conducted using the Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments, Center for Watershed Protection, October 2004; or another method of comparable or improved effectiveness. The Permittee shall document the field screening methodology in the relevant Annual Report.

(1) Each Permittee shall implement an ongoing field screening program of, on average, 12% of the Permittee's known conveyance systems each calendar year.

(2) Each City shall field screen all the conveyance systems within the Permittee's incorporated area at least once between February 2007 and July 31, 2018.

(3) Each County shall field screen all the conveyance systems within the Permittee's urban/higher density rural sub-basins at least once between February 2007 and July 31, 2018.

ii. A publicly-listed and publicized hotline or other telephone number for public reporting of spills and other illicit discharges.

iii. An ongoing training program for all municipal field staff, who, as part of their normal job responsibilities might come into contact with or otherwise observe an illicit discharge or illicit connection to the MS4, on the identification of an illicit discharge and/or connection, and on the

proper procedures for reporting and responding to the illicit discharge and/or connection. Follow-up training shall be provided as needed to address changes in procedures, techniques, requirements, or staffing. Permittees shall document and maintain records of the trainings provided and the staff trained.

d. Each Permittee shall implement an ongoing program designed to address illicit discharges, including spills and illicit connections, into the Permittee's MS4. The program shall include:

i. Procedures for characterizing the nature of, and potential public or environmental threat posed by, any illicit discharges found by or reported to the Permittee. Procedures shall address the evaluation of whether the discharge must be immediately contained and steps to be taken for containment of the discharge.

ii. Procedures for tracing the source of an illicit discharge; including visual inspections, and when necessary, opening manholes, using mobile cameras, collecting and analyzing water samples, and/or other detailed inspection procedures.

iii. Procedures for eliminating the discharge; including notification of appropriate authorities; notification of the property owner; technical assistance; follow-up inspections; and escalating enforcement and legal actions if the discharge is not eliminated.

iv. Compliance with the provisions in S5.C.8.d.i, ii, and iii, above, shall be achieved by meeting the following timelines:

(1) Immediately respond to all illicit discharges, including spills, which are determined to constitute a threat to human health, welfare, or the environment consistent with General Condition G3.

(2) Investigate (or refer to the appropriate agency with authority to act) within 7 days, on average, any complaints, reports or monitoring information that indicates a potential illicit discharge.

(3) Initiate an investigation within 21 days of any report or discovery of a suspected illicit connection to determine the source of the connection, the nature and volume of discharge through the connection, and the party responsible for the connection.

(4) Upon confirmation of an illicit connection, use enforcement authority in a documented effort to eliminate the illicit connection within 6 months. All known illicit connections to the MS4 shall be eliminated.

e. Permittees shall train staff who are responsible for identification, investigation, termination, cleanup, and reporting of illicit discharges,

including spills and illicit connections, to conduct these activities. Follow-up training shall be provided as needed to address changes in procedures, techniques, requirements, or staff. Permittees shall document and maintain records of the training provided and the staff trained.

f. Each Permittee shall either participate in a regional emergency response program, or develop and implement procedures to investigate and respond to spills and improper disposal into the MS4 owned or operated by the Permittee.

g. Recordkeeping: Each Permittee shall track and maintain records of the activities conducted to meet the requirements of this section.

9. Operation and Maintenance Program

Each Permittee shall implement a program to regulate maintenance activities and to conduct maintenance activities by the Permittee to prevent or reduce stormwater impacts.

Minimum performance measures:

a. Maintenance Standards. Each Permittee shall implement maintenance standards that are as protective, or more protective, of facility function than those specified in Chapter 4 of Volume V of the Stormwater Management Manual for Western Washington. For facilities which do not have maintenance standards, the Permittee shall develop a maintenance standard. No later than June 30, 2015 each Permittee shall update their maintenance standards as necessary to meet the requirements in this section.

i. The purpose of the maintenance standard is to determine if maintenance is required. The maintenance standard is not a measure of the facility's required condition at all times between inspections. Exceeding the maintenance standard between inspections and/or maintenance is not a permit violation.

ii. Unless there are circumstances beyond the Permittee's control, when an inspection identifies an exceedance of the maintenance standard, maintenance shall be performed:

(1) Within 1 year for typical maintenance of facilities, except catch basins.

(2) Within 6 months for catch basins.

(3) Within 2 years for maintenance that requires capital construction of less than $25,000.

Circumstances beyond the Permittee's control include denial or delay of access by property owners, denial or delay of necessary permit approvals, and unexpected reallocations of maintenance staff to perform emergency

work. For each exceedance of the required timeframe, the Permittee shall document the circumstances and how they were beyond the Permittee's control.

b. Maintenance of stormwater facilities regulated by the Permittee:

i. Each Permittee shall evaluate and, if necessary, update existing ordinances or other enforceable documents requiring maintenance of all permanent stormwater treatment and flow control BMPs/facilities regulated by the Permittee (including catch basins that are part of the facilities regulated by the Permittee), in accordance with maintenance standards established under S5.C.9.a, above.

ii. Each Permittee shall implement an on-going inspection program to annually inspect all stormwater treatment and flow control BMPs/facilities regulated by the Permittee to enforce compliance with adopted maintenance standards as needed based on inspection. The inspection program is limited to facilities to which the Permittee can legally gain access, provided the Permittee shall seek access to all stormwater treatment and flow control BMPs/facilities regulated by the permittee.

Permittees may reduce the inspection frequency based on maintenance records of double the length of time of the proposed inspection frequency. In the absence of maintenance records, the Permittee may substitute written statements to document a specific less frequent inspection schedule. Written statements shall be based on actual inspection and maintenance experience and shall be certified in accordance with G19 Certification and Signature.

iii. Each Permittee shall manage maintenance activities to inspect all permanent stormwater treatment and flow control BMPs/facilities, and catch basins, in new residential developments every six months, until 90% of the lots are constructed (or when construction has stopped and the site is fully stabilized), to identify maintenance needs and enforce compliance with maintenance standards as needed.

iv. Compliance with the inspection requirements of S5.C.9.b.ii and iii, above, shall be determined by the presence of an established inspection program designed to inspect all sites, and achieving inspection of 80% of all sites.

v. The Permittee shall require cleaning of catch basins regulated by the Permittee if they are found to be out of compliance with established maintenance standards in the course of inspections conducted at facilities under the requirements of S5.C.7. Source Control Program for Existing Development, and S5.C.8. Illicit Connections and Illicit Discharges Detection and Elimination, or if the catch basins are part of the

stormwater facilities inspected under the requirements of S5.C.9 Operation and Maintenance Program.

c. Maintenance of stormwater facilities owned or operated by the Permittee

i. Each Permittee shall implement a program to annually inspect all permanent stormwater treatment and flow control BMPs/facilities owned or operated by the Permittee. Permittees shall implement appropriate maintenance action(s) in accordance with adopted maintenance standards.

Permittees may reduce the inspection frequency based on maintenance records of double the length of time of the proposed inspection frequency. In the absence of maintenance records, the Permittee may substitute written statements to document a specific less frequent inspection schedule. Written statements shall be based on actual inspection and maintenance experience and shall be certified in accordance with G19 Certification and Signature.

ii. Each Permittee shall implement a program to conduct spot checks of potentially damaged permanent stormwater treatment and flow control BMPs/facilities after major storm events (24 hour storm event with a 10 year or greater recurrence interval). If spot checks indicate widespread damage/maintenance needs, inspect all stormwater treatment and flow control BMPs/facilities that may be affected. Conduct repairs or take appropriate maintenance action in accordance with maintenance standards established under S5.C.9.a, above, based on the results of the inspections.

iii. Compliance with the inspection requirements of S5.C.9.c.i, and ii above, shall be determined by the presence of an established inspection program designed to inspect all sites and achieving at least 95% of required inspections.

d. Maintenance of Catch Basins Owned or Operated by the Permittee

i. Each Permittee shall annually inspect catch basins and inlets owned or operated by the Permittee, or implement alternatives below.

Alternatives to the standard approach of inspecting catch basins annually: Permittees may apply the following alternatives to all or portions of their system.

(1) The annual catch basin inspection schedule may be changed as appropriate to meet the maintenance standards based on maintenance records of double the length of time of the proposed inspection frequency. In the absence of maintenance records for catch basins, the Permittee may substitute written statements to document a specific, less frequent inspection schedule. Written statements shall be based on actual inspection and maintenance

experience and shall be certified in accordance with G19 Certification and Signature.

(2) Annual inspections may be conducted on a "circuit basis" whereby 25% of catch basins and inlets within each circuit are inspected to identify maintenance needs. Include an inspection of the catch basin immediately upstream of any system outfall or discharge point, if applicable. Clean all catch basins within a given circuit for which the inspection indicates cleaning is needed to comply with maintenance standards established under S5.C.9.a, above.

(3) The Permittee may clean all pipes, ditches, catch basins, and inlets within a circuit once during the permit term. Circuits selected for this alternative must drain to a single point.

ii. The disposal of decant water shall be in accordance with the requirements in Appendix 6 – Street Waste Disposal.

iii. Compliance with the inspection requirements of S5.C.9.d.i above, shall be determined by the presence of an established inspection program designed to inspect all catch basins and achieving at least 95% of required inspections.

e. Each Permittee shall implement practices, policies, and procedures to reduce stormwater impacts associated with runoff from all lands owned or maintained by the Permittee, and road maintenance activities under the functional control of the Permittee. Lands owned or maintained by the Permittee include, but are not limited to: parking lots, streets, roads, highways, buildings, parks, open space, road right-of-way, maintenance yards, and stormwater treatment and flow control BMPs/facilities.

The following activities shall be addressed:

i. Pipe cleaning

ii. Cleaning of culverts that convey stormwater in ditch systems

iii. Ditch maintenance

iv. Street cleaning

v. Road repair and resurfacing, including pavement grinding

vi. Snow and ice control

vii. Utility installation

viii. Maintaining roadside areas, including vegetation management

ix. Dust control

x. Pavement striping maintenance

xi. Application of fertilizers, pesticides, and herbicides according to the instructions for their use, including reducing nutrients and pesticides using alternatives that minimize environmental impacts

xii. Sediment and erosion control

xiii. Landscape maintenance and vegetation disposal

xiv. Trash and pet waste management

xv. Building exterior cleaning and maintenance

f. Implement an ongoing training program for employees of the Permittee who have primary construction, operations or maintenance job functions may impact stormwater quality. The training program shall address the importance of protecting water quality, operation and maintenance standards, inspection procedures, selecting appropriate BMPs, ways to perform their job activities to prevent or minimize impacts to water quality, and procedures for reporting water quality concerns. Follow-up training shall be provided as needed to address changes in procedures, techniques, requirements, or staffing. Permittees shall document and maintain records of the training provided and the staff trained.

g. Implement a Stormwater Pollution Prevention Plan (SWPPP) for all heavy equipment maintenance or storage yards, and material storage facilities owned or operated by the Permittee in areas subject to this permit that are not required to have coverage under the General NPDES Permit for Stormwater Discharges Associated with Industrial Activities or another NPDES permit that authorizes stormwater discharges associated with the activity. A schedule for implementation of structural BMPs shall be included in the SWPPP. Generic SWPPPs that can be applied at multiple sites may be used to comply with this requirement. The SWPPP shall include periodic visual observation of discharges from the facility to evaluate the effectiveness of BMPs.

h. Maintain records of inspections and maintenance or repair activities conducted by the Permittee.

10. Education and Outreach Program

The SWMP shall include an education and outreach program designed to reduce or eliminate behaviors and practices that cause or contribute to adverse stormwater impacts and encourage the public to participate in stewardship activities. The education program may be developed and implemented locally or regionally.

Minimum performance measures:

a. Each Permittee shall implement or participate in an education and outreach program that uses a variety of methods to target the audiences and topics listed below. The outreach program shall be designed to educate each target audience about the stormwater problem and provide specific actions they can follow to minimize the problem.

   i. To build general awareness, Permittees shall target the following audiences and subject areas:

      (1) General Public (including school age children), and businesses (including home-based and mobile business):

         - General impacts of stormwater on surface waters.
         - Impacts from impervious surfaces.
         - Impacts of illicit discharges and how to report them.
         - LID principles and LID BMPs.
         - Opportunities to become involved in stewardship activities.

      (2) Engineers, contractors, developers, and land use planners:

         - Technical standards for stormwater site and erosion control plans.
         - LID principles and LID BMPs.
         - Stormwater treatment and flow control BMPs/facilities.

   ii. To effect behavior change, Permittees shall target the following audiences and BMPs:

      (1) General public (which may include school age children) and businesses (including home based and mobile businesses):

         - Use and storage of automotive chemicals, hazardous cleaning supplies, carwash soaps, and other hazardous materials.
         - Equipment maintenance.
         - Prevention of illicit discharges.

      (2) Residents, landscapers and property managers/owners:

         - Yard care techniques protective of water quality.
         - Use and storage of pesticides and fertilizers and other household chemicals.
         - Carpet cleaning and auto repair and maintenance.
         - Vehicle, equipment, and home/building maintenance.
         - Pet waste management and disposal.
         - LID principles and LID BMPs.
         - Stormwater facility maintenance.
         - Dumpster and trash compactor maintenance.

b. Each permittee shall create stewardship opportunities and/or partner with existing organizations to encourage residents to participate in activities such as stream teams, storm drain marking, volunteer monitoring, riparian plantings and education activities.

c. Each Permittee shall measure the understanding and adoption of the targeted behaviors for at least one targeted audience in at least one subject area. No later than February 2, 2016, Permittees shall use the resulting measurements to direct education and outreach resources most effectively as well as to evaluate changes in adoption of the targeted behaviors. Permittees may meet this requirement individually or as a member of a regional group.

S6. STORMWATER MANAGEMENT PROGRAM FOR SECONDARY PERMITTEES

A. This section applies to all Secondary Permittees and all New Secondary Permittees whether coverage under this Permit is obtained individually, or as a Co-Permittee with a city, town, county, and/or another Secondary Permittee.

New Secondary Permittees subject to this Permit shall fully meet the requirements of this section as modified in footnotes in S6.D below, or as established as a condition of coverage by Ecology.

1. To the extent allowable under state, federal and local law, all components are mandatory for each Secondary Permittee covered under this permit, whether covered as an individual Permittee or as a Co-Permittee.

2. Each Secondary Permittee shall develop and implement a stormwater management program (SWMP). A SWMP is a set of actions and activities comprising the components listed in S6 and any additional actions necessary to meet the requirements of applicable TMDLs pursuant to S7 Compliance with TMDL Requirements, and S8 Monitoring and Assessment. The SWMP shall be designed to reduce the discharge of pollutants from MS4s to the maximum extent practicable (MEP) and protect water quality.

3. Unless an alternate implementation schedule is established by Ecology as a condition of permit coverage, the SWMP shall be developed and implemented in accordance with the schedules contained in this section and shall be fully developed and implemented no later than four and one-half years from initial permit coverage date. Secondary Permittees that are already implementing some or all of the required SWMP components shall continue implementation of those components.

4. Secondary Permittees may implement parts of their SWMP in accordance with the schedule for cities, towns and counties in S5, provided they have signed a memorandum of understanding or other agreement to jointly implement the

activity or activities with one or more jurisdictions listed in S1.B, and submitted a copy of the agreement to Ecology.

5. Each Secondary Permittees shall prepare written documentation of the SWMP, called the SWMP Plan. The SWMP Plan shall include a description of program activities for the upcoming calendar year.

6. Conditions S6.A, S6.B, and S6.C are applicable to all Secondary Permittees covered under this permit. In addition:

    a. S6.D is applicable to all Secondary Permittees except the Port of Seattle and the Port of Tacoma.

    b. S6.E is applicable only to the Port of Seattle and the Port of Tacoma.

B. Coordination

Secondary Permittees shall coordinate stormwater-related policies, programs and projects within a watershed and interconnected MS4s. Where relevant and appropriate, the SWMP shall coordinate among departments of the Secondary Permittee to ensure compliance with the terms of this permit.

C. Legal Authority

To the extent allowable under state law and federal law, each Secondary Permittee shall be able to demonstrate that it can operate pursuant to legal authority which authorizes or enables the Secondary Permittee to control discharges to and from MS4s owned or operated by the Secondary Permittee.

This legal authority may be a combination of statutes, ordinances, permits, contracts, orders, interagency agreements, or similar instruments.

D. Stormwater Management Program for Secondary Permittees

The SWMP for Secondary Permittees shall include the following components:

1. Public Education and Outreach

Each Secondary Permittee shall implement the following stormwater education strategies:

    a. Storm drain inlets owned or operated by the Secondary Permittee that are located in maintenance yards, in parking lots, along sidewalks, and at pedestrian access points shall be clearly labeled with the message similar to "Dump no waste – Drains to water body." [5]

[5] New Secondary Permittees shall label all inlets as described in S6.D.1.a no later than four years from the initial date of permit coverage.

As identified during visual inspection and regular maintenance of storm drain inlets per the requirements of S6.D.3.d and S6.D.6.a.i below, or as otherwise reported to the Secondary Permittee, any inlet having a label that is no longer clearly visible and/or easily readable shall be re-labeled within 90 days.

b. Each year, beginning no later than three years from the initial date of permit coverage, public ports, colleges, and universities shall distribute educational information to tenants and residents on the impact of stormwater discharges on receiving waters, and steps that can be taken to reduce pollutants in stormwater runoff. Distribution may be by hard copy or electronic means. Appropriate topics may include:

   i. How stormwater runoff affects local waterbodies.

   ii. Proper use and application of pesticides and fertilizers.

   iii. Benefits of using well-adapted vegetation.

   iv. Alternative equipment washing practices, including cars and trucks that minimize pollutants in stormwater.

   v. Benefits of proper vehicle maintenance and alternative transportation choices; proper handling and disposal of vehicle wastes, including the location of hazardous waste collection facilities in the area.

   vi. Hazards associated with illicit connections, and illicit discharges.

   vii. Benefits of litter control and proper disposal of pet waste.

2. Public Involvement and Participation

   Each year, no later than May 31, each Secondary Permittee shall:

   a. Make the annual report available on the Permittee's website.

   b. Make available on the Permittee's website the latest updated version of the SWMP Plan.

   c. A Secondary Permittee that does not maintain a website may submit their updated SWMP Plan in electronic format to Ecology for posting on Ecology's website.

3. Illicit Discharge Detection and Elimination

   Each Secondary Permittee shall:

   a. From the initial date of permit coverage, comply with all relevant ordinances, rules, and regulations of the local jurisdiction(s) in which the Secondary Permittee is located that govern non-stormwater discharges.

   b. Implement appropriate policies prohibiting illicit discharges[6] and an enforcement plan to ensure compliance with illicit discharge policies.[7] These policies shall address, at a minimum: illicit connections; non-stormwater discharges, including spills of hazardous materials; and improper disposal of pet waste and litter.

      i. Allowable discharges: The policies do not need to prohibit the following categories of non-stormwater discharges:

         (1) Diverted stream flows

         (2) Rising ground waters

         (3) Uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(b)(20))

         (4) Uncontaminated pumped ground water

         (5) Foundation drains

         (6) Air conditioning condensation

         (7) Irrigation water from agricultural sources that is commingled with urban stormwater

         (8) Springs

         (9) Uncontaminated water from crawl space pumps

         (10) Footing drains

         (11) Flows from riparian habitats and wetlands

         (12) Discharges from emergency firefighting activities in accordance with S2 Authorized Discharges

         (13) Non-stormwater discharges authorized by another NPDES or State Waste Discharge permit

[6] New Secondary Permittees shall develop and implement appropriate policies prohibiting illicit discharges, and identify possible enforcement mechanisms as described in S6.D.3.b no later than one year from initial date of permit coverage.

[7] New Secondary Permittees shall develop and implement an enforcement plan as described in S6.D.3.b no later than 18 months from the initial date of permit coverage.

ii. Conditionally allowable discharges: The policies may allow the following categories of non-stormwater discharges only if the stated conditions are met and such discharges are allowed by local codes:

(1) Discharges from potable water sources, including but not limited to water line flushing, hyperchlorinated water line flushing, fire hydrant system flushing, and pipeline hydrostatic test water. Planned discharges shall be de-chlorinated to a total residual chlorine concentration of 0.1 ppm or less, pH-adjusted if necessary, and volumetrically and velocity controlled to prevent resuspension of sediments in the MS4.

(2) Discharges from lawn watering and other irrigation runoff. These discharges shall be minimized through, at a minimum, public education activities and water conservation efforts conducted by the Secondary Permittee and/or the local jurisdiction.

(3) Dechlorinated swimming pool, spa, and hot tub discharges. The discharges shall be dechlorinated to a total residual chlorine concentration of 0.1 ppm or less, pH-adjusted and reoxygenated if necessary, and volumetrically and velocity controlled to prevent resuspension of sediments in the MS4. Discharges shall be thermally controlled to prevent an increase in temperature of the receiving water. Swimming pool cleaning wastewater and filter backwash shall not be discharged to the MS4.

(4) Street and sidewalk wash water, water used to control dust, and routine external building washdown that does not use detergents. The Secondary Permittee shall reduce these discharges through, at a minimum, public education activities and/or water conservation efforts conducted by the Secondary Permittee and/or the local jurisdiction. To avoid washing pollutants into the MS4, the Secondary Permittee shall minimize the amount of street wash and dust control water used.

(5) Other non-stormwater discharges shall be in compliance with the requirements of a pollution prevention plan reviewed by the Permittee which addresses control of such discharges.

iii. The Secondary Permittee shall address any category of discharges in i or ii above if the discharge is identified as a significant source of pollutants to waters of the State.

c. Maintain a storm sewer system map showing the locations of all known storm drain outfalls and discharge points, labeling the receiving waters (other than groundwater), and delineating the areas contributing runoff to each outfall and discharge point. Make the map (or completed portions of the map) available on request to Ecology and to the extent appropriate to other Permittees. The preferred format for mapping is an electronic format with fully described

mapping standards. An example description is provided on Ecology's website.[8]

d. Conduct field inspections and visually inspect for illicit discharges at all known MS4 outfalls and discharge points. Visually inspect at least one third (on average) of all known outfalls and discharge points each year beginning no later than two years from the initial date of permit coverage. Implement procedures to identify and remove illicit discharges. Keep records of inspections and follow-up activities.

e. Implement a spill response plan that includes coordination with a qualified spill responder.[9]

f. No later than two years from initial date of permit coverage, provide staff training or coordinate with existing training efforts to educate staff on proper BMPs for preventing illicit discharges, including spills. Train all Permittee staff who, as part of their normal job responsibilities, have a role in preventing such illicit discharges.

4. Construction Site Stormwater Runoff Control

From the initial date of permit coverage, each Secondary Permittee shall:

a. Comply with all relevant ordinances, rules, and regulations of the local jurisdiction(s) in which the Secondary Permittee is located that govern construction phase stormwater pollution prevention measures.

b. Ensure that all construction projects under the functional control of the Secondary Permittee which require a construction stormwater permit obtain coverage under the NPDES General Permit for Stormwater Discharges Associated with Construction Activities, or an individual NPDES permit prior to discharging construction related stormwater.

c. Coordinate with the local jurisdiction regarding projects owned or operated by other entities which discharge into the Secondary Permittee's MS4, to assist the local jurisdiction with achieving compliance with all relevant ordinances, rules, and regulations of the local jurisdiction(s).

d. Provide training or coordinate with existing training efforts to educate relevant staff in erosion and sediment control BMPs and requirements, or hire trained contractors to perform the work.

[8] New Secondary Permittees shall meet the requirements of S6.D.3.c no later than four and one-half years from the initial date of permit coverage.

[9] New Secondary Permittees shall develop and implement a spill response plan as described in S6.D.3.e no later than four and one-half years from the initial date of permit coverage.

e. Coordinate as requested with Ecology or the local jurisdiction to provide access for inspection of construction sites or other land disturbances, which are under the functional control of the Secondary Permittee during land disturbing activities and/or the construction period.

5. Post-Construction Stormwater Management for New Development and Redevelopment

From the initial date of permit coverage, each Secondary Permittee shall:

a. Comply with all relevant ordinances, rules, and regulations of the local jurisdiction(s) in which the Secondary Permittee is located that govern post-construction stormwater pollution prevention measures.

b. Coordinate with the local jurisdiction regarding projects owned or operated by other entities which discharge into the Secondary Permittee's MS4, to assist the local jurisdiction with achieving compliance with all relevant ordinances, rules, and regulations of the local jurisdiction(s).

