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RECEIVED
June 30, 2016
**Commission on
State Mandates**

**Filing Cured on
August 25, 2016 and
September 6, 2016**

WRITER'S DIRECT NUMBER
(213) 629-8788

WRITER'S E-MAIL ADDRESS
dburhenn@burhennigest.com

August 25, 2016

VIA DROPBOX

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

Re: Joint Test Claim of the County of Orange et al. Concerning California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, as amended by Order No. R9-2015-0100.

Dear Ms. Halsey:

This office represents the County of Orange ("County") and the Orange County Flood Control District ("District"), and I have been designated the Claimant Representative for the Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente and San Juan Capistrano (collectively, the "Joint Test Claimants") with respect to the above-captioned Joint Test Claim.

We are filing today a revised Joint Test Claim that addresses the items identified in your July 29, 2016 letter as being incomplete in the Joint Test Claimants' original Joint Test Claim filed on June 30, 2016. The Joint Test Claim alleges the same mandates as the original test claim, but reorganizes the allegations slightly in the Section 5 Narrative Statement.

To address the specific issues identified in your July 29 letter, we note the following:

1. Joint Test Claim: On Page 3 of your July 29 letter, you indicated requirements for the filing of a joint test claim. In Section I.C of the Section 5 Narrative Statement, we have included the statement of all Joint Test Claimants that the state-mandated costs

Ms. Heather Halsey
August 25, 2016
Page 2

result from the same executive officer, that the Claimants agree on all issues of the test claim and that they have designated one contact person to act as a resource for information. In Section 3 of each test claim form, I am identified as that single contact person.

2. Filing Representatives: On Page 3 of your letter, you indicated that only certain local agency representatives may appear in Section 2 of the test claim form as the claimant contact. In the test claim forms filed with this Joint Test Claim, all 10 cities reflect their City Managers as claimant contacts. The County test claim form reflects the County's Auditor-Controller and the District test claim form reflects the agency's Chief Engineer, the functional equivalent of a general manager.

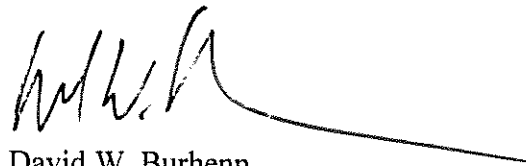
3. E-mail addresses: E-mail addresses have been provided for all persons shown on the test claim forms. In addition, the Joint Test Claimants will provide under separate cover a list of persons who should receive notice of proceedings regarding the Joint Test Claim.

4. Detailed description of costs: On page 5 of your letter, you indicated that claimants must provide detailed description of the costs arising from the mandates at issue in the test claim, both for past fiscal years and anticipated for the subsequent fiscal year. Your letter also indicates the need for a statewide cost estimate of increased costs that local agencies will incur to implement the mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

Costs for past fiscal years (2014-15 and 2015-16) and estimates have been provided in subsection 5 of Section IV.A-K of the Narrative Statement, and in paragraphs 7.a.-k. of the Declarations. A statewide cost estimate, and the basis for it, is set forth in Section V of the Narrative Statement.

I trust that with these changes to the test claim forms, Narrative Statement and Declarations, all issues identified in your July 29 letter have been fully addressed. Please contact the undersigned if you or your staff has any questions regarding the matters discussed in this letter or in the Joint Test Claim documentation. We wish to thank your staff, and especially Ms. Heidi Palchik, for their assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read 'David W. Burhenn', with a long horizontal line extending to the right.

David W. Burhenn

cc: Joint Test Claimants

JOINT TEST CLAIM
IN RE
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD
ORDER NO.R9-2013-0001, AS AMENDED BY ORDER NO. R9-2015-0001 AND ORDER
NO. R9-2015-0100
NPDES NO. CAS0109266
OF
COUNTY OF ORANGE
ORANGE COUNTY FLOOD CONTROL DISTRICT
AND THE CITIES OF
ALISO VIEJO
DANA POINT
LAGUNA BEACH
LAGUNA HILLS
LAGUNA NIGUEL
LAKE FOREST
MISSION VIEJO
RANCHO SANTA MARGARITA
SAN CLEMENTE
SAN JUAN CAPISTRANO

1. TEST CLAIM TITLE

Joint Test Claim of Orange County, et al. re
San Diego RWQCB Order No. R9-2015-0001

2. CLAIMANT INFORMATION

County of Orange

Name of Local Agency or School District

Eric H. Woolery

Claimant Contact

Auditor-Controller

Title

12 Civic Center Plaza, Room #200

Street Address

Santa Ana, CA 92702

City, State, Zip

714-834-2450

Telephone Number

714-834-2569

Fax Number

eric.woolery@ac.ocgov.com

E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn

Claimant Representative Name

Partner

Title

Burhenn & Gest LLP

Organization

624 S. Grand Avenue Suite 2200

Street Address

Los Angeles, CA 90017

City, State, Zip

213-629-8788

Telephone Number

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Fax Number

dburhenn@burhenngest.com

E-Mail Address

For CSM Use Only

Filing Date:

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State Mandates

Filing cured on August 25, 2016
and September 6, 2016

Test Claim #: 15-TC-02

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, adopted on February 11, 2015, as amended by Order No. R9-2015-0100, adopted on November 18, 2015, NPDES No. CAS0109266

Copies of all statutes and executive orders cited are attached.

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

5. Written Narrative: pages 5-1 to .

6. Declarations: pages 6-1 to .

7. Documentation: pages 7-1 to .

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

5. WRITTEN NARRATIVE

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

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

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

6. DECLARATIONS

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

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

7. DOCUMENTATION

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

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

8. CLAIM CERTIFICATION

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

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

Eric H. Woolery, C.P.A.

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



Signature of Authorized Local Agency or
School District Official

Auditor-Controller

Print or Type Title

September 6, 2016

Date

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

1. TEST CLAIM TITLE

Joint Test Claim of Orange County, et al. re
San Diego RWQCB Order No. R9-2015-0001

2. CLAIMANT INFORMATION

Orange County Flood Control District

Name of Local Agency or School District

Khalid Bazmi

Claimant Contact

Chief Engineer

Title

300 N. Flower St., 7th Floor

Street Address

Santa Ana, CA 92703

City, State, Zip

714-647-3999

Telephone Number

714-834-4572

Fax Number

khalid.bazmi@ocpw.ocgov.com

E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn

Claimant Representative Name

Partner

Title

Burhenn & Gest LLP

Organization

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Los Angeles, CA 90017

City, State, Zip

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Khalid Bazmi

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

Chief Engineer

Print or Type Title



Signature of Authorized Local Agency or
School District Official

August 22, 2016

Date

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Joint Test Claim of Orange County et al. re
San Diego RWQCB Order No. R9-2015-0001,
as amended

City of Aliso Viejo

Name of Local Agency or School District

David Doyle

Claimant Contact

City Manager

Title

12 Journey, Suite 100

Street Address

Aliso Viejo, CA 92656-5335

City, State, Zip

949-425-2530

Telephone Number

Fax Number

city-manager@cityofaliso Viejo.com

E-Mail Address

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

David W. Burhenn

Claimant Representative Name

Partner

Title

Burhenn & Gest LLP

Organization

624 S. Grand Ave. Suite 2200

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Los Angeles, CA 90017

City, State, Zip

213-629-8788

Telephone Number

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dburhenn@burhenngest.com

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and September 6, 2016

Test Claim #: 15-TC-02

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DECLARATION OF PUBLIC ACTION

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

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

David Doyle

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

City Manager

Print or Type Title


Signature of Authorized Local Agency or
School District Official

August 19, 2016

Date

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

1. TEST CLAIM TITLE

Joint Test Claim of Orange County et al. re
San Diego RWQCB Order No. R9-2015-0001,
as amended

2. CLAIMANT INFORMATION

City of Dana Point

Name of Local Agency or School District

Douglas Chotkevys

Claimant Contact

City Manager

Title

33282 Golden Lantern

Street Address

Dana Point, CA 92629

City, State, Zip

949-248-3516

Telephone Number

949-248-9052

Fax Number

dchotkevys@danapoint.org

E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

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Claimant Representative Name

Partner

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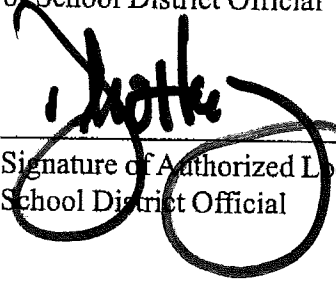
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Douglas Chotkevys

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



Signature of Authorized Local Agency or
School District Official

City Manager

Print or Type Title

August 19, 2016

Date

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1. TEST CLAIM TITLE

Joint Test Claim of Orange County et al. re San Diego RWQCB Order No. R9-2015-0001, as amended

2. CLAIMANT INFORMATION

City of Laguna Beach
Name of Local Agency or School District
John Pietig
Claimant Contact
City Manager
Title
505 Forest Avenue
Street Address
Laguna Beach, CA 92651
City, State, Zip
949-497-0704
Telephone Number
949-497-0771
Fax Number
lhall@lagunabeachcity.net
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name
Partner
Title
Burhenn & Gest LLP
Organization
624 S. Grand Ave. Suite 2200
Street Address
Los Angeles, CA 90017
City, State, Zip
213-629-8788
Telephone Number
213-624-1376
Fax Number
dburhenn@burhennigest.com
E-Mail Address

For CSM Use Only
Filing Date: **RECEIVED**
June 30, 2016
Commission on
State Mandates
Filing cured on August 25, 2016 and September 6, 2016
Test Claim #: 15-TC-02

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, adopted February 11, 2015, as amended by Order No. R9-2015-0100, adopted November 18, 2015, NPDES No. CAS0109266

Copies of all statutes and executive orders cited are attached.

Sections 5, 6, and 7 are attached as follows:
5. Written Narrative: pages 5-1 to ____.
6. Declarations: pages 6-1 to ____.
7. Documentation: pages 7-1 to ____.

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

5. WRITTEN NARRATIVE

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

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

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

6. DECLARATIONS

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

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

7. DOCUMENTATION

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

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

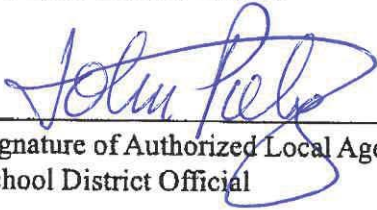
8. CLAIM CERTIFICATION

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

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

John Pietig

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



Signature of Authorized Local Agency or
School District Official

City Manager

Print or Type Title

August 22, 2016

Date

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

1. TEST CLAIM TITLE

Joint Test Claim of Orange County et al. re San Diego RWQCB Order No. R9-2015-0001, as amended

2. CLAIMANT INFORMATION

City of Laguna Hills

Name of Local Agency or School District

Bruce E. Channing

Claimant Contact

City Manager

Title

24035 El Toro Road

Street Address

Laguna Hills, CA 92653

City, State, Zip

949-707-2611

Telephone Number

949-707-2614

Fax Number

bchanning@lagunahillsca.gov

E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn

Claimant Representative Name

Partner

Title

Burhenn & Gest LLP

Organization

624 S. Grand Ave. Suite 2200

Street Address

Los Angeles, CA 90017

City, State, Zip

213-629-8788

Telephone Number

213-624-1376

Fax Number

dburhenn@burhennigest.com

E-Mail Address

For CSM Use Only

Filing Date:

RECEIVED

June 30, 2016

Commission on State Mandates

Filing cured on August 25, 2016 and September 6, 2016

Test Claim #: 15-TC-02

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

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

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 - (i) Dedicated state funds
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- (G) Identification of prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate.
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Under the heading "6. Declarations," support the written narrative with declarations that:

- (A) declare actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate;
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7. DOCUMENTATION

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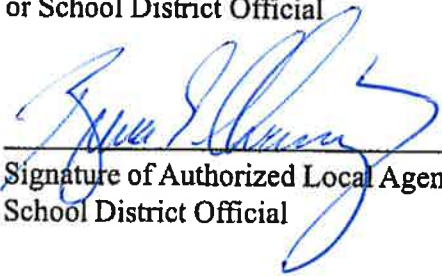
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*Read, sign, and date this section and insert at the end of the test claim submission.**

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

Bruce E. Channing

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



Signature of Authorized Local Agency or
School District Official

City Manager

Print or Type Title

August 16, 2016

Date

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

1. TEST CLAIM TITLE

Joint Test Claim of Orange County et al. re
San Diego RWQCB Order No. R9-2015-0001,
as amended

2. CLAIMANT INFORMATION

City of Laguna Niguel

Name of Local Agency or School District

Rod Foster

Claimant Contact

City Manager

Title

30111 Crown Valley Parkway

Street Address

Laguna Niguel, CA 92677

City, State, Zip

949-362-4300

Telephone Number

949-362-4340

Fax Number

Rfoster@cityoflagunaniguel.org

E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn

Claimant Representative Name

Partner

Title

Burhenn & Gest LLP

Organization

624 S. Grand Ave. Suite 2200

Street Address

Los Angeles, CA 90017

City, State, Zip

213-629-8788

Telephone Number

213-624-1376

Fax Number

dburhenn@burhennigest.com

E-Mail Address

For CSM Use Only

Filing Date:

RECEIVED

June 30, 2016

**Commission on
State Mandates**

**Filing cured on August 25, 2016
and September 6, 2016**

Test Claim #: 15-TC-02

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

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8. CLAIM CERTIFICATION

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


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

Rod Foster

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

City Manager

Print or Type Title


Signature of Authorized Local Agency or
School District Official

August 17, 2016

Date

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

1. TEST CLAIM ISSUE

Joint Test Claim of Orange County et al. re San Diego RWQCB Order No. R9-2015-0001, as amended

2. CLAIMANT INFORMATION

City of Lake Forest
Name of Local Agency or School District
Robert Dunek
Claimant Contact
City Manager
Title
25550 Commercentre Drive, Suite 100
Street Address
Lake Forest, CA 92630
City, State, Zip
949-461-3400
Telephone Number
949-461-35100
Fax Number
rdunek@lakeforestca.gov
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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David W. Burhenn
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Los Angeles, CA 90017
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Filing cured on August 25, 2016
and September 6, 2016
Test Claim # 15-TC-02

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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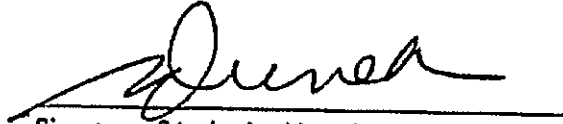
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Robert Dunek

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

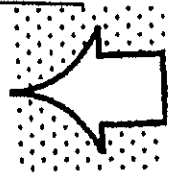


Signature of Authorized Local Agency or
School District Official

City Manager

Print or Type Title

8/22/2016
Date



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

1. TEST CLAIM NUMBER

Joint Test Claim of Orange County et al. re
San Diego RWQCB Order No. R9-2015-0001,
as amended

2. CLAIMANT INFORMATION

City of Mission Viejo
Name of Local Agency or School District
Dennis Wilberg
Claimant Contact
City Manager
Title
200 Civic Center
Street Address
Mission Viejo, CA 92691
City, State, Zip
949-470-3051
Telephone Number
949-859-1386
Fax Number
dwilberg@cityofmissionviejo.org
E-Mail Address

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6. DECLARATIONS

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

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

7. DOCUMENTATION

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

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

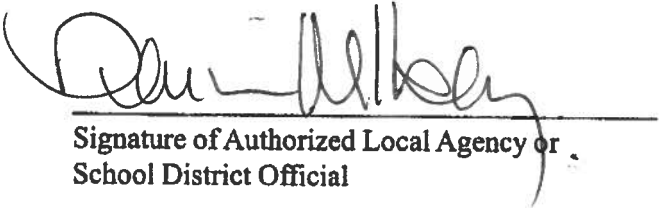
3. CLAIM CERTIFICATION

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

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

Dennis Wilberg

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



Signature of Authorized Local Agency or
School District Official

City Manager

Print or Type Title

August 16, 2016

Date

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

1. TEST CLAIM TITLE

Joint Test Claim of Orange County et al. re San Diego RWQCB Order No. R9-2015-0001, as amended

2. CLAIMANT INFORMATION

City of Rancho Santa Margarita
Name of Local Agency or School District
Jennifer M. Cervantez
Claimant Contact
City Manager
Title
22112 El Paseo
Street Address
Rancho Santa Margarita, CA 92688
City, State, Zip
949-635-1800 ext. 6301
Telephone Number
949-635-1840
Fax Number
JCervantez@cityofrsm.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name
Partner
Title
Burhenn & Gest LLP
Organization
624 S. Grand Ave. Suite 2200
Street Address
Los Angeles, CA 90017
City, State, Zip
213-629-8788
Telephone Number
213-624-1376
Fax Number
dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date: **RECEIVED**
June 30, 2016
Commission on
State Mandates
Filing cured on August 25, 2016
and September 6, 2016
Test Claim #: 15-TC-02

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, adopted February 11, 2015, as amended by Order No. R9-2015-0100, adopted November 18, 2015, NPDES No. CAS0109266

Copies of all statutes and executive orders cited are attached.

Sections 5, 6, and 7 are attached as follows:
5. Written Narrative: pages 5-1 to _____.
6. Declarations: pages 6-1 to _____.
7. Documentation: pages 7-1 to _____.

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

5. WRITTEN NARRATIVE

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

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

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

6. DECLARATIONS

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

- (A) declare actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate;
- (B) identify all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs;
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- (D) If applicable, describe the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Section 17573, and the authority to file a test claim pursuant to paragraph (1) of Section 17574(c).
- (E) are signed under penalty of perjury, based on the declarant's personal knowledge, information or belief, by persons who are authorized and competent to do so.