6. Pollution Prevention and Good Housekeeping for Municipal Operations

Each Secondary Permittee shall:

a. Implement a municipal operation and maintenance (O&M) plan to minimize stormwater pollution from activities conducted by the Secondary Permittee. The O&M Plan shall include appropriate pollution prevention and good housekeeping procedures for all of the following operations, activities, and/or types of facilities that are present within the Secondary Permittee's boundaries and under the functional control of the Secondary Permittee.[10]

i. Stormwater collection and conveyance systems, including catch basins, stormwater pipes, open channels, culverts, and stormwater treatment and flow control BMPs/facilities. The O&M Plan shall address, at a minimum: scheduled inspections and maintenance activities, including cleaning and proper disposal of waste removed from the system. Secondary Permittees shall properly maintain stormwater collection and conveyance systems owned or operated by the Secondary Permittee and regularly inspect and maintain all stormwater facilities to ensure facility function.

Secondary Permittees shall establish maintenance standards that are as protective or more protective of facility function than those specified in Chapter 4 Volume V of the Stormwater Management Manual for Western Washington.

[10] New Secondary Permittees shall develop and implement the operation and maintenance plan described in S6.D.6.a no later than three and a half years from the initial date of permit coverage.

Secondary Permittees shall review their maintenance standards to ensure they are consistent with the requirements of this section.

Secondary Permittees shall conduct spot checks of potentially damaged permanent stormwater treatment and flow control BMPs/facilities following major storm events (24 hour storm event with a 10-year or greater recurrence interval).

ii. Roads, highways, and parking lots. The O&M Plan shall address, but is not limited to: deicing, anti-icing, and snow removal practices; snow disposal areas; material (e.g., salt, sand, or other chemical) storage areas; all-season BMPs to reduce road and parking lot debris and other pollutants from entering the MS4.

iii. Vehicle fleets. The O&M Plan shall address, but is not limited to: storage, washing, and maintenance of Secondary Permittee vehicle fleets; and fueling facilities. Secondary Permittees shall conduct all vehicle and equipment washing and maintenance in a self-contained covered building or in designated wash and/or maintenance areas.

iv. External building maintenance. The O&M Plan shall address, building exterior cleaning and maintenance including cleaning, washing, painting; maintenance and management of dumpsters; other maintenance activities.

v. Parks and open space. The O&M Plan shall address, but is not limited to: proper application of fertilizer, pesticides, and herbicides; sediment and erosion control; BMPs for landscape maintenance and vegetation disposal; and trash and pet waste management.

vi. Material storage facilities, and heavy equipment maintenance or storage yards. Secondary Permittees shall develop and implement a Stormwater Pollution Prevention Plan to protect water quality at each of these facilities owned or operated by the Secondary Permittee and not covered under the General NPDES Permit for Stormwater Discharges Associated with Industrial Activities or under another NPDES permit that authorizes stormwater discharges associated with the activity.

vii. Other facilities that would reasonably be expected to discharge contaminated runoff. The O&M Plan shall address proper stormwater pollution prevention practices for each facility.

b. From the initial date of permit coverage, Secondary Permittees shall also have permit coverage for all facilities operated by the Secondary Permittee that are required to be covered under the General NPDES Permit for Stormwater Discharges Associated with Industrial Activities or another NPDES permit that authorizes discharges associated with the activity.

c. The O&M Plan shall include sufficient documentation and records as necessary to demonstrate compliance with the O&M Plan requirements in S6.D.6.a.i through vii above.

d. No later than three years from the initial date of permit coverage, Secondary Permittees shall implement a program designed to train all employees whose primary construction, operations, or maintenance job functions may impact stormwater quality. The training shall address:

i. The importance of protecting water quality.

ii. The requirements of this Permit.

iii. Operation and maintenance requirements.

iv. Inspection procedures.

v. Ways to perform their job activities to prevent or minimize impacts to water quality.

vi. Procedures for reporting water quality concerns, including potential illicit discharges (including spills).

E. Stormwater Management Program for the Port of Seattle and Port of Tacoma

Permittees that are already implementing some or all of the Stormwater Management Program (SWMP) components in this section shall continue implementation of those components of their SWMP.

The SWMP for the Port of Seattle and the Port of Tacoma of shall include the following components:

1. Education Program

The SWMP shall include an education program aimed at tenants and Permittee employees. The goal of the education program is to reduce or eliminate behaviors and practices that cause or contribute to adverse stormwater impacts.

Minimum performance measure:

a. The Permittee shall make educational materials available to tenants and Permittee employees whose job duties could impact stormwater.

2. Public Involvement and Participation

Each Permittee shall make the latest updated version of the SWMP Plan available to the public. The most recent SWMP Plan and Annual Report shall be posted on the Permittee's website.

3. Illicit Discharge Detection and Elimination

   The SWMP shall include a program to identify, detect, remove and prevent illicit connections and illicit discharges, including spills, into the MS4s owned or operated by the Permittee.

   Minimum performance measures:

   a. Comply with all relevant ordinances, rules, and regulations of the local jurisdiction(s) in which the Permittee's MS4 is located that govern non-stormwater discharges.

   b. Implement appropriate policies prohibiting illicit discharges and an enforcement plan to ensure compliance with illicit discharge policies. These policies shall address, at a minimum: illicit connections; non-stormwater discharges, including spills of hazardous materials; and improper disposal of pet waste and litter.

      i. Allowable Discharges: The policies do not need to prohibit the following categories of non-stormwater discharges:

         (1) Diverted stream flows

         (2) Rising ground waters

         (3) Uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(b)(20))

         (4) Uncontaminated pumped ground water

         (5) Foundation drains

         (6) Air conditioning condensation

         (7) Irrigation water from agricultural sources that is commingled with urban stormwater

         (8) Springs

         (9) Uncontaminated water from crawl space pumps

         (10) Footing drains

         (11) Flows from riparian habitats and wetlands

         (12) Discharges from emergency firefighting activities in accordance with S2 Authorized Discharges

         (13) Non-stormwater discharges authorized by another NPDES permit

      ii. Conditionally allowable discharges: The policies may allow the following categories of non-stormwater discharges only if the stated conditions are met and such discharges are allowed by local codes:

(1) Discharges from potable water sources, including but not limited to, water line flushing, hyperchlorinated water line flushing, fire hydrant system flushing, and pipeline hydrostatic test water. Planned discharges shall be de-chlorinated to a total residual chlorine concentration of 0.1 ppm or less, pH-adjusted if necessary, and volumetrically and velocity controlled to prevent resuspension of sediments in the MS4.

(2) Discharges from lawn watering and other irrigation runoff. These discharges shall be minimized through, at a minimum, public education activities and water conservation efforts conducted by the Permittee and/or the local jurisdiction.

(3) Dechlorinated swimming pool, spa, and hot tub discharges. The discharges shall be dechlorinated to a total residual chlorine concentration of 0.1 ppm or less, pH-adjusted and reoxygenated if necessary, and volumetrically and velocity controlled to prevent resuspension of sediments in the MS4. Discharges shall be thermally controlled to prevent an increase in temperature of the receiving water. Swimming pool cleaning wastewater and filter backwash shall not be discharged to the MS4.

(4) Street and sidewalk wash water, water used to control dust, and routine external building wash down that does not use detergents. The Ports of Seattle and Tacoma shall reduce these discharges through, at a minimum, public education activities and/or water conservation efforts conducted by the Port and/or the local jurisdiction. To avoid washing pollutants into the MS4, the amount of street wash and dust control water used shall be minimized.

(5) Other non-stormwater discharges shall be in compliance with the requirements of a pollution prevention plan reviewed by the Permittee which addresses control of such discharges.

iii. The Permittee shall address any category of discharges in i or ii above if the discharges are identified as significant source of pollutants to waters of the State.

c. The SWMP shall include an ongoing program for gathering, maintaining, and using adequate information to conduct planning, priority setting, and program evaluation activities for Permittee-owned properties. Permittees shall gather and maintain mapping data for the features listed below on an ongoing basis:

i. Known MS4 outfalls and discharge points, receiving waters (other than groundwater), and land uses for property owned by the Permittee, and all other properties served by MS4s known to and owned or operated by the Permittee.

ii. Tributary conveyances (including size, material, and type attributes where known), and the associated drainage areas of MS4 outfalls and discharge points with a 24 inch nominal diameter or larger, or an equivalent cross-sectional area for non-pipe systems. No later than December 31, 2017, each Permittee shall complete this requirement for all MS4 outfalls and discharge points with a 12 inch nominal diameter or larger, or an equivalent cross-sectional area for non-pipe systems.

iii. Known connections greater than or equal to 8 inches in nominal diameter to tributary conveyances mapped in accordance with S6.E.3.c.ii. The mapping shall be completed no later than December 31, 2017.

iv. To the extent consistent with national security laws and directives, each Permittee shall make available to Ecology upon request, available maps depicting the information required in S6.E.3.c.i through iii, above. The required format for mapping is electronic with fully described mapping standards. An example description is available on Ecology's website.

v. Implement a program to document operation and maintenance records for stormwater treatment and flow control BMPs/facilities and catch basins.

vi. Upon request, and to the extent consistent with national security laws and directives, mapping information and operation and maintenance records shall be provided to the City or County in which the Permittee is located.

d. Conduct field screening of at least 20% of the MS4 each year for the purpose of detecting illicit discharges and illicit connections. Field screening methodology shall be appropriate to the characteristics of the MS4 and water quality concerns. Implement procedures to identify and remove any illicit discharges and illicit connections. Keep records of inspections and follow-up activities.

e. Implement a spill response plan that includes coordination with a qualified spill responder.

f. Provide ongoing staff training or coordinate with existing training efforts to educate staff on proper BMPs for preventing illicit discharges, including spills, and for identifying, reporting, and responding as appropriate. Train all Permittee staff who, as part of their normal job responsibilities, have a role in preventing such discharges. Keep records of training provided and staff trained.

4. Construction Site Stormwater Runoff Control

The SWMP shall include a program to reduce pollutants in stormwater runoff from construction activities under the functional control of the Permittee.

Minimum performance measures:

a. Comply with all relevant ordinances, rules, and regulations of the local jurisdiction(s) in which the Permittee is located that govern construction phase stormwater pollution prevention measures. To the extent allowed by local ordinances, rules, and regulations, comply with the applicable minimum technical requirements for new development and redevelopment contained in Appendix 1.

b. Ensure all construction projects under the functional control of the Permittee which require a construction stormwater permit obtain coverage under the NPDES General Permit for Stormwater Discharges Associated with Construction Activities or an individual NPDES permit prior to discharging construction related stormwater.

c. Coordinate with the local jurisdiction(s) regarding projects owned or operated by other entities which discharge into the Permittee's MS4, to assist the local jurisdiction(s) with achieving compliance with all relevant ordinances, rules, and regulations of the local jurisdiction(s).

d. Provide staff training or coordinate with existing training efforts to educate Permittee staff responsible for implementing construction stormwater erosion and sediment control BMPs and requirements, or hire trained contractors to perform the work.

e. Coordinate as requested with Ecology or the local jurisdiction to provide access for inspection of construction sites or other land disturbances that are under the functional control of the Permittee during active land disturbing activities and/or the construction period.

5. Post-Construction Stormwater Management for New Development and Redevelopment

The SWMP shall include a program to address post-construction stormwater runoff from new development and redevelopment projects. The program shall establish controls to prevent or minimize water quality impacts.

Minimum performance measures:

a. Comply with all relevant ordinances, rules, and regulations of the local jurisdiction(s) in which the Permittee is located that govern post-construction stormwater pollution prevention measures, including proper operation and maintenance of the MS4. To the extent allowed by local ordinances, rules, and regulations, comply with the applicable the minimum technical requirements for new development and redevelopment contained in Appendix 1.

b. Coordinate with the local jurisdiction regarding projects owned and operated by other entities which discharge into the Permittee's MS4, to assist the local jurisdiction in achieving compliance with all relevant ordinances, rules, and regulations of the local jurisdiction(s).

6. Operation and Maintenance Program

The SWMP shall include an operation and maintenance program for all stormwater treatment and flow control BMPs/facilities, and catch basins to ensure that BMPs continue to function properly.

Minimum performance measures:

a. Each Permittee shall implement an operation and maintenance (O&M) manual for all stormwater treatment and flow control BMPs/facilities and catch basins that are under the functional control of the Permittee and which discharge stormwater to its MS4, or to an interconnected MS4.

i. Retain a copy of the O&M manual in the appropriate Permittee department and routinely update following discovery or construction of new stormwater facilities.

ii. The operation and maintenance manual shall establish facility-specific maintenance standards that are as protective, or more protective than those specified in Chapter 4 of Volume V of the Stormwater Management Manual for Western Washington. For existing stormwater facilities which do not have maintenance standards, the Permittee shall develop a maintenance standard. No later than July 1, 2016, each Permittee shall update maintenance standards, as necessary, to meet the requirements of this section.

iii. The purpose of the maintenance standard is to determine if maintenance is required. The maintenance standard is not a measure of the facility's required condition at all times between inspections. Exceeding the maintenance standards between inspections and/or maintenance is not a permit violation. Maintenance actions shall be performed within the time frames specified in S6.E.6.b.ii.

b. The Permittee will manage maintenance activities to inspect all stormwater facilities listed in the O&M manual annually, and take appropriate maintenance action in accordance with the O&M manual.

i. The Permittee may change the inspection frequency to less than annually, provided the maintenance standards are still met. Reducing the annual inspection frequency shall be based on maintenance records of double the length of time of the proposed inspection frequency. In the absence of maintenance records, the Permittee may substitute written statements to

document a specific less frequent inspection schedule. Written statements shall be based on actual inspection and maintenance experience and shall be certified in accordance with G19 Certification and Signature.

ii. Unless there are circumstances beyond the Permittees control, when an inspection identifies an exceedance of the maintenance standard, maintenance shall be performed:

(1) Within 1 year for wet pool facilities and retention/detention ponds.

(2) Within 1 year for typical maintenance of facilities, except catch basins.

(3) Within 6 months for catch basins.

(4) Within 2 years for maintenance that requires capital construction of less than $25,000.

Circumstances beyond the Permittee's control include denial or delay of access by property owners, denial or delay of necessary permit approvals, and unexpected reallocations of maintenance staff to perform emergency work. For each exceedance of the required timeframe, the Permittee shall document the circumstances and how they were beyond their control.

c. The Permittee shall provide appropriate training for Permittee maintenance staff.

d. The Permittee will maintain records of inspections and maintenance activities.

7. Source Control in existing Developed Areas

The SWMP shall include the development and implementation of one or more Stormwater Pollution Prevention Plans (SWPPPs). A SWPPP is a documented plan to identify and implement measures to prevent and control the contamination of discharges of stormwater to surface or ground water. SWPPP(s) shall be prepared and implemented for all Permittee-owned lands, except environmental mitigation sites owned by the Permittee, that are not covered by a NPDES permit issued by Ecology that authorizes stormwater discharges.

Minimum performance measures:

a. SWPPP(s) shall be updated as necessary to reflect changes at the facility.

b. The SWPPP(s) shall include a facility assessment including a site plan, identification of pollutant sources, and description of the drainage system.

c. The SWPPP(s) shall include a description of the source control BMPs used or proposed for use by the Permittee. Source control BMPs shall be selected from the Stormwater Management Manual for Western Washington (or an equivalent Manual approved by Ecology). Implementation of non-structural

BMPs shall begin immediately after the pollution prevention plan is developed. Where necessary, a schedule for implementation of structural BMPs shall be included in the SWPPP(s).

d. The Permittee shall maintain a list of sites covered by the SWPPP(s) required under this permit. At least 20% of the listed sites shall be inspected annually.

e. The SWPPP(s) shall include policies and procedures to reduce pollutants associated with the application of pesticides, herbicides and fertilizer.

f. The SWPPP(s) shall include measures to prevent, identify and respond to illicit discharges, including illicit connections, spills and improper disposal. When the Permittee submits a notification pursuant to G3, the Permittee shall also notify the City or County it is located in.

g. The SWPPP(s) shall include a component related to inspection and maintenance of stormwater facilities and catch basins that is consistent with the Permittee's O&M Program, as specified in S6.E.6 above.

8. Monitoring Program. Monitoring requirements for the Port of Seattle and Port of Tacoma are included in Special Condition S8.

S7. COMPLIANCE WITH TOTAL MAXIMUM DAILY LOAD REQUIREMENTS

The following requirements apply if an applicable Total Maximum Daily Load (TMDL) is approved for stormwater discharges from MS4s owned or operated by the Permittee. Applicable TMDLs are TMDLs which have been approved by EPA on or before the issuance date of this Permit, or prior to the date that Ecology issues coverage under this permit, whichever is later.

A. For applicable TMDLs listed in Appendix 2, affected Permittees shall comply with the specific requirements identified in Appendix 2. Each Permittee shall keep records of all actions required by this Permit that are relevant to applicable TMDLs within their jurisdiction. The status of the TMDL implementation shall be included as part of the annual report submitted to Ecology. Each annual report shall include a summary of relevant SWMP and Appendix 2 activities conducted in the TMDL area to address the applicable TMDL parameter(s).

B. For applicable TMDLs not listed in Appendix 2, compliance with this permit shall constitute compliance with those TMDLs.

C. For TMDLs that are approved by EPA after this permit is issued, Ecology may establish TMDL-related permit requirements through future permit modification if Ecology determines implementation of actions, monitoring or reporting necessary to demonstrate reasonable further progress toward achieving TMDL waste load allocations, and other targets, are not occurring and shall be implemented during the term of this permit or when this permit is reissued. Permittees are encouraged to

participate in development of TMDLs within their jurisdiction and to begin implementation.

S8. MONITORING AND ASSESSMENT

A. All Permittees including Secondary Permittees shall provide, in each annual report, a description of any stormwater monitoring or stormwater-related studies conducted by the Permittee during the reporting period. If other stormwater monitoring or stormwater-related studies were conducted on behalf of the Permittee during the reporting period, or if stormwater-related investigations conducted by other entities were reported to the Permittee during the reporting period, a brief description of the type of information gathered or received shall be included in the annual report.

Permittees are not required to provide descriptions of any monitoring, studies, or analyses conducted as part of the Regional Stormwater Monitoring Program (RSMP) in annual reports. If a Permittee conducts independent monitoring in accordance with requirements in S8.B or S8.C below, annual reporting of such monitoring must follow the requirements specified in those sections.

B. Status and trends monitoring.

1. No later than October 15, 2013, King, Pierce, and Snohomish Counties, the Cities of Seattle and Tacoma, and the Ports of Seattle and Tacoma shall notify Ecology in writing which of the following two options for status and trends monitoring the Permittee chooses to carry out during this permit cycle. Either option will fully satisfy the Permittee's obligations under this section (S8.B.1). Each Permittee shall select a single option for the duration of this permit term.

a. Status and Trends Monitoring Option #1: Each Permittee that chooses this option shall pay into a collective fund to implement RSMP small streams and marine nearshore status and trends monitoring in Puget Sound. The first payment into the collective fund is due to Ecology October 15, 2013, and subsequent payments into the collective fund are due to Ecology annually beginning August 15, 2014. The payment amounts are:

Permittee	First payment	Second and subsequent payments
King County	$ 15,000	$ 74,540
Pierce County	$ 15,000	$ 92,800
Port of Seattle	$ 5,000	$ 4,151
Port of Tacoma	$ 5,000	$ 4,151
City of Seattle	$ 15,000	$149,436
Snohomish County	$ 15,000	$ 73,452
City of Tacoma	$ 15,000	$ 49,861

Or

b. Status and Trends Monitoring Option #2: Each Permittee that chooses this option shall conduct status and trends monitoring as follows:

i. Beginning no later than October 31, 2014 city and county Permittees shall conduct wadeable stream water quality, benthos, habitat, and sediment chemistry monitoring according to the Ecology-approved Quality Assurance Project Plan (QAPP) for RSMP Small Streams Status and Trends Monitoring at the first twelve qualified locations (as listed sequentially among the potential monitoring locations defined in the RSMP QAPP) that are located within the jurisdiction's boundaries. Counties shall monitor the first four locations inside UGA boundaries and the first eight locations outside UGA boundaries.

ii. Beginning no later than October 1, 2015, city and county Permittees and the Ports of Seattle and Tacoma shall conduct sediment chemistry, bacteria, and mussel monitoring according to the Ecology-approved QAPPs for RSMP Marine Nearshore Status and Trends Monitoring at the first eight qualified locations each, for sediment and for mussels and bacteria (as listed sequentially among the potential monitoring locations defined in the RSMP QAPPs), that are located adjacent to the Permittee's Puget Sound shoreline boundary.

iii. Data and analyses shall be reported annually in accordance with the Ecology-approved QAPPs.

2. Clark County shall:

a. Continue stormwater discharge monitoring at two of the three locations selected pursuant to S8.D in the Phase I Municipal Stormwater Permit February 16, 2007 – February 15, 2012 for the duration of this permit term. This monitoring and reporting of findings shall be conducted in accordance with the previously-approved QAPP until September 30, 2014.

b. No later than February 2, 2014 submit a revised QAPP to Ecology. The revised QAPP shall follow the specifications and deadlines in Appendix 9. If Ecology does not request changes within 90 days, the QAPP is considered approved. The final QAPP shall be submitted to Ecology as soon as possible following finalization, and before September 30, 2014.

c. If the County changes a discharge monitoring location, the County shall document in the revised QAPP why the pre-existing stormwater monitoring location is not a good location for additional monitoring and why the newly selected location is of interest for long term stormwater discharge monitoring.

C. Stormwater management program effectiveness studies. No later than December 1, 2013, Clark, King, Pierce, and Snohomish Counties, the Cities of Seattle and Tacoma,

and the Ports of Seattle and Tacoma shall notify Ecology in writing which of the following three options for effectiveness studies the Permittee chooses to carry out during this permit cycle. Any one of the three options will fully satisfy the Permittee's obligations under this section (S8.C). Each Permittee shall select a single option for the duration of this permit term.

1. Effectiveness Studies Option #1: Each Permittee that chooses this option shall pay into a collective fund to implement RSMP effectiveness studies. The payments into the collective fund are due to Ecology annually beginning August 15, 2014. The payment amounts are:

Permittee	Annual payment amount
Clark County	$ 86,617
King County	$124,196
Pierce County	$154,619
Port of Seattle	$ 6,916
Port of Tacoma	$ 6,916
City of Seattle	$248,986
Snohomish County	$122,383
City of Tacoma	$ 83,077

Or

2. Effectiveness Studies Option #2: Each Permittee that chooses this option shall conduct stormwater discharge monitoring in accordance with Appendix 9 and the following:

    a. Each city and county Permittee, except Clark County, shall conduct stormwater discharge monitoring at five locations. Permittees are encouraged to continue stormwater monitoring at locations monitored under S8.D of the Phase I Municipal Stormwater Permit February 16, 2007 – February 15, 2012.

    Any Permittee who would like to change a discharge monitoring location or add a new location shall document in the revised QAPP (see S8.C.2.c, below) why the pre-existing stormwater monitoring location is not a good location for additional monitoring and why the newly selected location is of interest for long term stormwater discharge monitoring and associated stormwater management program effectiveness evaluations.

    Clark County shall either:

    i. Select and monitor five discharge monitoring locations in addition to the two discharge monitoring locations monitored pursuant to S8.B.2 above.

Or

ii. Select and monitor two discharge monitoring locations in addition to the two discharge monitoring locations monitored pursuant to S8.B.2 and conduct receiving-water monitoring in wadeable streams or lakes at locations downstream of each of all four stormwater discharge monitoring locations.

(1) Receiving-water chemistry samples will be collected during and following the storm events for which the discharge monitoring is conducted, and for the same parameters.

(2) Sediment samples shall be collected during the month of May or June. Streambed sediment samples at these receiving-water monitoring locations shall be collected and analyzed pursuant to the RSMP Small Streams Status and Trends Monitoring QAPP and for any additional sediment parameters listed in Appendix 9; lake bed sediments shall be collected from the surficial sediment layer and analyzed for the same parameters.

(3) Explain in the revised QAPP (see S8.C.2.c below) why the receiving-water monitoring locations were selected and describe in detail the design of the receiving-water monitoring.

b. Each port Permittee shall conduct stormwater discharge monitoring at two locations representing different pollution-generating activities or land uses. Permittees are encouraged to continue stormwater monitoring at locations monitored under S8.D of the Phase I Municipal Stormwater Permit February 16, 2007 – February 15, 2012. Any Permittee who would like to change a discharge monitoring location shall describe why the pre-existing stormwater monitoring location is not a good location for additional monitoring. The Permittee shall document why the newly selected location(s) are of interest for long term stormwater discharge monitoring and associated stormwater management program effectiveness evaluations.

c. No later than February 2, 2014 each Permittee shall submit to Ecology a draft updated stormwater discharge monitoring QAPP for review and approval. If Ecology does not request changes within 90 days, the draft QAPP is considered approved. Final QAPPs shall be submitted to Ecology as soon as possible following finalization.

d. Flow monitoring at new discharge monitoring locations shall begin no later than October 1, 2014. Stormwater discharge monitoring shall be fully implemented no later than October 1, 2014 at existing discharge monitoring locations and October 1, 2015 at new discharge monitoring locations. All monitoring shall be conducted in accordance with an Ecology-approved QAPP.

Or

3. Effectiveness Studies Option #3: Each Permittee that chooses this option shall both pay into a collective fund to implement RSMP effectiveness studies and independently conduct an effectiveness study that is not expected to be undertaken as part of the RSMP.

    a. Payments into the collective fund are due to Ecology annually beginning August 15, 2014. The payment amounts are:

Permittee	Annual payment amount
Clark County	$ 43,308
King County	$ 62,098
Pierce County	$ 77,310
Port of Seattle	$ 3,458
Port of Tacoma	$ 3,458
City of Seattle	$124,493
Snohomish County	$ 61,192
City of Tacoma	$ 41,538

    And

    b. Conduct the independent effectiveness study in accordance with the requirements below:

        i. No later than February 2, 2014 submit to Ecology, for review and approval, a detailed proposal describing: the purpose, objectives, design, and methods of the independent effectiveness study; anticipated outcomes; expected modifications to the Permittee's stormwater management program; and relevance to other Permittees.

        ii. Submit a draft QAPP to Ecology within 120 days of Ecology's approval of the detailed proposal. The QAPP shall be prepared in accordance with Guidelines for Preparing Quality Assurance Project Plans for Environmental Studies, July 2004 (Ecology Publication No. 04-03-030). The QAPP shall include reporting details including timely uploading of all relevant data to Ecology's EIM database and/or the International Stormwater BMP Database as appropriate. If Ecology does not request changes within 90 days of submittal, the QAPP is considered approved.

        iii. Begin full implementation of the study no later than six months following Ecology's approval of the QAPP.

iv. Describe interim results and status of the study implementation in annual reports throughout the duration of the study.

v. Report final results, including recommended future actions, to Ecology and on the Permittee's webpage no later than six months after completion of the study.

D. Source identification and diagnostic monitoring. Clark, King, Pierce, and Snohomish Counties, the Cities of Seattle and Tacoma, and the Ports of Seattle and Tacoma shall pay into a collective fund to implement the RSMP Source Identification Information Repository (SIDIR). The payments into the collective fund are due to Ecology annually beginning August 15, 2014. The payment amounts are:

Permittee	Annual payment amount
Clark County	$ 8,033
King County	$11,518
Pierce County	$14,339
Port of Seattle	$ 641
Port of Tacoma	$ 641
City of Seattle	$23,091
Snohomish County	$11,350
City of Tacoma	$ 7,704

S9. REPORTING REQUIREMENTS

A. No later than March 31 of each year beginning in 2015, each Permittee shall submit an annual report. The reporting period for the first annual report will be from January 1, 2014 through December 31, 2014. The reporting period for all subsequent annual reports shall be the previous calendar year unless otherwise specified.

Permittees must submit annual reports electronically using Ecology's Water Quality Permitting Portal (WQWebPortal) available on Ecology's website at: http://www.ecy.wa.gov/programs/wq/permits/paris/portal.html unless otherwise directed by Ecology.

Permittees unable to submit electronically through Ecology's WQWebPortal must contact Ecology to request a waiver and obtain instructions on how to submit an annual report in an alternative format.

B. Each Permittee is required to keep all records related to this permit and the SWMP for at least five years.

C. Each Permittee shall make all records related to this permit and the Permittee's SWMP available to the public at reasonable times during business hours. The

Permittee will provide a copy of the most recent annual report to any individual or entity, upon request.

1. A reasonable charge may be assessed by the Permittee for making photocopies of records.

2. The Permittee may require reasonable advance notice of intent to review records related to this permit.

D. The annual report for Permittees listed in S1.B shall include the following:

1. A copy of the Permittee's current SWMP Plan as required by S5.A.1.

2. Submittal of the annual report form as provided by Ecology pursuant to S9.A, describing the status of implementation of the requirements of this permit during the reporting period.

3. Attachments to the annual report form including summaries, descriptions, reports, and other information as required, or as applicable, to meet the requirements of this permit during the reporting period. Refer to Appendix 12 for annual report questions.

4. If applicable, notice that the MS4 is relying on another governmental entity to satisfy any of the obligations under the permit.

5. Certification and signature pursuant to G19.D, and notification of any changes to authorization pursuant to G19.C.

6. A notification of any annexations, incorporations, or jurisdictional boundary changes resulting in an increase or decrease in the Permittee's geographic area of permit coverage during the reporting period.

E. Annual Report for Secondary Permittees, including the Port of Seattle and the Port of Tacoma

Each annual report shall include the following:

1. Submittal of the annual report as provided by Ecology pursuant to S9.A, describing the status of implementation of the requirements of this permit during the reporting period.

2. Attachments to the annual report form including summaries, descriptions, reports, and other information as required, or as applicable, to meet the requirements of this permit during the reporting period. Refer to Appendix 3 for annual report questions for the Ports of Seattle and Tacoma, and Appendix 4 for annual report questions for all other Secondary Permittees.

3. If applicable, notice that the MS4 is relying on another governmental entity to satisfy any of the obligations under this permit.

4. Certification and signature pursuant to G19.D, and notification of any changes to authorization pursuant to G19.C.

5. A notification of any jurisdictional boundary changes resulting in an increase or decrease in the Permittee's geographic area of permit coverage during the reporting period.

GENERAL CONDITIONS

G1. DISCHARGE VIOLATIONS

All discharges and activities authorized by this permit shall be consistent with the terms and conditions of this permit.

G2. PROPER OPERATION AND MAINTENANCE

The Permittee shall at all times properly operate and maintain all facilities and systems of collection, treatment, and control (and related appurtenances) which are installed or used by the Permittee for pollution control to achieve compliance with the terms and conditions of this permit.

G3. NOTIFICATION OF DISCHARGE INCLUDING SPILLS

If a Permittee has knowledge of a discharge, including spill(s), into or from a MS4, which could constitute a threat to human health, welfare, or the environment, the Permittee, shall:

A. Take appropriate action to correct or minimize the threat to human health, welfare and/or the environment.

B. Notify the Ecology regional office and other appropriate spill response authorities immediately but in no case later than within 24 hours of obtaining that knowledge. The Department of Ecology's Regional Office 24-hr. number is (425) 649-7000 for the Northwest Regional Office, and (360) 407-6300 for the Southwest Regional Office.

C. Immediately report spills or other discharges which might cause bacterial contamination of marine waters, such as discharges resulting from broken sewer lines and failing onsite septic systems, to the Ecology regional office and to the Department of Health, Shellfish Program. The Department of Health's Shellfish number is (360) 236-3330 (business hours) or (360) 789-8962 (24-hours).

D. Immediately report spills or discharges of oils or hazardous substances to the Ecology regional office and to the Washington Emergency Management Division, (800) 258-5990.

G4. BYPASS PROHIBITED

The intentional bypass of stormwater from all or any portion of a stormwater treatment BMP whenever the design capacity of the treatment BMP is not exceeded, is prohibited unless the following conditions are met:

A. Bypass is: (1) unavoidable to prevent loss of life, personal injury, or severe property damage; or (2) necessary to perform construction or maintenance-related activities essential to meet the requirements of the Clean Water Act (CWA); and

B. There are no feasible alternatives to bypass, such as the use of auxiliary treatment facilities, retention of untreated stormwater, or maintenance during normal dry periods.

"Severe property damage" means substantial physical damage to property, damage to the treatment facilities which would cause 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.

G5. RIGHT OF ENTRY

The Permittee shall allow an authorized representative of Ecology, upon the presentation of credentials and such other documents as may be required by law at reasonable times:

A. To enter upon the Permittee's premises where a discharge is located or where any records must be kept under the terms and conditions of this permit;

B. To have access to, and copy at reasonable cost and at reasonable times, any records that must be kept under the terms of the permit;

C. To inspect at reasonable times any monitoring equipment or method of monitoring required in the permit;

D. To inspect at reasonable times any collection, treatment, pollution management, or discharge facilities; and

E. To sample at reasonable times any discharge of pollutants.

G6. DUTY TO MITIGATE

The Permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit, which has a reasonable likelihood of adversely affecting human health or the environment.

G7. PROPERTY RIGHTS

This permit does not convey any property rights of any sort, or any exclusive privilege.

G8. COMPLIANCE WITH OTHER LAWS AND STATUTES

Nothing in the permit shall be construed as excusing the Permittee from compliance with any other applicable federal, state, or local statutes, ordinances, or regulations.

G9. MONITORING

A. Representative Sampling: Samples and measurements taken to meet the requirements of this permit shall be representative of the volume and nature of the monitored discharge, including representative sampling of any unusual discharge or discharge condition, including bypasses, upsets, and maintenance-related conditions affecting effluent quality.

B. Records Retention: The Permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original 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 years. This period of retention shall be extended during the course of any unresolved litigation regarding the discharge of pollutants by the Permittee or when requested by Ecology. On request, monitoring data and analysis must be provided to Ecology.

C. Recording of Results: For each measurement or sample taken, the Permittee shall record the following information: (1) the date, exact place and time of sampling; (2) the individual who performed the sampling or measurement; (3) the dates the analyses were performed; (4) who performed the analyses; (5) the analytical techniques or methods used; and (6) the results of all analyses.

D. Test Procedures: All sampling and analytical methods used to meet the monitoring requirements in this Permit shall conform to the Guidelines Establishing Test Procedures for the Analysis of Pollutants contained in 40 CFR Part 136, unless otherwise specified in this permit or approved in writing by Ecology.

E. Flow Measurement: Where flow measurements are required by other conditions of this Permit, appropriate flow measurement devices and methods consistent with accepted scientific practices shall be selected and used to ensure the accuracy and reliability of measurements of the volume of monitored discharges. The devices must be installed, calibrated, and maintained to ensure that the accuracy of the measurements are consistent with the accepted industry standard for that type of device. Frequency of calibration shall be in conformance with manufacturer's recommendations or at a minimum frequency of at least one calibration per year. Calibration records should be maintained for a minimum of three years.

F. Lab Accreditation: All monitoring data, except for flow, temperature, conductivity, pH, total residual chlorine, and other exceptions approved by Ecology, shall be prepared by a laboratory registered or accredited under the provisions of, Accreditation of Environmental Laboratories, chapter 173-50 WAC. Soils and hazardous waste data are exempted from this requirement pending accreditation of laboratories for analysis of these media by Ecology. Quick methods of field detection of pollutants including nutrients, surfactants, salinity, and other parameters are exempted from this requirement when the purpose of the sampling is identification and removal of a suspected illicit discharge.

G. Additional Monitoring: Ecology may establish specific monitoring requirements in addition to those contained in this permit by administrative order or permit modification.

G10. REMOVED SUBSTANCES

With the exception of decant from street waste vehicles, the Permittee must not allow collected screenings, grit, solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of stormwater to be resuspended or reintroduced to the storm sewer system or to waters of the state. Decant from street waste vehicles resulting from cleaning stormwater facilities may be reintroduced only when other practical means are not available and only in accordance with the Street Waste Disposal Guidelines in Appendix 6. Solids generated from maintenance of the MS4 may be reclaimed, recycled, or reused when allowed by local codes and ordinances. Soils that are identified as contaminated pursuant to chapter 173-350 WAC shall be disposed at a qualified solid waste disposal facility (see Appendix 6).

G11. SEVERABILITY

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit shall not be affected thereby.

G12. REVOCATION OF COVERAGE

The director may terminate coverage under this General Permit in accordance with Chapter 43.21B RCW and chapter 173-226 WAC. Cases where coverage may be terminated include, but are not limited to the following:

A. Violation of any term or condition of this general permit;

B. Obtaining coverage under this general permit by misrepresentation or failure to disclose fully all relevant facts;

C. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

D. A determination that the permitted activity endangers human health or the environment, or contributes significantly to water quality standards violations;

E. Failure or refusal of the Permittee to allow entry as required in RCW 90.48.090;

F. Nonpayment of permit fees assessed pursuant to RCW 90.48.465;

Revocation of coverage under this general permit may be initiated by Ecology or requested by any interested person.

G13. TRANSFER OF COVERAGE

The director may require any discharger authorized by this general permit to apply for and obtain an individual permit in accordance with Chapter 43.21B RCW and chapter 173-226 WAC.

G14. GENERAL PERMIT MODIFICATION AND REVOCATION

This general permit may be modified, revoked and reissued, or terminated in accordance with the provisions of WAC 173-226-230. Grounds for modification, revocation and reissuance, or termination include, but are not limited to the following:

A. A change occurs in the technology or practices for control or abatement of pollutants applicable to the category of dischargers covered under this general permit;

B. Effluent limitation guidelines or standards are promulgated pursuant to the CWA or chapter 90.48 RCW, for the category of dischargers covered under this general permit;

C. A water quality management plan containing requirements applicable to the category of dischargers covered under this general permit is approved;

D. Information is obtained which indicates that cumulative effects on the environment from dischargers covered under this general permit are unacceptable; or

E. Changes made to State law reference this permit.

G15. REPORTING A CAUSE FOR MODIFICATION OR REVOCATION

A Permittee who knows or has reason to believe that any activity has occurred or will occur which would constitute cause for modification or revocation and reissuance under Condition G12, G14, or 40 CFR 122.62 shall report such plans, or such information, to Ecology so that a decision can be made on whether action to modify, or revoke and reissue this permit will be required. Ecology may then require submission of a new or amended application. Submission of such application does not relieve the Permittee of the duty to comply with this permit until it is modified or reissued.

G16. APPEALS

A. The terms and conditions of this general permit, as they apply to the appropriate class of dischargers, are subject to appeal within thirty days of issuance of this general permit, in accordance with chapter 43.21B RCW, and chapter 173-226 WAC.

B. The terms and conditions of this general permit, as they apply to an individual discharger, can be appealed, in accordance with chapter 43.21B RCW, within thirty days of the effective date of coverage of that discharger. Consideration of an appeal of general permit coverage of an individual discharger is limited to the general permit's applicability or nonapplicability to that individual discharger.

C. The appeal of general permit coverage of an individual discharger does not affect any other dischargers covered under this general permit. If the terms and conditions of this general permit are found to be inapplicable to any individual discharger(s), the matter shall be remanded to Ecology for consideration of issuance of an individual permit or permits.

D. Modifications of this permit can be appealed in accordance with chapter 43.21B RCW and chapter 173-226 WAC.

G17. PENALTIES

40 CFR 122.41(a)(2) and (3), 40 CFR 122.41(j)(5), and 40 CFR 122.41(k)(2) are hereby incorporated into this permit by reference.

G18. DUTY TO REAPPLY

The Permittee shall apply for permit renewal at least 180 days prior to the specified expiration date of this permit.

G19. CERTIFICATION AND SIGNATURE

All formal submittals to Ecology shall be signed and certified.

A. All permit applications shall be signed by either a principal executive officer or ranking elected official.

B. All formal submittals required by this Permit shall be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
   1. The authorization is made in writing by a person described above and submitted to Ecology, and
   2. The authorization specifies either an individual or a position having responsibility for the overall development and implementation of the stormwater management program. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.)

C. Changes to authorization. If an authorization under General Condition G19.B.2 is no longer accurate because a different individual or position has responsibility for the overall development and implementation of the stormwater management program, a new authorization satisfying the requirements of General Condition G19.B.2 must be submitted to Ecology prior to or together with any reports, information, or applications to be signed by an authorized representative.

D. Certification. Any person signing a formal submittal under this permit must make the following certification:

   "I certify under penalty of law, that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering 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 willful violations."

G20. NON-COMPLIANCE NOTIFICATION

In the event a Permittee is unable to comply with any of the terms and conditions of this Permit, the Permittee must:

A. Notify Ecology of the failure to comply with the permit terms and conditions in writing within 30 days of becoming aware that the non-compliance has occurred. The written notification to Ecology must include all of the following:
   1. A description of the non-compliance, including the reference(s).
   2. Beginning and ending dates of the non-compliance, or if the Permittee has not corrected the non-compliance, the anticipated date of correction.
   3. Steps taken or planned to reduce, eliminate, or prevent reoccurrence of the non-compliance.

B. Take appropriate action to stop or correct the condition of non-compliance.

G21. UPSETS

Permittees shall meet the conditions of 40 CFR 122.41(n) regarding "Upsets." The conditions are as follows:

A. 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 Permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

B. 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 paragraph (C) of this condition are met. Any determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, will not constitute final administrative action subject to judicial review.

C. Conditions necessary for demonstration of upset. A Permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed contemporaneous operating logs, or other relevant evidence that:
   1. An upset occurred and that the Permittee can identify the cause(s) of the upset;
   2. The permitted facility was at the time being properly operated; and
   3. The Permittee submitted notice of the upset as required in 40 CFR 122.41(l)(6)(ii)(B) (24-hour notice of noncompliance).
   4. The Permittee complied with any remedial measures required under 40 CFR 122.41(d) (Duty to Mitigate).

D. Burden of proof. In any enforcement proceeding, the Permittee seeking to establish the occurrence of an upset has the burden of proof.

DEFINITIONS AND ACRONYMS

This section includes definitions for terms used in the body of the permit and in all the appendices except Appendix 1. Terms defined in Appendix 1 are necessary to implement requirements related to Appendix 1.

40 CFR means Title 40 of the Code of Federal Regulations, which is the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the federal government.

AKART means All Known, Available and Reasonable methods of prevention, control and Treatment. See also State Water Pollution Control Act, chapter 90.48.010 and 90.48.520 RCW.

All Known, Available and Reasonable methods of prevention, control and Treatment refers to the State Water Pollution Control Act, Chapter 90.48.010 and 90.48.520 RCW.

Applicable TMDL means a TMDL which has been approved by EPA on or before the issuance date of this Permit, or prior to the date that Ecology issues coverage under this Permit, whichever is later.

Beneficial Uses means uses of waters of the state, which include but are not limited to: use for domestic, stock watering, industrial, commercial, agricultural, irrigation, mining, fish and wildlife maintenance and enhancement, recreation, generation of electric power and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state.

Best Management Practices are the schedules of activities, prohibitions of practices, maintenance procedures, and structural and/or managerial practices approved by Ecology that, when used singly or in combination, prevent or reduce the release of pollutants and other adverse impacts to waters of Washington State.

B-IBI means Benthic Index of Biotic Integrity.

BMP means Best Management Practice.

Bypass means the diversion of stormwater from any portion of a stormwater treatment facility.

Circuit means a portion of a MS4 discharging to a single point or serving a discrete area determined by traffic volumes, land use, topography, or the configuration of the MS4.

Component or *Program Component* means an element of the Stormwater Management Program listed in Special Condition S5 Stormwater Management Program for Permittees or S6 Stormwater Management Program for Secondary Permittees, or S7 Compliance with Total Maximum Daily Load Requirements, or S8 Monitoring and Assessment.

Conveyance system means that portion of the municipal separate storm sewer system designed or used for conveying stormwater.

Co-Permittee means an owner or operator of a MS4 which is in a cooperative agreement with at least one other applicant for coverage under this permit. A co-permittee is an owner or operator of a regulated MS4 located within or in proximity to another regulated MS4. A Co-Permittee is only responsible for permit conditions relating to the discharges from the MS4 the Co-Permittee owns or operates. See also 40 CFR 122.26(b)(1).

CWA means the federal Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended Pub. L. 95-217, Pub. L. 95-576, Pub. L. (6-483 and Pub. L. 97-117, 33 U.S.C. 1251 *et seq*.).

Director means the Director of the Washington State Department of Ecology, or an authorized representative.

Discharge Point means the location where a discharge leaves the Permittee's MS4 through the Permittee's MS4 facilities/BMPs designed to infiltrate.

Entity means a governmental body, or a public or private organization.

EPA means the U.S. Environmental Protection Agency.

General Permit means a permit which covers multiple dischargers of a point source category within a designated geographical area, in lieu of individual permits being issued to each discharger.

Ground Water means water in a saturated zone or stratum beneath the surface of the land or below a surface water body. Refer to chapter 173-200 WAC.

Hazardous Substance means any liquid, solid, gas, or sludge, including any material, substance, product, commodity, or waste, regardless of quantity, that exhibits any of the physical, chemical, or biological properties described in WAC 173-303-090 or WAC 173-303-100.

Heavy equipment maintenance or storage yard means an uncovered area where any heavy equipment, such as mowing equipment, excavators, dump trucks, backhoes, or bulldozers are washed or maintained, or where at least five pieces of heavy equipment are stored on a long term basis.

Highway means a main public road connecting towns and cities.

Hydraulically Near means runoff from the site discharges to the sensitive feature without significant natural attenuation of flows that allows for suspended solids removal. See Appendix 7 Determining Construction Site Sediment Damage Potential for a more detailed definition.

Hyperchlorinated means water that contains more than 10 mg/Liter chlorine.

Illicit Connection means any infrastructure connection to the MS4 that is not intended, permitted, or used for collecting and conveying stormwater or non-stormwater discharges allowed as specified in this permit (S5.C.8, S6.D.3, and S6.E.3). Examples include sanitary sewer connections, floor drains, channels, pipelines, conduits, inlets, or outlets that are connected directly to the MS4.

Illicit Discharge means any discharge to a MS4 that is not composed entirely of stormwater or of non-stormwater discharges allowed as specified in this Permit (S5.C.8, S6.D.3 and S6.E.3).

Impervious Surface means a non-vegetated surface area that either prevents or retards the entry of water into the soil mantle as under natural conditions prior to development. A non-vegetated 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 prior to development. Common impervious surfaces include, but are not limited to, roof tops, walkways, patios,

driveways, parking lots or stormwater areas, concrete or asphalt paving, gravel roads, packed earthen materials, and oiled, macadam or other surfaces which similarly impede the natural infiltration of stormwater.

Land disturbing activity means any activity that results in a change in the existing soil cover (both vegetative and non-vegetative) and/or the existing soil topography. Land disturbing activities include, but are not limited to clearing, grading, filling and excavation. Compaction that is associated with stabilization of structures and road construction shall also be considered land disturbing activity. Vegetation maintenance practices, including landscape maintenance and gardening, are not considered land disturbing activity. Stormwater facility maintenance is not considered land disturbing activity if conducted according to established standards and procedures.

LID means Low Impact Development.

LID BMP means Low Impact Development Best Management Practices.

LID Principles means land use management strategies that emphasize conservation, use of on-site natural features, and site planning to minimize impervious surfaces, native vegetation loss, and stormwater runoff.

Low Impact Development means a stormwater and land use management strategy that strives to mimic pre-disturbance hydrologic processes of infiltration, filtration, storage, evaporation and transpiration by emphasizing conservation, use of on-site natural features, site planning, and distributed stormwater management practices that are integrated into a project design.

Low Impact Development Best Management Practices means distributed stormwater management practices, integrated into a project design, that emphasize pre-disturbance hydrologic processes of infiltration, filtration, storage, evaporation and transpiration. LID BMPs include, but are not limited to, bioretention, rain gardens, permeable pavements, roof downspout controls, dispersion, soil quality and depth, vegetated roofs, minimum excavation foundations, and water re-use.

Material Storage Facilities means an uncovered area where bulk materials (liquid, solid, granular, etc.) are stored in piles, barrels, tanks, bins, crates, or other means.

Maximum Extent Practicable refers to paragraph 402(p)(3)(B)(iii) of the federal Clean Water Act which reads as follows: Permits for discharges from municipal storm sewers shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques, and system, design, and engineering methods, and other such provisions as the Administrator or the State determines appropriate for the control of such pollutants.

MEP means Maximum Extent Practicable.

MS4 means Municipal Separate Storm Sewer System.