7. DOCUMENTATION

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

- (A) the test claim statute that includes the bill number alleged to impose or impact a mandate; and/or
- (B) the executive order, identified by its effective date, alleged to impose or impact a mandate; and
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8. CLAIM CERTIFICATION

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

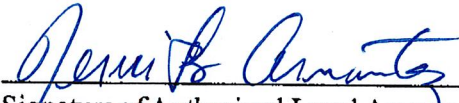
This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in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

Jennifer M. Cervantez

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

City Manager

Print or Type Title



Signature of Authorized Local Agency or
School District Official

August 16, 2016

Date

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

1. TEST CLAIM NUMBER

Joint Test Claim of Orange County et al. re
San Diego RWQCB Order No. R9-2015-0001,
as amended

2. CLAIMANT INFORMATION

City of San Clemente
Name of Local Agency or School District
James Makshanoff
Claimant Contact
City Manager
Title
100 Ave. Presidio
Street Address
San Clemente, CA 92672
City, State, Zip
949-361-8322
Telephone Number
949-361-8283
Fax Number
CityManager@San-Clemente.org
E-Mail Address

3. CLAIMANT DESIGNATES SOLE REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name
Partner
Title
Burhenn & Gest LLP
Organization
624 S. Grand Ave. Suite 2200
Street Address
Los Angeles, CA 90017
City, State, Zip
213-629-8788
Telephone Number
213-624-1376
Fax Number
dburhenn@burhennigest.com
E-Mail Address

For CSM Use Only
Filing Date: **RECEIVED**
June 30, 2016
Commission on State Mandates
Filing cured on August 25, 2016 and September 6, 2016
Test Claim #: 15-TC-02

4. CLAIMANT DESIGNATES CODE SECTIONS OF EXECUTIVE ORDERS

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

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, adopted February 11, 2015, as amended by Order No. R9-2015-0100, adopted November 18, 2015, NPDES No. CAS0109266

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CLAIM CERTIFICATION

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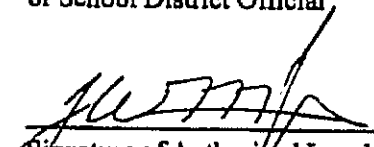
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James Makshanoff

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

City Manager

Print or Type Title


Signature of Authorized Local Agency or
School District Official

August 22, 2016

Date

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

1. TEST CLAIM TITLE

Joint Test Claim of Orange County et al. re
San Diego RWQCB Order No. R9-2015-0001,
as amended

2. CLAIMANT INFORMATION

City of San Juan Capistrano

Name of Local Agency or School District

Ben Siegel

Claimant Contact

City Manager

Title

32400 Paseo Adelanto

Street Address

San Juan Capistrano, CA 92675

City, State, Zip

949-493-1171

Telephone Number

949-488-3874

Fax Number

bsiegel@sanjuancapistrano.org

E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn

Claimant Representative Name

Partner

Title

Burhenn & Gest LLP

Organization

624 S. Grand Ave. Suite 2200

Street Address

Los Angeles, CA 90017

City, State, Zip

213-629-8788

Telephone Number

213-624-1376

Fax Number

dburhenn@burhenngest.com

E-Mail Address

For CSM Use Only

Filing Date:

RECEIVED
June 30, 2016
Commission on
State Mandates

Filing cured on August 25, 2016
and September 6, 2016

Test Claim #: 15-TC-02

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8. CLAIM CERTIFICATION

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

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

Ben Siegel

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

City Manager

Print or Type Title


Signature of Authorized Local Agency or
School District Official

August 23, 2016

Date

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

SECTION 5
NARRATIVE STATEMENT
IN SUPPORT OF JOINT TEST CLAIM
IN RE
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD
ORDER NO. R9-2013-0001, AS AMENDED BY ORDER NO. R9-2015-0001 AND ORDER
NO. R9-2015-0100
NPDES NO. CAS 0109266

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SECTION 5 NARRATIVE STATEMENT IN SUPPORT OF TEST CLAIM OF THE COUNTY
OF ORANGE, ET AL., TO SAN DIEGO REGIONAL WATER QUALITY CONTROL
BOARD ORDER NO. R9-2013-0001, AS AMENDED

I. INTRODUCTION

A. ADOPTION OF EXECUTIVE ORDER

On May 8, 2013, the San Diego Regional Water Quality Control Board (“Regional Board”) adopted Order No. R9-2013-0001 (hereinafter the “2013 Permit”), which became effective on June 27, 2013. The 2013 Permit acts as both a National Pollutant Discharge Elimination System (“NPDES”) permit under the federal Water Pollution Control Act (“Clean Water Act” or “CWA”)¹ and Waste Discharge Requirements under California’s Porter-Cologne Water Quality Control Act.² The 2013 Permit regulates stormwater discharges from municipal separate storm sewer systems (“MS4s”) on a regional basis, including San Diego County, southwestern Riverside County and south Orange County.³ At the time the 2013 Permit was adopted, however, the permit did not initially regulate MS4 discharges in south Orange County because the County of Orange, Orange County Flood Control District and the south Orange County cities (“collectively, the “South Orange County Copermittees”) were still governed by an existing MS4 permit covering only those municipalities.

On February 11, 2015, the Regional Board adopted Order No. R9-2015-0001 (“First Amended Permit”), which amended the 2013 Permit to include the regulation of MS4 discharges by the Joint Test Claimants. On November 18, 2015, the Regional Board issued Order No. R9-2015-0100 (“Second Amended Permit”), which amended the 2013 Permit to include the regulation of discharges from MS4s in southwestern Riverside County. The Second Amended Permit imposed mandates on all permittees within the San Diego Region additional to those set forth in the 2013 Permit and the First Amended Permit. The 2013 Permit, the First Amended Permit and the Second Amended Permit are referred to collectively as the “Regional Permit.”⁴

Prior to adoption of the First Amended Permit, the Regional Board regulated MS4 discharges by the South Orange County Copermittees through NPDES Permit No. CAS0108740, adopted on July 16, 1990 and reissued on August 8, 1996 (Order No. 96-03), February 13, 2002 (Order No. R9-2002-01), and December 19, 2009 (Order No. R9-2009-0002 or the “2009 Permit”).⁵ The South Orange County Copermittees, therefore, have a distinct MS4 permitting history different from that of the County of San Diego, whose pending Test Claim, 14-TC-03, also seeks reimbursement for mandates imposed by the Regional Permit. The County of Orange, the Orange County Flood Control District and the Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente and San Juan Capistrano (the “Joint Test Claimants”) seek reimbursement in this Joint Test Claim for costs mandated by the Regional Permit that are additional to those costs mandated by previous permits. Determination of the Joint Test Claimants’ increased costs requires a separate analysis from the increased costs claimed by San Diego County. The Joint Test Claimants therefore request

¹ 33 U.S.C. § 1251 *et seq.*

² Water Code § 13000 *et seq.*

³ The San Diego Region, as described herein, consists of all lands and waters subject to the jurisdiction of the San Diego Regional Water Quality Control Board, including all of San Diego County and the southern portions of Orange and Riverside Counties.

⁴ A copy of the Regional Permit and accompanying Fact Sheet is included in Section 7 – Documentation.

⁵ A copy of the 2009 Permit is also included in Section 7.

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that this Joint Test Claim receive an independent analysis from staff and a separate determination from the Commission.

B. OVERVIEW OF STATE MANDATES IN JOINT TEST CLAIM

The Regional Board asserts that the Regional Permit is based on both federal and California statutes and regulations, including the Clean Water Act, the Porter-Cologne Water Quality Control Act, applicable state and federal regulations, all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Resources Control Board (“State Board”), the Water Quality Control Plan for the San Diego Basin adopted by the Regional Board, the California Toxics Rule, and the California Toxics Rule Implementation Plan.⁶

The Regional Permit does not delineate which of its requirements are based on federal law and which are based on state law. It is undisputed, however, that federal NPDES permits, such as the Regional Permit, only govern discharges of pollutants to navigable waters of the United States from a point source.⁷ MS4s are only required to remove pollutants in their stormwater discharges to the maximum extent practicable (“MEP”).⁸ Any requirements in the Regional Permit that purport to regulate discharges of pollutants other than from MS4 point sources or that go beyond the MEP standard originate under state, and not federal, law.

The Regional Permit contains a number of state mandates for which the Joint Test Claimants are entitled to reimbursement under Article XIII B, section 6 of the California Constitution. This Joint Test Claim describes the activities that constitute unfunded mandates and sets forth the basis for reimbursement of the costs of such activities. These new programs and higher levels of service are described in detail below, and are summarized as follows:

- A. New requirements to strictly comply with numeric water quality standards mandated by the Regional Permit, including new requirements to develop and implement comprehensive watershed modification projects and management actions via the Water Quality Improvement Plans (“WQIP”) process in furtherance of meeting numeric standards imposed by the Regional Permit.
- B. New requirements incorporating numeric effluent limitations for Total Maximum Daily Loads (“TMDLs”).
- C. New requirements to develop goals, strategies, schedules, panels, assessment and adaptive management strategies, and watershed coordination in the development and implementation of watershed based WQIPs, requirements which also shift to the Joint Test Claimants the state’s responsibility under the CWA to develop TMDLs.
- D. New requirements to develop numeric goals, strategies and analyses in conjunction

⁶ Regional Permit Fact Sheet, F-24 to F-33.

⁷ 33 U.S.C. § 1362 (12).

⁸ 33 U.S.C. § 1342(p)(3)(B)(iii).

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with an “alternative compliance” provision.

- E. New requirements to manage critical sediment yield areas in accordance with hydromodification management standards.
- F. New requirements to update the BMP Design Manual in response to increased regulation.
- G. New requirements to develop and implement a residential inspection program.
- H. New requirements to retrofit existing development and rehabilitate streams within areas of existing development.
- I. New requirements to update the enforcement response plan in response to increased regulation.
- J. New requirements to update the Jurisdictional Urban Runoff Management Plan to incorporate expanded Regional Permit requirements.
- K. New requirements to appear before the Regional Board on request by the Board and to prepare and make presentations on topics identified by the Board.

The Joint Test Claimants first incurred costs to implement the Regional Permit during the fiscal year that ended on June 30, 2015.⁹ This Narrative Statement includes fiscal year costs for FY 2014-15, 2015-16 and estimates for 2016-17.

C. STATEMENT OF INTEREST OF JOINT TEST CLAIMANTS

The Joint Test Claimants are filing this test claim jointly and, pursuant to 2 Cal. Code Reg. § 1183.1(g), attest to the following:

- 1. The Joint Test Claimants allege state-mandated costs resulting from the same Executive Order, i.e., the Regional Permit;
- 2. The Joint Test Claimants agree on all issues of the Joint Test Claim; and
- 3. The Joint Test Claimants have designated one contact person to act as a resource for information regarding the test claim in Section 3 of their Test Claim Forms.

D. STATEMENT OF ACTUAL AND/OR ESTIMATED COSTS EXCEEDING \$1,000

⁹ See Declarations Submitted in Support of Joint Test Claim (“Declarations”), ¶ 6, included in Section 6 – Declarations.

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The Joint Test Claimants further state that, as set forth below and in the attached Section 6 Declarations in support, the actual and/or estimated costs from the state mandates set forth in this Joint Test Claim exceed \$1,000 for each of the Joint Test Claimants.

II. MS4 PERMITTING PROGRAM BACKGROUND

A. THE CLEAN WATER ACT

Congress first enacted the CWA in 1972 (three years after California adopted the Porter-Cologne Water Quality Control Act (“Porter-Cologne”)) and amended the Act in 1987 to regulate discharges from MS4s serving a population of more than 100,000 or from systems that the United States Environmental Protection Agency (“US EPA”) or the state determine contribute to a violation of a water quality standard or represent a significant contribution of pollutants to waters of the United States must obtain an NPDES permit issued under the CWA.¹⁰ The CWA establishes three basic requirements for all MS4 permits. Such permits:

- (i) may be issued on a system or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.¹¹

In 1990, US EPA promulgated regulations to implement the first phase of the MS4 permit program, setting forth which entities need to apply for permits and the information to include in the permit application. The MS4 permit application must propose management programs that the permitting authority will consider in adopting the permit, including the following:

[A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and

¹⁰ 33 U.S.C. § 1342(p)(2) requires NPDES permits for the following discharges:

- (C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.
- (D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.
- (E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

¹¹ 33 U.S.C. § 1342 (p)(3)(B).

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system, design and engineering methods, and such other provisions which are appropriate.¹²

The US EPA can suspend its permitting authority and authorize a state to administer its own permit program when that state presents “the program it proposes to establish and administer *under state law*” and demonstrates that “the *laws of such State . . .* provide adequate authority to carry out the described program.”¹³ NPDES permits issued under state laws must be consistent with the requirements of the suspended federal program.¹⁴ States may, however, issue permits with requirements exceeding the requirements of the federal program.¹⁵

B. CALIFORNIA LAW

In 1972, California became the first state authorized to implement its own NPDES permitting program.¹⁶ California sought authorization of its program “in order to avoid direct regulation by the federal government of persons already subject to regulation *under state law*[.]”¹⁷ Because California is an authorized state, its permitting system is a state program operating under state law. The State Board and the nine Regional Water Quality Control Boards (“Regional Water Boards”) comprise “the principal state agencies with primary responsibility for the coordination and control of water quality.”¹⁸ Such boards may issue NPDES permits that serve as “waste discharge requirements” under Porter-Cologne.¹⁹

In assessing California’s state NPDES permitting program, the California Supreme Court found that the CWA:

reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to “enforce any effluent limitation” that is not “*less stringent*” than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority. . .²⁰

The courts, the State Board and the Regional Water Boards have repeatedly acknowledged that many aspects of NPDES permits issued in California exceed the requirements of the CWA or are not otherwise required by federal law. In reviewing the 2001 MS4 Permit for San Diego County, for example, the State Board acknowledged that because NPDES permits are adopted as

¹² 40 C.F.R. §122.26 (d)(2)(iv).

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

¹⁴ 33 U.S.C. § 1342 (b).

¹⁵ 33 U.S.C. §1370.

¹⁶ *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1565-66.

¹⁷ Water Code § 13370(c) (emphasis added).

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

¹⁹ Water Code §13374.

²⁰ *Id.* at 627-28.

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waste discharge requirements in California, they can more broadly protect “waters of the state,” rather than being limited to “waters of the United States.”²¹

On June 16, 2015, the State Board adopted Order No. WQ 2015-0075, *In the Matter of Review of Order No. R4-2010-0176*, NPDES Permit No. CAS004001 (“Los Angeles Order”).²² The Los Angeles Order recognizes that the water boards can implement requirements “under the Porter-Cologne Act that are not compelled by federal law” and asserts that the State Board has “discretion under federal law to determine whether to require strict compliance” with water quality standards.²³ . The Los Angeles Order further recognizes that the State Board and Regional Water Boards have discretion to express Water Quality Based Effluent Limitations (“WQBELs”) for TMDLs incorporated into a permit “either as numeric effluent limitations or as BMPs [Best Management Practices].”²⁴

While the State Board cited language in 33 U.S.C. § 1342(p) that it can adopt “such other provisions as . . . the State determines appropriate for the control of pollutants” as authority for such discretion, Congress did not *mandate* that a state exceed MEP. California is authorized, but not required, to adopt such measures as requiring strict compliance with water quality standards, when it acts as a state agency, asserting state powers.

The Regional Water Boards have also acknowledged that many of the requirements of MS4 permits exceed the requirements of federal law, and are instead based on the broader authority of Porter-Cologne. For example, in a December 13, 2000 staff report regarding the Regional Board’s draft 2001 San Diego County permit, the Board conceded that 40% of the draft permit requirements “exceed the federal regulations” because they were either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.²⁵

In *City of Burbank v. State Water Resources Control Bd.*, the California Supreme Court acknowledged that NPDES permits may contain requirements that exceed the federal CWA. The Court held that to the extent such provisions are not required by federal law, the State Board and Regional Water Boards are required to consider state law restrictions on agency action.²⁶ Explicit in the Court’s decision — which held that Regional Water Board permitting decisions that go above and beyond the requirements of the CWA may only do so in accordance with Water Code Sections 13263 and 13241 — is the requirement that state-derived requirements ordered by these Boards are subject to state law.

Similarly, in *Building Industry Association of San Diego County v. State Water Resources Control Board*,²⁷ the Court of Appeal specifically considered whether permit terms in an MS4 Permit issued by the Regional Board for a San Diego County MS4 permit requiring permittee

²¹ In Re Building Industry Association of San Diego County and Western States Petroleum Association, State Board Order WQ 2001-15.

²² State Water Resources Control Board Order No. WQ 2015-0075 (“Los Angeles Order”).

²³ *Id.* at 11.

²⁴ *Id.* at 57.

²⁵ The Staff Report is included in Section 7 – Documentation.

²⁶ *City of Burbank*, 35 Cal.4th at 618.

²⁷ (2004) 124 Cal.App.4th 866.

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compliance with numeric effluent limits, were either “authorized” or “required” by the CWA. The court held that: “it is well settled that the Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law.”²⁸ The court found that the San Diego Regional Board had the “discretion” to impose certain permit terms that were not “required” by the CWA.²⁹

III. STATE MANDATE LAW

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

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

The purpose of Section 6 “is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”³⁰ The section “was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues.”³¹ In order to implement Section 6, the Legislature enacted a comprehensive administrative scheme to define and pay mandate claims.³² Under this scheme, the Legislature defined “Costs mandated by the state” to include:

any increased costs which a local agency . . . is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.³³

²⁸ *Id.* at 881.

²⁹ *Id.* at 886 (“That provision gives the EPA *discretion* to determine what pollutant controls are appropriate”), citing *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1167-67 (emphasis added).

³⁰ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

³¹ *County of Fresno*, 53 Cal.3d at 487; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 984-85.

³² Govt. Code § 17500 *et seq.*; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331, 333 (statute establishes “procedure by which to implement and enforce section 6”).

³³ Govt. Code § 17514.

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Government Code § 17556 identifies seven exceptions to the rule requiring reimbursement for state mandated costs:

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

When the state usurps a local agency's discretion as to how to implement a program, even where that program is required by federal law, and mandates a specific course of action, such a mandate is a state mandate. This principle was expressly recognized in *Long Beach Unified School Dist. v. State of California*,³⁴ where the court found that a state executive order requiring school districts to measure and address racial segregation in local schools constituted a reimbursable

³⁴ (1990) 225 Cal. App. 3d 155.

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mandate. Similarly, when the state freely chooses to shift a federal obligation onto a local agency, rather than perform that obligation itself, a state mandate is created.³⁵

The Commission's decisions on other municipal NPDES permits have recognized this principle. In its decision on Test Claim 07-TC-09 regarding the 2007 San Diego County MS4 permit, the Commission addressed this issue in the context of the United States Supreme Court's decision in *P.U.D. No. 1 v. Washington Department of Ecology*.³⁶ The Commission held:

Staff agrees with claimants about the applicability of the P.U.D. case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. *Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it.* This was not addressed in the P.U.D. decision.

Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation." As in *Long Beach Unified School Dist. v. State of California*, the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen to impose these requirements. Thus, staff finds that part D.1.g. of the permit is not a federal mandate.³⁷

The programs in the Regional Permit identified in this Joint Test Claim are not mandated by the CWA or its implementing regulations. These programs are unique to local government entities such as the Joint Test Claimants. The identified programs in the Regional Permit therefore represent a state mandate for which the Joint Test Claimants are entitled to a subvention of funds pursuant to Article XIII B, section 6 of the California Constitution.

IV. STATE MANDATED PROGRAMS AND ACTIVITIES IN REGIONAL PERMIT

The requirements set forth in this Narrative Statement are "programs" within the meaning of article XIII B, section 6 in that they require the Joint Test Claimants to provide certain services to the public. The requirements are unique because they arise from the operation of a municipal

³⁵ *Hayes v. Commn. on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593-94.

³⁶ (1994) 511 U.S. 700.

³⁷ Statement of Decision, Test Claim 07-TC-09, *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, 45 (internal citations omitted).

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stormwater NPDES permit, which is issued only to municipalities and which require activities that are not required of private non-governmental dischargers. These requirements include the development and amendment of government planning documents, the inspection of property, the development and construction of public works projects and other purely governmental functions.³⁸

A test claim must be filed with the Commission “not later than 12 months following the effective date of a statute or executive order, or within 12 months of first incurring increased costs as a result of a statute or executive order, whichever is later. For purposes of claiming based on the date of first incurring costs, ‘within 12 months’ means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.”³⁹

The Joint Test Claimants first incurred certain costs to implement the Regional Permit (then, the First Amended Permit) during fiscal year 2014-2015, which ended on June 30, 2015.⁴⁰ As such, this Joint Test Claim is timely filed.⁴¹ The cost numbers set forth below and in the attached declarations are subject to change as further information is obtained by the Joint Test Claimants as to their costs.

The following programs and activities and higher levels of service are at issue in this Joint Test Claim.⁴²

A. NUMERIC WATER QUALITY STANDARDS, PROVISIONS A.2 AND A.4

1. Mandated Requirements in Regional Permit

The Regional Permit requires the Joint Test Claimants to attain strict numeric water quality standards and to develop plans and strategies to attain such standards, requirements which the courts and the State Board itself has recognized exceed federal requirements.⁴³

Provision A.2 of the Regional Permit, in a section entitled “Receiving Water Limitations” (“RWL”), requires the Joint Test Claimants to strictly comply with the requirement that discharges from their MS4 systems not cause or contribute to a violation of water quality standards in any receiving waters.

Provision A.2 states:

2. Receiving Water Limitations

³⁸ Orders issued by Regional Water Boards pursuant to Division 7 of the California Water Code (commencing at section 13000) are “executive orders.” *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 920.

³⁹ 2 Cal. Code Regs. § 1183.1(b).

⁴⁰ Declarations, ¶ 6.

⁴¹ 2 Cal. Code Regs. § 1183.1 (b).

⁴² This Joint Test Claim specifically incorporates by reference all prior test claims filed by South Orange County test claimants concerning requirements in prior MS4 permits.

⁴³ A further receiving water limitation in the Regional Permit, which requires the Joint Test Claimants to achieve numeric WQBELs in a TMDL, Provision A.3.b, is discussed in Section IV.B.

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

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

Provision A.4 of the Regional Permit requires the updating and modification of a water quality improvement plan (“WQIP”) should exceedances of water quality standards persist in receiving waters. The WQIP (the preparation of which represents an additional state mandate, as discussed in section IV.C below) must address strategies to achieve compliance with receiving water limitations and effluent limitations, including “[best management practices], “retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs” and other new programs and projects that will reduce or eliminate pollutants to prevent further exceedances of water quality standards.

Provision A.4.a requires:

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

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- (c) Updates to the schedule for implementation of the existing and additional water quality improvement strategies, and
 - (d) Updates to the monitoring and assessment program to track progress toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a of this Order;
- (3) The San Diego Water Board may require the incorporation of additional modifications to the Water Quality Improvement Plan required under Provision B. The applicable Copermittees must submit any modifications to the update to the Water Quality Improvement Plan within 90 days of notification that additional modifications are required by the San Diego Water Board, or as otherwise directed;
- (4) Within 90 days of the San Diego Water Board determination that the modifications to the Water Quality Improvement Plan required under Provision A.4.a.(3) meet the requirements of this Order, the applicable Copermittees must revise the jurisdictional runoff management program documents to incorporate the modified water quality improvement strategies that have been and will be implemented, the implementation schedule, and any additional monitoring required; and
- (5) Each Copermittee must implement the updated Water Quality Improvement Plan.

2. These Permit Requirements Are State Mandates

Compliance with strict numeric water quality standards is a state mandate. Nothing in the CWA, its regulations, or case law requires MS4 permittees to strictly comply with water quality standards. The CWA specifically provides that pollutants in municipal stormwater discharges are to be controlled to the “maximum extent practicable” rather than through a strict numeric limit. There is good reason for this requirement. Unlike industrial dischargers, municipalities do not control the volume, frequency, duration or composition of stormwater pollutants or the storms that convey them. Congress recognized these facts when it adopted the MEP standard for MS4 permits, rather than the numeric standard applicable to industrial dischargers.

US EPA has expressed a preference for regulating MS4 stormwater discharges by requiring the implementation of BMPs rather than compliance with numeric standards, a policy preference recognized by the courts. The United States Court of Appeals for the Ninth Circuit cited the EPA’s BMP-based approach in *Defenders of Wildlife*, stating:

[T]he 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

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compliance with state water-quality standards. *The EPA has adopted an interim approach, which “uses best management practices (BMPs) in first-round storm water permits . . . to provide for the attainment of Water Quality Standards.”* The EPA applied that approach to the permits at issue here. Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion.⁴⁴

Courts in other states have also concluded that federal law does not require the imposition of numeric effluent limits in MS4 permits tied to state-adopted water quality standards.⁴⁵

The State Board itself concluded that federal law does not mandate strict compliance with numeric water quality standards in MS4 permits, finding that such compliance is discretionary, not mandatory:

the State Water Board has *discretion* under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, [and] the State Water Board may also utilize the *flexibility* under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.⁴⁶

Because federal law does not require strict compliance with water quality standards or numeric effluent limits such as those imposed on the Joint Test Claimants in the Regional Permit, such requirements are imposed under color of state law, not federal law. The mandate is state, not federal.

3. These Provisions Are New Programs or Require Higher Levels of Service

While previous permits covering the Joint Test Claimants included the same or similar language regarding RWLs, the Regional Board has imposed a new program or higher level of service in the Regional Permit. Starting in 1999, the State Board's policy had been to prohibit discharges from MS4s that cause or contribute to exceedances of water quality standards, but to allow dischargers to remain in compliance with that requirement by implementing pollution control measures through an “iterative process.”⁴⁷ In 2001, following *Defenders of Wildlife*, the

⁴⁴ *Defenders of Wildlife*, 191 F.3d at 1166-67 (emphasis added).

⁴⁵ See e.g., *Natural Resources Defense Council, Inc. v. New York State Dept. of 25 Environmental Conservation* (N.Y.Ct. App. 2015) 25 N.Y.3d 373, 382; *Maryland Dept. of the Environment v. Anacostia Riverkeeper* (Md. Ct. Spec. App. 2015) 222 Md.App. 153, 171-76, cert. granted sub nom. *Maryland Dept. of Environment v. Anacostia Riverkeeper* (2015) 443 Md. 734; *Tualatin Riverkeepers v. Oregon Dept. of Environmental Quality* (Ore. App. 2010) 230 P.3d 559, 564 n. 10.

⁴⁶ Los Angeles Order, *supra*, at 11 (emphasis added).

⁴⁷ State Board Order WQ 2001-15.

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State Board clarified its standard RWL provision in previous permits in light of the decision. The State Board held:

While we will continue to address Water Quality Standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate. *We will generally not require “strict compliance” with Water Quality Standards through numeric effluent limits and we will continue to follow an iterative approach, which seeks compliance over time.* The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced through large and medium municipal storm sewer systems.⁴⁸

In 2013, the Ninth Circuit held that each provision in a stormwater permit could be separately and strictly enforceable.⁴⁹ When the Regional Board adopted the Regional Permit, it explicitly imposed this new interpretation on the Permittees, and now was going to require strict compliance.⁵⁰ Thus, discharges under the Regional Permit are now no longer addressed by the implementation of BMPs, but instead by the ultimate achievement of these numeric effluent limits. These new, stricter requirements are a new program or higher level of service required of the Joint Test Claimants.

Moreover, while the prior MS4 permit issued to the Joint Test Claimants required participation in the so-called “iterative process” if exceedances of water quality standards persisted, the Regional Permit’s requirements relating to the updating and modification of WQIPs contained in Provision A.4 are new and far more expansive than in the prior permit and also represent a new requirement and higher level of service for the Permittees.

4. Mandated Activities in Regional Permit

The Regional Permit requires the Joint Test Claimants to undertake activities sufficient to strictly comply with the Receiving Water Limitations Provisions in Provision A.2 of the Regional Permit and to update and modify WQIPs to comply with Provision A.4 in the event of exceedances of RWLs, utilizing measures required in Provision B of the Permit, as discussed in Section IV.C below.

5. Actual and Estimated Reimbursable Costs

Compliance with Provisions A.2 and A.4 of the Regional Permit will require the Joint Test Claimants to significantly increase their existing resource commitments to develop, administer, and maintain a multitude of costly program elements, and to expend funds to update and modify

⁴⁸ *Id.* at 7-8 (emphasis added).

⁴⁹ *NRDC v. County of Los Angeles, supra.*

⁵⁰ See Regional Permit Fact Sheet at F-41, which cites the *NRDC* case as authority for Provision A.2. The Fact Sheet also notes that the CWA provides “discretion” to the state permitting authority “to determine what permit conditions are necessary to control pollutants. *Id.* at F-40.

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WQIPs. Meeting these requirements would require a significant expansion of all existing stormwater management program activities, as well as the construction and operation of treatment control BMPs throughout the Joint Test Claimants' jurisdictions. Required activities include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying WQIP programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs that would not be imposed on the Joint Test Claimants absent the strict imposition of numeric effluent limits for municipal stormwater in the Permit.

The ultimate costs of carrying out new and expanded programs at a level sufficient to meet these standards are not currently known, but a consulting firm retained by the Joint Test Claimants has preliminarily estimated that the cost to achieve numeric Receiving Water Limitations under the Regional Permit could range between \$1.64 and \$2.01 billion.

The Joint Test Claimants have, however, commenced funding of various programs intended to address this requirement, including through development of a TMDL for Indicator Bacteria in Twenty Beaches and Creeks in the San Diego region (further discussed in Section IV.B), a Water Quality Improvement Plan ("WQIP") (further discussed in Section IV.C) and Alternative Compliance Requirements (further discussed in Section IV.D). These three programs form the basis for the estimates in this Narrative Statement and in the accompanying supporting declarations for the cost of complying with receiving water limitations in Provisions A.2 and A.4. With respect to such programs, the Joint Test Claimants have spent \$278,260 plus, for one Test Claimant, a yet to be identified share of a \$2,306,214 project in FY 2014-15 and \$627,515 plus, for one Test Claimant, a yet to be identified share of a \$165,494 project in FY 2015-16 and estimate that they will spend \$943,589 plus, for one Test Claimant, a yet to be identified share of a \$6,445,232 project in FY 2016-17.⁵¹

B. PROVISION A.3.b AND ATTACHMENT E

1. Mandated Requirements in Regional Permit

Provision A.3.b and relevant portions of Attachment E of the Regional Permit impose several new State-mandated programs on the Joint Test Claimants. Provision A.3.b, contained in the RWL section, requires the Permittees to "comply with applicable WQBELs established for the TMDLs in Attachment E to [the] Order, pursuant to the applicable TMDL compliance schedules." Attachment E, Section 6 requires, in relevant part, as follows:

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

The Responsible Copermittees for MS4 discharges to the water bodies listed in Table 6.0 must be in compliance with the final

⁵¹ See Section 6 Declarations, ¶ 7.a.

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TMDL compliance requirements according to the following compliance dates:

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

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance dates under Specific Provision 6.b.(1): [Tables 6.2a, 6.2b].⁵²

The Water Quality Improvement Plans for the applicable Watershed Management Areas in Table 6.0 must incorporate the Comprehensive Load Reduction Plans (CLRPs) required to be developed pursuant to Resolution No. R9-2010-0001.⁵³

The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision 6.b.(2)(a) and/or the effluent limitations under Specific Provision 6.b.(2)(b) for the segments or areas of the water bodies listed in Table 6.0.⁵⁴

The Regional Permit requires the Joint Test Claimants to meet both interim and final numeric pollutant limits (referenced as “Waste Load Allocations” or “WLAs” within the Permit) with respect to the Twenty Beaches and Creeks TMDL and to comply with monitoring and reporting requirements. None of these requirements (hereafter, the “TMDL-Related Mandates”) is required by federal law. While Attachment E provides that the Joint Test Claimants may rely upon BMPs in attempting to comply with these numeric effluent limits, implementation of such BMPs does *not* constitute compliance with the numeric limits. Thus, the Regional Permit requires compliance with interim and final numeric limits, irrespective of what BMPs may or may not be implemented and regardless of how effective the BMPs may be.

2. These Permit Requirements Are State Mandates

Under the CWA, a TMDL is to be established once a water body has been determined not to be meeting a water quality standard, *i.e.*, once the water body has been listed as being “impaired”

⁵² Regional Permit, Attachment E, § 6.b.(2)(a).

⁵³ Attachment E, § 6.b.(2)(c)(i).

⁵⁴ Attachment E, § 6.b.(2)(c)(ii).

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for the particular pollutant or pollutants in issue.⁵⁵ A TMDL is to be established “at a level necessary to implement the applicable water quality standards.”⁵⁶ The federal regulations define a TMDL as follows:

Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.⁵⁷

The regulations then define a “WLA” as a “portion of a receiving water’s loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.”⁵⁸

The federal stormwater regulations do not require municipal stormwater permits to contain TMDL provisions. The relationship between TMDLs and NPDES permits is set forth in 40 C.F.R. § 122.44(d)(1)(vii)(B). The regulations provide that NPDES permits are to include conditions consistent with the assumptions and requirements of TMDL waste load allocations “when applicable.”⁵⁹ Because MS4 permits are not required to contain provisions to comply with water quality standards, TMDL WLAs intended to achieve such standards arguably are not “applicable.”

Moreover, if MS4 permits are going to include TMDL implementation provisions, the federal regulations do not require that a WLA be incorporated into a stormwater permit as a strict numeric limit, but only that permit terms be “consistent with the assumptions and requirements of any available wasteload allocations for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.”⁶⁰ How a WLA is to be incorporated into an NPDES permit depends upon whether the discharger is industrial or municipal. For industrial waste dischargers, Congress chose to require strict compliance with water quality standards pursuant to 33 U.S.C. § 1311(b)(1)(C), *i.e.* WLAs are to be strictly enforced through numeric limits in the industrial NPDES Permit. However, as noted above, for municipalities, Congress only required that such

⁵⁵ 33 U.S.C. § 1313(d)(1)(C) and (D).

⁵⁶ 33 U.S.C. § 1313 (d)(1)(C); *Arcadia v. State Board* (2006) 135 Cal.App.4th 1392, 1404 (“A TMDL must be ‘established’ at a level necessary to implement the applicable water quality standards. . . . Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the waste load allocations in the TMDL.”).

⁵⁷ 40 C.F.R. § 130.2 (i).

⁵⁸ 40 C.F.R. § 130.2 (h).

⁵⁹ 40 C.F.R. § 122.44.

⁶⁰ 40 C.F.R. § 122.44 (d)(1)(vii)(B) (emphasis added).

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dischargers reduce “the discharge of pollutants to the maximum extent practicable,” and expressly “did not require municipal storm-sewer dischargers to comply strictly with 33 U.S.C. § 1311(b)(a)(C)”⁶¹ and US EPA allows municipal permittees to implement BMPs (rather than meet water quality standards. Thus, when it came to municipal stormwater dischargers, the Ninth Circuit found that “Congress did not mandate a minimum standards approach.”⁶²

It is also settled law that unless the CWA or the federal regulations expressly require a particular permit term, the Regional Board has wide discretion in imposing permit requirements.⁶³ In *Rancho Cucamonga*, the Court of Appeal held that for municipal NPDES permits, “The Act authorizes States to issue permits with conditions necessary to carry out its provisions. [citation] *The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants.*”⁶⁴

A Regional Water Board is exercising its discretion when it incorporates WLAs from a TMDL into a permit as numeric effluent limits. As one California court has held, there is no such mandate in federal law. In *Divers’ Environmental*, plaintiff claimed that an NPDES permit issued by the Regional Board to the United States Navy was contrary to law because it did not incorporate TMDL WLAs into the permit as numeric effluent limits. After discussing the relevant requirements of the CWA, as well as governing case authority, the Court of Appeal found that, in regulating stormwater permits, EPA “has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations.”⁶⁵ The Court went on to find that “it is now clear that in implementing numeric water quality standards, such as those set forth in [the California Toxics Rule], permitting agencies are not required to do so solely by means of a corresponding numeric WQBEL’s”⁶⁶ Thus, *Divers’ Environmental* confirms that the TMDL-derived numeric effluent limits included in the Regional Permit are included at the discretion of the Regional Board, and are not mandated by the federal CWA.

In the Los Angeles Order, the State Board further confirmed that the decision to implement WLAs through numeric effluent limits is discretionary, not mandatory:

⁶¹ *Defenders of Wildlife*, 191 F.3d at 1165 (emphasis added). In *Defenders*, the Ninth Circuit recognized the different approach taken by Congress for stormwater, finding that “industrial discharges must comply strictly with state water-quality standards,” while “Congress chose not to include a similar provision for municipal storm-sewer discharges.” The Court found that 33 U.S.C. § 1342(p)(3)(B) “is not merely silent regarding whether municipal discharges must comply with 33 U.S.C. § 1311,” but instead “replaces the requirements of § 1311 with the requirement that municipal storm-sewer dischargers ‘reduce the discharge of pollutants to the maximum extent practicable.’” *Defenders* thus concluded that “the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).”

⁶² *Natural Resources Defense Council v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, 1308.

⁶³ See, e.g., *Rancho Cucamonga v. Regional Water Quality Control Board, Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389.

⁶⁴ *Id.* at 1389 (emphasis added).

⁶⁵ *Id.* at 256.

⁶⁶ *Id.* at 262 (emphasis added).

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The permitting authority [has] discretion as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs[.]⁶⁷

In sum, while “TMDLs serve as a link in an implementation chain” linking the implementation of water quality standards to the NPDES Permits,⁶⁸ strict compliance with WLAs in the TMDL is *not* required when incorporating a TMDL into a stormwater NPDES Permit. Nonetheless, as this Commission has previously recognized, “the federal Clean Water Act authorizes states to impose more stringent measures than required by federal law.”⁶⁹ Thus NPDES “permits may include state-imposed, in addition[] to federally required measures. Those state measures . . . may constitute a state mandate if they ‘exceed the mandate in . . . federal law.’”⁷⁰

Here, the Regional Board has clearly exercised its discretion “to impose more stringent measures than required by federal law.” Specifically, the provisions within the Regional Permit that require all interim and final numeric targets to be “achieved” and “met,” as well as the monitoring and reporting obligations associated with such numeric targets, go beyond federal requirements.

3. These Are New Requirements or Require Higher Levels of Service

Previous permits for the Joint Test Claimants did not contain the Twenty Beaches and Creeks TMDL-related mandates at issue in this Joint Test Claim, as that TMDL was not incorporated into such permits. As such, the requirements involving the TMDLs within the Regional Permit are new requirements and ones requiring a higher level of service.