Municipal separate storm sewer system means a conveyance, or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade 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 wastes, stormwater, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the State.

(ii) Designed or used for collecting or conveying stormwater.

(iii) Which is not a combined sewer.

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

(v) Which is defined as "large" or "medium" or "small" or otherwise designated by Ecology pursuant to 40 CFR 122.26.

National Pollutant Discharge Elimination System means the national program for issuing, modifying, revoking, and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of the Federal Clean Water Act, for the discharge of pollutants to surface waters of the state from point sources. These permits are referred to as NPDES permits and, in Washington State, are administered by the Washington Department of Ecology.

Native Vegetation means vegetation comprised of plant species, other than noxious weeds, that are indigenous to the coastal region of the Pacific Northwest and which reasonably could have been expected to naturally occur on the site. Examples include trees such as Douglas Fir, western hemlock, western red cedar, alder, big-leaf maple; shrubs such as willow, elderberry, salmonberry, and salal; and herbaceous plants such as sword fern, foam flower, and fireweed.

"New Development" means land disturbing activities, including Class IV-General Forest Practices that are conversions from timber land to other uses; structural development, including construction or installation of a building or other structure; creation of hard surfaces; and subdivision, short subdivision and binding site plans, as defined and applied in chapter 58.17 RCW. Projects meeting the definition of redevelopment shall not be considered new development. Refer to Appendix 1 for a definition of hard surfaces.

New Secondary Permittee means a Secondary Permittee that is covered under a Municipal Stormwater General Permit and was not covered by the permit prior to August 1, 2013.

NOI means Notice of Intent.

Notice of Intent means the application for, or a request for coverage under a General NPDES Permit pursuant to WAC 173-226-200.

Notice of Intent for Construction Activity means the application form for coverage under the Construction Stormwater General Permit.

Notice of Intent for Industrial Activity means the application form for coverage under the General Permit for Stormwater Discharges Associated with Industrial Activities.

NPDES means National Pollutant Discharge Elimination System.

O&M means operation and maintenance.

Outfall means point source as defined by 40 CFR 122.2 at the point where a discharge means a point source as defined by 40 CFR 122.2 at the point where a discharge leaves the Permittee's MS4 and enters a surface receiving waterbody or surface receiving waters. Outfall does not include pipes, tunnels, or other conveyances which connect segments of the same stream or other surface waters and are used to convey primarily surface waters (i.e., culverts).

Permittee unless otherwise noted, includes city, town, or county Permittee, port Permittee, Co-Permittee, Secondary Permittee, and New Secondary Permittee.

Physically Interconnected means that one MS4 is connected to another storm sewer system in such a way that it allows for direct discharges to the second system. For example, the roads with drainage systems and municipal streets of one entity are physically connected directly to a storm sewer system belonging to another entity.

Project Site means that portion of a property, properties, or right-of-ways subject to land disturbing activities, new hard surfaces, or replaced hard surfaces. Refer to Appendix 1 for a definition of hard surfaces.

QAPP means Quality Assurance Project Plan.

Qualified Personnel means someone who has had professional training in the aspects of stormwater management for which they are responsible and are under the functional control of the Permittee. Qualified Personnel may be staff members, contractors, or volunteers.

Quality Assurance Project Plan means a document that describes the objectives of an environmental study and the procedures to be followed to achieve those objectives.

RCW means the Revised Code of Washington State.

Receiving waterbody or *Receiving waters* means naturally and/or reconstructed naturally occurring surface water bodies, such as creeks, streams, rivers, lakes, wetlands, estuaries, and marine waters, or ground water, to which a MS4 discharges. *Redevelopment* means, on a site that is already substantially developed (i.e., has 35% or more of existing hard surface coverage), the creation or addition of hard surfaces; the expansion of a building footprint or addition or replacement of a structure; structural development including construction, installation or expansion of a building or other structure; replacement of hard surface that is not part of a routine maintenance activity; and land disturbing activities. Refer to Appendix 1 for a definition of hard surfaces.

Regional Stormwater Monitoring Program means for all of western Washington, a stormwater-focused monitoring and assessment program consisting of these components: status and trends monitoring in small streams and marine nearshore areas, stormwater management program effectiveness studies, and a source identification information repository (SIDIR). The priorities and scope for the RSMP are set by a formal stakeholder group. For this permit term, RSMP status and trends monitoring will be conducted in the Puget Sound basin only.

RSMP means Regional Stormwater Monitoring Program.

Runoff is water that travels across the land surface and discharges to water bodies either directly or through a collection and conveyance system. See also "Stormwater."

Secondary Permittee is an operator of a MS4 which is not a city, town or county. Secondary Permittees include special purpose districts and other public entities that meet the criteria inS1.E.1.

Sediment/Erosion-Sensitive Feature means an area subject to significant degradation due to the effect of construction runoff, or areas requiring special protection to prevent erosion. See Appendix 7 Determining Construction Site Sediment Transport Potential for a more detailed definition.

Shared Waterbodies means waterbodies, including downstream segments, lakes and estuaries, that receive discharges from more than one Permittee.

SIDIR means a Source Identification Information Repository.

Significant Contributor means a discharge that contributes a loading of pollutants considered to be sufficient to cause or exacerbate the deterioration of receiving water quality or instream habitat conditions.

Source Control BMP means a structure or operation that is intended to prevent pollutants from coming into contact with stormwater through physical separation of areas or careful management of activities that are sources of pollutants. The SWMMWW separates source control BMPs into two types. Structural Source Control BMPs are physical, structural, or mechanical devices, or facilities that are intended to prevent pollutants from entering stormwater. Operational BMPs are non-structural practices that prevent or reduce pollutants from entering stormwater. See Volume IV of the SWMMWW for details.

Stormwater means runoff during and following precipitation and snowmelt events, including surface runoff, drainage, and interflow.

Stormwater Associated with Industrial and Construction Activity means the discharge from any conveyance which is used for collecting and conveying stormwater, which is directly related to manufacturing, processing or raw materials storage areas at an industrial plant, or associated with clearing, grading and/or excavation, and is required to have an NPDES permit in accordance with 40 CFR 122.26.

Stormwater facilities regulated by the Permittee means permanent stormwater treatment and flow control BMPs/facilities located in the geographic area covered by the permit and which are not owned by the Permittee, and are known by the permittee to discharge into MS4 owned or operated by the Permittee.

Stormwater Management Program means a set of actions and activities designed to reduce the discharge of pollutants from the MS4 to the MEP and to protect water quality, and comprising the components listed in S5 or S6 of this Permit and any additional actions necessary to meet the requirements of applicable TMDLs pursuant to S7 Compliance with TMDL Requirements, and S8 Monitoring and Assessment.

Stormwater Treatment and Flow Control BMPs/Facilities means detention facilities, treatment BMPs/facilities, bioretention, vegetated roofs, and permeable pavements that help meet minimum requirement #6 (treatment), #7 (flow control), or both.

SWMMWW and *Stormwater Management Manual for Western Washington* refer to the Stormwater Management Manual for Western Washington as amended in 2014.

SWMP means Stormwater Management Program.

TMDL means Total Maximum Daily Load.

Total Maximum Daily Load means a water cleanup plan. A TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources. A TMDL is the sum of the allowable loads of a single pollutant from all contributing point and nonpoint sources. The calculation must include a margin of safety to ensure that the water body can be used for the purposes the state has designated. The calculation must also account for seasonable variation in water quality. Water quality standards are set by states, territories, and tribes. They identify the uses for each water body, for example, drinking water supply, contact recreation (swimming), and aquatic life support (fishing), and the scientific criteria to support that use. The Clean Water Act, section 303, establishes the water quality standards and TMDL programs.

Tributary Conveyance means pipes, ditches, catch basins, and inlets owned or operated by the Permittee and designed or used for collecting and conveying stormwater.

UGA means Urban Growth Area.

Urban Growth Area means those areas designated by a county pursuant to RCW 36.70A.110.

Urban/higher density rural sub-basins means all areas within or proposed to be within the UGA, or any sub-basin outside the UGA with 50% or more area comprised of lots less than 5 acres.

Vehicle Maintenance or Storage Facility means an uncovered area where any vehicles are regularly washed or maintained, or where at least 10 vehicles are stored.

Water Quality Standards means Surface Water Quality Standards, chapter 173-201A WAC, Ground Water Quality Standards, chapter 173-200 WAC, and Sediment Management Standards, chapter 173-204 WAC.

Waters of the State includes those waters as defined as *Waters of the United States* in 40 CFR Subpart 122.2 within the geographic boundaries of Washington State and *Waters of the State* as defined in chapter 90.48 RCW which includes lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and water courses within the jurisdiction of the State of Washington.

Waters of the United States refers to the definition in 40 CFR 122.2.

Attachment 5

United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

Authorization to Discharge Under the
National Pollutant Discharge Elimination System

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §1251 *et seq.*, as amended by the Water Quality Act of 1987, P.L. 100-4, the "Act",

Ada County Highway District,
Boise State University,
City of Boise,
City of Garden City.
Drainage District #3,
and the Idaho Transportation Department District #3,

(hereinafter "the Permittees")

are authorized to discharge from all municipal separate storm sewer system (MS4) outfalls existing as of the effective date of this Permit to waters of the United States, including the Boise River and its tributaries, in accordance with the conditions set forth herein.

This Permit will become effective February 1, 2013.

This Permit, and the authorization to discharge, expires at midnight, January 30, 2018.

Permittees must reapply for permit reissuance on or before August 3, 2017, 180 days before the expiration of this Permit, if the Permittees intend to continue operations and discharges from the MS4s beyond the term of this Permit.

Signed this 12th day of December, 2012.

Daniel D. Opalski, Director
Office of Water and Watersheds, Region 10
U.S. Environmental Protection Agency

Table of Contents

I. Applicability

A. Permit Area. This Permit covers all areas within the corporate boundary of the City of Boise and Garden City, Idaho, which are served by the municipal separate storm sewer systems (MS4s) owned or operated by the Ada County Highway District, Boise State University, City of Boise, City of Garden City, Drainage District #3, and/or the Idaho Transportation Department District #3 (the Permittees).

B. Discharges Authorized Under This Permit. Subject to the conditions set forth herein, the Permittees are authorized to discharge storm water to waters of the United States from the MS4s identified in Part I.A.

As provided in Part I.D, this Permit also authorizes the discharge of flows from the MS4s which are categorized as allowable non-storm water discharge, storm water discharge associated with industrial activity, and storm water discharge associated with construction activity.

C. Permittees' Responsibilities

1. **Individual Responsibility**. Each Permittee is individually responsible for Permit compliance related only to portions of the MS4 owned or operated solely by that Permittee, or where this Permit requires a specific Permittee to take an action.
2. **Joint Responsibility.** Each Permittee is jointly responsible for Permit compliance:
   a) related to portions of the MS4 where operational or storm water management program (SWMP) implementation authority has been transferred to all of the Permittees in accordance with an intergovernmental agreement or agreement between the Permittees;
   b) related to portions of the MS4 where Permittees jointly own or operate a portion of the MS4;
   c) related to the submission of reports or other documents required by Parts II and IV of this Permit; and
   d) Where this Permit requires the Permittees to take an action and a specific Permittee is not named.
3. **Intergovernmental Agreement.** The Permittees must maintain an intergovernmental agreement describing each organization's respective roles and responsibilities related to this Permit. Any previously signed agreement may be updated, as necessary, to comply with this requirement. An updated intergovernmental agreement must be completed no later than July 1, 2013. A copy of the updated intergovernmental agreement must be submitted to the Environmental Protection Agency (EPA) with the 1st Year Annual Report.

D. Limitations on Permit Coverage

1. **Non-Storm Water Discharges**. Permittees are not authorized to discharge non-storm water from the MS4, except where such discharges satisfy one of the following three conditions:

   a) The non-storm water discharges are in compliance with a separate NPDES permit;

   b) The non-storm water discharges result from a spill and:

      (i) are the result of an unusual and severe weather event where reasonable and prudent measures have been taken to prevent and minimize the impact of such discharge; or

      (ii) consist of emergency discharges required to prevent imminent threat to human health or severe property damage, provided that reasonable and prudent measures have been taken to prevent and minimize the impact of such discharges;

   or

   c) The non-storm water discharges satisfy each of the following two conditions:

      (i) The discharges consist of uncontaminated water line flushing; potable water sources; landscape irrigation (provided all pesticides, herbicides and fertilizer have been applied in accordance with manufacturer's instructions); lawn watering; irrigation water; flows from riparian habitats and wetlands; diverted stream flows; springs; rising ground waters; uncontaminated ground water infiltration (as defined at 40 CFR § 35.2005(20)) to separate storm sewers; uncontaminated pumped ground water or spring water; foundation and footing drains (where flows are not contaminated with process materials such as solvents); uncontaminated air conditioning or compressor condensate; water from crawlspace pumps; individual residential car washing; dechlorinated swimming pool discharges; routine external building wash down which does not use detergents; street and pavement wash waters, where no detergents are used and no spills or leaks of toxic or hazardous materials have occurred (unless all spilled material has been removed); fire hydrant flushing; or flows from emergency firefighting activities; and

      (ii) The discharges are not sources of pollution to waters of the United States. A discharge is considered a source of pollution to waters of the United States if it:

         1) Contains hazardous materials in concentrations found to be of public health significance or to impair beneficial uses in receiving waters. (Hazardous materials are those

that are harmful to humans and animals from exposure, but not necessarily ingestion);

2) Contains toxic substances in concentrations that impair designated beneficial uses in receiving waters. (Toxic substances are those that can cause disease, malignancy, genetic mutation, death, or similar consequences);

3) Contains deleterious materials in concentrations that impair designated beneficial uses in receiving waters. (Deleterious materials are generally substances that taint edible species of fish, cause taste in drinking waters, or cause harm to fish or other aquatic life);

4) Contains radioactive materials or radioactivity at levels exceeding the values listed in 10 CFR Part 20 in receiving waters;

5) Contains floating, suspended, or submerged matter of any kind in concentrations causing nuisance or objectionable conditions or in concentrations that may impair designated beneficial uses in receiving waters;

6) Contains excessive nutrients that can cause visible slime growths or other nuisance aquatic growths that impair designated beneficial uses in receiving waters;

7) Contains oxygen-demanding materials in concentrations that would result in anaerobic water conditions in receiving waters; or

8) Contains sediment above quantities specified in IDAPA 58.01.02.250.02.e or in the absence of specific sediment criteria, above quantities that impair beneficial uses in receiving waters; or

9) Contains material in concentrations that exceed applicable natural background conditions in receiving waters (IDAPA 58.01.02.200. 09). Temperature levels may be increased above natural background conditions when allowed under IDAPA 58.01.02.401.

2. **Discharges Threatening Water Quality.** Permittees are not authorized to discharge storm water that will cause, or have the reasonable potential to cause or contribute to, an excursion above the Idaho water quality standards.

3. **Snow Disposal to Receiving Waters**. Permittees are not authorized to push or dispose of snow plowed within the Permit area directly into waters of the United States, or directly into the MS4(s). Discharges from any Permittee's snow disposal and snow management practices are authorized under this Permit only when such sites and practices are designed, conducted, operated, and maintained to prevent and reduce pollutants in the discharges to the maximum

extent practicable so as to avoid excursions above the Idaho water quality standards.

4. **Storm Water Discharge Associated with Industrial and Construction Activity.** Permittees are authorized to discharge storm water associated with industrial activity (as defined in 40 CFR 122.26(b)(14)), and storm water associated with construction activity (as defined in 40 CFR 122.26(b)(14)(x) and (b)(15)), from their MS4s, only when such discharges are otherwise authorized under an appropriate NPDES permit.

II. Storm Water Management Program (SWMP) Requirements

A. General Requirements

1. **Reduce pollutants to the maximum extent practicable.** The Permittees must implement and enforce a SWMP designed to reduce the discharge of pollutants from their MS4 to the maximum extent practicable (MEP), and to protect water quality in receiving waters. The SWMP as defined in this Permit must include best management practices (BMPs), controls, system design, engineering methods, and other provisions appropriate to control and minimize the discharge of pollutants from the MS4s.

   a) **SWMP Elements**. The required SWMP control measures are outlined in Part II.SWMP assessment/monitoring requirements are described in Part IV. Each Permittee must use practices that are selected, implemented, maintained, and updated to ensure that storm water discharges do not cause or contribute to an exceedance of an applicable Idaho water quality standard.

   b) **SWMP Documentation.** Each Permittee must prepare written documentation of the SWMP as implemented within their jurisdiction. The SWMP documentation must be organized according to the program components in Parts II and IV of this Permit, and must provide a current narrative physical description of the Permittee's MS4, illustrative maps or graphics, and all related ordinances, policies and activities as implemented within their jurisdiction. Each Permittee's SWMP documentation must be submitted to EPA with the 1st Year Annual Report.

      (i) Each Permittee must provide an opportunity for public review and comment on their SWMP documentation, consistent with applicable state or local requirements and Part II.B.6 of this Permit.

      (ii) Each Permittee's SWMP documentation must be updated at least annually and submitted as part of each subsequent Annual Report. (The document format used for Annual Report(s) submitted to EPA by the Permittees' prior to the effective date of this Permit may be modified to meet this requirement.)

   c) **SWMP Information.** The SWMP must include an ongoing program for gathering, tracking, maintaining, and using information to set priorities, evaluate SWMP implementation and Permit compliance.

d) **SWMP Statistics**. Permittees must track the number of inspections, official enforcement actions and types of public education activities and outcomes as stipulated by the respective program component. This information must be included in the Annual Report.

2. **Shared Implementation with outside entities.** Implementation of one or more of the SWMP minimum control measures may be shared with or delegated to another entity other than the Permittee(s). A Permittee may rely on another entity only if:

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

   b) The action, or component thereof , is at least as stringent as the corresponding Permit requirement; and

   c) The other entity agrees to implement the minimum control measure on the Permittee's behalf. A binding written acceptance of this obligation is required. Each Permittee must maintain and record this obligation as part of the SWMP documentation. If the other entity agrees to report on the minimum control measure, the Permittees must supply the other entity with the reporting requirements in Part IV.C of this Permit. The Permittees remain responsible for compliance with the Permit obligation if the other entity fails to implement the required minimum control measure.

3. **Modification of the SWMP**. Minor modifications to the SWMP may be made in accordance with Part II.E of this Permit.

4. **Subwatershed Planning.** No later than September 30, 2016, the Permittees must jointly complete at least two individual sub-watershed plans for areas served by the MS4s within the Permit area. For the purposes of this Permit, the terms "subwatershed" and "storm sewershed" are defined as in Part VII. For each plan document, the subwatershed planning area must drain to at least one of the water bodies listed in Table II.C.

   Selected subwatersheds must be identified in the 1st Year Annual Report. Two completed subwatershed plan documents must be submitted to EPA as part of the 4th Year Annual Report.

   a) The Permittees must actively engage stakeholders in the development of each plan, and must provide opportunities for public input, consistent with Part II.B.6.

   b) The Permittees may modify and update any existing watershed planning document(s) to address the requirements of this Part.

   c) Each subwatershed plan must describe the extent and nature of the existing storm sewershed, and identify priority aquatic resources and beneficial uses to be protected or restored within the subwatershed planning area. Each subwatershed plan must contain a prioritized list of potential locations or opportunities for protecting or restoring such resources or beneficial uses through storm water infiltration, evapotranspiration or rainfall

harvesting/reuse, or other site-based low impact development (LID) practices. See Parts II.B.2.a, and II.B.2.c.

d) Each subwatershed plan must include consideration and discussion of how the Permittees will provide incentives, or enforce requirements, through their respective Stormwater Management Programs to address the following principles:

(i) Minimize the amount of impervious surfaces (roads, parking lots, roofs) within each watershed, by minimizing the creation, extension and widening of roads and associated development.

(ii) Preserve, protect, create and restore ecologically sensitive areas that provide water quality benefits and serve critical watershed functions. These areas may include, but are not limited to; riparian corridors, headwaters, floodplains and wetlands.

(iii) Prevent or reduce thermal impacts to water bodies, including requiring vegetated buffers along waterways, and disconnecting discharges to surface waters from impervious surfaces such as parking lots.

(iv) Seek to avoid or prevent hydromodification of streams and other water bodies caused by development, including roads, highways, and bridges.

(v) Preserve and protect trees, and other vegetation with important evapotranspirative qualities.

(vi) Preserve and protect native soils, prevent topsoil stripping, and prevent compaction of soils.

B. Minimum Control Measures. The following minimum control measures must be accomplished through each Permittee's Storm Water Management Program:

1. **Construction Site Runoff Control Program.** The Permittees must implement a construction site runoff control program to reduce discharges of pollutants from public and private construction activity within its jurisdiction.

The Permittees' construction site management program must include the requirements described below:

a) **Ordinance and/or other regulatory mechanism**. To the extent allowable under local or state law, Permittees must adopt, implement, and enforce requirements for erosion controls, sediment controls, and materials management techniques to be employed and maintained at each construction project from initial clearing through final stabilization. Each Permittee must require construction site operators to maintain adequate and effective controls to reduce pollutants in storm water discharges from construction sites. The Permittees must use enforcement actions (such as, written warnings, stop work orders or fines) to ensure compliance.

No later than September 30, 2015, each Permittee must update their ordinances or other regulatory mechanisms, as necessary, to be consistent with this Permit and with the current version of the *NPDES General Permit for Storm Water Discharges from Construction Activities*, Permit #IDR12-0000 (NPDES Construction General Permit or CGP).

b) **Manuals Describing Construction Storm Water Management Controls and Specifications.** The Permittees must require construction site operators within their jurisdiction to use construction site management controls and specifications as defined within manuals adopted by the Permittees.

No later than September 30, 2015, the Permittees must update their respective manuals, as necessary, to include requirements for the proper installation and maintenance of erosion controls, sediment controls, and material containment/pollution prevention controls during all phases of construction activity. The manual(s) must include all acceptable control practices, selection and sizing criteria, illustrations, and design examples, as well as recommended operation and maintenance of each practice. At a minimum, the manual(s) must include requirements for erosion control, sediment control, and pollution prevention which complement and do not conflict with the current version of the CGP. If the manuals previously adopted by the individual Permittee do not meet these requirements, the Permittee may create supplemental provisions to include as part of the adopted manual in order to comply with this Permit.

c) **Plan Review and Approval.** The Permittees must review and approve preconstruction site plans from construction site operators within their jurisdictions. Permittees must ensure that the construction site operator is prohibited from commencing construction activity prior to receipt of written approval.

(i) The Permittees must not approve any erosion and sediment control (ESC) plan or Storm Water Pollution Prevention Plan (SWPPP) unless it contains appropriate site-specific construction site control measures meeting the Permittee's requirements as outlined in Part II.B.1.b.

(ii) Prior to the start of a construction project disturbing one or more acres, or disturbing less than one acre but is part of a larger common plan of development, the Permittees must advise the construction site operator(s) to seek or obtain necessary coverage under the NPDES Construction General Permit.

(iii) Permittees must use qualified individuals, knowledgeable in the technical review of ESC plans/SWPPPs, to conduct such reviews.

(iv) Permittees must document the review of each ESC plan and/or SWPPP using a checklist or similar process.

d) **Construction Site Inspections**. The Permittees must inspect construction sites occurring within their jurisdictions to ensure compliance with their

applicable requirements. The Permittees may establish an inspection prioritization system to identify the frequency and type of inspection based upon such factors as project type, total area of disturbance, location, and potential threat to water quality. If a prioritization system is used, the Permittee must include a description of the current inspection prioritization in the SWMP document required in Part II.A, and summarize the nature and number of inspections conducted during the previous reporting period in each Annual Report.

(i) Inspections of construction sites must include, but not be limited to:

- As applicable, a check for coverage under the Construction General Permit by reviewing any authorization letter or Notice of Intent (NOI) during initial inspections;
- Review the applicable ESC plan/SWPPP to determine if control measures have been installed, implemented, and maintained as approved;
- Assessment of compliance with the Permittees' ordinances/requirements related to storm water runoff, including the implementation and maintenance of required control measures;
- Assessment of the appropriateness of planned control measures and their effectiveness;
- Visual observation of non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff;
- Education or instruction related to on storm water pollution prevention practices, as needed or appropriate; and
- A written or electronic inspection report.

(ii) The Permittees must track the number of construction site inspections conducted throughout the reporting period, and verify that the sites are inspected at the minimum frequencies required by the inspection prioritization system. Construction site inspections must be tracked and reported with each Annual Report.

(iii) Based on site inspection findings, each Permittee must take all necessary follow-up actions (i.e., re-inspection, enforcement) to ensure compliance. Follow-up and enforcement actions must be tracked and reported with each Annual Report.

e) **Enforcement Response Policy for Construction Site Management Program**. No later than September 30, 2016, each Permittee must develop and implement a written escalating enforcement response policy (ERP) appropriate to their organization. Upon implementation of the policy in its jurisdiction, each Permittee must submit its completed ERP to EPA with the 4th Year Annual Report. The ERP for City of Boise, City of Garden City, and Ada County Highway District must address enforcement of construction site runoff controls for all currently regulated construction projects within their jurisdictions. The ERP for Idaho Transportation Department District 3, Drainage District 3, and Boise State University must address contractual enforcement of construction site runoff controls at construction sites within their jurisdictions. Each ERP must describe the Permittee's potential responses to violations with an appropriate educational or enforcement response. The ERP must address repeat violations through progressively stricter responses as needed to achieve compliance. Each ERP must describe how the Permittee will use the following types of enforcement response, as available, based on the type of violation:

(i) Verbal Warnings: Verbal warnings are primarily consultative in nature. At a minimum, verbal warnings must specify the nature of violation and required corrective action.

(ii) Written Notices: Written notices must stipulate the nature of the violation and the required corrective action, with deadlines for taking such action.

(iii) Escalated Enforcement Measures: The Permittees must have the legal ability to employ any combination of the enforcement actions below (or their functional equivalent):

- The ERP must indicate when the Permittees will initiate a Stop Work Order. Stop work orders must require that construction activities be halted, except for those activities directed at cleaning up, abating discharge, and installing appropriate control measures.
- The Permittees must also use other escalating measures provided under local or state legal authorities, such as assessing monetary penalties. The Permittees may perform work necessary to improve erosion control measures and collect the funds from the responsible party in an appropriate manner, such as collecting against the project's bond, or directly billing the responsible party to pay for work and materials.

f) **Construction General Permit Violation Referrals.** For those construction projects which are subject to the NPDES Construction General Permit and do not respond to Permittee educational efforts, the Permittee may provide to EPA information regarding construction project operators which cannot demonstrate that they have appropriate NPDES Permit

coverage and/or site operators deemed by the Permittee as not complying with the NPDES Construction General Permit. Permittees may submit such information to the EPA NPDES Compliance Hotline in Seattle, Washington, by telephone, at (206) 553-1846, and include, at a minimum, the following information:

- Construction project location and description;
- Name and contact information of project owner/ operator;
- Estimated construction project disturbance size; and
- An account of information provided by the Permittee to the project owner/ operator regarding NPDES filing requirements.

(i) **Enforcement Tracking.** Permittees must track instances of non-compliance either in hard-copy files or electronically. The enforcement case documentation must include, at a minimum, the following:

- Name of owner/operator;
- Location of construction project;
- Description of violation;
- Required schedule for returning to compliance;
- Description of enforcement response used, including escalated responses if repeat violations occur;
- Accompanying documentation of enforcement response (e.g., notices of noncompliance, notices of violations, etc.); and
- Any referrals to different departments or agencies.

g) **Construction Program Education and Training.** Throughout the Permit term, the Permittees must ensure that all staff whose primary job duties are related to implementing the construction program (including permitting, plan review, construction site inspections, and enforcement) are trained to conduct such activities. The education program must also provide regular training opportunities for construction site operators. This training must include, at a minimum:

(i) *Erosion and Sediment Control/Storm Water Inspectors*:

- Initial training regarding proper control measure selection, installation and maintenance as well as administrative requirements such as inspection reporting/tracking and the implementation of the enforcement response policy; and

- Annual refresher training for existing inspection staff to update them on preferred BMPs, regulation changes, Permit updates, and policy or standards updates.

(ii) *Other Construction Inspectors*: Initial training on general storm water issues, basic control measure implementation information, and procedures for notifying the appropriate personnel of noncompliance.

(iii) *Plan Reviewers*:

- Initial training regarding control measure selection, design standards, review procedures;

- Annual training regarding new control measures, innovative approaches, Permit updates, regulation changes and policy or standard updates.

(iv) *Third-Party Inspectors and Plan Reviewers*. If the Permittee utilizes outside parties to either conduct inspections and or review plans, these outside staff must be trained per the requirements listed in Part II.B.1.f.i.-iii above.

(v) *Construction Operator Education*. At a minimum, the Permittees must educate construction site operators within the Permit area as follows:

- At least once per year, the Permittees must either provide information to all construction companies on existing training opportunities or develop new training for construction operators regarding appropriate selection, installation, and use of required construction site control measures at sites within the Permit area.

- The Permittees must require construction site operators to have at least one person on-site during construction that is appropriately trained in erosion and sediment control.

- The Permittees must require construction operators to attend training at least once every three years.

- The Permittees must provide appropriate information and outreach materials to all construction operators who may disturb land within their jurisdiction.

2. Storm Water Management for Areas of New Development and Redevelopment. At a minimum, the Permittees must implement and enforce a program to control storm water runoff from new development and redevelopment projects that result in land disturbance of 5,000 square feet or more, excluding individual one or two family dwelling development or redevelopment. This program must apply to private and public sector development, including roads and streets. The program implemented by the Permittees must ensure that permanent controls or practices are utilized at each new development and redevelopment site to protect water quality. The program must include, at a minimum, the elements described below:

a) **Ordinance or other regulatory mechanisms**. No later than the expiration date of this Permit, each Permittee must update its applicable ordinance or regulatory mechanism which requires the installation and long-term maintenance of permanent storm water management controls at new development and redevelopment projects. Each Permittee must update their ordinance/regulatory mechanism to the extent allowed by local and state law, consistent with the individual Permittee's respective legal authority. Permittees must submit their revised ordinance/regulatory mechanism as part of the 5th Year Annual Report.

(i) The ordinance/regulatory mechanism must include site design standards for all new and redevelopment that require, in combination or alone, storm water management measures that keep and manage onsite the runoff generated from the first 0.6 inches of rainfall from a 24-hour event preceded by 48 hours of no measureable precipitation. Runoff volume reduction can be achieved by canopy interception, soil amendments, bioretention, evapotranspiration, rainfall harvesting, engineered infiltration, extended filtration, and/or any combination of such practices that will capture the first 0.6 inches of rainfall. An Underground Injection Control permit may be required when certain conditions are met. The ordinance or regulatory mechanism must require that the first 0.6 inches of rainfall be 100% managed with no discharge to surface waters, except when the Permittee chooses to implement the conditions of II.B.2.a.ii below.

(ii) For projects that cannot meet 100% infiltration/evapotranspiration/reuse requirements onsite, the Permittees' program may allow offsite mitigation within the same subwatershed, subject to siting restrictions established by the Permittee. The Permittee allowing this option must develop and apply criteria for determining the circumstances under which offsite mitigation may be allowed. A determination that the onsite retention requirement cannot be met must be based on multiple factors, including but not limited to technical feasibility or logistic practicality (e.g. lack of available space, high groundwater, groundwater contamination, poorly infiltrating soils, shallow bedrock, and/or a land use that is inconsistent with

capture and reuse or infiltration of storm water). Determinations may not be based solely on the difficulty and/or cost of implementing such measures. The Permittee(s) allowing this option must create an inventory of appropriate mitigation projects and develop appropriate institutional standards and management systems to value, estimate and track these situations. Using completed subwatershed plans or other mechanisms, the Permittee(s) must identify priority areas within subwatersheds in which off-site mitigation may be conducted.

(iii) The ordinance or regulatory mechanism must include the following water quality requirements:

- Projects with potential for excessive pollutant loading(s) must provide water quality treatment for associated pollutants before infiltration.
- Projects with potential for excessive pollutant loading(s) that cannot implement adequate preventive or water quality treatment measures to ensure compliance with Idaho surface water standards must properly convey storm water to a NPDES permitted wastewater treatment facility or via a licensed waste hauler to a permitted treatment and disposal facility.

(iv) The ordinance or other regulatory mechanism must include procedures for the Permittee's review and approval of permanent storm water management plans for new development and redevelopment projects consistent with Part II.B.1.d.

(v) The ordinance or other regulatory mechanism must include sanctions (including fines) to ensure compliance, as allowed under state or local law.

b) **Storm Water Design Criteria Manual.** No later than September 30, 2015, each Permittee must update as necessary their existing Storm Water Design Criteria Manual specifying acceptable permanent storm water management and control practices. The manual must contain design criteria for each practice. In lieu of updating a manual, a Permittee may adopt a manual created by another entity which complies with this section. The manual must include:

(i) Specifications and incentives for the use of site-based practices appropriate to local soils and hydrologic conditions;

(ii) A list of acceptable practices, including sizing criteria, performance criteria, design examples, and guidance on selection and location of practices; and

(iii) Specifications for proper long term operation and maintenance, including appropriate inspection interval and self-inspection checklists for responsible parties.

c) **Green Infrastructure/Low Impact Development (LID) Incentive Strategy and Pilot Projects**. No later than September 30, 2015, the Permittees must develop a strategy to provide incentives for the increased use of LID techniques in private and public sector development projects within each Permittee's jurisdiction. Permittees must comply with applicable State and local public notice requirements when developing this Strategy. Pursuant to Part IV.A.2.a, the Strategy must reference methods of evaluating at least three (3) Green Infrastructure/LID pilot projects as described below. Permittees must implement the Green Infrastructure/LID Incentive Strategy, and complete an effectiveness evaluation of at least three pilot projects, prior to the expiration date of this Permit.

(i) As part of the 3rd Year Annual Report, the Permittees must submit the written Green Infrastructure /LID Incentive Strategy; the Strategy must include a description of at least three selected pilot projects, and a narrative report on the progress to evaluate the effectiveness of each selected LID technique or practice included in the pilot project. Each pilot project must include an evaluation of the effectiveness of LID technique(s) or practice(s) used for on-site control of water quality and/or quantity. Each Pilot Project must involve at least one or more of the following characteristics:

- The project manages runoff from at least 3,000 square feet of impervious surface;
- The project involves transportation related location(s) (including parking lots);
- The drainage area of the project is greater than five acres in size; and/or
- The project involves mitigation of existing storm water discharges to one or more of the water bodies listed in Table II.C.

(ii) Consistent with Part IV.A.10, the Permittees must evaluate the performance of LID technique(s) or practice(s) in each pilot project, and include a progress report on overall strategy implementation in the 4th Annual Report. Final pilot project evaluations must be submitted in the 5th Year Annual Report. The Permittees must monitor, calculate or model changes in runoff quantities for each of the pilot project sites in the following manner:

- For retrofit projects, changes in runoff quantities shall be calculated as a percentage of 100% pervious surface before and after implementation of the LID technique(s) or practice(s).
- For new construction projects, changes in runoff quantities shall be calculated for development scenarios both with LID technique(s) or practice(s) and without LID technique(s) or practice(s).

- The Permittees must measure runoff flow rate and subsequently prepare runoff hydrographs to characterize peak runoff rates and volumes, discharge rates and volumes, and duration of discharge volumes. The evaluation must include quantification and description of each type of land cover contributing to surface runoff for each pilot project, including area, slope, vegetation type and condition for pervious surfaces, and the nature of impervious surfaces.
- The Permittees must use these runoff values to evaluate the overall effectiveness of various LID technique(s) or practice(s) and to develop recommendations for future adoption of LID technique(s) or practice(s) that address appropriate use, design, type, size, soil type and operation and maintenance practices.

(iii) **Riparian Zone Management and Outfall Disconnection.** No later than September 30, 2015, the Permittees must identify and prioritize riparian areas appropriate for Permittee acquisition and protection. Prior to the expiration date of this Permit, the Permittees must undertake and complete at least one project designed to reduce the flow of untreated urban storm water discharging through the MS4 system through the use of vegetated swales, storm water treatment wetlands and/or other appropriate techniques. The Permittees must submit the list of prioritized riparian protection areas, and a status report on the planning and implementation of the outfall disconnection project, as part of the 3rd Year Annual Report. Documentation of the completed outfall disconnection project must be included in the 5th Year Annual Report.

(iv) **Repair of Public Streets, Roads and Parking Lots.** When public streets, roads or parking lots are repaired (as defined in Part VII), the Permittees performing these repairs must evaluate the feasibility of incorporating runoff reduction techniques into the repair by using canopy interception, bioretention, soil amendments, evaporation, rainfall harvesting, engineered infiltration, rain gardens, infiltration trenches, extended filtration and/or evapotranspiration and/or any combination of the aforementioned practices. Where such practices are found to be technically feasible, the Permittee performing the repair must use such practices in the design and repair. These requirements apply only to projects whose design process is started after the effective date of this Permit. As part of the 5th Year Annual Report, the Permittees must list the locations of street, road and parking lot repair work completed since the effective date of the Permit that have incorporated such runoff reduction practices, and the receiving water body(s) benefitting from such practices. This documentation must include a general description of the project design, estimated total cost, and estimates of total flow

volume and pollutant reduction achieved compared to traditional design practices.

d) **Plan Review and Approval.** The Permittees must review and approve pre-construction plans for permanent storm water management. The Permittees must review plans for consistency with the ordinance/regulatory mechanism and Storm Water Design Criteria Manual required by this Part. The Permittees must ensure that the project operator is prohibited from commencing construction activity prior to receipt of written approval from the Permittee.

(i) The Permittees must not approve or recommend for approval any plans for permanent storm water controls that do not contain appropriate permanent storm water management practices that meet the minimum requirements specified in this Part.

(ii) Permittees must use qualified individuals, knowledgeable in the technical review of plans for permanent storm water controls to conduct such reviews.

(iii) Permittees must document the review of each plan using a checklist or similar process.

e) **Operation and Maintenance (O&M) of Permanent Storm Water Management Controls.**

(i) **Inventory and Tracking.** The Permittees must maintain a database tracking all new public and private sector permanent storm water controls. No later than January 30, 2018, all of the available data on existing permanent storm water controls known to the Permittees must be included in the inventory database. For the purposes of this Part, new permanent controls are those installed after February 1, 2013; existing permanent controls are those installed prior to February 1, 2013. The tracking must begin in the plan review stage with a database that incorporates geographic information system (GIS) information. The tracking system must also include, at a minimum: type and number of practices; O&M requirements, activity and schedule; responsible party; and self-inspection schedule.

(ii) **O&M Agreements.** Where parties other than the Permittees are responsible for operation and maintenance of permanent storm water controls, the Permittees must require a legally enforceable and transferable O&M agreement with the responsible party, or other mechanism, that assigns permanent responsibility for maintenance of structural or treatment control storm water management practices.

f) **Inspection and Enforcement of Permanent Storm Water Management Controls.** The Permittees must ensure proper long term operation and

maintenance of all permanent storm water management practices within the Permittees' respective jurisdiction. The Permittees must implement an inspection program, and define and prioritize new development and redevelopment sites for inspections of permanent storm water management controls. Factors used to prioritize sites must include, but not be limited to: size of new development or redevelopment area; sensitivity and/or impaired status of receiving water(s); and, history of non-compliance at the site during the construction phase.

(i) No later than September 30, 2017, all high priority locations must be inventoried and associated inspections must be scheduled to occur at least once annually. The inspections must determine whether storm water management or treatment practices have been properly installed (i.e., an "as built" verification). The inspections must evaluate the operation and maintenance of such practices, identify deficiencies and potential solutions, and assess potential impacts to receiving waters.

(ii) No later than September 30, 2017, the Permittees must develop checklists to be used by inspectors during these inspections, and must maintain records of all inspections conducted on new development and redevelopment sites.

(iii) No later than September 30, 2017, the Permittees must develop and implement an enforcement strategy similar to that required in Section II.B.1.e to maintain the integrity of permanent storm water management and treatment practices.

g) **Education and Training on Permanent Storm Water Controls**. No later than September 30, 2015, the Permittees must begin a training program for appropriate audiences regarding the selection, design, installation, operation and maintenance of permanent storm water controls. The training program and materials must be updated as necessary to include information on updated or revised storm water treatment standards, design manual specifications, Low Impact Development techniques or practices, and proper operation and maintenance requirements.

(i) No later than September 30, 2016, and annually thereafter, all persons responsible for reviewing plans for new development and redevelopment and/or inspecting storm water management practices and treatment controls must receive training sufficient to determine the adequacy of storm water management and treatment controls at proposed new development and redevelopment sites.

(ii) No later than September 30, 2016, and at least annually thereafter, Permittees must provide training to local audiences on the storm water management requirements described in this Part.

3. Industrial and Commercial Storm Water Discharge Management. The Permittees must implement a program to reduce to the MEP the discharge of pollutants from industrial and commercial operations within their jurisdiction. Throughout the Permit term, the Permittees must conduct educational and/or enforcement efforts to reduce the discharge of pollutants from those industrial and commercial locations which are considered to be significant contributors of phosphorus, bacteria, temperature, and/or sediment to receiving waters. At a minimum, the program must include the following elements:

a) **Inventory of Industrial and Commercial Facilities/Activities**. No later than September 30, 2016, the Permittees must update the inventory and map of facilities and activities discharging directly to their MS4s.

(i) At a minimum, the inventory must include information listing the watershed/receiving water body, facility name, address, nature of business or activity, and North American or Standard Industrial Classification code(s) that best reflect the facility's product or service;

(ii) The inventory must include the following types of facilities: municipal landfills (open and closed); Permittee-owned maintenance yards and facilities; hazardous waste recovery, treatment, storage and disposal facilities; facilities subject to Section 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11023; all industrial sectors listed in 40 CFR §122.26(b)(14); vehicle or equipment wash systems; commercial animal facilities, including kennels, race tracks, show facilities, stables, or other similar commercial locations where improper management of domestic animal waste may contribute pollutants to receiving waters or to the MS4; urban agricultural activities; and other industrial or commercial facility that the Permittees determine is contributing a substantial pollutant loading to the MS4 and associated receiving waters.

(iii) The Permittees must collectively identify at least two specific industrial/commercial activities or sectors operating within the Permit area for which storm water discharges are not being adequately addressed through existing programs. No later than September 30, 2016, the Permittees must develop best management practices for each activity, and educate the selected industrial/commercial audiences regarding these performance expectations. Example activities for consideration include, but are not limited to: landscaping businesses; wholesale or retail agricultural and construction supply businesses; urban agricultural activities; power washers; commercial animal facilities; commercial car/truck washing operations; and automobile repair shops.

b) **Inspection of Industrial and Commercial Facilities/Activities**. The Permittees must work cooperatively throughout the Permit term to prioritize

and inspect selected industrial and commercial facilities/activities which discharge to receiving waters or to the MS4. No later than September 30, 2016, any existing agreements between the Permittees to accomplish such inspections must be updated as necessary to comply with this permit. At a minimum, the industrial and commercial facility inspection program must include:

(i) Priorities and procedures for inspections, including inspector training, and compliance assistance or education materials to inform targeted facility/activity operators of applicable requirements;

(ii) Provisions to record observations of a facility or activity;

(iii) Procedures to report findings to the inspected facility or activity, and to follow-up with the facility/activity operator as necessary;

(iv) A monitoring (or self monitoring) program for facilities that assesses the type and quantity of pollutants discharging to the MS4s;

(v) Procedures to exercise legal authorities to ensure compliance with applicable local storm water ordinances.

c) **Maintain Industrial and Commercial Facility/Activity Inventory**. The industrial and commercial facility/activity inventory must be updated at least annually. The updated inventory and a summary of the compliance assistance and inspection activities conducted, as well as any follow-up actions, must be submitted to EPA with each Annual Report.

4. Storm Water Infrastructure and Street Management. The Permittees must maintain their MS4 and related facilities to reduce the discharge of pollutants from the MS4 to the MEP. All Permittee-owned and operated facilities must be properly operated and maintained. This maintenance requirement includes, but is not limited to, structural storm water treatment controls, storm sewer systems, streets, roads, parking lots, snow disposal sites, waste facilities, and street maintenance and material storage facilities. The program must include the following:

a) **Storm Sewer System Inventory and Mapping**. No later than January 30, 2018, the Permittees must update current records to develop a comprehensive inventory and map of the MS4s and associated outfall locations. The inventory must identify all areas over which each Permittee has responsibility. The inventory must include:

(i) the location of all inlets, catch basins and outfalls owned/operated by the Permittee;

(ii) the location of all MS4 collection system pipes (laterals, mains, etc.) owned/operated by the Permittee, including locations where the MS4 is physically interconnected to the MS4 of another operator ;

(iii) the location of all structural flood control devices, if different from the characteristics listed above;

(iv) the names and locations of receiving waters of the U.S. that receive discharges from the outfalls;

(v) the location of all existing structural storm water treatment controls;

(vi) identification of subwatersheds, associated land uses, and approximate acreage draining into each MS4 outfall; and

(vii) the location of Permittee-owned vehicle maintenance facilities, material storage facilities, maintenance yards, and snow disposal sites; Permittee-owned or operated parking lots and roadways.

A summary description of the Permittees' storm sewer system inventory and a map must be submitted to EPA as part of the reapplication package required by Part VI.B

b) **Catch Basin and Inlet Cleaning.** No later than September 30, 2016, the Permittees must initiate an inspection program to inspect all Permittee-owned or operated catch basins and inlets at least every two years and take appropriate maintenance action based on those inspections. Inspection records must be maintained and summarized in each Annual Report.

c) **Street and Road Maintenance.** No later than September 30, 2015, the Permittees responsible for road and street maintenance must update any standard operating procedures for storm water controls to ensure the use of BMPs that, when applied to the Permittee's activity or facility, will protect water quality, and reduce the discharge of pollutants to the MEP. The operating procedures must contain, for each activity or facility, inspection and maintenance schedules specific to the activity, and appropriate pollution prevention/good housekeeping procedures for all of the following types of facilities and/or activities listed below. Water conservation measures should be considered for all landscaped areas.

(i) **Streets, roads, and parking lots**. The procedures must address, but are not limited to: road deicing, anti-icing, and snow removal practices; snow disposal areas; street/road material (e.g. salt, sand, or other chemical) storage areas; maintenance of green infrastructure/low impact development practices; and BMPs to reduce road and parking lot debris and other pollutants from entering the MS4. Within four years of the effective date of this permit, the Permittees must implement all of the pollution prevention/good housekeeping practices established in the SOPs for all streets, roads, highways, and parking lots with more than 3,000 square feet of impervious surface that are owned, operated, or maintained by the Permittees.

(ii) **Inventory of Street Maintenance Materials.** Throughout the Permit term, all Permittees with street maintenance

responsibilities must maintain an inventory of street /road maintenance materials, including use of sand and salt, and document the inventory in the corresponding Annual Reports.

(iii) **Manage Sand with Salt and Salt Storage Areas.** No later than September 30, 2017, the Permittees must address any sand, salt, or sand with salt material stockpiles at each of their materials storage locations to prevent pollutants in stormwater runoff from discharging to the MS4 or into any receiving waterbody. Examples how the Permittee may choose to address runoff from their material storage areas include, but are not limited to: building covered storage areas; fully containing the material stockpile area in a manner that prevents runoff from discharging to the MS4 or a receiving waterbody; relocating and/or otherwise consolidating material storage piles to alternative locations which prevents discharges to the MS4 or a receiving waterbody. The Permittees must identify their material storage locations in the SWMP documentation submitted to EPA with the 1st year Annual Report and reference the average quantity of material stored at each location in the inventory required in Part II.B.4.c.ii. Permittees must document in the 5th Year Annual Report how their material stockpiles have been addressed to prevent runoff from discharging to the MS4 or a receiving waterbody.

d) **Street, Road and Parking Lot Sweeping**. Each Permittee with street, road, and/or public parking lot maintenance responsibilities must update their respective sweepings management plans no later than September 30, 2015. Each updated plan must designate all streets, roads, and/or public parking lots which are owned, operated or maintained by that Permittee to fit within one of the following categories for sweeping frequency based on land use, traffic volumes or other factors:

- Residential – Streets and road segments that include, but are not limited to, light traffic zones and residential zones.
- Arterial and all other – Streets and road segments with high traffic volumes serving commercial or industrial districts.
- Public Parking Lots – large lots serving schools and cultural facilities, plazas, sports and event venues or similar facilities.