4. Mandated Activities in Regional Permit

Provision A.3.b and Attachment E, Section 6 in the Regional Permit impose mandates on the Joint Test Claimants to meet the numeric effluent limits specified in Attachment E, along with related monitoring and reporting obligations. The permit obligates the Joint Test Claimants to strictly meet interim and final numeric effluent limits, and to take extensive steps to achieve the TMDL WLAs without reference to achievable BMPs, including through the performance of studies and investigations, planning, development and implementation of new program activities, as well as steps required to monitor, assess and update as required, those activities.

5. Actual and Estimated Reimbursable Costs

To comply with the Regional Permit’s TMDL requirements, the Joint Test Claimants must expend resources each year to develop, administer, implement and maintain costly programs. This includes costs to conduct studies and investigations, plan and implement new program activities (research, meetings, stakeholder coordination, etc.), and to monitor, assess, report on, and modify these programs as necessary to achieve and maintain compliance with the TMDLs. These costs

⁶⁷ Los Angeles Order, *supra*, at 57.

⁶⁸ *Arcadia v. EPA* (N.D. Cal. 2003) 265 F.Supp.2d 1142, 1144-45.

⁶⁹ Statement of Decision, Test Claim 07-TC-09, at 41.

⁷⁰ *Id.* (finding individual permit terms must be analyzed “to determine whether the state requirements exceed the federal requirements imposed on local agencies”).

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may include staffing, materials and supplies, and contract work. The ultimate costs of complying with Provision A.3.b and the relevant provisions of Attachment E are not currently known. The Joint Test Claimants have spent \$278,422 plus a yet to be identified share of a \$2,306,214 project in FY 2014-15 and \$592,178 in FY 2015-16 and estimate that they will spend \$869,318 in FY 2016-17 with respect to these requirements.⁷¹

C. WATER QUALITY IMPROVEMENT PLAN REQUIREMENTS, PROVISIONS B AND F

1. Mandated Programs in Regional Permit

Provisions B and F of the Regional Permit require the Joint Test Claimants to develop a WQIP for each of the Watershed Management Areas identified in Table B-1 of the Permit.⁷² The Permittees are required to develop, implement, update and provide annual reports for WQIPs for each Watershed Management Area. Provision B sets forth the substantive requirements for the development and content of the WQIPs for each Area, while Provision F sets forth requirements for public participation, submittal, review and modification of the WQIPs.

Relevant portions of Provisions B.2 to B.6⁷³ require the Permittees to:

- identify the water quality priorities within each Watershed Management Area that will be addressed by the Water Quality Improvement Plan.⁷⁴
- consider [nine factors] at a minimum, to identify water quality priorities based on impacts of MS4 discharges on receiving water beneficial uses.⁷⁵
- consider [six factors] at a minimum, to identify the potential impacts to receiving waters that may be caused or contributed to by discharges from the Copermittees' MS4s.⁷⁶
- use the information gathered for Provisions B.2.a and B.2.b to develop a list of priority water quality conditions as pollutants, stressors and/or receiving water conditions that are the highest threat to receiving water quality or that most adversely affect the quality of receiving waters. The list must include [five elements] for each priority water quality condition.⁷⁷
- identify the highest priority water quality conditions to be addressed by

⁷¹ See Section 6 Declarations, ¶ 7.b.

⁷² Regional Permit, Provision B.1.

⁷³ Additionally, Provision B.3.c. requires additional programs, as discussed in Section IV.D below.

⁷⁴ Regional Permit Provision B.2.a.

⁷⁵ Regional Permit Provision B.2.a.

⁷⁶ Regional Permit Provision B.2.b.

⁷⁷ Regional Permit Provision B.2.c.(1).

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the Water Quality Improvement Plan, and provide a rationale for selecting a subset of the water quality conditions identified pursuant to Provision B.2.c.(1) as the highest priorities.⁷⁸

- identify and prioritize known and suspected sources of storm water and non-storm water pollutants and/or other stressors associated with MS4 discharges that cause or contribute to the highest priority water quality conditions identified under Provision B.2.c. The identification of known and suspected sources of pollutants and/or stressors that cause or contribute to the highest priority water quality conditions as identified for Provision B.2.c must consider [five factors].⁷⁹
- evaluate the findings identified under Provisions B.2.a-d, and identify potential strategies that can result in improvements to water quality in MS4 discharges and/or receiving waters within the Watershed Management Area. Potential water quality improvement strategies that may be implemented within the Watershed Management Area must include [three factors].⁸⁰
- identify and develop specific water quality improvement goals and strategies to address the highest priority water quality conditions identified within a Watershed Management Area. The water quality improvement goals and strategies must address the highest priority water quality conditions by effectively prohibiting non-storm water discharges to the MS4, reducing pollutants in storm water discharges from the MS4 to the MEP, and protecting the water quality standards of receiving waters.⁸¹
- develop and incorporate numeric goals into the Water Quality Improvement Plan. Numeric goals must be used to support Water Quality Improvement Plan implementation and measure reasonable progress towards addressing the highest priority water quality conditions identified under Provision B.2.c. The Copermittees must establish and incorporate [final and interim] numeric goals in the Water Quality Improvement Plan.⁸²
- develop and incorporate schedules for achieving the numeric goals into the Water Quality Improvement Plan. The schedules must demonstrate reasonable progress toward achieving the final numeric goals required for Provision B.3.a.(1). The Copermittees must incorporate the

⁷⁸ Regional Permit Provision B.2.c.(2).

⁷⁹ Regional Permit Provision B.2.d.(1)-(5).

⁸⁰ Regional Permit Provision B.2.e.

⁸¹ Regional Permit Provision B.3.

⁸² Regional Permit Provision B.3.a.(1).

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schedules for achieving the numeric goals into the Water Quality Improvement Plan based on final and interim dates for achieving final and interim numeric goals based on eight considerations specified in Provision B.3.a.(2).(a).(i)-(iv) and Provision B.3.a.(2).(b).(i)-(iv).⁸³

- identify the strategies that will be implemented in each Watershed Management Area as follows:
 - (1) Jurisdictional Strategies ...⁸⁴
 - (2) Watershed Management Area Strategies ...⁸⁵
 - (3) Schedules for Implementing Strategies.⁸⁶
- develop and incorporate an integrated monitoring and assessment program into the Water Quality Improvement Plan.⁸⁷
- implement the iterative approach pursuant to Provision A.4 to adapt the Water Quality Improvement Plan, monitoring and assessment program, and jurisdictional runoff management programs to become more effective toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a, and must include the following
 - re-evaluation of priority water quality conditions . . .
 - adaptation of goals, strategies and schedules . . .
 - adaptation of monitoring and assessment.⁸⁸

Provision F.1 requires:

1. Water Quality Improvement Plans

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

a. WATER QUALITY IMPROVEMENT PLAN DEVELOPMENT

⁸³ Regional Permit Provision B.3.a.(2).

⁸⁴ Regional Permit Provision B.3.b.(1).

⁸⁵ Regional Permit Provision B.3.b.(2).

⁸⁶ Regional Permit Provision B.3.b.

⁸⁷ Regional Permit Provision B.4.

⁸⁸ Regional Permit Provision B.5.

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

(1) Public Participation Process

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

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

(b) The Copermittees must form a Water Quality Improvement Consultation Panel to provide recommendations during the development of the Water Quality Improvement Plan. The Water Quality Improvement Consultation Panel must consist of at least the following members:

(i) A representative of the San Diego Water Board;

(ii) A representative of the environmental community familiar with the water quality conditions of concern of the receiving waters in the Watershed Management Area, preferably from an environmental interest group associated with a water body within the Watershed Management Area; and

(iii) A representative of the development community familiar with the opportunities and constraints for implementing structural BMPs, retrofitting projects, and stream, channel or habitat rehabilitation projects in the Watershed Management Area, preferably with relevant engineering, hydrology, and/or geomorphology experience in the Watershed Management Area.

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

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(2) Priority Water Quality Conditions

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

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

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

(d) The Copermittees must include all the potential water quality improvement strategies identified by the public and the Water Quality Improvement Consultation Panel with the submittal of the priority water quality conditions to the San Diego Water Board.

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

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

(3) Water Quality Improvement Goals, Strategies and Schedules

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

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

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

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

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

(c) The Copermittees must submit the Water Quality Improvement Plan requirements of Provision B.3 to the San Diego Water Board as early as 9 months and no later than 18 months after the commencement of coverage under this Order. Upon receipt, the San Diego Water Board will issue a public notice and release the proposed water quality improvement goals, strategies and schedules for public review and comment for a minimum of 30 days.

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

b. WATER QUALITY IMPROVEMENT PLAN SUBMITTAL AND IMPLEMENTATION

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

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

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

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

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

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

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

Provision F.2.c. requires:

c. WATER QUALITY IMPROVEMENT PLAN UPDATES

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

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

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

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

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

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

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

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Provision F.3.b.(3) requires:

(3) Water Quality Improvement Plan Annual Reports

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

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

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

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

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

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

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

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

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

(v) Previous modifications or updates incorporated into the Water Quality Improvement Plan and/or each Copermittee's

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jurisdictional runoff management program document and implemented by the Copermittees in the Watershed Management Area; and

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

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

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

2. These Permit Requirements Are State Mandates

Nothing in the CWA, its regulations, or case law requires local agencies to develop, implement, update, and provide annual reports on a WQIP for each of the Watershed Management Areas. As discussed in Section IV.A and B, the requirement to attain water quality standards, which is the end goal of the WQIP and the WQIP process set forth in Provisions B and F, is a discretionary decision by the Regional Water Board, and not required by federal law.

3. These Are New Requirements or Require Higher Levels of Service

This Commission has previously reviewed requirements in a 2007 MS4 permit issued by the Regional Water Board that were similar to, but much less extensive than, the cited requirements of Provisions B and F and found them to constitute an unfunded state mandate. The Commission found that requirements in Provision E.2.f and g of Regional Board Order R9-2007-0001 (the "2007 San Diego County Permit"), which are similar but less proscriptive than the requirements of B2-B6, F.1, F.2.c. and F.3.b.(c) of the Regional Permit, were unfunded state mandates. The

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Commission found that the “federal regulations authorize but do not require the specificity regarding whether collaboration occurs on a jurisdictional, watershed, or other basis.”⁸⁹

Previous permits covering the Joint Test Claimants did not require them to develop, implement, update, and provide annual reports on a WQIP for each of the Watershed Management Areas. Provisions G.2 through G.7 of the 2009 Permit required the Joint Test Claimants to collaborate in the development and implementation of a Watershed Water Quality Work Plan (“Watershed Work Plan”) for each watershed. Each Watershed Work Plan was required to characterize receiving water quality in the watershed, identify highest priority water quality problems, identify the sources of the highest water quality problems, develop a watershed BMP implementation strategy, include a strategy to model and monitor improvements in receiving water quality resulting from implementation of the BMPs, and include a schedule for development and implementation of the strategy outlined in the Watershed Work Plan. These requirements were the subject of a test claim on the 2009 Permit, which is incorporated herein by this reference.⁹⁰ These requirements, however, were far less impactful than the cited requirements of Provisions B and F of the Regional Permit, which impose both new programs and higher levels of service on the Permittees.

In addition to representing new programs and higher levels of service, the WQIP process in the cited portions of Provisions B and F also shifts responsibility for the development of TMDLs from the state, where it is laid under the CWA and its regulations, to the Joint Test Claimants. The test for determining whether the “new program or higher level of service” is a state mandate is whether the state has a “true choice” in the matter of implementation, *i.e.*, whether the state freely chose to impose that program on local municipalities as opposed to performing the obligation itself.⁹¹

As discussed above, TMDLs are designed to improve water quality in “impaired” waterbodies. The federal CWA regulations require states to assess a waterbody with respect to pollutants which impair its ability to meet assigned beneficial uses, including the amount of the total load of such pollutants which the waterbody can receive and still meet water quality standards and to develop allocations, including WLAs.⁹² Following this effort, state law requires the development of an implementation plan.⁹³

The requirements of Provision B.1 through B.4 shift that process of assessing waterbodies, determining total loads and developing implementation plans to the Joint Test Claimants. These provisions require the Joint Test Claimants to identify prior water quality conditions in the watersheds, including assessment of receiving water conditions, impacts from MS4 discharges and the identification of potential water quality improvement strategies, requiring the Permittees to develop goals and schedules, including final numeric goals as well as interim dates for interim goals, and requiring the development of jurisdictional strategies and Watershed Management Area

⁸⁹ Statement of Decision, Test Claim 07-TC-09, at 74.

⁹⁰ Test Claim 10-TC-11, § IV.G.

⁹¹ *Hayes*, 11 Cal.App.4th at 1593-94.

⁹² *See generally* 40 C.F.R. §130.7(b).

⁹³ Water Code §13241.

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strategies. These provisions, as well as Provision B.3.c (discussed in Section IV.D) shift the responsibility of the Regional Water Board to develop TMDLs for impaired waterbodies to the Joint Test Claimants.

This shift was explicitly recognized by the Regional Board in its adoption of the Regional Permit. The Board noted that implementation of the WQIPs in the cases of watersheds with waterbodies already affected by pollutants may allow the Board to re-evaluate the status of such waterbodies and, potentially, move the waterbodies from the 303(d) list (which require TMDL implementation) to a less stringent categorization.⁹⁴ Although, as the Regional Board has asserted, WQIP implementation may have advantages over TMDLs from a policy standpoint, that is not the issue before the Commission. The issue is whether the Board has shifted its federally imposed TMDL responsibility to the Permittees, thus creating a state mandate.⁹⁵

4. Mandated Activities in Regional Permit

The Regional Permit requires the Joint Test Claimants to perform the following activities that are not required under either federal law or the 2009 Permit:

(a) Develop and Implement WQIP

- identify the water quality priorities within each Watershed Management Area that will be addressed by the WQIP.⁹⁶
- consider [nine] factors at a minimum, to identify water quality priorities based on impacts of MS4 discharges on receiving water beneficial uses⁹⁷
- consider [six factors] at a minimum, to identify the potential impacts to receiving waters that may be caused or contributed to by discharges from the Permittees' MS4s.⁹⁸ use the information gathered for Provisions B.2.a and B.2.b to develop a list of priority water quality conditions as pollutants, stressors and/or receiving water conditions that are the highest threat to receiving water quality or that most adversely affect the quality of receiving waters. The list must include [five elements] for each priority water quality condition.⁹⁹
- identify the highest priority water quality conditions to be addressed by the WQIP, and provide a rationale for selecting a subset of the water quality conditions identified pursuant to Provision B.2.c.(1) as the

⁹⁴ See Regional Permit Fact Sheet at F-63 to F-65

⁹⁵ *Hayes, supra*, 11 Cal. App.4th at 1593-94.

⁹⁶ Regional Permit Provision B.2.a.

⁹⁷ Regional Permit Provision B.2.a.

⁹⁸ Regional Permit Provision B.2.b.

⁹⁹ Regional Permit Provision B.2.c.(1).

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highest priorities.¹⁰⁰

- identify and prioritize known and suspected sources of storm water and non-storm water pollutants and/or other stressors associated with MS4 discharges that cause or contribute to the highest priority water quality conditions identified under Provision B.2.c. The identification of known and suspected sources of pollutants and/or stressors that cause or contribute to the highest priority water quality conditions as identified for Provision B.2.c must consider [five factors].¹⁰¹
- evaluate the findings identified under Provisions B.2.a-d, and identify potential strategies that can result in improvements to water quality in MS4 discharges and/or receiving waters within the Watershed Management Area. Potential water quality improvement strategies that may be implemented within the Watershed Management Area must include [three factors].¹⁰²
- identify and develop specific water quality improvement goals and strategies to address the highest priority water quality conditions identified within a Watershed Management Area. The water quality improvement goals and strategies must address the highest priority water quality conditions by effectively prohibiting non-storm water discharges to the MS4, reducing pollutants in storm water discharges from the MS4 to the MEP, and protecting the water quality standards of receiving waters.¹⁰³
- develop and incorporate numeric goals into the WQIP. Numeric goals must be used to support WQIP implementation and measure reasonable progress towards addressing the highest priority water quality conditions identified under Provision B.2.c. The Permittees must establish and incorporate [final and interim] numeric goals in the WQIP.¹⁰⁴
- develop and incorporate schedules for achieving the numeric goals into the WQIP. The schedules must demonstrate reasonable progress toward achieving the final numeric goals required for Provision B.3.a.(1). The Permittees must incorporate the schedules for achieving the numeric goals into the WQIP based on final and interim dates for achieving final and interim numeric goals based on eight considerations specified in

¹⁰⁰ Regional Permit Provision B.2.c.(2).

¹⁰¹ Regional Permit Provision B.2.d.(1)-(5).

¹⁰² Regional Permit Provision B.2.e.

¹⁰³ Regional Permit Provision B.3.

¹⁰⁴ Regional Permit Provision B.3.a.(1).

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Provision B.3.a.(2).(a).(i)-(iv) and Provision B.3.a.(2).(b).(i)-(iv).¹⁰⁵

- identify the strategies that will be implemented in each Watershed Management Area as follows:
 - (1) Jurisdictional Strategies ...¹⁰⁶
 - (2) Watershed Management Area Strategies ...¹⁰⁷
 - (3) Schedules for Implementing Strategies.¹⁰⁸
- develop and incorporate an integrated monitoring and assessment program into the WQIP.¹⁰⁹
- implement the iterative approach pursuant to Provision A.4 to adapt the WQIP, monitoring and assessment program, and jurisdictional runoff management programs to become more effective toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a, and must include the following
 - re-evaluation of priority water quality conditions . . .
 - adaptation of goals, strategies and schedules . . .
 - adaptation of monitoring and assessment.¹¹⁰

(b) Update WQIPs

- develop and implement a public participation process to obtain data, information and recommendations for updating the WQIP. The public participation process must provide for a publicly available and noticed schedule of opportunities for the public to participate and provide comments during the development of updates to the WQIP;
- consult with the Water Quality Improvement Consultation Panel on proposed updates of the WQIP, and consider the Consultation Panel's recommendations in finalizing the proposed updates;
- submit 1) proposed updates to the WQIP and supporting rationale, and 2) recommendations received from the public and the Consultation Panel and the rationale for the requested updates, either in the WQIP

¹⁰⁵ Regional Permit Provision B.3.a.(2).

¹⁰⁶ Regional Permit Provision B.3.b.(1).

¹⁰⁷ Regional Permit Provision B.3.b.(2).

¹⁰⁸ Regional Permit Provision B.3.b.

¹⁰⁹ Regional Permit Provision B.4.

¹¹⁰ Regional Permit Provision B.5.

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Annual Reports required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b;

- revise the requested updates as directed by the Regional Water Board Executive Officer; and
- make the updated WQIPs available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of acceptance of the requested updates by the Regional Water Board.