(i) No later than September 30, 2014, each Permittee with street, road, and/or public parking lot maintenance responsibilities must inventory and map all of their designated streets, roads, and public parking lots for sweeping frequency. The resulting inventory and map must be submitted as part of the 2nd Year Annual Report.

(ii) No later than September 30, 2015, Permittees with street, road, and/or public parking lot maintenance responsibilities must

sweep all streets, roads, and public parking lots that are owned, operated or maintained by that Permittee according to the following schedule:

Table II.B-2

Roadway Type	Sweeping Schedule			
	Two Times Per Month	**Every Six Weeks**	**Four Times Per Year**	**One Time Per Year**
Downtown Areas of Boise and Garden City	**X**			
Arterial and Collector Roadways (non-downtown)		**X**		
Residential Roadways			**X**	
Paved Alleys and Public Parking Lots				**X**

(iii) If a Permittee's existing overall street/road/parking lot sweeping program provides equivalent or greater street sweeping frequency to the requirements above, the Permittee must continue to implement its existing street/road/parking lot sweeping program.

(iv) For areas where sweeping is technically infeasible, the Permittees with street, road, and/or public parking lot maintenance responsibilities must document in the 1st Year Annual Report each area and indicate why sweeping is infeasible. The Permittee must document what alternative sweeping schedule will be used, or how the Permittee will increase implementation of other trash/litter control procedures to minimize pollutant discharges to the MS4 and to receiving waters.

(v) The Permittees with street, road, and/or public parking lot maintenance responsibilities must estimate the effectiveness of their street sweeping activities to minimize pollutant discharges to the MS4 and receiving waters, and document the following in each Annual Report:

- Identify any significant changes to the designated road/street/parking lot inventory and map, and the basis for those changes;
- Report annually on types of sweepers used, swept curb and/or lane miles, dates of sweeping by general location and frequency category, volume or weight of materials removed and a representative sample of the particle size distribution of swept material;
- Report annually on any public outreach efforts or other means to address excess leaves and other material as well as areas that are infeasible to sweep.

e) **Implement appropriate requirements for pesticide, herbicide, and fertilizer applications**. Permittees must continue to implement practices to reduce the discharge of pollutants to the MS4 associated with the application, storage and disposal of pesticides, herbicides and fertilizers from municipal areas and activities. Municipal areas and activities include, at a minimum, municipal facilities, public right-of-ways, parks, recreational facilities, golf courses, and landscaped areas. All employees or contractors of the Permittees applying restricted use pesticides must be registered as certified applicators.

f) **Develop and implement Storm Water Pollution Prevention Plans.** No later than September 30, 2015, the Permittees must develop and implement SWPPPs for all Permittee-owned material storage facilities, and maintenance yards located within the Permit area and identified in the inventory required in Parts II.B.3.a and II.B.4.a.viii. Permittee-owned facilities discharging storm water associated with industrial activity as defined in 40 CFR 122.26(b)(14) must obtain separate NPDES permit coverage as required in Part I.D.4 of this permit.

g) **Storm Water Management.** Each Permittee must ensure that any storm water management projects it undertakes after the effective date of this Permit are designed and implemented to prevent adverse impacts on water quality.

(i) Permittees must evaluate the feasibility of retrofitting existing storm water control devices to provide additional pollutant removal from collected storm water.

(ii) No later than the expiration date of this Permit, Permittees must identify and define all locations where such retrofit project opportunities are feasible, identify appropriate funding sources, and outline project timelines or schedule(s) for retrofit projects designed to better control the discharge of pollutants of concern to the Boise River and its tributaries.

h) **Litter Control.** Throughout the Permit term, each Permittee must continue to implement effective methods to reduce litter within their jurisdiction. Permittees must work with others as appropriate to control litter on a

regular basis and after major public events to reduce the discharge of pollutants to receiving waters.

i) **Training.** The Permittees must provide regular training to appropriate Permittee staff on all operations and maintenance procedures designed to prevent pollutants from entering the MS4 and receiving waters. Appropriate Permittee staff must receive training no later than September 30, 2015, and annually thereafter.

5. Illicit Discharge Management. An illicit discharge is any discharge to an MS4 that is not composed entirely of storm water. Exceptions are described in Part I.D. of this permit. The Permittees must continue to implement their illicit discharge management program to reduce to the MEP the unauthorized and illegal discharge of pollutants to the MS4. The program must include:

a) **Ordinance or other regulatory mechanisms.** Upon the effective date of this Permit, the Permittees must effectively prohibit non-storm water discharges to the MS4 (except those identified in Part 1.D of this permit) through enforcement of relevant ordinances or other regulatory mechanisms. Such ordinances/regulatory mechanisms must be updated prior to the expiration date of this Permit as necessary to provide adequate controls. To be considered adequate, an ordinance or regulatory mechanism must:

(i) Authorize the Permittee to prohibit, at a minimum, the following discharges to the MS4, unless otherwise authorized in Part 1.D:

- Sewage;
- Discharges of wash water resulting from the hosing or cleaning of gas stations, auto repair garages, or other types of automotive services facilities;
- Discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility, including motor vehicles, cement-related equipment, and port-a-potty servicing, etc.;
- Discharges of wash water from mobile operations, such as mobile automobile or truck washing, steam cleaning, power washing, and carpet cleaning, etc.;
- Discharges of wash water from the cleaning or hosing of impervious surfaces in municipal, industrial, commercial, and residential areas - including parking lots, streets, sidewalks, driveways, patios, plazas, work yards and outdoor eating or drinking areas, etc. - where no detergents are used and no spills or leaks of toxic or hazardous materials have occurred (unless all spilled material has been removed);
- Discharges of runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials;

- Discharges of pool or fountain water containing chlorine, biocides, or other chemicals; discharges of pool or fountain filter backwash water;
- Discharges of sediment, pet waste, vegetation clippings, or other landscape or construction-related wastes; and
- Discharges of food-related wastes (grease, fish processing, and restaurant kitchen mat and trash bin wash water, etc.).

(ii) Prohibit and eliminate illicit connections to the MS4;

(iii) Control the discharge of spills, and prohibit dumping or disposal of materials other than storm water into the MS4.

b) **Illicit Discharge Complaint Reporting and Response Program.** At a minimum, Permittees must respond to reports of illicit discharges from the public in the following manner:

(i) **Complaint/ReportingHotline.** The Permittees must maintain the dedicated telephone number and email address, or other publicly available and accessible means in addition to the website required in Part II.B.6, for use by the public to report illicit discharges. This complaint hotline must be answered by trained staff during normal business hours. During non-business hours, a system must be in place to record incoming calls to the hotline and a system must be in place to guarantee timely response. The telephone number must be printed on appropriate education, training, and public participation materials produced under Part II.B.6, and clearly listed in the local telephone book as appropriate.

(ii) **Response to Complaints/Reports.** The Permittees must respond to all complaints or reports of illicit discharges as soon as possible, but no later than within two working days.

(iii) **Maintain log of complaints/reports received and actions taken.** The Permittees must maintain a record documenting all complaints or reports of illicit discharges and responses taken by the Permittees.

c) **Illicit Discharge Mapping.** No later than September 30, 2014, the Permittees must develop a map of reported and documented illicit discharges or illicit connections to identify priority areas. The map must identify, at a minimum, the location, type and relative quantity or severity of the known, recurrent or ongoing non-storm water discharges to the MS4. This map must be updated annually and used to target the specific outfall locations for that field screening season.

d) **Dry Weather Outfall Screening Program.** Permittees must implement, and update as necessary, a dry weather analytical and field screening monitoring program. This dry weather outfall screening program must emphasize frequent, geographically widespread monitoring to detect illicit discharges and illegal connections, and to reinvestigate potentially

problematic outfalls. At a minimum, the procedures must be based on the following guidelines and criteria:

(i) **Outfall Identification.** The Permittees must update as necessary the storm water outfall identification and screening plan, describing the reconnaissance activities that must be performed and information used to prioritize targeted outfalls and associated land uses.. The plan must discuss how chemical and microbiological analysis will be conducted on any flows identified during dry weather screening, including field screening methodologies and associated trigger thresholds to be used for determining follow-up action.

(ii) **Monitoring Illicit Discharges.** No later than September 30, 2015, dry weather analytical and field screening monitoring must be conducted at least once annually (or more often if the Permittees deem necessary). One third of the outfalls to be screened annually must be conducted within the June 1 and September 30th timeframe.

- Upon the effective date of the Permit, the Permittees must conduct visual dry weather screening of at least 20% of their total outfalls per year.
- The outfalls must be geographically dispersed across the MS4 and must represent all major land uses in the Permit area. In addition, the Permittees must ensure that dry weather screening includes, but is not limited to, screening of 20% outfalls discharging to impaired waters listed in Table II.C.
- When flows during dry weather are identified the Permittees must collect grab samples of the discharge for in-field analysis of the following indicator constituents: pH; total chlorine; detergents as surfactants; total copper; total phenols; *E. coli*; total phosphorus; turbidity; temperature; and suspended solids concentrations (to be measured in mg/L).
- Photos may be used to document conditions.
- Results of field sampling must be compared to established trigger threshold levels and/or existing state water quality standards. If the outfall is dry (no flowing or ponded runoff), the Permittees must make and record all applicable visual observations.
- All dry weather flows previously identified or documented by the Permittees to be associated with irrigation flows or ground water seepage must be sampled to assess pollutant loading associated with such flows. The results must be evaluated to identify feasible actions necessary to eliminate such flows and ensure compliance with Part I.D of this Permit. If field sample

results of such irrigation or groundwater seepage comply with Part I.D of this permit, annual sampling of that dry weather flow at that outfall is no longer required. Permittees must document in the SWMP document the specific location(s) of outfalls associated with these results as well as the Permittee's rationale for the conclusion to discontinue future dry weather screening at that location..

(iii) **Maintain Records of Dry Weather Screening.** The Permittees must keep detailed records of the dry weather screening with the following information at a minimum: time since last rain event; quantity of last rain event; site description (e.g., conveyance type, dominant watershed land uses); flow estimation (e.g., width of water surface, approximate depth of water, approximate flow velocity, flow rate); visual observations (e.g., odor, color, clarity, floatables, deposits/stains, vegetation condition, structural condition, and biology); results of any in field sampling; and recommendations for follow-up actions to address identified problems, and documentation of completed follow-up actions.

e) **Follow-up.** The Permittees must investigate recurring illicit discharges identified as a result of complaints or as a result of dry weather screening inspections and sampling within fifteen (15) days of its detection to determine the source. Permittees must take appropriate action to address the source of the ongoing illicit discharge within 45 days of its detection.

f) **Prevent and Respond to Spills to the MS4.** Throughout the Permit term, the Permittees must coordinate appropriate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies to ensure maximum water quality protection at all times. The Permittees must respond to, contain and clean up all sewage and other spills that may discharge into the MS4 from any source (including private laterals and failing septic systems).

g) **Facilitate Disposal of Used Oil and Toxic Materials.** The Permittees must continue to coordinate with appropriate agencies to ensure the proper management and disposal or recycling of used oil, vehicle fluids, toxic materials, and other household hazardous wastes by their employees and the public. Such a program must include educational activities, public information activities, and establishment of collection sites operated by the Permittees or other entity. The program must be implemented throughout the Permit term.

h) **Training.** No later than September 30, 2014, and annually thereafter, the Permittees must develop and provide training to staff on identifying and eliminating illicit discharges, spill, and illicit connections to the MS4. At a minimum, the Permittee's construction inspectors, maintenance field staff, and code compliance officers must be sufficiently trained to respond to illicit discharges and spills to the MS4.

6. Education, Outreach and Public Involvement.

a) **Comply with Applicable Requirements.** The Permittees must comply with applicable State and local public notice requirements when implementing their SWMP public involvement activities.

b) **Implement an Ongoing Education Outreach and Involvement Program.** The Permittees must conduct, or contract with other entities to conduct, an ongoing joint education, outreach and public involvement program aimed at residents, businesses, industries, elected officials, policy makers, and Permittee planning staff /other employees.

The goal of the education and outreach program is to reduce or eliminate behaviors and practices that cause or contribute to adverse storm water impacts. The goal of the public involvement program is to engage interested stakeholders in the development and implementation of the Permittees' SWMP activities to the extent allowable pursuant to the respective authority granted individual Permittees under Idaho law.

The Permittees' joint education and public involvement program must be designed to improve each target audience's understanding of the selected storm water issues, engage stakeholders, and help target audiences understand what they can do to positively impact water quality by preventing pollutants from entering the MS4.

(i) No later than September 30, 2014, the Permittees must implement or participate in an education, outreach and public involvement program using a variety of methods to target each of the audiences and at least one or more of the topics listed below:

1) General Public

- Watershed characteristics and subwatershed planning efforts as required in Part II.A.4;
- General impacts of storm water flows into surface water;
- Impacts from impervious surfaces;
- Source control best management practices and environmental stewardship, actions and opportunities for pet waste control/disposal, vehicle maintenance, landscaping and vegetative buffers;
- Water wise landscaping, water conservation, water efficiency.

2) General public and businesses, including home based and mobile businesses

- Best management practices for use and storage of automotive chemicals, hazardous cleaning supplies, vehicle wash soaps and other hazardous materials;

- Proper use and application of pesticides, herbicides and fertilizers;
- Impacts of illicit discharges and how to report them;
- Water wise landscaping, water conservation, water efficiency.

3) Homeowners, homeowner's associations, landscapers, and property managers
   - Yard care techniques protective of water quality, such as composting;
   - Best management practices for use and storage of pesticides, herbicides, and fertilizers;
   - Litter and trash control and recycling programs;
   - Best management practices for power washing, carpet cleaning and auto repair and maintenance;
   - Low Impact Development techniques, including site design, pervious paving, retention of mature trees and other vegetation;
   - Storm water treatment and flow/volume control practices;
   - Water wise landscaping, water conservation, water efficiency.
4) Engineers, contractors, developers, review staff, and land use planners
   - Technical standards for storm water site plans;
   - Low Impact Development techniques, including site design, pervious paving, retention of mature trees and other vegetation;
   - Storm water treatment and flow/volume control practices;
   - Water wise landscaping, water conservation, water efficiency.
5) Urban farmers and managers of public and private community gardens
   - Water wise landscaping, water conservation, and water efficiency.

(ii) The Permittees must assess, or participate in an effort to assess understanding and adoption of behaviors by the target audiences.

The resulting assessments must be used to direct storm water education and outreach resources most effectively.

(iii) The Permittees must track and maintain records of public education, outreach and public involvement activities.

c) **Targeted Education and Training.** For the specific topics identified in the Permit sections listed below, the Permittees must develop and implement, or contract with other entities to implement, targeted training programs to educate appropriate Permittee staff or other audiences within their jurisdiction. Where joint, cooperative education efforts to address these topics are not feasible, the individual Permitttee must ensure that the necessary education and training occurs for the following topics:

(i) II.B.1.f - Construction Storm Water Management Training for construction site operators and Permittee staff;

(ii) II.B.2.g – Permanent Storm Water Control Training for project operators and Permittee staff;

(iii) II.B.4.i– Storm Water Infrastructure and Street Management/ Maintenance training for the Permittee staff; and

(iv) II.B.5.h – Illicit Discharge Management Training for Permittee staff.

d) **Storm Water Website.** The Permittees must maintain and promote at least one publicly-accessible website that identifies each Permittee's SWMP activities and seeks to educate the audiences listed in Part II.B.6.b.i. The website(s) must describe and provide relevant information regarding the activities of all Permittees. The website must be updated no later than February 1, 2014, and updated at least quarterly thereafter as new material is available. The website must incorporate the following features:

(i) All reports, plans, or documents generated by each Permittee in compliance with this Permit must be posted on the website in draft form when input from the public is being solicited, and in final form when the document is completed.

(ii) Information and/or links to key sites that provide education, training, licensing, and permitting related to construction and post-construction storm water management controls and requirements for each jurisdiction. The website must include links to all applicable ordinances, policies and/or guidance documents related to the Permittees' construction and post-construction stormwater management control programs.

(iii) Information and/or links to appropriate controls for industrial and commercial activities,

(iv) Information and/or links to assist the public to report illicit connections and illegal dumping activity;

(v) Appropriate Permittee contact information, including phone numbers for relevant staff and telephone hotline, mailing addresses, and electronic mail addresses.

C. Discharges to Water Quality Impaired Receiving Waters.

1. The Permittees must conduct a storm water discharge monitoring program as required in Part IV.
2. For the purposes of this Permit and as listed in Table II.C, the Clean Water Act §303 (d) listed water bodies are those cited in the IDEQ 2010 Integrated Report including, but not limited to the Lower Boise River, and its associated tributaries. "Pollutant(s) of concern" refer to the pollutant(s) identified as causing or contributing to the water quality impairment. Pollutants of concern for the purposes of this Permit are: total phosphorus, sediment, temperature, and *E. coli*.
3. Each Permittees' SWMP documentation must include a description of how the activities of each minimum control measure in Part II.B are implemented by the Permittee to control the discharge of pollutants of concern and ensure that the MS4 discharges will not cause or contribute to an excursion above the applicable Idaho water quality standards. This discussion must specifically identify how the Permittee evaluates and measures the effectiveness of the SWMP to control the pollutants of concern. For those activities identified in Part II.B requiring multiple years to develop and implement, the Permittee must provide interim updates on progress to date. Consistent with Part II.A.1.b, each Permittee must submit this description of the SWMP implementation to EPA and IDEQ as part of the 1st Year Annual Report required in Part IV.C, and must update its description annually in subsequent Annual Reports.

Table II.C

Clean Water Act §303 (d) listed Water Bodies and Pollutants of Concern

Receiving Water Body Assessment Unit/ Description	Pollutants of Concern Causing Impairment
ID17050114SW011a_06 ***Boise River – Diversion Dam to River Mile 50***	Temperature
ID17050114SW005_06 ***Boise River – River Mile 50 to Star Bridge***	Temperature, Sediment, *E. coli.*
ID17050114SW005_06a ***Boise River – Star to Middleton***	Temperature, Sediment, *E. coli.*
ID17050114SW005_06b ***Boise River- Middleton to Indian Creek***	Temperature, Total phosphorus, Sediment, *E. coli.*
ID17050114SW001_06 ***Boise River- Indian Creek to the mouth***	Temperature, Total phosphorus, Sediment, *E. coli.*
ID17050114SW008_03 ***Tenmile Creek - 3rd order below Blacks Creek Reservoir***	Sediment, *E. coli.*
ID17050114SW010_02 ***Fivemile Creek - 1st & 2nd order tributaries***	*E. coli.*
ID17050114SW010_03 ***Fivemile Creek - 3rd order tributaries***	Sediment, *E. coli.*

D. Reviewing and Updating the SWMP.

1. Permittees must annually review their SWMP actions and activities for compliance with this Permit as part of the preparation of the Annual Report required under Part IV.C.2.

2. Permittees may request changes to any SWMP action or activity specified in this Permit in accordance with the following procedures:
   a) Changes to delete or replace an action or activity specifically identified in this Permit with an alternate action or activity may be requested by the Permittees at any time. Modification requests to EPA must include:
      (i) An analysis of why the original action or activity is ineffective, infeasible, or cost prohibitive;
      (ii) Expectations on the effectiveness of the replacement action or activity; and
      (iii) An analysis of why the replacement action or activity is expected to better achieve the Permit requirements.
   b) Change requests must be made in writing and signed by the Permittees in accordance with Part VI.E.
   c) Documentation of any of the actions or activities required by this Permit must be submitted to EPA upon request.
   d) EPA may review Annual Reports or other such documentation and subsequently notify the Permittees that changes to the SWMP actions and activities are necessary to:
      (i) Address discharges from the MS4 that are causing or contributing to water quality impacts;
      (ii) Include more stringent requirements necessary to comply with new federal or state statutory or regulatory requirements; or
      (iii) Include other conditions deemed necessary by EPA to comply with water quality standards, and/or other goals and requirements of the CWA.
   e) If EPA notifies the Permittees that changes are necessary pursuant to Parts II.D.2.a or II.D.2.d, the notification will offer the Permittees an opportunity to propose alternative program changes to meet the objectives of the requested modification. Following this opportunity, the Permittees must implement any required changes according to the schedule set by EPA.

4. Any modifications to this Permit will be accomplished according to Part VI.A of this Permit.

E. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation. The Permittees must implement the actions and activities of the SWMP in all new areas added or transferred to the Permittee's MS4 (or for which a Permittee becomes responsible for implementation of storm water quality controls) as expeditiously as practicable, but not later than one year from the date upon which the new areas were added. Such additions and schedules for implementation must be documented in the next Annual Report following the transfer.

F. SWMP Resources. The Permittees must continue to provide adequate finances, staff, equipment and other support capabilities to implement their SWMP actions and activities outlined in this permit. The Permittees must report on total costs associated with SWMP implementation over the prior 12 month reporting period in each Annual Report. Permittees are encouraged to consider establishing consistent funding sources for continued program implementation.

G. Legal Authority. To the extent allowable pursuant to the respective authority granted individual Permittees under Idaho law, each Permittee must operate to, at a minimum:

- Prohibit and eliminate, through statute, ordinance, policy, permit, contract, court or administrative order or other similar means, the contribution of pollutants to the MS4 by illicit connections and discharges to the MS4. Illicit connections include pipes, drains, open channels, or other conveyances that have the potential to allow an illicit discharge to enter the MS4. Illicit discharges include all non-storm water discharges not otherwise authorized under Part I.D. of this Permit;
- Control through statute, ordinance, policy, permit, contract, court or administrative order, or other similar means, the discharge to the MS4 of spills, dumping or disposal of materials other than storm water;
- Control through interagency agreements among the Permittees the contribution of pollutants from one portion of the MS4 to another portion of the MS4;
- Require compliance with conditions in statutes, ordinances, policy, permits, contracts, or court or administrative orders; and
- Carry out all inspection, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with Permit conditions including the prohibition on illicit discharges to the MS4.

No later than January 30, 2014, each Permittee must review and revise its relevant ordinances or other regulatory mechanisms, (or adopt new ordinances or regulatory mechanisms that provide it with adequate legal authority as allowed and authorized pursuant to applicable Idaho law), to control pollutant discharges into and from its MS4 and to meet the requirements of this permit. As part of the SWMP documentation that accompanies the 1st Year Annual Report, each Permittee must summarize all of its unique legal authorities which satisfy the five criteria listed above.

III. Schedule for Implementation and Required Submissions

The Permittees must complete SWMP actions, and/or submit documentation, to EPA and IDEQ as summarized below. Unless otherwise noted, Annual Reports must include the interim or completed status of required SWMP activities occurring during the corresponding reporting period as specified in Part IV.C.3, and include program summary statistics, copies of interim or final documents, and/or other supporting information.

Table III. Schedule for Implementation and Required Submissions

Permit Part	Item/Action	Due Date
I.C.3	Update intergovernmental agreement no later than July 1, 2013.	Submit updated intergovernmental agreement with the 1st Year Annual Report.
II.A.1.b, II.C.3	SWMP documentation	Submit SWMP documentation with the 1st Year Annual Report. Include updated documentation in each subsequent Annual Report.
II.A.4	Complete two subwatershed planning documents	Identify subwatersheds in 1st Year Annual Report; Submit two completed planning documents with the 4rd Year Annual Report.
II.B.1.a	Update construction runoff control ordinances/ regulatory mechanisms, if necessary	September 30, 2015; submit any updated ordinances etc w/ 3rd Year Annual Report.
II.B.1.b	Update Construction Stormwater Management Manual(s)	September 30, 2015; submit any updated documents with 3rd Year Annual Report.
II.B.1.e	Develop & Implement Enforcement Response Policy (ERP)	September 30, 2016; submit final ERPs w/ 4th Year Annual Report
II.B.2.a	Update ordinance or regulatory mechanism requiring long term onsite stormwater management controls	January 30, 2018; submit ordinance or regulatory mechanism with 5th Year Annual Report.
II.B.2.b	Update Stormwater Design Criteria Manual(s)	September 30, 2015; submit any updated ordinances etc w/ 3rd Year Annual Report
II.B.2.c	Develop & Implement Green Infrastructure/Low Impact Development (LID) Incentive Strategy;	September 30, 2015;
II.B.2.c.i	Evaluate Effectiveness of LID Practices via three Pilot Projects;	Submit strategy document, identify 3 pilot projects in the 3rd Year Annual Report.
II.B.2.c.ii, IV.A.10	Identify recommendations for specific LID practices to be adopted within the Permit area	Progress report on strategy implementation/ Pilot Project evaluations w/4rd Year Annual Report. Submit final evaluations & recommendations with the 5th Year Annual Report.
II.B.2.c.iii	Develop Priority Riparian Area List	September 30, 2015; Submit priority area list with the 3rd Year Annual Report.
II.B.2.c.iii	Complete Outfall Disconnection Project	Document progress on outfall disconnection project w/3rd Year Annual Report. Complete outfall disconnection project by January 30, 2018; document completed project in 5th Year Annual Report.

Table III. Schedule for Implementation and Required Submissions, continued

Permit Part	Item/Action	Due Date
II.B.2.c.iv	Consider/install stormwater runoff reduction techniques for streets, roads & parking lot repair work entering design phase after February 1, 2013 where feasible	Document all locations of street/road/parking lot repair projects where runoff reduction techniques were installed w/5th Year Annual Report.
II.B.2.e.i	O&M Database of new permanent stormwater controls; Incorporate all existing controls into database	Include new controls beginning February 1, 2013; Existing controls, no later than January 30, 2018.
II.B.2.f.i	Identify high priority locations; annual inspections	September 30, 2017
II.B.2.f.ii	Develop inspection checklists	September 30, 2017
II.B.2.f.iii	Enforcement Response Policy for SW controls	September 30, 2017
II.B.2.g	Conduct Education/Training on Permanent SW Controls	September 30, 2015; staff training & training for local audiences, September 30, 2016.
II.B.3.a	Inventory Industrial & Commercial facilities/activities	September 30, 2016
II.B.3.a.iii	Identify two specific activities, develop BMPs, and begin compliance assistance education program	September 30, 2016
II.B.3.b	Update Permittee agreements; inspect selected industrial & commercial facilities/activities	September 30, 2016
II.B.3.c	Document industrial & commercial inspection and compliance assistance activities	Annually
II.B.4.a	Update MS4 system inventory & map	No later than January 30, 2018; include w/5th Year Annual Report
II.B.4.b	Inspect of catch basins at least every two years	September 30, 2016
II.B.4.c	Update SOPs for Street & Road Maintenance	September 30, 2015
II.B.4.c.iii	Cover storage facilities for sand/salt storage areas	September 30, 2017; Identify locations in SWMP w/1st year Annual Report; Final documentation w/5th Year Annual Report
II.B.4.d	Update Street/Road/Parking Lot Sweeping Plans	September 30, 2015
II.B.4.d.i	Inventory/map designated areas	September 30, 2014; submit w/2st Year Annual Report
II.B.4.d.ii	Sweep according to schedule	September 30, 2015
II.B.4.d.iv,	Identify infeasible sweeping areas, alternative schedule or other program	Document in 1st Year Annual Report
II.B.4.d.v	Estimate sweeping effectiveness	Document in each Annual Report
II.B.4.f	Develop facility& maintenance yards SWPPPs	September 30, 2015
II.B.4.i	Train Permittee staff	September 30, 2016; annually thereafter
II.B.4.g	Evaluate the feasibility of retrofitting existing control devices	January 30, 2018; submit evaluation with 5th Year Annual Report

Table III. Schedule for Implementation and Required Submissions, continued

Permit Part	Item/Action	Due Date
II.B.5.c	Inventory/Map Illicit Discharge Reports	September 30, 2014, update annually
II.B.5.d.ii, IV.A.11	Conduct dry weather outfall screening; update screening plan; inspect 20% of outfalls per year	September 30, 2015; inspect 20% annual ly
II.B.6.b	Conduct public education & assess understanding to specific audiences	September 30, 2014; ongoing
II.B.6.d	Maintain, Promote, and Update Storm water Website	September 30, 2014, quarterly thereafter
II.C.3, II.A.1.b	Identify how Permittee controls are implemented to reduce discharge of pollutants of concern, measure SWMP effectiveness	Include discussion in SWMP documentation submitted with 1st Year Annual Report
II.E	Implement SWMP in all geographic areas newly added or annexed by Permittee	No later than one year from date new areas are added to Permittee's jurisdiction
II.F	Report SWMP implementation costs for the corresponding 12 month reporting period	Within each Annual Report
II.G	Review & Summarize legal authorities or regulatory mechanisms used by Permittee to implement & enforce SWMP & Permit requirements	No later than January 30, 2014, summarize legal authorities within the required SWMP documentation submitted with 1st Annual Report
IV.A.1	Assess & Document Permit Compliance	Annually; submit with Annual Reports
IV.A.2	Develop & Complete Stormwater Monitoring & Evaluation Plan	September 30, 2014; Submit Completed Plan with 2nd Year Annual Report
IV.A.7.a	Update *Boise NPDES Municipal SW Monitoring Plan*	September 30, 2015
IV.A.7.b	Monitor Five Representative Outfalls During Wet Weather; sample three times per year thereafter	No later than September 30, 2014
IV.A.8	If Applicable: update SW Monitoring & Evaluation Plan to include WQ Monitoring and/or Fish Tissue Sampling	If applicable: Update SW Monitoring & Evaluation Plan by September 30, 2014 to include WQ Monitoring and/or Fish Tissue Sampling; submit with 2nd Year Annual Report
IV.A.9	Evaluate Effectiveness of 2 Structural Control Techniques Currently Required by the Permittees	Begin evaluations no later than September 30, 2015; document in Annual Report(s)
IV.C.1	Submit Stormwater Outfall Discharge Data	2nd Year Annual Report, annually thereafter
IV.C.2	Submit WQ Monitoring or Fish Tissue Sampling Data Report (if applicable)	2nd Year Annual Report, annually thereafter
IV.C.3	Submit Annual Reports	1st Year Annual Report due January 30, 2014; all subsequent Annual Reports are due annually no later than January 30th; See Table IV.C.
VI.B	Submit Permit Renewal Application	No later than 180 days prior to Permit Expiration Date; see cover page. Alternatively, Renewal Application may be submitted as part of the 4th Year Annual Report.

IV. Monitoring, Recordkeeping and Reporting Requirements.

A. Monitoring

1. **Assess Permit Compliance.** At least once per year, each Permittee must individually evaluate their respective organization's compliance with these Permit conditions, and progress toward implementing each of the control measures defined in Part II. The compliance evaluation must be documented in each Annual Report required in Part IV.C.2.

2. **Stormwater Monitoring and Evaluation Program Plan and Objectives.** The Permittees must conduct a wet weather monitoring and evaluation program, or contract with another entity to implement such a program. This stormwater monitoring and evaluation program must be designed to characterize the quality of storm water discharges from the MS4, and to evaluate overall effectiveness of selected storm water management practices.

   a) No later than September 30, 2014, the Permittees must develop a stormwater monitoring and evaluation plan that includes the quality assurance requirements, outfall monitoring, in-stream and/or fish tissue monitoring (as appropriate), evaluation of permanent storm water controls and evaluation of LID pilot project effectiveness as described later in this Part. In general, the Permittees must develop and conduct a stormwater monitoring and evaluation program to:

      (i) Broadly estimate reductions in annual pollutant loads of sediment, bacteria, phosphorus and temperature discharged to impaired receiving waters from the MS4s, occurring as a result of the implementation of SWMP activities;

      (ii) Assess the effectiveness and adequacy of the permanent storm water controls and LID techniques or controls selected for evaluation by the Permittees and which are intended to reduce the total volume of storm water discharging from impervious surfaces and/or improve overall pollutant reduction in stormwater discharges; and

      (iii) Identify and prioritize those portions of each Permittee's MS4 where additional controls can be accomplished to further reduce total volume of storm water discharged and/or reduce pollutants in storm water discharges to waters of the U.S.

   b) The final, updated stormwater monitoring and evaluation plan must be submitted to EPA with the 2nd Year Annual Report.

3. **Representative Sampling.** Samples and measurements must be representative of the nature of the monitored discharge or activity**.**

4. **Analytical Methods.** Sample collection, preservation, and analysis must be conducted according to sufficiently sensitive methods/test procedures approved under 40 CFR Part 136, unless otherwise approved by EPA. Where an approved 40 CFR Part 136 method does not exist, and other test procedures

have not been specified, any available method may be used after approval from EPA**.**

5. **Quality Assurance Requirements.** The Permittees must develop or update a quality assurance plan (QAP) for all analytical monitoring conducted in accordance with this Part. The QAP must be developed concurrently as part of the stormwater monitoring and evaluation plan. The Permittees must submit the QAP as part of the stormwater monitoring and evaluation plan to EPA and IDEQ in the 2nd Year Annual Report. Any existing QAP may be modified for the requirements under this section**.**

   a) The QAP must be designed to assist in the collection and analysis of storm water discharges in support of this Permit and in explaining data anomalies when they occur.

   b) Throughout all sample collection, analysis and evaluation activities, Permittees must use the EPA-approved QA/QC and chain-of-custody procedures described in the most current version of the following documents:

      (i) *EPA Requirements for Quality Assurance Project Plans EPA-QA/R-5* (EPA/240/B-01/003, March 2001). A copy of this document can be found electronically at: http://www.epa.gov/quality/qs-docs/r5-final.pdf;

      (ii) *Guidance for Quality Assurance Project Plans EPA-QA/G-5*, (EPA/600/R-98/018, February, 1998). A copy of this document can be found electronically at: http://www.epa.gov/r10earth/offices/oea/epaqag5.pdf ;

      (iii) *Urban Storm BMP Performance Monitoring*, (EPA-821-B-02-001, April 2002). A copy of this document can be found electronically at: http://www.epa.gov/npdes/pubs/montcomplete.pdf

      The QAP should be prepared in the format specified in these documents.

   c) At a minimum, the QAP must include the following:

      (i) Organization chart reflecting responsibilities of key Permittee staff;

      (ii) Details on the number of samples, type of sample containers, preservation of samples, holding times, analytical methods, analytical detection and quantitation limits for each target compound, type and number of quality assurance field samples, precision and accuracy requirements, sample representativeness and completeness, sample preparation requirements, sample shipping methods, and laboratory data delivery requirements;

      (iii) Data quality objectives;

(iv) Map(s) and associated documentation reflecting the location of each sampling point and physical description including street address or latitude/longitude;

(v) Qualification and training of personnel;

(vi) Name(s), address(es) and telephone number(s) of the laboratories, used by or proposed to be used by the Permittees;

(vii) Data management;

(viii) Data review, validation and verification; and

(ix) Data reconciliation.

d) The Permittees must amend the QAP whenever there is a modification in sample collection, sample analysis, or other procedure addressed by the QAP. The amended QAP must be submitted to EPA as part of the next Annual Report.

e) Copies of any current QAP must be maintained by the Permittees and made available to EPA and/or IDEQ upon request.

6. **Additional Monitoring by Permittees.** If the Permittees monitor more frequently, or in more locations, than required by this Permit, the results of any such additional monitoring must be included and summarized with other data submitted to EPA and IDEQ as required in Part IV.C.

7. **Storm Water Outfall Monitoring**

a) No later than September 30, 2015, the Permittees must update the existing *Boise NPDES Municipal Storm Water Permit Monitoring Plan* to be consistent with the monitoring and evaluation program objectives and plan as described in Part IV.A.2. At a minimum, the plan must describe five outfall sample locations, and any additional or alternative locations, as defined by the Permittees. The outfalls selected by the Permittees to be monitored must be identified as representative of all major land uses occurring within the Permit area.

b) No later than September 30, 2014, the Permittees must begin monitoring discharges from the identified five storm water outfalls during wet weather events at least three times per year. The specific minimum monitoring requirements are outlined in Table IV.A, but may be augmented based on the Permittees' updated stormwater monitoring and evaluation plan required by Part IV.A.2. The Permittees must include any additional parameters to be sampled in an updated Table IV.A within the final updated stormwater monitoring and evaluation plan submitted to EPA with the 2nd Annual Report.

Table IV.A – Outfall Monitoring Requirements[1, 2]
PARAMETER SAMPLING
Ammonia
Total Kjeldahl Nitrogen (TKN) (mg/l)
Nitrate + Nitrite
Total Phosphorus (mg/l)
Dissolved Orthophosphate (mg/l)
E. coli
Biological Oxygen Demand (BOD5) (mg/l)
Chemical Oxygen Demand (COD) (mg/l)
Total Suspended Solids (TSS) (mg/l)
Total Dissolved Solids (TDS) (mg/l)
Dissolved Oxygen
Turbidity (NTU)
Temperature
pH (S.U)
Flow/Discharge, Volume, in cubic feet
Arsenic – Total
Cadmium- Total and Dissolved
Copper – Dissolved
Lead – Total and Dissolved
Mercury – Total
Zinc – Dissolved
Hardness (as CaCO3) (mg/l)

[1] Five or more outfall locations will be identified in the Permittees' updated stormwater monitoring and evaluation plan

[2] A minimum of ***three (3) samples*** must be collected during wet weather storm events in each reporting year, assuming the presence of storm events sufficient to produce a discharge.

8. **Water Quality Monitoring and/or Fish Tissue Sampling**. At the Permittees' option and to augment the storm water discharge data collection required in Part IV.A.7 above, one or more of the Permittees may conduct, or contract with others to conduct, water quality monitoring and/or fish tissue sampling within the Lower Boise River Watershed.

   a) If the Permittees elect to conduct in-stream water quality monitoring and/or fish tissue sampling within the Lower Boise River Watershed, the Permittees must revise the stormwater monitoring and evaluation plan and QAP to describe the monitoring and/or sampling effort(s) per Part IV.A.2 and IV.A.5, no later September 30, 2014.

   b) The documentation of the Permittees' intended in-stream water quality monitoring and/or fish tissue sampling activities must be included in the final updated stormwater monitoring and evaluation plan submitted with the 2nd Year Annual Report as required in Part IV.A.2.b.

   c) The Permittees are encouraged to engage in cooperative efforts with other organizations to collect reliable methylmercury fish tissue data within a specific geographic area of the Lower Boise River Watershed. The objective of the cooperative effort is to determine if fish tissue concentrations of methylmercury in the Lower Boise River are compliant with Idaho's methylmercury fish tissue criterion of 0.3 mg/kg.

      (i) In particular, the Permittees are encouraged to cooperate with other organizations to collect data through implementation of the Methylmercury Fish Tissue Sampling requirements specified in NPDES Permits # ID-002044-3 and ID-002398-1 as issued to the City of Boise. Beginning with the 2nd Year Annual Report, the Permittees' may (individually or collectively) submit documentation in each Annual Report which describes their specific involvement over the prior reporting period, and may reference fish tissue sampling plans and data reports as developed or published by others through the cooperative watershed effort.

9. **Evaluate the Effectiveness of Required Structural Controls**. Within two years of the effective date of this Permit, the Permittees must select and begin to evaluate at least two different types of permanent structural storm water management controls currently mandated by the Permittees at new development or redevelopment sites. For each selected control, this evaluation must determine whether the control is effectively treating or preventing the discharge of one or more of the pollutants of concern into waterbodies listed in Table II.C. The results of this evaluation, and any recommendations for improved treatment performance, must be submitted to EPA in subsequent Annual Reports as the evaluation projects are implemented and completed.

10. **Evaluate the Effectiveness of Green Infrastructure/Low Impact Development Pilot Projects**. The Permittees must evaluate the performance and effectiveness of the three pilot projects required in Part II.B.2.c of this Permit, or contract with another entity to conduct such evaluations. An evaluation summary of the LID technique or control and any recommendations

of improved treatment performance must be submitted in subsequent Annual Reports as the evaluation projects are implemented and completed.

11. **Dry Weather Discharge Screening.** The Permittees must implement a dry weather screening program, or contract with another entity to implement such a program, as required in Part II.B.5.d.

B. Recordkeeping

1. **Retention of Records.** The Permittees must retain records and copies of all information (e.g., all monitoring, calibration, and maintenance records; all original strip chart recordings for any continuous monitoring instrumentation; copies of all reports required by this Permit; storm water discharge monitoring reports; a copy of the NPDES permit; and records of all data or information used in the development and implementation of the SWMP and to complete the application for this Permit;) for a period of at least five years from the date of the sample, measurement, report or application, or for the term of this Permit, whichever is longer. This period may be extended at the request of the EPA at any time.
2. **Availability of Records.** The Permittees must submit the records referred to in Part IV.B.1 to EPA and IDEQ only when such information is requested. At a minimum, the Permittees must retain all records comprising the SWMP required by this Permit (including a copy of the Permit language and all Annual Reports) in a location and format that are accessible to EPA and IDEQ. The Permittees must make all records described above available to the public if requested to do so in writing. The public must be able to view the records during normal business hours. The Permittees may charge the public a reasonable fee for copying requests**.**

C. Reporting Requirements

1. **Storm Water Discharge Monitoring Report.** Beginning with the 2nd Year Annual Report, and in subsequent Annual Reports, all storm water discharge monitoring data collected to date must be submitted as part of the Annual Report. At a minimum, this Storm Water Discharge Monitoring Report must include:
   a) Dates of sample collection and analyses;
   b) Results of sample analyses;
   c) Location of sample collection. and
   d) Summary discussion and interpretation of the data collected, including a discussion of quality assurance issues and comparison to previously collected information, as appropriate.
2. **Water Quality Monitoring and/or Fish Tissue Sampling Report(s).** If the Permittees elect to conduct water quality monitoring and/or fish tissue sampling as specified in Part IV.A.8, all relevant monitoring data collected to date must

be submitted as part of each Annual Report beginning with the 2nd Year Annual Report. Summary data reports as prepared by other organizations with whom the Permittee(s) cooperate may be submitted to fulfill this requirement. At a minimum, this Water Quality Monitoring and/or Fish Tissue Sampling Report must include:

a) Dates of sample collection and analyses;

b) Results of sample analyses;

c) Locations of sample collection; and

d) Summary discussion and interpretation of the data collected, including discussion of quality assurance issues and comparison to previously collected information, as appropriate.

3. **Annual Report.**

a) No later than January 30th of each year beginning in 2014, and annually thereafter, each Permittee must submit an Annual Report to EPA and IDEQ. The reporting period for the 1st Year Annual Report will be from February 1, 2013, through September 30, 2013. Reporting periods for subsequent Annual Reports are specified in Table IV.C. Copies of all Annual Reports, including each Permittee's SWMP documentation, must be available to the public, through a Permittee-maintained website, and/or through other easily accessible means.

Table IV.C - Annual Report Deadlines

Annual Report	Reporting Period	Due Date
1st Year Annual Report	February 1, 2013–September 30, 2013	January 30, 2014
2nd Year Annual Report	October 1, 2013-September 30, 2014	January 30, 2015
3rd Year Annual Report	October 1, 2014-September 30, 2015	January 30, 2016
4th Year Annual Report	October 1, 2015-September 30, 2016	January 30, 2017
5th Year Annual Report	October 1, 2016-December 31, 2017	January 30, 2018

b) Preparation and submittal of the Annual Reports must be coordinated by Ada County Highway District. Each Permittee is responsible for content of their organization's SWMP documentation and Annual Report(s) relating to SWMP implementation for portions of the MS4s for which they are responsible.

c) The following information must be submitted in each Annual Report:

(i) A updated and current document describing the SWMP as implemented by the specific Permittee, in accordance with Part II.A.1.b;

(ii) A narrative assessment of the Permittee's compliance with this Permit, describing the status of implementing the control measures in Parts II and IV. The status of each control measure must be addressed, even if activity has previously been completed, has not yet been implemented, does not apply to the Permittee's jurisdiction or operation, or is conducted on the Permittee's behalf by another entity;

(iii) Discussion of any information collected and analyzed during the reporting period, including but not limited to storm water monitoring data not included with the Storm Water Discharge Monitoring Report; dry weather monitoring results; Green Infrastructure/LID pilot project evaluation results, structural control evaluation results, and any other information collected or used by the Permittee(s) to assess the success of the SWMP controls at improving receiving water quality to the maximum extent practicable;

(iv) A summary of the number and nature of public education programs; the number and nature of complaints received by the Permittee(s), and follow-up actions taken; and the number and nature of inspections, formal enforcement actions, or other similar activities as performed by the Permittee(s) during the reporting period;

(v) Electronic copies of new or updated education materials, ordinances (or other regulatory mechanisms), inventories, guidance materials, or other products produced as required by this Permit during the reporting period;

(vi) A description and schedule of the Permittee's implementation of additional controls or practices deemed necessary by the Permittee, based on monitoring or other information, to ensure compliance with applicable water quality standards;

(vii) Notice if the Permittee is relying on another entity to satisfy any of the Permit obligations, if applicable; and

(viii) Annual expenditures for the reporting period, and estimated budget for the reporting period following each Annual Report.

d) If, after the effective date of this Permit, EPA provides the Permittees with an alternative Annual Report format, the Permittees may use the alternative format in lieu of the required elements of Part IV.C.3.c.

D. Addresses

Reports and other documents required by this Permit must be signed in accordance with Part VI.E and submitted to each of the following addresses:

IDEQ: Idaho Department of Environmental Quality
Boise Regional Office
Attn: Water Program Manager
1410 North Hilton
Boise, ID 83854

EPA: United States Environmental Protection Agency
Attention: Storm Water MS4 Compliance Program
NPDES Compliance Unit
1200 6th Avenue, Suite 900 (OCE-133)
Seattle, WA 98101

Any documents and/or submittals requiring formal EPA approval must also be submitted to the following address:

United States Environmental Protection Agency
Attention: Storm Water MS4 Permit Program
NPDES Permits Unit
1200 6th Avenue, Suite 900 (OWW-130)
Seattle, WA 98101

V. Compliance Responsibilities.

A. Duty to Comply. The Permittees must comply with all conditions of this Permit. Any Permit noncompliance constitutes a violation of the Act and is grounds for enforcement action, for Permit termination, revocation and reissuance, or modification, or for denial of a Permit renewal application.

B. Penalties for Violations of Permit Conditions

1. Civil and Administrative Penalties. Pursuant to 40 CFR Part 19 and the Act, any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed the maximum amounts authorized by Section 309(d) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $37,500 per day for each violation).

2. Administrative Penalties. Any person may be assessed an administrative penalty by the Administrator for violating Section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of this Act. Pursuant to 40 CFR Part 19

and the Act, administrative penalties for Class I violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(A) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $16,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed $37,500). Pursuant to 40 CFR Part 19 and the Act, penalties for Class II violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(B) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $16,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed $177,500).

3. Criminal Penalties

a) **Negligent Violations**. The Act provides that any person who negligently violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of $2,500 to $25,000 per day of violation, or imprisonment of not more than one year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than $50,000 per day of violation, or by imprisonment of not more than two years, or both.

b) **Knowing Violations**. Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of $5,000 to $50,000 per day of violation, or imprisonment for not more than three years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than $100,000 per day of violation, or imprisonment of not more than six years, or both.

c) **Knowing Endangerment**. Any person who knowingly violates Section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than $500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in Section 309(c)(3)(B)(iii) of the Act, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than $1,000,000 and can be fined up to $2,000,000 for second or subsequent convictions.

d) **False Statements.** The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Permit shall, upon conviction, be

punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than four years, or both. The Act further provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this Permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

C. Need to Halt or Reduce Activity not a Defense. It shall not be a defense for the Permittees in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with this Permit.

D. Duty to Mitigate. The Permittees must take all reasonable steps to minimize or prevent any discharge or disposal in violation of this Permit that has a reasonable likelihood of adversely affecting human health or the environment**.**

E. Proper Operation and Maintenance. The Permittees must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Permittees to achieve compliance with the conditions of this Permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by the Permittees only when the operation is necessary to achieve compliance with the conditions of the Permit.

F. Toxic Pollutants. The Permittees must comply with effluent standards or prohibitions established under Section 307(a) of the Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the Permit has not yet been modified to incorporate the requirement.

G. Planned Changes. The Permittee(s) must give notice to the Director and IDEQ as soon as possible of any planned physical alterations or additions to the permitted facility whenever:

1. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source as determined in 40 CFR §122.29(b); or

2. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are not subject to effluent limitations in the Permit.

H. Anticipated Noncompliance. The Permittee(s) must give advance notice to the Director and IDEQ of any planned changes in the permitted facility or activity that may result in noncompliance with this Permit.