(c) Report on WQIPs

- Submit a WQIP Annual Report for each reporting period no later than January 31 of the following year, which includes the following:
 - The receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1 and D.2, summarized and presented in tabular and graphical form;
 - The progress of the special studies required pursuant to Provision D.3, and the findings, interpretations and conclusions of a special study, or each phase of a special study, upon its completion;
 - The findings, interpretations and conclusions from the assessments required pursuant to Provision D.4;
 - The progress of implementing the WQIP, including, but not limited to, the following:
 - (i) The progress toward achieving the interim and final numeric goals for the highest water quality priorities for the Watershed Management Area;
 - (ii) The water quality improvement strategies that were implemented and/or no longer implemented by each of the Copermittees during the reporting period and previous reporting periods;
 - (iii) The water quality improvement strategies planned for implementation during the next reporting period;
 - (iv) Proposed modifications to the water quality improvement strategies, the public comments received and the supporting rationale for the proposed modifications;

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(v) Previous modifications or updates incorporated into the WQIP and/or each Permittee’s jurisdictional runoff management program document and implemented by the Permittees in the Watershed Management Area; and

(vi) Proposed modifications or updates to the WQIP and/or each Permittee’s jurisdictional runoff management program document;

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

5. Actual and Estimated Reimbursable Costs

To comply with the Regional Permit’s WQIP requirements, the Joint Test Claimants must expend resources each year to develop, administer, and maintain programs required under each WQIP in which they participate. This includes costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. These elements may include staffing, materials and supplies, as well as contract work. The Joint Test Claimants have spent \$4,100 in FY 2014-15 and \$321,291 in FY 2015-16 and estimate that they will spend \$243,427 in FY 2016-17 with respect to these requirements.¹¹¹

D. ALTERNATIVE COMPLIANCE OPTION, PROVISION B.3.c.

1. Mandated Requirement in Regional Permit

Provision B.3.c of the Regional Permit provides that permittees have “the option to use implementation of the Water Quality Improvement Plan to demonstrate compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2.a, and A.3.b within a Watershed Management

¹¹¹ See Section 6 Declarations, ¶ 7.c.

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Area, subject to [certain] conditions[.]”¹¹² Recognizing that permittees, including the Joint Test Claimants, are in jeopardy for their inability to comply with the strict numeric limitations in Provisions A.2 – A.3, Provision B.3.c of the Regional Permit establishes a “voluntary” alternative compliance option (“ACO”) that would allow the Permittees to be deemed compliant with these provisions by undertaking actions above and beyond developing and implementing a WQIP for each Watershed Management Area.

As discussed below, while termed an “option,” the ACO is neither an “alternative” to ultimate strict compliance with receiving water limitations nor is it truly “voluntary.”

Provision B.3.c provides¹¹³:

c. PROHIBITIONS AND LIMITATIONS COMPLIANCE OPTION

Each Copermittee has the option to utilize the implementation of the Water Quality Improvement Plan to demonstrate compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b within a Watershed Management Area subject to the following conditions:

- (1) A Copermittee is eligible to be deemed in compliance with Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b within a Watershed Management Area when the Water Quality Improvement Plan for a Watershed Management Area incorporates the following:
 - (a) Numeric goals, water quality improvement strategies, and schedules developed pursuant to Provisions B.3.a and B.3.b that include the following:
 - (i) Interim and final WQBELs established by the TMDLs in Attachment E to this Order applicable to the Copermittee’s jurisdiction within the Watershed Management Area; AND
 - (ii) Interim and final numeric goals for any ASBS subject to the provisions of Attachment B to State Water Board Resolution No. 2012-0012 (included as Attachment A to this Order) applicable to the Copermittee’s jurisdiction within the Watershed Management Area; AND
 - (iii) Interim and final numeric goals applicable to the Copermittee’s MS4 discharges within the Watershed Management Area expressed as numeric concentration-

¹¹² Regional Permit, B.3.c.

¹¹³ Footnotes omitted.

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based or load-based goals for all pollutants and conditions listed on the Clean Water Act Section 303(d) List of Water Quality Impaired Segments for the receiving waters in the Watershed Management Area that do not have a TMDL incorporated into Attachment E to this Order; AND/OR

- (iv) Interim and final numeric goals for pollutants and conditions identified as receiving water priorities in the Water Quality Improvement Plan that will result in chemical, physical, and biological conditions protective of the beneficial uses of the receiving waters impacted by the Copermittee's MS4 discharges within the Watershed Management Area; AND
 - (v) The Copermittee has the option to include interim and final numeric goals applicable to the Copermittee's MS4 discharges and/or receiving waters within the Watershed Management Area for any pollutants or conditions in addition to those described in Provisions B.3.c.(1)(a)(i)-(iv); AND
 - (vi) Schedules for achieving each final numeric goal that reflect a realistic assessment of the shortest practicable time needed for achievement; AND
 - (vii) For each final numeric goal developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(v), annual milestones and the dates for their achievement must be included within each of the next five (5) Water Quality Improvement Plan Annual Report reporting periods, or until the final numeric goal is achieved. Annual milestones and the dates for their achievement for the 5 Water Quality Improvement Plan Annual Report reporting periods of the next permit term, or until the final numeric goal is achieved, must be provided as part of the Report of Waste Discharge required pursuant to Provision F.5.
- (b) An analysis that meets all of the following conditions:
- (i) The analysis, with clearly stated assumptions included in the analysis, must quantitatively demonstrate that the implementation of the water quality improvement strategies required under Provision B.3.b will achieve

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the final numeric goals within the schedules developed pursuant to Provisions B.3.a and B.3.c.(1)(a).

- (ii) The development of the analysis must include a public participation process which allows the public to review and provide comments on the analysis methodology utilized and the assumptions included in the analysis. Public comments and responses must be included as part of the analysis documentation included in the Water Quality Improvement Plan.
 - (iii) The analysis may be performed by an individual Copermittee or jointly by two or more Copermittees choosing to utilize this compliance option for their jurisdictions within the Watershed Management Area.
 - (iv) The analysis must be updated as part of the iterative approach and adaptive management process required under Provisions B.5.a-b.
- (c) Specific monitoring and assessments required pursuant to Provision B.4.a that will be performed by the Copermittee capable of 1) demonstrating whether the implementation of the water quality improvement strategies are making progress toward achieving the numeric goals in accordance with the established schedules developed pursuant to Provisions B.3.a and B.3.c.(1)(a), and 2) determining whether interim and final numeric goals have been achieved. The specific monitoring and assessments must be updated as part of the iterative approach and adaptive management process required under Provision B.5.c.
- (d) Documentation showing that the numeric goals, schedules, and annual milestones proposed pursuant to Provision B.3.c.(1)(a), the analysis performed pursuant to Provision B.3.c.(1)(b), and the specific monitoring and assessments proposed pursuant to Provision B.3.c.(1)(c) have been reviewed by the Water Quality Improvement Consultation Panel (see Provision F.1.a.(1)(b)). Updates must be reviewed by the Water Quality Improvement Consultation Panel for any recommendations.
- (2) Each Copermittee that voluntarily completes the requirements of Provision B.3.c.(1) is deemed in compliance with Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b for the pollutants and conditions for which numeric goals are developed when the

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Water Quality Improvement Plan, incorporating the requirements of Provision B.3.c.(1), is accepted by the San Diego Water Board pursuant to Provision F.1.b or F.2.c. The Copermittee is deemed in compliance during the term of this Order as long as:

- (a) The Copermittee is implementing the water quality improvement strategies within its jurisdiction developed pursuant to Provision B.3.b.(1) and in compliance with the schedules for implementing the strategies established pursuant to Provisions B.3.b.(3)(a) and B.3.c.(1)(a)(vii); AND
- (b) The Copermittee is performing the monitoring and assessments developed pursuant to Provision B.3.c.(1)(c); AND
- (c) The Copermittee's assessments in the Water Quality Improvement Plan Annual Report submitted pursuant to Provision F.3.b.(3) support a conclusion that: 1) the Copermittee is in compliance with the annual milestones and dates for achievement developed pursuant to Provision B.3.c.(1)(a)(vii), OR 2) the Copermittee has provided acceptable rationale and recommends appropriate modifications to the interim numeric goals, and/or water quality improvement strategies, and/or schedules to improve the rate of progress toward achieving the final numeric goals developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(vi); AND
- (d) Any proposed modifications to the numeric goals, strategies, schedules, and/or annual milestones are accepted by the San Diego Water Board as part of subsequent updates to the Water Quality Improvement Plan pursuant to Provision F.2.c; AND
- (e) The Copermittee is implementing the requirements of Provision A.4.a.

2. The Permit Requirements Are a State Mandate

The ACO is a state mandate. First, the ACO is not an alternative to ultimate strict compliance with receiving water limitations because Section B.3.c requires the Joint Test Claimants to demonstrate through the planning documents required by the WQIP that they will attain the numeric effluent limitations strictly enforced in Provisions A.2 - A.3 and Attachment E

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of the Regional Permit. Under the ACO, therefore, Permittees must still attain all receiving water limitations.

Second, the ACO is not a truly voluntary alternative. To be considered a “voluntary” program, a government entity “must have a genuine choice whether to accept the offer” and voluntariness ends where “pressure turns into compulsion.”¹¹⁴ Where a governmental entity lacks a meaningful choice, because non-compliance with a provision would subject the agency to a “barrage of litigation with no real defense,” a regulation is considered a mandate.¹¹⁵ Here, the Joint Test Claimants must either, at substantial cost, attempt to comply with Section B.3.c and the numeric effluent limitations required to be attained therein (if possible), or be out of compliance with the RWL provisions of the Regional Permit, thereby exposing the Permittees to potential civil penalties¹¹⁶ and exposure to third party lawsuits. Such exposure is a current risk to the Joint Test Claimants, as is reflected by the very provision of the ACO.

Faced with such a “choice,” the Permittees have no meaningful option other than to try and obtain “alternative compliance” for RWLs via the massive undertaking (and associated costs) imposed by Section B.3.c. Because failure to undertake the ACO exposes the Joint Test Claimants to both Regional Water Board enforcement actions and citizen suits under the CWA, both with potential massive financial penalties, the ACO provides no meaningful alternative to strict compliance with Sections A.2-4 and Attachment E.

3. These Provisions Are New Programs or Require Higher Levels of Service

As previously discussed, the WQIP provisions in the Regional Permit, including Provision B.3.c., are new to the Joint Test Claimants, and were not part of any previous MS4 permit. The requirements thus represent a new program and a higher level of service. Moreover, under *Hayes*,¹¹⁷ the ACO provision represents a state mandate because it further confirms that the purpose of the WQIP requirements in Provision B of the Regional Permit is to shift the requirement for the Regional Board to develop TMDLs to the Joint Test Claimants. Provision B.3.c. effectuates this shift through its requirements for the incorporation of interim and final numeric goals and for the attainment of those goals.

That the provision serves this TMDL development purpose was expressly conceded by Regional Board senior staff at the hearing to adopt the Second Amended Permit. In response to a comment made by a Permittee representative that WQIP requirements, including Provision B.3.c., were supplanting the need for the Regional Board to develop TMDLs and other federally required provisions, Regional Board staff agreed.¹¹⁸

¹¹⁴ See generally *Nat'l Fed'n of Indep. Bus. v. Sebelius* (2012) 132 S.Ct. 2566, 2571.

¹¹⁵ *Hayes, supra*, 11 Cal.App.4th at 1592.

¹¹⁶ See US EPA, Civil Monetary Penalty Inflation Adjustment Rule 78 Fed. Reg. 66643, 66647–48 (Nov. 6, 2013).

¹¹⁷ 11 Cal. App.4th at 1593-94.

¹¹⁸ See Transcript of November 18, 2015 Hearing before the San Diego Regional Water Quality Control Board, page 112 line 12 to page 113 line 8 (Permittee comment) and page 273 line 19 to page 274 line 22 (Regional Board response). A copy of relevant portions of this transcript is included in Section 7, Volume IV, Tab 8.

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4. Mandated Activities in Regional Permit

Provision B.3.c. requires that the WQIP for a Watershed Management Area incorporate numeric goals, water quality improvement strategies and schedules that include interim and final WQBELs for TMDLs, interim and final goals for any ASBS, interim and final numeric goals applicable to MS4 discharges in 303(d)-listed impaired waterbodies that are not subject to a TMDL, interim and final numeric goals that will result in conditions protective of the beneficial uses of receiving waters, schedules for achieving each final numeric goal and the identification of annual milestones toward achievement of the goals. Additionally, an analysis is required to quantitatively demonstrate that the water quality strategies will achieve the final numeric goals, and including public participation. Further, monitoring and assessments are required to demonstrate whether implementation of the water quality strategies are making progress toward achieving the numeric goals, or whether they have been achieved. Documentation must also be provided showing that the various elements required by provision B.3.c. have been reviewed by the WQIP Consultation Panel for any recommendations.

5. Actual and Estimated Reimbursable Costs

To comply with the Regional Permit's ACO provision, the Joint Test Claimants must expend resources each year to, among other items, conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones and conduct analyses regarding the ability of the water quality strategies to meet numeric goals, and to monitor, assess, report on, and modify these programs as necessary. These elements may include staffing, materials and supplies, as well as contract work. The Joint Test Claimants did not spend funds to comply with this requirement in FY 2015-16, but estimate that they will spend \$19,776 during FY 2016-17.¹¹⁹

E. CRITICAL SEDIMENT AND HYDROMODIFICATION, PROVISION E.3.c.(2)

1. Mandated Requirements in Regional Permit

Provision E.3.c.(2) of the Regional Permit, "Hydromodification Management BMP Requirements," imposes new unfunded state-mandated requirements on the Joint Test Claimants that are not federally required.

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

(2) Hydromodification Management BMP Requirements

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

¹¹⁹ See Section 6 Declarations, ¶7.d.

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

2. The Permit Requirements Are a State Mandate

The Commission, in Test Claim 07-TC-09, already has determined that the hydromodification management requirement in the 2007 San Diego County MS4 permit constitutes a state-mandated new program or higher level of service.¹²⁰ Nothing in the CWA, its regulations, or case law requires local agencies to implement onsite BMPs to manage hydromodification that may be caused by storm water runoff discharged from a project or to establish criteria for such efforts.¹²¹

3. These Provisions Are New Programs or Require Higher Levels of Service

Previous permits did not include a requirement that Priority Development Projects avoid critical sediment yield areas or to design BMPs that will allow coarse sediment to be discharged to receiving waters. The 2009 Permit required the Joint Test Claimants to collaborate in the development and implementation of a hydromodification management plan to manage increases in runoff discharge rates and durations from Priority Development Projects meeting specified criteria.¹²² This requirement was included in a previous test claim, which is incorporated herein by this reference.¹²³ Previous permits did not require the specific onsite BMPs to manage hydromodification that may be caused by storm water runoff discharged from South Orange County Permittee projects.

4. Mandated Activities in Regional Permit

Provision E.3.c.(2) of the Regional Permit requires the Joint Test Claimants to hire a consultant to establish defensible standards for determining the location of critical sediment yield areas to be avoided and as to how Priority Development Projects meet various criteria regarding the discharge of coarse sediment to receiving waters. It further requires monitoring, assessment and reporting, with modification of the programs as necessary.

5. Actual and Estimated Reimbursable Costs

The Joint Test Claimants must develop and implement standards and programs to identify critical sediment yield areas to be avoided by Priority Development Projects and techniques to manage discharges coarse sediment. This includes costs needed to conduct modeling and studies,

¹²⁰ Statement of Decision, Test Claim 07-TC-09, at 97.

¹²¹ 33 U.S.C. § 1342 (p); 40 C.F.R. § 122.26; see also Statement of Decision, Test Claim 07-TC-09, at 51.

¹²² 2009 Permit, Provision F.1.h.

¹²³ Test Claim 10-TC-11, § IV.E.

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plan and implement new program activities, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Permit Provision E.3.c.(2)(b). This work may include staffing, materials and supplies, and contract work. The Joint Test Claimants expect to expend funds to update the hydromodification plan. Additional costs related to the completion, implementation, review, and modification of these approaches are not currently known. The Joint Test Claimants spent \$5,000 in FY 2014-15, \$2,000 in FY 2015-16 and estimate that they will spend \$33,580 in FY 2016-17 with respect to these requirements.¹²⁴

F. BMP DESIGN MANUAL UPDATE, PROVISIONS E.3.d AND F.2.b

1. Mandated Requirements in Regional Permit

Provisions E.3.d and F.2.b of the Regional Permit, entitled “BMP Design Manual Updates,” imposes new unfunded state-mandated requirements on the Joint Test Claimants that are not required by federal law.

Provision E.3.d requires the Joint Test Claimants to “update [their] BMP Design Manual . . . [to] include the following:

- (1) Updated procedures to determine the nature and extent of storm water requirements applicable to a potential development or redevelopment projects. . . .
- (2) Updated procedures to identify pollutants and conditions of concern for selecting the most appropriate structural BMPs that consider, at a minimum, the following:
 - (a) Receiving water quality (including pollutants for which receiving waters are listed as impaired under the CWA section 303(d) List);
 - (b) Pollutants, stressors, and/or receiving water conditions that cause or contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;
 - (c) Land use type of the project and pollutants associated with that land use type; and
 - (d) Pollutants expected to be present onsite.
- (3) Updated procedures for designing structural BMPs, including any updated performance requirements to be consistent with the requirements of Provision E.3.c for all structural BMPs listed in the BMP Design Manual.
- (4) Long-term maintenance criteria for each structural BMP listed in the BMP

¹²⁴ See Section 6 Declarations, ¶ 7.e.

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Design Manual; and

- (5) Alternative compliance criteria, in accordance with the requirements under Provision E.3.c.(3), if the Copermittee elects to allow Priority Development Projects within its jurisdiction to utilize alternative compliance.

Provision F.2.b requires the following:

b. BMP DESIGN MANUAL UPDATES

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

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

2. The Permit Requirements Are a State Mandate

This Commission, in the Test Claim involving the 2007 San Diego County MS4 permit, already has considered whether the requirement to review and update BMPs in local guidance materials, such as a Standard Stormwater Mitigation Plan (“SSMP”), is required by federal law or regulation and has determined that “nothing in the federal regulation requires agencies to update local or model SSMPs.”¹²⁵ Moreover, nothing in the CWA, its regulations, or case law requires local agencies to update a BMP Design Manual to include specific procedures and criteria.¹²⁶

The Commission also considered and decided that nothing in federal law or regulation requires updated guidance documents to incorporate minimum low impact development (“LID”) and other BMP requirements for incorporation into local plans.¹²⁷ The CWA only requires MS4

¹²⁵ Statement of Decision, Test Claim 07-TC-09, at 51.

¹²⁶ 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26; see also Statement of Decision, Test Claim 07-TC-09, at, 51.

¹²⁷ *Id.* at 51.