I. Twenty-four Hour Notice of Noncompliance Reporting

1. The Permittee(s) must report the following occurrences of noncompliance by telephone within 24 hours from the time the Permittee(s) becomes aware of the circumstances:

a) any noncompliance that may endanger health or the environment;

b) any unanticipated bypass that exceeds any effluent limitation in the permit (See Part IV.F., "Bypass of Treatment Facilities");

c) any upset that exceeds any effluent limitation in the permit (See Part IV.G., "Upset Conditions"); or

d) any overflow prior to the stormwater treatment facility over which the Permittee(s) has ownership or has operational control. An overflow is any spill, release or diversion of municipal sewage including:

(1) an overflow that results in a discharge to waters of the United States; and

(2) an overflow of wastewater, including a wastewater backup into a building (other than a backup caused solely by a blockage or other malfunction in a privately owned sewer or building lateral) that does not reach waters of the United States.

2. The Permittee(s) must also provide a written submission within five days of the time that the Permittee(s) becomes aware of any event required to be reported under subpart 1 above. The written submission must contain:

a) a description of the noncompliance and its cause;

b) the period of noncompliance, including exact dates and times;

c) the estimated time noncompliance is expected to continue if it has not been corrected; and

d) steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

e) if the noncompliance involves an overflow, the written submission must contain:

(1) The location of the overflow;

(2) The receiving water (if there is one);

(3) An estimate of the volume of the overflow;

(4) A description of the sewer system component from which the release occurred (e.g., manhole, constructed overflow pipe, crack in pipe);

(5) The estimated date and time when the overflow began and stopped or will be stopped;

(6) The cause or suspected cause of the overflow;

(7) Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the overflow and a schedule of major milestones for those steps;

(8) An estimate of the number of persons who came into contact with wastewater from the overflow; and

(9) Steps taken or planned to mitigate the impact(s) of the overflow and a schedule of major milestones for those steps.

3. The Director of the Office of Compliance and Enforcement may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the NPDES Compliance Hotline in Seattle, Washington, by telephone, (206) 553-1846.

4. Reports must be submitted to the addresses in Part IV.D ("Addresses").

J. Bypass of Treatment Facilities

1. Bypass not exceeding limitations. The Permittee(s) may allow any bypass to occur that does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs 2 and 3 of this Part.

2. Notice.

a) **Anticipated bypass**. If the Permittee(s) knows in advance of the need for a bypass, it must submit prior written notice, if possible at least 10 days before the date of the bypass.

b) **Unanticipated bypass.** The Permittee(s) must submit notice of an unanticipated bypass as required under Part III.G ("Twenty-four Hour Notice of Noncompliance Reporting").

3. Prohibition of bypass.

a) Bypass is prohibited, and the Director of the Office of Compliance and Enforcement may take enforcement action against the Permittee(s) for a bypass, unless:

(1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal periods of equipment downtime or preventive maintenance; and

(3) The Permittee(s) submitted notices as required under paragraph 2 of this Part.

b) The Director of the Office of Compliance and Enforcement may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph 3.a. of this Part.

K. Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the Permittee(s) meets the requirements of paragraph 2 of this Part. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

2. Conditions necessary for a demonstration of upset. To establish the affirmative defense of upset, the Permittee(s) must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

a) An upset occurred and that the Permittee(s) can identify the cause(s) of the upset;

b) The permitted facility was at the time being properly operated;

c) The Permittee(s) submitted notice of the upset as required under Part V.I, "*Twenty-four Hour Notice of Noncompliance Reporting;*" and

d) The Permittee(s) complied with any remedial measures required under Part V.D, "*Duty to Mitigate.*"

3. Burden of proof. In any enforcement proceeding, the Permittee(s) seeking to establish the occurrence of an upset has the burden of proof.

VI. General Provisions

A. Permit Actions.

1. This Permit may be modified, revoked and reissued, or terminated for cause as specified in 40 CFR **§§** 122.62, 122.64, or 124.5. The filing of a request by the Permittee(s) for a Permit modification, revocation and reissuance, termination, or a notification of planned changes or anticipated noncompliance, does not stay any Permit condition.

2. Permit coverage may be terminated, in accordance with the provisions of 40 CFR §§122.64 and 124.5, for a single Permittee without terminating coverage for the other Permittees subject to this Permit.

B. Duty to Reapply. If the Permittees intend to continue an activity regulated by this Permit after the expiration date of this Permit, the Permittees must apply for and obtain a

new permit. In accordance with 40 CFR §122.21(d), and unless permission for the application to be submitted at a later date has been granted by the Director, the Permittees must submit a new application at least 180 days before the expiration date of this Permit, or alternatively in conjunction with the 4th Year Annual Report. The reapplication package must contain the information required by 40 CFR §122.21(f), which includes: name and mailing address(es) of the Permittees(s) that operate the MS4(s), and names and titles of the primary administrative and technical contacts for the municipal Permittees(s). In addition, the Permittees must identify any previously unidentified water bodies that receive discharges from the MS4(s); a summary of any known water quality impacts on the newly identified receiving waters; a description of any changes to the number of applicants; and any changes or modifications to the Storm Water Management Program as implemented by the Permittees. The re-application package may incorporate by reference the 4th Year Annual Report when the reapplication requirements have been addressed within that report.

C. Duty to Provide Information. The Permittees must furnish to the Director and IDEQ, within the time specified in the request, any information that the Director or IDEQ may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this Permit, or to determine compliance with this Permit. The Permittees must also furnish to the Director or IDEQ, upon request, copies of records required to be kept by this Permit.

D. Other Information. When the Permittees become aware that it failed to submit any relevant facts in a Permit application, or that it submitted incorrect information in a Permit application or any report to the Director or IDEQ, the Permittees must promptly submit the omitted facts or corrected information.

E. Signatory Requirements. All applications, reports or information submitted to the Director and IDEQ must be signed and certified as follows.

1. All Permit applications must be signed as follows:
   a) For a corporation: by a responsible corporate officer.
   b) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively.
   c) For a municipality, state, federal, or other public agency: by either a principal executive officer or ranking elected official.

2. All reports required by the Permit and other information requested by the Director or the IDEQ must be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
   a) The authorization is made in writing by a person described above;
   b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or

position having overall responsibility for environmental matters for the organization; and

c) The written authorization is submitted to the Director and IDEQ.

3. **Changes to Authorization.** If an authorization under Part VI.E.2 is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part VI.E.2 must be submitted to the Director and IDEQ prior to or together with any reports, information, or applications to be signed by an authorized representative.

4. **Certification.** Any person signing a document under this Part must make the following certification:

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

F. Availability of Reports. In accordance with 40 CFR Part 2, information submitted to EPA pursuant to this Permit may be claimed as confidential by the Permittees. In accordance with the Act, permit applications, permits and effluent data are not considered confidential. Any confidentiality claim must be asserted at the time of submission by stamping the words “confidential business information” on each page containing such information. If no claim is made at the time of submission, EPA may make the information available to the public without further notice to the Permittees. If a claim is asserted, the information will be treated in accordance with the procedures in 40 CFR Part 2, Subpart B (Public Information) and 41 Fed. Reg. 36902 through 36924 (September 1, 1976), as amended.

G. Inspection and Entry. The Permittees must allow the Director, IDEQ, or an authorized representative (including an authorized contractor acting as a representative of the Director), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the Permittees' premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purpose of assuring Permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

H. Property Rights. The issuance of this Permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to persons or property or invasion of other private rights, nor any infringement of state or local laws or regulations.

I. Transfers. This Permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the Permit to change the name of the Permittees and incorporate such other requirements as may be necessary under the Act. (See 40 CFR 122.61; in some cases, modification or revocation and reissuance is mandatory.)

J. State/Tribal Environmental Laws

1. Nothing in this Permit shall be construed to preclude the institution of any legal action or relieve the Permittees from any responsibilities, liabilities, or penalties established pursuant to any applicable State/Tribal law or regulation under authority preserved by Section 510 of the Act**.**
2. No condition of this Permit releases the Permittees from any responsibility or requirements under other environmental statutes or regulations.

K. Oil and Hazardous Substance Liability Nothing in this Permit shall be constructed to preclude the institution of any legal action or relieve the Permittees from any responsibilities, liabilities, or penalties to which the Permittees is or may be subject under Section 311 of the CWA or Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

L. Severability The provisions of this Permit are severable, and if any provision of this permit, or the application of any provision of this Permit to any circumstance, is held invalid, the application of such provision to the circumstances, and the remainder of this Permit shall not be affected thereby.

VII. Definitions and Acronyms

All definitions contained in Section 502 of the Act and 40 CFR Part 122 apply to this Permit and are incorporated herein by reference. For convenience, simplified explanations of some regulatory/statutory definitions have been provided but, in the event of a conflict, the definition found in the statute or regulation takes precedence.

“Administrator” means the Administrator of the EPA, or an authorized representative.

“Animal facility” see “commercial animal facility.”

“Annual Report” means the periodic self –assessment submitted by the Permittee(s) to document incremental progress towards meeting the storm water management requirements and implementation schedules as required by this Permit. See Part IV.C.

"Best Management Practices (BMPs)" means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. See 40 CFR § 122.2. BMP refers to operational activities, physical controls or educational measures that are applied to reduce the discharge of pollutants and minimize potential impacts upon receiving waters, and accordingly, refers to both structural and nonstructural practices that have direct impacts on the release, transport, or discharge of pollutants. See also "storm water control measure (SCM)."

"Bioretention" is the water quality and water quantity storm water management practice using the chemical, biological and physical properties of plants, microbes and soils for the removal of pollution from storm water runoff.

"Canopy Interception**"** is the interception of precipitation, by leaves and branches of trees and vegetation that does not reach the soil.

"CGP" and "Construction General Permit" means the current available version of EPA's *NPDES General Permit for Storm Water Discharges for Construction Activities in Idaho*, Permit No. IDR12-0000. EPA's CGP is posted on EPA's website at *www.epa.gov/npdes/stormwater/cgp*.

"Commercial Animal Facility" as used in this Permit, means a business that boards, breeds, or grooms animals including but not limited to dogs, cats, rabbits or horses.

"Common Plan of Development**"** is a contiguous construction project or projects where multiple separate and distinct construction activities may be taking place at different times on different schedules but under one plan. The "plan" is broadly defined as any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot; included in this definition are most subdivisions and industrial parks.

"Construction activity" includes, but is not limited to, clearing, grading, excavation, and other site preparation work related to the construction of residential buildings and non-residential buildings, and heavy construction (e.g., highways, streets, bridges, tunnels, pipelines, transmission lines and industrial non-building structures).

"Control Measure" as used in this Permit, refers to any action, activity, Best Management Practice or other method used to prevent or reduce the discharge of pollutants in stormwater to waters of the United States.

"CWA" or "The Act" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended by Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483 and Pub. L. 97-117, 33 U.S.C. 1251 et seq.

"Director" means the Environmental Protection Agency Regional Administrator, the EPA Director of the Office of Water and Watersheds, or an authorized representative.

"Discharge" when used without a qualifier, refers to "discharge of a pollutant" as defined at 40 CFR §122.2.

"Discharge of a pollutant" means (a) any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

"Discharge of Storm Water Associated with Construction Activity" as used in this Permit, refers to a discharge of pollutants in storm water runoff from areas where soil disturbing activities (*e.g.*, clearing, grading, or excavation), construction materials or equipment storage or maintenance (*e.g.*, fill piles, borrow areas, concrete truck washout, fueling) or other industrial storm water directly related to the construction process are located, and which are required to be managed under an NPDES permit. See the regulatory definitions of storm water discharge associated with large and small construction activity at 40 CFR §122.26(b)(14)(x) and 40 CFR §122.26(b)(15), respectively

"Discharge of Storm Water Associated with Industrial Activity" as used in this Permit, refers to the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant included in the regulatory definition of storm water discharge associated with industrial activity at 40 CFR §122.26(b)(14).

"Discharge-related Activities" include: activities which cause, contribute to, or result in storm water point source pollutant discharges and measures to control storm water discharges, including the siting, construction, and operation of best management practices to control, reduce or prevent storm water pollution.

"Disconnect" for the purposes of this permit, means the change from a direct discharge into receiving waters to one in which the discharged water flows across a vegetated surface, through a constructed water or wetlands feature, through a vegetated swale, or other attenuation or infiltration device before reaching the receiving water.

"Engineered Infiltration" is an underground device or system designed to accept storm water and slowly exfiltrates it into the underlying soil. This device or system is designed based on soil tests that define the infiltration rate.

"Erosion" means the process of carrying away soil particles by the action of water.

"Evaporation" means rainfall that is changed or converted into a vapor.

"Evapotranspiration" means the sum of evaporation and transpiration of water from the earth's surface to the atmosphere. It includes evaporation of liquid or solid water plus the transpiration from plants.

"Extended Filtration" is a structural storm water device which filters storm water runoff through a soil media and collects it in an underdrain which slowly releases it after the storm is over.

"EPA" means the Environmental Protection Agency Regional Administrator, the EPA Director of the Office of Water and Watersheds, or an authorized representative.

"Entity" means a governmental body, or a public or private organization.

"Existing Permanent Controls," in the context of this Permit, means post- construction or permanent storm water management controls designed to treat or control runoff on a permanent basis and that were installed prior to the effective date of this Permit.

"Facility or Activity" generally means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

"Fish Tissue Sampling" see "Methylmercury Fish Tissue Sampling"

"Green infrastructure" means runoff management approaches and technologies that utilize, enhance and/or mimic the natural hydrologic cycle processes of infiltration, evapotranspiration and reuse.

"Hydromodification" means changes to the storm water runoff characteristics of a watershed caused by changes in land use.

"IDEQ" means the Idaho Department of Environmental Quality or its authorized representative.

"Illicit Connection" means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

"Illicit Discharge" is defined at 40 CFR §122.26(b)(2) and means any discharge to a municipal separate storm sewer that is not entirely composed of storm water, except discharges authorized under an NPDES permit (other than the NPDES Permit for discharges from the MS4) and discharges resulting from fire fighting activities.

"Impaired Water**"** (or "Water Quality Impaired Water") for purposes of this Permit means any water body identified by the State of Idaho or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State water quality standards. Impaired waters include both waters with approved or established Total Maximum Daily Loads (TMDLs), and those for which a TMDL has not yet been approved or established.

"Industrial Activity" as used in this Permit refers to the eleven categories of industrial activities included in the definition of discharges of "storm water associated with industrial activity" at 40 CFR §122.26(b)(14).

"Industrial Storm Water" as used in this Permit refers to storm water runoff associated with the definition of "discharges of storm water associated with industrial activity".

"Infiltration" is the process by which storm water penetrates into soil.

"Low Impact Development" or "LID" means storm water management and land development techniques, controls and strategies applied at the parcel and subdivision scale that emphasize conservation and use of on-site natural features integrated with engineered, small scale hydrologic controls to more closely mimic pre-development hydrologic functions.

"Major outfall" is defined in 40 CFR §122.26(b)(5) and in general, means a municipal storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more.

"MEP" or "maximum extent practicable," means the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in storm water discharges that was established by Section 402(p) of the Clean Water Act, 33 U.S.C §1342(p).

"Measurable Goal" means a quantitative measure of progress in implementing a component of a storm water management program.

"Methylmercury Fish Tissue Sampling" and "Methylmercury Fish Tissue Sampling Requirements" means the IDEQ-recommended cooperative data collection effort for the Lower Boise River Watershed. In particular, Methylmercury Fish Tissue Sampling requirements are otherwise specified in NPDES Permits # ID-002044-3 and ID-002398-1, as issued by EPA to the City of Boise and available online at http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/Current+ID1319

"Minimize" means to reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry or municipal practices.

"MS4" means "municipal separate storm sewer system," and is used to refer to either a Large, Medium, or Small Municipal Separate Storm Sewer System as defined in 40 CFR 122.26(b). The term, as used within the context of this Permit, refers to those portions of the municipal separate storm sewer systems within the corporate limits of the City of Boise and City of Garden City that are owned and/or operated by the Permittees, namely: Ada County Highway District, Boise State University, City of Boise, City of Garden City, Drainage District #3 and/or the Idaho Transportation Department District #3.

"Municipality" means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA.

"Municipal Separate Storm Sewer" is defined in 40 CFR §122.26(b) and means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to

State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR §122.2.

"National Pollutant Discharge Elimination System" or "NPDES" means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 402, 318 and 405 of the CWA. The term includes an 'approved program.'

"New Permanent Controls," in the context of this Permit, means post- construction or permanent storm water management controls designed to treat or control runoff on a permanent basis that are installed after the effective date of this permit.

"Outfall" is defined at 40 CFR §122.26(b)(9) means a point source (see definition below) at the point where a municipal separate storm sewer discharges to waters of the United States, and does not include open conveyances connecting two municipal separate storm sewers or pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

"Owner or operator" means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

"Permanent storm water management controls" see "post-construction storm water management controls."

"Permitting Authority" means the U.S. Environmental Protection Agency (EPA)

"Point Source" is defined at 40 CFR §122.2 and means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

"Pollutant" is defined at 40 CFR §122.2. A partial listing from this definition includes: dredged spoil, solid waste, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial or municipal waste.

"Pollutant(s) of concern" includes any pollutant identified by IDEQ as a cause of impairment of any water body that will receive a discharge from a MS4 authorized under this Permit. See Table II.C.

"Post- construction storm water management controls" or "permanent storm water management controls" means those controls designed to treat or control runoff on a permanent basis once construction is complete. See also "new permanent controls" and "existing permanent controls."

"QA/QC" means quality assurance/quality control.

"QAP" means Quality Assurance Plan.

"Rainfall and Rainwater Harvesting**"** is the collection, conveyance, and storage of rainwater. The scope, method, technologies, system complexity, purpose, and end uses vary from rain barrels for garden irrigation in urban areas, to large-scale collection of rainwater for all domestic uses.

"Redevelopment" for the purposes of this Permit, means the alteration, renewal or restoration of any developed land or property that results in land disturbance of 5,000 square feet or more, and that has one of the following characteristics: land that currently has an existing structure, such as buildings or houses; or land that is currently covered with an impervious surface, such as a parking lot or roof; or land that is currently degraded and is covered with sand, gravel, stones, or other non-vegetative covering.

"Regional Administrator" means the Regional Administrator of Region 10 of the EPA, or the authorized representative of the Regional Administrator.

"Repair of Public Streets, Roads and Parking Lots" means repair work on Permittee-owned or Permittee-managed streets and parking lots that involves land disturbance, including asphalt removal or regrading of 5,000 square feet or more. This definition excludes the following activities: pot hole and square cut patching; overlaying existing asphalt or concrete pacing with asphalt or concrete without expanding the area of coverage; shoulder grading; reshaping or regrading drainage ditches; crack or chip sealing; and vegetative maintenance.

"Runoff Reduction Techniques" means the collective assortment of storm water practices that reduce the volume of storm water from discharging off site.

"Storm Sewershed" means, for the purposes of this Permit, all the land area that is drained by a network of municipal separate storm sewer system conveyances to a single point of discharge into a water of the United States.

"Significant contributors of pollutants" means any discharge that causes or could cause or contribute to a violation of surface water quality standards.

"Small Construction Activity" – is defined at 40 CFR §122.26(b)(15) and incorporated here by reference. A small construction activity includes clearing, grading, and excavating resulting in a land disturbance that will disturb equal to or greater than one (1) acre and less than five (5) acres of land or will disturb less than one (1) acre of total land area but is part of a larger common plan of development or sale that will ultimately disturb equal to or greater than one (1) acre and less than five (5) acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the site.
"Snow management" means the plowing, relocation and collection of snow.

"Soil amendments" are components added to in situ or native soils to increase the spacing between soil particles so that the soil can absorb and hold more moisture. The amendment of soils changes

various other physical, chemical and biological characteristics so that the soils become more effective in maintaining water quality.

"Source control" storm water management means practices that control storm water *before* pollutants have been introduced into storm water

"Storm event" or "measurable storm event" for the purposes of this Permit means a precipitation event that results in an actual discharge from the outfall and which follows the preceding measurable storm event by at least 48 hours (2 days).

"Storm water" and "storm water runoff" as used in this Permit means storm water runoff, snow melt runoff, and surface runoff and drainage, and is defined at 40 CFR §122.26(b)(13). "Storm water" means that portion of precipitation that does not naturally percolate into the ground or evaporate, but flows via overland flow, interflow, channels, or pipes into a defined surface water channel or a constructed infiltration facility.

"Storm Water Control Measure" (SCM) or "storm water control device," means physical, structural, and/or managerial measures that, when used singly or in combination, reduce the downstream quality and quantity impacts of storm water. Also, SCM means a permit condition used in place of or in conjunction with effluent limitations to prevent or control the discharge of pollutants. This may include a schedule of activities, prohibition of practices, maintenance procedures, or other management practices. SCMs may include, but are not limited to, treatment requirements; operating procedures; practices to control plant site runoff, spillage, leaks, sludge, or waste disposal; or drainage from raw material storage. See "best management practices (BMPs)."

"Storm Water Facility" means a constructed component of a storm water drainage system, designed or constructed to perform a particular function or multiple functions. Storm water facilities include, but are not limited to, pipes, swales, ditches, culverts, street gutters, detention basins, retention basins, constructed wetlands, infiltration devices, catch basins, oil/water separators, sediment basins, and modular pavement.

"Storm Water Management Practice**"** or "Storm Water Management Control" means practices that manage storm water, including structural and vegetative components of a storm water system.

"Storm Water Management Project" means a project that takes into account the effects on the water quality of the receiving waters and whether a structural storm water control device can be retrofitted to control water quality.

"Storm Water Management Program (SWMP)" refers to a comprehensive program to manage the quality of storm water discharged from the municipal separate storm sewer system. For the purposes of this Permit, the SWMP consists of the actions and activities conducted by the Permittees as required by this Permit and described in the Permittees' SWMP documentation. A "SWMP document" is the written summary describing the unique and/or cooperative means by which an individual Permittee or entity implements the specific storm water management controls Permittee within their jurisdiction.

"Storm Water Pollution Prevention Plan (SWPPP)" means a site specific plan designed to describe the control of soil, raw materials, or other substances to prevent pollutants in storm water runoff; a SWPPP is generally developed for a construction site, or an industrial facility. For the purposes of this permit, a SWPPP means a written document that identifies potential sources of pollution, describes practices to reduce pollutants in storm water discharges from the site, and identifies procedures or controls that the operator will implement to reduce impacts to water quality and comply with applicable Permit requirements.

"Structural flood control device" means a device designed and installed for the purpose of storm drainage during storm events.

"Subwatershed" for the purposes of this Permit means a smaller geographic section of a larger watershed unit with a drainage area between 2 to 15 square miles and whose boundaries include all the land area draining to a point where two second order streams combine to form a third order stream. A subwatershed may be located entirely within the same political jurisdiction.

"TMDL" means Total Maximum Daily Load, an analysis of pollutant loading to a body of water detailing the sum of the individual waste load allocations for point sources and load allocations for non-point sources and natural background. See 40 CFR §130.2.

"Treatment control" storm water management means practices that 'treat' storm water after pollutants have been incorporated into the storm water.

"Urban Agriculture" and "Urban Agricultural Activities" means the growing, processing, and distribution of food and other products through intensive plant cultivation and animal husbandry in and around cities. For the purposes of this Permit, the term includes activities allowed and/or acknowledged by the Permittees through a local comprehensive plan ordinance, or other regulatory mechanism. For example, see: *Blueprint Boise* online at *http://www.cityofboise.org/BluePrintBoise/pdf/Blueprint%20Boise/0_Blueprint_All.pdf*, and/or *City of Boise Urban Agriculture ordinance amendment, ZOA11-00006.*

"Waters of the United States," as defined in 40 CFR 122.2, means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

2. All interstate waters, including interstate "wetlands";

3. All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

a. Which are or could be used by interstate or foreign travelers for recreational or other purposes;
b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

c. Which are used or could be used for industrial purposes by industries in interstate commerce;

4. All impoundments of waters otherwise defined as waters of the United States under this definition;

5. Tributaries of waters identified in paragraphs 1 through 4 of this definition;

6. The territorial sea; and

7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs 1 through 6 of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds for steam electric generation stations per 40 CFR Part 423) which also meet the criteria of this definition are not waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

“Watershed” is defined as all the land area that is drained by a waterbody and its tributaries.

“Wetlands” means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On March 16, 2018, I served the:

- **Claimant's Rebuttal Comments filed March 15, 2018**

  California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001, 14-TC-03
  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 March 16, 2018 at Sacramento, California.

Lorenzo Duran
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 12/21/17

Claim Number: 14-TC-03

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001

Claimant: County of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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