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permits to impose controls that reduce the discharge of pollutants to the MEP.¹²⁸ MEP is not defined, but the CWA suggests management practices, control techniques, and system, design, and engineering methods as options for attaining the maximum reduction possible.¹²⁹ When suggestions are no longer merely being suggested as options for consideration “but are required acts, [t]hese requirements constitute a higher level of service.”¹³⁰

Federal regulations require municipal stormwater permit application to include a plan for developing, implementing and enforcing controls to reduce the discharge from MS4s that originate in areas of new development.¹³¹ Requiring post-construction controls to limit pollutant discharges originating in areas of new development may be within the requirements of Section 122.26(d)(2)(iv)(A) of the federal regulations, but the specific requirements contained in the Regional Permit are not required in the regulations. By adopting permit provisions that require the Joint Test Claimants to create and update a BMP Design Manual to include specific procedures and criteria, the state has freely chosen¹³² to impose requirements and related costs that are not federally mandated and that, when mandated by the state, constitute a new program or higher level of service.¹³³

3. These Provisions Are New Programs or Require Higher Levels of Service

Previous permits required the Joint Test Claimants to update a model “Standard Storm Water Mitigation Plan” and each Copermittee to update a local SSMP.¹³⁴ The SSMP, now called the BMP Design Manual, was not required to include the specific procedures and criteria now required in the Regional Permit and identified above.

4. Mandated Activities in Regional Permit

Provisions E.3.d and F.2.b require the Joint Test Claimants to update the BMP Design Manual to include specific procedures and criteria. To perform this work, the permittees must hire a consultant to determine the nature of those procedures and criteria and to revise the Design Manual accordingly. The Joint Test Claimants have further been required to collaborate to update the BMP Design Manual for submission concurrent with the submission of each Water Quality Improvement Plan, and face additional costs if the update is not fully satisfactory to the Regional Board.¹³⁵

5. Actual and Estimated Reimbursable Costs

To comply with the Regional Permit’s stricter onsite BMP requirements for Priority Development Projects, the Joint Test Claimants must expend resources to update the BMP Design

¹⁰⁷ 33 U.S.C. § 1342 (p)(3)(B)(iii).

¹²⁹ Statement of Decision, Test Claim 07-TC-09, at 51.

¹³⁰ *Id.*; see also *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173.

¹³¹ 40 C.F.R. § 122.26(d)(2)(iv)(A)(2).

¹³² See *Hayes, supra*, 11 Cal.App.4th at 1593-94.

¹³³ Statement of Decision, Test Claim 07-TC-09, at 51.

¹³⁴ 2009 Permit, F.1.d.

¹³⁵ Regional Permit, Provision F.2.b.

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Manual to include specific standards, procedures, and criteria. To comply with the Regional Permit's stricter requirements for Priority Development Projects, the Joint Test Claimants must expend resources to update the Model Water Quality Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The permittees must also develop their own local Model Water Quality Management Plan to institute the minimum standards of the regional Plan. These efforts includes costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Permit Section E.3.d. The Joint Test Claimants have spent \$44,107 in FY 2015-16 and estimate that they will spend \$50,626 in FY 2016-17 with respect to these requirements.¹³⁶

G. RESIDENTIAL INVENTORY AND INSPECTIONS, PROVISION E.5

1. Mandated Requirements in Regional Permit

Provisions E.5.a, E.5.c.(1)(a), E.5.c.(2)(a), and E.5.c.(3) of the Regional Permit, generally entitled "Existing Development Management," impose several new unfunded state-mandated programs on the Joint Test Claimants.

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

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

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

Provision E.5.c requires the Joint Test Claimants except for the Orange County Flood Control District to maintain and update a watershed-based inventory of the existing development that may discharge a pollutant load to and from the MS4. This Provision requires the following:

c. EXISTING DEVELOPMENT INSPECTIONS¹³⁷

¹³⁶ See Section 6 Declarations, ¶ 7.f.

¹³⁷ Footnotes omitted.

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

(1) Inspection Frequency

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

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

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

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

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

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

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

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

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

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

(2) Inspection Content

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

- (i) Visual inspections for the presence of actual non-storm water discharges;
- (ii) Visual inspections for the presence of actual or potential discharge of pollutants;
- (iii) Visual inspections for the presence of actual or potential illicit connections; and
- (iv) Verification that the description of the facility or area in the inventory, required pursuant to Provision E.5.a.(2), has not changed.

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

- (i) Assessment of compliance with its applicable local ordinances and permits related to non-storm water and storm water discharges and runoff;
- (ii) Assessment of the implementation of the designated BMPs;
- (iii) Verification of coverage under the Industrial General Permit, when applicable; and
- (iv) If any problems or violations are found, inspectors must take and document appropriate actions in accordance with the Enforcement Response Plan pursuant to Provision E.6.

(3) Inspection Tracking and Records

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

- (a) Name and location of the facility or area (address and hydrologic subarea) consistent with the inventory name and location, pursuant to Provision E.5.a.(1);
- (b) Inspection and re-inspection date(s);
- (c) Inspection method(s) (i.e. drive-by, onsite);

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- (d) Observations and findings from the inspection(s);
- (e) For onsite inspections of existing development by Copermittee municipal or contract staff, the records must also include, as applicable:
 - (i) Description of any problems or violations found during the inspection(s);
 - (ii) Description of enforcement actions issued in accordance with the Enforcement Response Plan pursuant to Provision E.6; and
 - (iii) The date problems or violations were resolved.

2. The Permit Requirements Are a State Mandate

The Commission has previously considered whether permit requirements to inspect commercial and industrial facilities constituted unfunded state mandates.¹³⁸ Based on the plain language of the federal regulations, which are silent on the types of facilities at issue in that permit, the Commission held that performing inspections “as specified in the permit, is not a federal mandate.”¹³⁹ Federal law and regulations are likewise silent on inspections of residential properties. The requirement in the Regional Permit to inspect residential properties is an activity, as in the *Long Beach Unified School Dist.* case discussed above, that is “a specified action going beyond the federal requirement for inspections ‘to prevent illicit discharges to the municipal separate storm sewer system.’ [Citation] As such, the inspections are not federally mandated.”¹⁴⁰

3. These Provisions Are New Programs or Require Higher Levels of Service

The 2009 Permit required establishment of a Residential program in the JRMP that prioritized threats to water quality, required Joint Test Claimants to “encourage the use of pollution prevention methods by residents,” to enforce their stormwater ordinances, to review the effectiveness of efforts to reduce residential discharges with pollutants, and to undertake educational activities. The 2009 Permit, however, did not establish the mandatory inventory and inspection program now present in the Regional Permit.

4. Mandated Activities in Regional Permit

To comply with the residential inventory and inspection program requirements in the Regional Permit, the Joint Test Claimants must create and maintain a watershed-based inventory of existing residential development that includes the name, location (by hydrological subarea and address) of every residential area in the jurisdiction, a description of the residential area, including a description of whether the residential area is or includes a Common Interest Area/ Home Owner

¹³⁸ Statement of Decision, Test Claim Nos. 03-TC-04, 03-TC-19, 03 TC-20, 03-TC-21, *Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182 NPDES Permit CAS004001*, at 36 (appeal pending).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

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Association, or mobile home park, as well as identification of pollutants generated and potentially generated by the residential area. The Joint Test Claimants will then need to conduct inspections of every residential area at least once every 5 years, and possibly more often, to inspect for the presence of actual non-storm water discharges, discharge of pollutants, illicit connections, whether there have been any changes to the area, assessment of compliance with local regulations, and assessment of BMPs. Each inspection must be tracked in an electronic database or tabular format and must include five types of information as specified in the Permit.

5. Actual and Estimated Reimbursable Costs

The Joint Test Claimants must expend resources to develop, administer, and maintain a new program to comply with the Regional Permit's residential inspection requirements. These expenses include costs needed to plan and implement inspection and enforcement activities and to monitor, assess, report on, and modify this program as necessary to maintain compliance with Provision E.5.c. Any of these cost types may include staffing, materials and supplies, and contract work. This includes costs needed to conduct studies and investigations (mapping, modeling, pilot studies, etc.), plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Permit Provisions E.5.a and E.5.c. The Joint Test Claimants have spent \$1,056 in FY 2015-16 and estimate that they will spend \$17,240 in FY 2016-17 with respect to these requirements.¹⁴¹

Unlike the regulatory fee that may be available to fund commercial and industrial inspection programs, the Joint Test Claimants have no authority to impose a fee on residential property for the sake of inspecting residential property.¹⁴² Such a fee would constitute a "property-related" fee for a property-related service and would be subject to voter approval.¹⁴³ The Commission has already determined that "a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners."¹⁴⁴

Further, since the Commission's decision in *Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182*, voters in 2010 approved Proposition 26. Proposition 26 added Article XIII C, section 1(e) to the California Constitution and prohibits charging a fee for a service that is also of benefit to others who are not charged.¹⁴⁵ If the Joint Test Claimants charge a user fee to comply with the Regional Permit requirements, it must be charged to all users in the watershed who drain into the MS4. If they charge a smaller class of users than all those who benefit from the stormwater program, such as residential properties, they may run afoul of Proposition 26 for charging a smaller class than those who benefit from the MS4 service. For

¹⁴¹ See Section 6 Declarations, ¶ 7.g.

¹⁴² Cf. Statement of Decision, *Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182*, 55-56.

¹⁴³ *Howard Jarvis Taxpayer Assoc. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1354.

¹⁴⁴ Statement of Decision, *Test Claim 07-TC-09*, at 106.

¹⁴⁵ Cal. Const. art. XIII C, § 1, subd. (e)(2).

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these reasons, the Joint Test Claimants do not have authority to impose a fee on residential properties for the sake of complying with the inspection requirements in the Regional Permit.

H. RETROFIT AND REHABILITATE STREAM REQUIREMENT, PROVISION E.5.e

1. Mandated Requirements in Regional Permit

Provision E.5.e of the Regional Permit, entitled “Retrofitting and Rehabilitating Areas of Existing Development” imposes several new State-mandated programs on the Joint Test Claimants.

Provision E.5.e.(1) requires the Joint Test Claimants to retrofit areas of existing development, stating:

(1) Retrofitting Areas of Existing Development

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

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

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priority water quality conditions in the Water Quality Improvement Plan, the Copermittee should collaborate and cooperate with other Copermittees and/or entities in the Watershed Management Area to identify, develop, and implement regional retrofitting projects (i.e. projects that can receive and/or treat storm water from one or more areas of existing development and will result in a net benefit to water quality and the environment) adjacent to and/or downstream of the areas of existing development.

Provision E.5.e.(2) requires:

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

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

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

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cooperate with other Copermitees and/or entities in the Watershed Management Area to identify, develop, and implement regional stream, channel, and/or habitat rehabilitation projects (i.e. projects that can receive storm water from one or more areas of existing development and will result in a net benefit to water quality and the environment).

2. The Permit Requirements Are a State Mandate

Nothing in the CWA, its regulations, or case law requires local agencies to develop, fund, and implement a retrofitting and rehabilitation program. The most analogous provisions in the US EPA regulations require municipal NPDES permits to include “[a] description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible.”¹⁴⁶ This requirement however applies only to structural flood control devices and does not extend to requiring the type of comprehensive retrofitting and rehabilitation programs required in the Regional Permit.

In addition, the habitat rehabilitation provisions require Permittees to address streams, channels and/or habitat, none of which qualify as MS4. Rehabilitation of water courses is not part of the NPDES permit program. As such, it is a state mandate, imposed by the Regional Board and pursuant to state law.

3. These Provisions Are New Programs or Require Higher Levels of Service

Although the 2009 Permit required a retrofitting program (which is subject to a pending test claim before the Commission),¹⁴⁷ it did not require stream, channel and/or habitat rehabilitation program requirements, or contain all elements set forth in the Regional Permit.

4. Mandated Activities in Regional Permit

Provision E.5.e. of the Regional Permit requires the Joint Test Claimants to develop and implement a program to rehabilitate streams, channels, and/or habitats in areas of existing development. Implementation of the rehabilitation program requires the Joint Test Claimants to identify streams, channels, and/or habitats in areas of existing development as candidates for rehabilitation; develop a strategy to facilitate the implementation of rehabilitation projects in areas of existing development identified as candidates; identify areas of existing development where Priority Development Projects may be allowed or should be encouraged to implement or contribute toward the implementation of alternative compliance stream, channel, and/or habitat rehabilitation projects; and, where stream, channel, and/or habitat rehabilitation projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the Water Quality Improvement Plan, collaborate and cooperate with each other

¹⁴⁶ 40 C.F.R. § 122.26 (d)(2)(iv)(A)(1).

¹⁴⁷ Test Claim 10-TC-11, § IV.J.

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and/or entities in the Watershed Management Area to identify, develop, and implement regional stream, channel, and/or habitat rehabilitation projects.

5. Actual and Estimated Reimbursable Costs

The Joint Test Claimants must expend significant resources to develop, administer, and maintain a costly new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes costs needed to conduct studies and investigations (mapping, modeling, etc.), plan and implement program activities (identification, evaluation, and prioritization of candidate projects; selection of projects for implementation; project design and engineering; coordination with regulatory agencies; outreach and coordination with stakeholders and project partners; acquisition and management of project funding; etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Permit Provision E.5.e. Any of these cost types may include staffing, materials and supplies, and contract work. The Joint Test Claimants expect to expend funds for program development and implementation. The Joint Test Claimants spent \$10,838 plus, for one Test Claimant, a yet to be identified share of a \$1,5621,878 project in FY 2015-16 and estimate that they will spend \$44,954 plus, for one Test Claimant, a yet to be identified share of a \$6,445,232 project in FY 2016-17.¹⁴⁸

I. ENFORCEMENT RESPONSE PLANS, PROVISION E.6

1. Mandated Requirements in Regional Permit

Provision E.6 of the Regional Permit, entitled "Enforcement Response Plans" imposes new requirements to develop and implement an Enforcement Response Plan as part of the Jurisdictional Runoff Management Program ("JRMP") document. JRMP requirements are addressed generally in Section IV.J, below. Provision E.6 requires the following:

6. Enforcement Response Plans

Each Copermittee must develop and implement an Enforcement Response Plan as part of its jurisdictional runoff management program document. The Enforcement Response Plan must describe the applicable approaches and options to enforce its legal authority established pursuant to Provision E.1, as necessary, to achieve compliance with the requirements of this Order. The Enforcement Response Plan must be in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and include the following:

a. ENFORCEMENT RESPONSE PLAN COMPONENTS

The Enforcement Response Plan must include the following individual components:

- (1) Illicit Discharge Detection and Elimination Enforcement Component;

¹⁴⁸ See Section 6 Declarations, ¶ 7.h.

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- (2) Development Planning Enforcement Component;
- (3) Construction Management Enforcement Component; and
- (4) Existing Development Enforcement Component.

b. ENFORCEMENT RESPONSE APPROACHES AND OPTIONS

Each component of the Enforcement Response Plan must describe the enforcement response approaches that the Copermitttee will implement to compel compliance with its statutes, ordinances, permits, contracts, orders, or similar means, and the requirements of this Order. The description must include the protocols for implementing progressively stricter enforcement responses. The enforcement response approaches must include appropriate sanctions to compel compliance, including, at a minimum, the following tools or their equivalent:

- (1) Verbal and written notices of violation;
- (2) Cleanup requirements;
- (3) Fines;
- (4) Bonding requirements;
- (5) Administrative and criminal penalties;
- (6) Liens;
- (7) Stop work orders; and
- (8) Permit and occupancy denials.

c. CORRECTION OF VIOLATIONS

- (1) Violations must be corrected in a timely manner with the goal of correcting the violations within 30 calendar days after the violations are discovered, or prior to the next predicted rain event, whichever is sooner.
- (2) If more than 30 calendar days are required to achieve compliance, then a rationale must be recorded in the applicable electronic database or tabular system used to track violations.

d. ESCALATED ENFORCEMENT

- (1) The Enforcement Response Plan must include a definition of “escalated enforcement.” Escalated enforcement must include any enforcement scenario where a violation or other non-compliance is determined to cause or contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan. Escalated enforcement may

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be defined differently for development planning, construction sites, commercial facilities or areas, industrial facilities, municipal facilities, and residential areas.

(2) Where the Copermittee determines escalated enforcement is not required, a rationale must be recorded in the applicable electronic database or tabular system used to track violations.

(3) Escalated enforcement actions must continue to increase in severity, as necessary, to compel compliance as soon as possible.

e. REPORTING OF NON-COMPLIANT SITES

(1) Each Copermittee must notify the San Diego Water Board in writing within five (5) calendar days of issuing escalated enforcement (as defined in the Copermittee's Enforcement Response Plan) to a construction site that poses a significant threat to water quality as a result of violations or other noncompliance with its permits and applicable local ordinances, and the requirements of this Order. Written notification may be provided electronically by email to the appropriate San Diego Water Board staff.

(2) Each Copermittee must notify the San Diego Water Board of any persons required to obtain coverage under the statewide Industrial General Permit and Construction General Permit and failing to do so, within five (5) calendar days from the time the Copermittee become aware of the circumstances. Written notification may be provided electronically by email to RB9_Nonfilers@waterboards.ca.gov.

2. The Permit Requirements Are State Mandates

The Commission already has considered whether certain elements in a JRMP are state mandates and also whether the requirement in the 2007 San Diego County MS4 Permit to review and update BMP requirements listed in Standard Urban Stormwater Management Plans ("SUSMP") and to develop, submit and implement an updated Model SUSMP constituted a state mandate. The Commission determined that that nothing in federal law or regulations requires updates to the SUSMP and likewise determined that the requirements to collaborate with copermittees in the development of standards, to undertake street sweeping and conveyance system cleaning, and to undertake educational activities in the JRMP also constituted state mandates. As noted in more detail in Section IV.J.2, below, nothing in the CWA, its regulations, or case law requires local agencies to create and implement an Enforcement Response Plan as part of a JRMP. Likewise, nothing in federal law or regulation requires the Joint Test Claimants to develop and implement an Enforcement Response Plan, to include protocols for implementing progressively stricter enforcement responses, to create a definition for "escalated enforcement," or to notify the Regional Board in writing within 5 days of issuing certain escalated enforcement.

With regard to the statewide general permits, as this Commission has already previously determined, enforcement of the permits is a state obligation. The Regional Board itself has responsibility to ensure that facilities that should be covered under such permits have obtained such coverage.

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3. These Provisions Are New Programs or Require Higher Levels of Service

Nothing in the 2009 Permit required a local agency to develop an Enforcement Response Plan. The most analogous provision in the 2009 Permit only required permittees to “develop and implement an escalating enforcement process that achieves prompt corrective actions at construction sites for violations of ... water quality protection permit requirements and ordinances.”¹⁴⁹ The cited provision of the Regional Permit also mandates specific elements of the Response Plan. Thus, these requirements in the Regional Permit represent new programs and require higher levels of service.

4. Mandated Activities in Regional Permit

To comply with the requirements in the Regional Permit, the Joint Test Claimants will need to retain an attorney to assist in the development of an Enforcement Response Plan to comply with the requirements of Provision E.6. The draft plan will be required to be reviewed by the Permittees and adapted to the specific circumstances of the Permittee. Permittee staff will be required to be trained in the implementation of the Enforcement Response Plan elements, including recording rationales for delayed responses to enforcement and notification to the Regional Board.

5. Actual and Estimated Reimbursable Costs

To comply with the Regional Permit’s requirement to develop and implement an Enforcement Response Plan, the Joint Test Claimants have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. Each of the Claimants must also expend funds to implement the update through training of staff and other implementation activities. The Joint Test Claimants did not spend funds in FY 2015-16 but estimate that they will spend \$22,336 in FY 2016-17 with respect to these requirements.¹⁵⁰

J. JURISDICTIONAL URBAN RUNOFF MANAGEMENT PLAN UPDATE, PROVISION F.2.a

1. Mandated Requirements in Regional Permit

Provision F.2.a of the Regional Permit, entitled “Jurisdictional Runoff Management Program Document Updates” imposes new requirements on the Joint Test Claimants to update their JRMPS.

Provision F.2.a requires the following:

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

¹⁴⁹ 2009 Permit, F.2.f.

¹⁵⁰ See Section 6 Declarations, ¶ 7.i.

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- (1) Each Copermittee is encouraged to seek public and key stakeholder participation and comments, as early and often as possible during the process of developing updates to its jurisdictional runoff management program document;
- (2) Each Copermittee must update its jurisdictional runoff management program document to incorporate the [eight] requirements of Provision E concurrent with the submittal of the Water Quality Improvement Plan. Each Copermittee must correct any deficiencies in the jurisdictional runoff management program document based on comments received from the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report;
- (3) Each Copermittee must submit updates to its jurisdictional runoff management program, with the supporting rationale for the modifications, either in the Water Quality Improvement Plan Annual Report required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b;
- (4) The Copermittee must revise proposed modifications to its jurisdictional runoff management program as directed by the San Diego Water Board Executive Officer; and
- (5) Updated jurisdictional runoff management program documents must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of submitting the Water Quality Improvement Plan Annual Report.

2. The Permit Requirements Are State Mandates

The Commission has already considered in the San Diego County Test Claim, previously cited, whether certain elements in a JRMP are state mandates and also whether the requirement to review and update BMP requirements listed in a SUSMP and to develop, submit and implement an updated Model SUSMP constituted a state mandate. The Commission determined that that nothing in federal law or regulations requires updates to the SUSMP and likewise determined that the requirements to collaborate with copermittees in the development of standards, to undertake street sweeping and conveyance system cleaning, and to undertake educational activities in the JRMP, also constituted state mandates.

Nothing in federal law or regulation requires local agencies, including the Joint Test Claimants, to create, review and update a JRMP where that update consists of at least eight elements (legal authority establishment and enforcement, illicit discharge detection and elimination, development planning, construction management, existing development management, enforcement response plans, public education and participation, and fiscal analysis), providing supporting rationale for modifications, providing public and stakeholder input during the update process and providing a regional clearinghouse for the plan.

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3. These Provisions Are New Programs or Require Higher Levels of Service

Provision F of the 2009 Permit required the Joint Test Claimants to update their Jurisdictional Runoff Management Plans. This requirement is subject to a pending test claim, which is incorporated herein by reference.¹⁵¹ As noted above, the Commission considered a challenge to the same requirement in the 2007 Permit and to requirements to update similar plans and determined the requirements constituted state mandates. Moreover, the Regional Permit requires additional requirements from the related provision in the 2009 Permit, and thus imposes a higher level service.

4. Mandated Activities in Regional Permit

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

5. Actual and Estimated Reimbursable Costs

In compliance with Permit Section F.2, the Joint Test Claimants must undertake efforts to update the JRMP document. The Joint Test Claimants must also submit updates to the jurisdictional runoff management program, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provision F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. The costs of these efforts include: meetings and correspondence to coordinate content development with staff; developing, distributing, and revising draft content; and, monitoring, assessing, reporting on, and modifying programs and activities as necessary to maintain compliance with the Permit. Such efforts may include staffing, materials and supplies, and contract work. The Joint Test Claimants did not spend funds in FY 2015-16 and estimate that they will spend \$77,220 in FY 2016-17 with respect to these requirements.¹⁵²

**K. REQUIREMENT TO APPEAR BEFORE THE REGIONAL BOARD,
PROVISION F.3.a**

1. Mandated Requirement in Regional Permit

Provision F.3.a of the Regional Permit, entitled “Progress Report Presentations” requires the Joint Test Claimants to appear before the Regional Board on request by the Board to provide progress reports on implementation of WQIPs and jurisdictional runoff management programs.

¹⁵¹ Test Claim 10-TC-11, § H.

¹⁵² See Section 6 Declarations, ¶ 7.j.

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These appearances and presentations are in addition to annual reports on the jurisdictional runoff management program, monitoring and assessment program, and WQIP.

Provision F.3.a requires:

a. PROGRESS REPORT PRESENTATIONS

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

2. The Permit Requirements Are a State Mandate

Nothing in the CWA, its regulations, or case law authorizes a state agency to compel a local agency to appear before a Regional Water Board and make presentations or to provide progress reports on plan implementation at intervals other than annual reports. The most analogous provision in the federal regulations requires a permittee to provide “information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the Director upon request, copies of records required to be kept by this permit.”¹⁵³ This federal regulation requiring submission of information does not compel physical attendance and oral presentation at meetings of the Regional Board.

3. These Provisions Are New Programs or Require Higher Levels of Service

Nothing in the 2009 Permit required a local agency to appear before the Regional Board and make presentations or to provide progress reports on plan implementation at intervals other than annual reports. The most analogous provision in the 2009 Permit required permittees to provide information to regulatory agencies that requested such information in accordance with 40 C.F.R. 122.41(h), discussed above.¹⁵⁴

4. Mandated Activities in Regional Permit

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

¹⁵³ 40 C.F.R. § 122.41.

¹⁵⁴ 2009 Permit, Attachment B, Provision 5(a).

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5. Actual and Estimated Reimbursable Costs

If required by the Regional Board to make a presentation, the Joint Test Claimants will be required to conduct research, meet with or confer with other permittees, write materials for distribution at the meeting and appear before the Regional Board. No funds were spent by the Joint Test Claimants during FY 2015-16 concerning this requirement. The Joint Test Claimants have spent an estimated \$2,500 so far in FY 2016-17 with respect to an appearance made by County representatives on behalf of all of the South Orange County Copermittees and anticipate spending a further \$3,176 with respect to this requirement.¹⁵⁵

V. STATEWIDE COST ESTIMATE

This Joint Test Claim concerns a regional municipal stormwater permit covering municipalities in San Diego, South Orange and southwest Riverside Counties. The Joint Test Claimants do not, however, have information concerning the potential costs incurred by San Diego and Riverside County municipalities, other than to refer the Commission to the costs set forth in the County of San Diego's test claim regarding costs incurred by that agency in the 2013 Permit, which did not cover the South Orange County Copermittees. The San Diego County test claim contains no information on costs for FY 2016-17.

The Joint Test Claimants estimate that, for all requirements set forth in the Regional Permit that are applicable to all South Orange County Copermittees and that are the subject of this Joint Test Claim, the amount of \$ \$1,396,250, plus, for one Test Claimant, a yet to be determined share of a \$6,445,232 project, will be spent in FY 2016-17. This amount does not include a separate amount for compliance with receiving water limitations in Provisions A.2 and A.4 (see Section IV.A above), but does include costs to comply with numeric effluent limits in the Beaches & Creeks TMDL (see Section IV.B), to develop the WQIP (see Section IV.C) and to implement the alternative compliance program (see Section IV.D).

VI. FUNDING SOURCES

A. THE JOINT TEST CLAIMANTS DO NOT HAVE FEE AUTHORITY TO OFFSET THEIR COSTS

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

¹⁵⁵ See Section 6 Declarations, ¶ 7.k.

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in Section IV.G.5 above, concerning the unavailability of fees for the inspection of residential areas.

1. Activities Mandated By The Regional Permit Do Not Convey Unique Benefits Or Deal With Unique Burdens Being Imposed On The MS4 By Individual Persons, Businesses Or Property Owners.

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

The Regional Permit is intended to deal with water quality impacts from stormwater that is being conveyed by the Joint Test Claimants' MS4s and to reduce pollutants being discharged from the MS4. Most of the requirements in the Permit involve developing programs to minimize the likelihood of pollutants being carried by runoff into the MS4 and to otherwise reduce those pollutants before being discharged into receiving waters.

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

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

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2. Article XIII C of the California Constitution Limits the Joint Test Claimants' Power to Impose Fees

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

Article XIII C § 2(d) provides that:

No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

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

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

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

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

- (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
- (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
- (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
- (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

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(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

Valid fees therefore must recover no more than the amount necessary to recover costs of the governmental program being funded by the fee. The person or business being charged the fee, the payor, may only be charged a fee based on the portion of the total government costs attributable to burdens being placed on the government by that payor or an amount based on the direct benefits the payor receives from the program or facility being funded by the fee. The services and work products produced by the Joint Test Claimants in response to the requirements of the Regional Permit are not being provided directly to any individual nor are they related to a specific benefit conferred on any individual. Any fee charged by the Joint Test Claimants for costs related to the requirements of the Regional Permit at issue in this Joint Test Claim, therefore would not meet the requirement of Article XIII C §§ 1(e) (1) or 1(e) (2) and would not be a valid fee. The fee also would not fall under subsections (e)(3) through (e)(7).

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

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

Any tax that is intended to fund a specific program such as a stormwater management program is a "special tax." subject to the requirements of Article XIII A § 4, and Article XIII C § 2(d).

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

If a fee were imposed on owners or occupants or real property that is triggered by their ownership or use of property within the jurisdiction it would constitute a property related fee governed by Article XIII D of the California Constitution.

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

(a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except ... (2) Any special tax receiving a two-thirds vote pursuant to § 4 of Article XIII A ... (4) Fees or charges for property related services as provided by this article....”

Article XIII D § 2(e) defines fee or charge as:

“... any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.”

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

Article XIII D § 6(c) requires voter approval for most new or increased fees and charges. It provides “Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. ...”

In *Howard Jarvis Taxpayers Association v. City of Salinas*, the Court of Appeal struck down a fee that the City of Salinas attempted to enact to fund the city’s stormwater program. The court held in that case that a stormwater fee was a property related fee governed by Article XIII D and that such a fee could not be imposed unless it was approved by the voters.

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

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

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

The City asserted that the fee did not require voter approval requirements of Article XIII D § 6(c) on two grounds. The first ground was that the fee was not a "property related" fee but rather a "user fee" which the property owner could avoid simply by maintaining a storm water management facility on the property. The City argued that because it was possible to own property without being subject to the fee, it was not a fee imposed "as an incident of property ownership."¹⁵⁶ The second ground asserted by the City was that, even if the fee could be characterized as a property related fee, it was exempted from the voter approval requirements by the provisions of Article XIII D § 6(c) that allow local governments to enact fees for sewer and water services without prior voter approval.¹⁵⁷

The court rejected both arguments, finding that because the fee was not directly based on or measured by use, comparable to the metered use of water or the operation of a business, it could not be characterized as a use fee. Rather the fee was based on ownership or occupancy of a parcel and was based on the size of the parcel and therefore must be viewed as a property related fee.¹⁵⁸

The court also found that the "Proportional Reduction" provision of the City's fee did not alter the nature of the fee as a property related fee. A property owner's operation of a private storm drain system reduced the amount owed to the City to the extent that runoff into the City's system is reduced but did not eliminate the need to pay a fee. The reduction was not proportional to the amount of services requested or used by the occupant, but rather was based on the physical properties of the parcel. Thus, the Court determined that the fee was ultimately a fee for a public service having a direct relationship to the ownership of developed property. The court concluded that the storm drainage fee "burden[s] landowners *as landowners*," and thus it was in reality a property related fee subject to the requirements of Article XIII D and not a user fee. The fee was therefore subject to the voter-approval requirements of Article XIII D unless one of the exceptions in section 6(c) of that section applied.¹⁵⁹

The court then went on to reject the City's contention that the fee fell within exemption from the voter-approval requirement applicable to fees for sewer or water services. The court concluded that that the term "sewer services" was ambiguous in the context of both § 6(c) and Article XIII D as a whole. The court found that, because Article XIII D was enacted through the initiative process, the rule of judicial construction that an enactment must be strictly construed required the court to take a narrow reading of the sewer exemption. The court went on to hold that the sewer services exception in Article XIII D § 6(c) was applicable only to sanitary sewerage and *not* to services related to stormwater.¹⁶⁰

The court observed:

¹⁵⁶ (2002) 98 Cal.App.4th 1351,1354.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at p. 1355.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1357-58.

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The City itself treats storm drainage differently from its other sewer systems. The stated purpose of [the City storm drainage fee ordinance] was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of “non-storm water” into the storm drainage system, which channels storm water into state waterways ... the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water.¹⁶¹

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

[W]e cannot subscribe to the City's suggestion that the storm drainage fee is “for . . . water services.” *Government Code section 53750*, enacted to explain some of the terms used in articles XIII C and XIII D, defines “[w]ater” as “any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water.” (Gov. Code, § 53750, subd. (m).) The average voter would envision “water service” as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.¹⁶²

4. Conclusion

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

B. THE JOINT TEST CLAIMANTS HAVE LIMITED OTHER FUNDING SOURCES

The Joint Test Claimants are not aware of any state, federal or other non-local agency funds that are or will be available to fund these new activities, with the exception of Measure M2 grant funds administered by the Orange County Transportation Authority, a Metropolitan Water District (“Met”) funding program and a rebate program from the Municipal Water District of Orange County (“MWDOC”), and State Proposition 84 and Proposition 1 Integrated Regional Water Management Program and Stormwater Program funds. These are limited, competitive grant

¹⁶¹ *Id.* at 1358.

¹⁶² *Id.*

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programs and/or limited rebate programs, which may not be available to the Joint Test Claimants and which, as set forth in the attached Section 6 Declarations, may have only limited applicability to the requirements set forth in this Joint Test Claim and which require some element of local matching funds. These programs also require recipients to meet specific criteria. Thus, even if these funding sources were available with respect to the requirements set forth in this Joint Test Claim, they would not be available to fully recompense the Joint Test Claimants for such requirements. Further, as indicated in the attached declarations, to the extent such funds may have been received by various of the Joint Test Claimants, those funds are not included in the costs identified in the declarations.

Also, as noted in the Declaration of Khalid Bazmi, P.E. for the County of Orange, the County currently has access to monies from the Orange County Flood Control District assessments, but such monies are not permanently dedicated to the County and in any event, would not fully compensate the County for the obligations set forth in the Regional Permit which are the subject of this Test Claim. Absent such funds, or in light of the expanded requirements of the Regional Permit, the County would be required to access General Fund monies. Moreover, such funds, having been made available to the County, are not available to the Orange County Flood Control District to address costs incurred by that local agency.

VII. PRIOR MANDATE DETERMINATIONS

A. LOS ANGELES COUNTY

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

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

B. SAN DIEGO COUNTY

In 2007, the County of San Diego and 21 cities within the county (the San Diego claimants) submitted test claim 07-TC-09. The test claim asserted that many provisions of San Diego Water Board Order R9-2007-0001 constitute reimbursable State mandates. Order R9-2007-0001 renewed the municipal storm water permit for San Diego County and many of its incorporated cities, and served as an NPDES permit until the adoption of the Regional Permit. The challenged

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permit provisions required the San Diego claimants to: (1) conduct and report on street sweeping activities; (2) clean and report on storm sewer cleaning; (3) implement a regional urban runoff management program; (4) assess program effectiveness; (5) conduct public education and outreach; (6) collaborate among Permittees to implement the program; (7) implement hydromodification management plans; and (8) implement plans for low impact development.

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

1. Street Sweeping
2. Street Sweeping Reporting
3. Conveyance System Cleaning
4. Conveyance System Cleaning Reporting
5. Public Education Requirements with Specific Target Communities and Specified Topics
6. Mandatory Watershed Activities and Collaboration in Watershed Urban Management Program
7. Regional Urban Runoff Management Program
8. Program Effectiveness Assessment
9. Long-term Effectiveness Assessment
10. Permittee Collaboration

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

VIII. CONCLUSION

The Regional Permit imposes many new mandated activities and programs on the Joint Test Claimants that are not required to be imposed on local governments under federal law. As detailed above, the costs to develop and implement these new programs and activities are substantial. At the same time, the Joint Test Claimants lack the ability/authority to develop and impose fees to fund these programs. The costs incurred and to be incurred to comply with these state-mandated programs all satisfy the criteria for reimbursable mandates, and the Joint Test Claimants respectfully request that the Commission make such findings as to each of the mandated programs and activities set forth herein, and find that they require funding under the California Constitution.

SECTION 6

DECLARATIONS IN SUPPORT OF JOINT TEST CLAIM

IN RE

SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

ORDER NO. R9-2013-0001, AS AMENDED BY ORDER NO. R9-2015-0001 AND ORDER

NO. R9-2015-0100

NPDES NO. CAS 0109266

COUNTY OF ORANGE, ET AL.

DECLARATION OF KHALID BAZMI, P.E.
FOR COUNTY OF ORANGE

DECLARATION OF KHALID BAZMI, P.E., ON BEHALF OF THE COUNTY OF
ORANGE
IN SUPPORT OF TEST CLAIM

I, Khalid Bazmi, declare as follows:

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

2. I am employed by the County of Orange ("County") as an Assistant Director of OC Public Works. I have knowledge of the County's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately one year. My duties include assisting in the management of the OC Public Works Department and I oversee managers in OC Environmental Resources who are responsible for managing the Orange County Stormwater Program and the County's role in that program. I am a Professional Engineer in the State of California.

4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 ("2013 Permit"), as amended by Order No. R9-2015-0001 ("Amended Permit") and Order No. R9-2015-0100 ("Second Amended Permit") (collectively, "Regional Permit"), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 (“2009 Permit”).

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County, the County and the Orange County Flood Control District (collectively, “South Orange County Permittees”), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the County, which amendment became effective on January 7, 2016. The County first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year (“FY”) 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the County to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the County to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision

A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the County to significantly increase its existing resource commitments to develop, administer and maintain a multitude of costly new program elements. Meeting those requirements would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in the County. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. These efforts may include County staffing, materials and supplies, as well as contract work. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the County is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the County of \$26,304 in FY 2014-15, \$135,090 in FY 2015-16 and an estimated assessment during FY 2016-17 of \$196,368.

b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the County to strictly comply with the numeric effluent

limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research, meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. These efforts may include County staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the County is required, under a cost-sharing agreement, to pay a portion of the costs of such work. As part of the cost-sharing, the County was assessed \$26,304 in FY 2014-15, \$72,573 in FY 2015-16 and anticipates an assessment of \$140,633 in FY 2016-17.

c. Water Quality Improvement Plan. Provisions A.4, B, and F of the Regional Permit require the South Orange County Permittees, including the County, to develop, implement, and update a water quality improvement plan (“WQIP”). To comply with these Provisions, the South Orange County Permittees, including the County, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. These costs may also include County staffing, materials and supplies, and contract work. The South Orange County Permittees have retained consultants to assist in developing a WQIP, and the County is required, under a cost-sharing agreement, to pay a portion of the costs of such

consultants. As part of the cost-sharing, the County was assessed \$63,335 in FY 2015-16 and anticipates an assessment of an estimated \$50,668 in FY 2016-17.

d. Alternative Compliance Requirements. Provision B.3.c. of the Regional Permit provides that if the South Orange County Permittees, including the County, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the County must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. These efforts may include County staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing these programs, and the County is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of that cost-sharing, I am informed and believe and therefore state that the County expended no funds in FY 2015-16 and anticipates spending an estimated \$5,066 during FY 2016-17 with respect to such requirements.

e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the County, to ensure that Priority Development Projects either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation

of new program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the update of their existing Hydromodification Management Plan to implement these new requirements, and the County is required to pay a portion of the cost of those consultants through a cost-sharing agreement. As part of that cost-sharing, I am informed and believe and therefore state that the County was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$7,600 during FY 2016-17 with respect to such requirements.

f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the County, to update their BMP Design Manual (termed “Model Water Quality Management Plan” in Orange County) with specific criteria and procedures. To comply with the Regional Permit’s stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the County, must expend resources to update the Model Water Quality Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The County must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South

Orange County Permittees, including the County, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The County is required to pay a portion of such costs pursuant to a cost-sharing agreement. The County also will be required to fund development of the County's local Water Quality Management Plan. I am informed and believe and therefore state that the County was assessed \$5,315 in FY 2015-16 and anticipates an assessment of an estimated \$5.322 during FY 2016-17 with respect to such requirements.

g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Permit require the County to develop and implement a residential inspection program. To comply with these Provisions, the County must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection requirements. These costs include those to conduct studies and investigations (mapping, modeling, pilot studies, etc.), to plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain compliance with Provision E.5.a. and E.5.c. These costs may include County staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the County was assessed no funds in FY 2015-16 or FY 2016-17 with respect to such requirements. I am informed and believe and therefore state that expenditures will be required for future fiscal years.

h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the County, to develop

and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the South Orange County Permittees, including the County, must expend funds to develop, administer, and maintain a new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes funds needed to conduct studies and investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.5.e. These costs may include County staff resources, materials and supplies, and contract work. The South Orange County Permittees, including the County, have retained consultants to undertake screening for existing development retrofit and stream rehabilitation project opportunities. The County is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the County was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$6,333 during FY 2016-17 with respect to such requirements.

i. Enforcement Response Plan. Provision E.6 of the Regional Permit requires development and implementation by the County of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal authority for ensuring water quality protection. The South Orange County Permittees, including the County, have retained legal counsel to undertake an update of the existing

Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. The County is required to pay a portion of the cost of this update through a cost-sharing agreement. The County also will be required to expend funds to implement the update through training of staff and other implementation activities. I am informed and believe and therefore state that the County was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$1,729 during FY 2016-17 with respect to such requirements.

j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the County must update its Jurisdictional Urban Runoff Program (“JRMP”) document in FY 2016-17. The County must also submit updates to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with the Regional Permit. These costs may include requirements for County employee staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the County was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$3,992 during FY 2016-17 with respect to such requirements.

k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the County, to

periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the County and its staff to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The County was assessed no funds for this requirement in FY 2015-16. I am informed and believe and therefore state that the assessment to the County of this requirement to date is approximately \$633 during FY 2016-17, which represents the County's share of an appearance on before the RWQCB on behalf of itself and the other South Orange County Copermittees.

8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for any of these new and/or enhanced programs/activities, with the exception of flood district assessments which have been temporarily transferred to the County by the Orange County Flood Control District. I am informed and believe and therefore state that such District funding, even if extended through the term of the requirements set forth in the Regional Permit and at issue in the test claim, would not fully recompense the County for the cost of such requirements. Additionally, the Measure M2 Environmental Cleanup Program, which is a countywide competitive grant program administered by the Orange County Transportation Authority, that offers funding for transportation-related water quality programs, and other competitive state or regional grant programs and limited rebate programs, such as Metropolitan Water District's ("Met") funding programs and the Municipal Water District of Orange County's ("MWDOC") rebate programs, provide some source of funds for stormwater quality activities. I am informed and believe and therefore state that the funds received from such programs, would, if received, pay only for a

portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that projects employing Measure M2 funds, Met funds, and MWDOC funds also require some element of County matching funds. The County has not received any such funds. Thus, to the extent that these funds are available with respect to the requirements set forth in the Regional Permit, such funds do not provide offsetting savings that result in no net costs to the County nor do they provide any additional revenue in an amount sufficient to fund the cost of the state mandates and therefore would not fully recompense the County for such requirements.

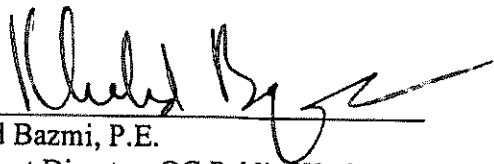
9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the County would have the discretion to impose under California law to recover any portion of these new and/or enhanced programs/activities without a vote of the affected electorate.

10. I am further informed and believe and therefore state that the County cannot recoup the costs of any of the programs described above by imposing fees.

11. I am further informed and believe and therefore state that, subject to the sources identified in Paragraph 8, the only available source to pay for the above-described new and/or enhanced programs/activities is the County's General Fund.

Executed this 24th day of August 2016 at Santa Ana, California.

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


Khalid Bazmi, P.E.
Assistant Director, OC Public Works, County of
Orange

DECLARATION OF KHALID BAZMI, P.E.
FOR ORANGE COUNTY FLOOD CONTROL DISTRICT

DECLARATION OF KHALID BAZMI, P.E., ON BEHALF OF THE ORANGE COUNTY
FLOOD CONTROL DISTRICT IN SUPPORT OF TEST CLAIM

I, Khalid Bazmi, declare as follows:

1. I make this declaration based upon my own personal knowledge, except for matters set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would competently testify to the matters set forth herein under oath.
2. I am employed by the County of Orange (“County”) as an Assistant Director of OC Public Works. I also serve as the Chief Engineer for the Orange County Flood Control District (“District”). I have knowledge of the District’s sources of funding for the programs and activities set forth in this declaration.
3. I have held my current position for approximately one year. My duties include assisting in managing the OC Public Works Department and I oversee managers in OC Environmental Resources who are responsible for managing the Orange County Stormwater Program and the District’s role in that program. I am a Professional Engineer in the State of California.
4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region (“RWQCB”) Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 (“2013 Permit”), as amended by Order No. R9-2015-0001 (“Amended Permit”) and Order No. R9-2015-0100 (“Second Amended Permit”) (collectively, “Regional Permit”), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 (“2009 Permit”).

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County, the County of Orange and the District (collectively, “South Orange County Permittees”), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the District, which amendment became effective on January 7, 2016. The District first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year (“FY”) 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the District to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the District to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the

District to significantly increase its existing resource commitments to develop and maintain a multitude of costly new program elements. Meeting those requirements would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in District right-of-way. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the District is required, under a cost-sharing agreement, to pay a percentage of the costs of such consultants, as well as other work performed under the cost-sharing agreement. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the District of \$26,304 in Fiscal Year (“FY”) 2014-15, \$63,355 in FY 2015-16 and an estimated assessment during FY 2016-17 of \$89,036.

b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the District to strictly comply with the numeric effluent limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I –

Twenty Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research, meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the District is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the District expended \$66,433 in FY 2014-15, \$38,355 in FY 2015-16 and anticipates an assessment of \$69,036 in FY 2016-17.

c. Water Quality Improvement Plan. Provisions A.4, B, and F of the Regional Permit require the South Orange County Permittees, including the District, to develop, implement, and update a water quality improvement plan (“WQIP”). To comply with these Provisions, the South Orange County Permittees, including the District, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. The South Orange County Permittees have retained consultants to assist in developing a WQIP, and the District is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the District was assessed \$25,000 in FY 2015-16 and anticipates an assessment of an estimated \$20,000 in FY 2016-17.

d. Alternative Compliance Requirements. Provision B.3.c. of the Regional

Permit provides that if the South Orange County Permittees, including the District, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the District must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. The South Orange County Permittees have retained consultants to assist in developing these programs, and the District is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of that cost-sharing, I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$2,000 during FY 2016-17 with respect to such requirements.

e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the District, to ensure that Priority Development Projects either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation of new program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the update of their existing Hydromodification Management Plan to implement these new requirements, and the District is required to pay a portion of the cost of those

consultants through a cost-sharing agreement. As part of that cost-sharing, I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$3,000 during FY 2016-17 with respect to such requirements.

f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the District, to update their BMP Design Manual (termed "Model Water Quality Management Plan" in Orange County) with specific criteria and procedures. To comply with the Regional Permit's stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the District, must expend resources to update the Model Water Quality Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The District must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South Orange County Permittees, including the District, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The District is required to pay a portion of such costs pursuant to a cost-sharing agreement. The District also will be required to fund development of the District's local Water Quality Management Plan.

I am informed and believe and therefore state that the District was assessed \$4,000 in FY 2015-16 and anticipates an assessment of an estimated \$4,000 during FY 2016-17 with respect to such requirements.

g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Permit require the District to develop and implement a residential inspection program. To comply with these Provisions, the District must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection requirements. These costs include those to conduct studies and investigations (mapping, modeling, pilot studies, etc.), to plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain compliance with Provision E.5.a. and E.5.c. I am informed and believe and therefore state that the District was assessed no funds in FY 2015-16 or FY 2016-17 with respect to such requirements. I am informed and believe and therefore state that expenditures may be required for future fiscal years.

h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the District, to develop and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the South Orange County Permittees, including the District, must expend funds to develop, administer, and maintain a new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes funds needed to conduct studies and

investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.5.e. The South Orange County Permittees, including the District, have retained consultants to undertake screening for existing development retrofit and stream rehabilitation project opportunities. The District is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the District was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$2,500 during FY 2016-17 with respect to such requirements.

i. Enforcement Response Plan. Provision E.6 of the Regional Permit requires development and implementation by the District of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal authority for ensuring water quality protection. The South Orange County Permittees, including the District, have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. The District is required to pay a portion of the cost of this update through a cost-sharing agreement. The District also will be required to expend funds to implement the update through training of staff and other implementation activities. I am informed and believe and therefore state that the District was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$1,300 during FY 2016-17 with

respect to such requirements.

j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the District must update its Jurisdictional Urban Runoff Program (“JRMP”) document in FY 2016-17. The District must also submit updates to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with the Regional Permit. I am informed and believe and therefore state that the District was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$3,000 during FY 2016-17 with respect to such requirements.

k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the District, to periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the copermitees to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The District was assessed no funds for this requirement in FY 2015-16. I am informed and believe and therefore state that the assessment to the District of this requirement to date is approximately \$250 during FY 2016-17, which represents the District share of an appearance on behalf of it and other copermitees by the County.

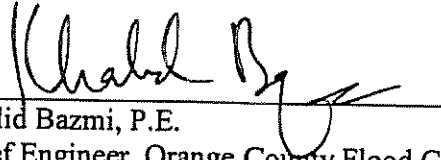
8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for any of these new and/or enhanced programs/activities, with the exception of certain competitive grant programs and limited rebate programs, such as Metropolitan Water District's ("Met") funding programs and the Municipal Water District of Orange County's ("MWDOC") rebate programs. I am informed and believe and therefore state that the funds received from such programs, would, if received, pay only for a portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that projects employing such funds also require some element of District matching funds. The District has not received any such funds. Thus, to the extent that these funds are available with respect to the requirements set forth in the Regional Permit, such funds do not provide offsetting savings that result in no net costs to the District nor do they provide any additional revenue in an amount sufficient to fund the cost of the state mandates and therefore would not fully recompense the District for such requirements.

9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the District would have the discretion to impose under California law to recover any portion of these new and/or enhanced programs/activities without a vote of the affected electorate, with the exception of that portion of flood district tax assessments which has been allocated for stormwater quality efforts. These funds are limited, and have temporarily been allocated to the County, which is the principal permittee under the Regional Permit and which coordinates stormwater quality management efforts for the South Orange County Copermittees. I am further informed and believe and therefore state that even if these funds were returned to the District, they would not be sufficient to fully fund the state mandates required by the Regional Permit and therefore would not fully recompense the District for such mandates.

10. I am further informed and believe and therefore state that the District cannot recoup the costs of any of the programs described above by imposing fees,

Executed this 24th day of August 2016 at Santa Ana, California.

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



Khalid Bazmi, P.E.
Chief Engineer, Orange County Flood Control
District

DECLARATION OF DAVID DOYLE

FOR CITY OF ALISO VIEJO

DECLARATION OF DAVID DOYLE ON BEHALF OF THE CITY OF ALISO VIEJO
IN SUPPORT OF TEST CLAIM

I, David Doyle, declare as follows:

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

2. I am employed by the City of Aliso Viejo (hereafter, "City") as the City Manager. I have knowledge of the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for over 2 years. My duties include managing and overseeing all departments of the City of Aliso Viejo, including the Public Works Department and its stormwater management program.

4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 ("2013 Permit"), as amended by Order No. R9-2015-0001 ("Amended Permit") and Order No. R9-2015-0100 ("Second Amended Permit") (collectively, "Regional Permit"), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 ("2009 Permit").

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County (including the City), the County of Orange and the Orange County Flood Control District (collectively, "South Orange County Permittees"), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the City, which amendment became effective on January 7, 2016. The City first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year ("FY") 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the City to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the City to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the City to significantly increase its existing resource commitments to develop, administer and maintain a multitude of costly new program elements. Meeting those requirements

would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in the City. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the City of \$60,179 in Fiscal Year (“FY”) 2015-16 and an estimated expenditure during FY 2016-17 of \$83,045.

b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the City to strictly comply with the numeric effluent limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research,

meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$19,700 in FY 2014-15, \$45,919 in FY 2015-16 and anticipates an assessment of \$70,497 in FY 2016-17. In addition, the City spent \$3,500 in FY 2014-15 in staff time and other internal expenses. The City, together with three other South Orange County municipalities, initiated the Dairy Fork Wetland project, a regional structural BMP for the reduction of bacteria in compliance with the TMDL. I am informed and believe and therefore state that the City spent \$110,000 in local matching funds in FY 2015-16 and anticipants spending an additional \$40,000 in FY 2016-17 with respect to such requirements. In addition, the City has anticipates spending \$111,000 of its share of a \$311,000 project to install filter inserts on catch basins and funded in part by Orange County Measure M2 during FY2016-17.

c. Water Quality Improvement Plan. Provisions A.4, B, and F of the Regional Permit require the South Orange County Permittees, including the City, to develop, implement, and update a water quality improvement plan ("WQIP"). To comply with these Provisions, the South Orange County Permittees, including the City, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables,

meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. These costs may also include City staffing, materials and supplies, and contract work. The South Orange County Permittees have retained consultants to assist in developing a WQIP, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$14,259 in FY 2015-16 and anticipates an assessment of an estimated \$11,407 in FY 2016-17. Also, I am informed and believe and therefore state that the City has itself expended \$7,950 in FY 2015-16 and anticipates spending an estimated \$ 15,900 during FY 2016-17 with respect to such requirements.

d. Alternative Compliance Requirements. Provision B.3.c. of the Regional Permit provides that if the South Orange County Permittees, including the City, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the City must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing these programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such

consultants. As part of that cost-sharing, I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$1,140 during FY 2016-17 with respect to such requirements.

e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the City, to ensure that Priority Development Projects either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation of new program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the update of their existing Hydromodification Management Plan to implement these new requirements, and the City is required to pay a portion of the cost of those consultants through a cost-sharing agreement. As part of that cost-sharing, I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$1,711 during FY 2016-17 with respect to such requirements.

f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the City, to update their BMP Design Manual (termed "Model Water Quality Management Plan" in Orange County) with specific criteria and procedures. To comply with the Regional Permit's stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the City, must expend resources to update the Model Water Quality Management Plan to include revised standards, procedures, and criteria required by the

Regional Permit. The City must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South Orange County Permittees, including the City, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The City is required to pay a portion of such costs pursuant to a cost-sharing agreement. The City also will be required to fund development of the City's local Water Quality Management Plan. I am informed and believe and therefore state that the City was assessed \$471 in FY 2015-16 and anticipates an assessment of an estimated \$469 during FY 2016-17 with respect to such requirements.

g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Permit require the City to develop and implement a residential inspection program. To comply with these Provisions, the City must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection requirements. These costs include those to conduct studies and investigations (mapping, modeling, pilot studies, etc.), to plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain

compliance with Provision E.5.a. and E.5.c. These costs may include City staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 or FY 2016-17 with respect to such requirements. I am informed and believe and therefore state that expenditures will be required for future fiscal years.

h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the City, to develop and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the South Orange County Permittees, including the City, must expend funds to develop, administer, and maintain a new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes funds needed to conduct studies and investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.5.e. These costs may include City staff resources, materials and supplies, and contract work. The South Orange County Permittees, including the City, have retained consultants to undertake screening for existing development retrofit and stream rehabilitation project opportunities. The City is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City was assessed no

funds in FY 2015-16 and anticipates an assessment of an estimated \$1,425 during FY 2016-17 with respect to such requirements.

i. Enforcement Response Plan. Provision E.6 of the Regional Permit requires development and implementation by the City of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal authority for ensuring water quality protection. The South Orange County Permittees, including the City, have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. The City is required to pay a portion of the cost of this update through a cost-sharing agreement. The City also will be required to expend funds to implement the update through training of staff and other implementation activities. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates spending an estimated \$152 during FY 2016-17 with respect to such requirements.

j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the City must update its Jurisdictional Urban Runoff Program ("JRMP") document in FY 2016-17. The City must also submit updates to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with

the Regional Permit. These costs may include requirements for City employee staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$352 during FY 2016-17 with respect to such requirements.

k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the City, to periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the City and its staff to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The City was assessed no funds for this requirement in FY 2015-16. I am informed and believe and therefore state that the assessment to the City of this requirement to date is approximately \$143 during FY 2016-17, which represents the City's share of an appearance on behalf of it and other copermittees by the County of Orange.

8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for any of these new and/or enhanced programs/activities, with the exception of the Orange County Measure M2 Environmental Cleanup Program, which is a countywide competitive grant program that offers funding for transportation-related water quality programs, and other competitive grant programs and limited rebate programs, such as Metropolitan Water District's ("Met") funding programs and the Municipal Water District of Orange County's ("MWDOC") rebate programs. I am informed and believe and therefore state that the funds received from Measure M2, Met and MWDOC's

programs, would, if received, pay only for a portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that projects employing Measure M2 funds, Met funds, and MWDOC funds also require some element of City matching funds. Thus, to the extent that these funds are available with respect to the requirements set forth in the Regional Permit, such funds do not provide offsetting savings that result in no net costs to the City nor do they provide any additional revenue in an amount sufficient to fund the cost of the state mandates and therefore would not fully recompense the City for such requirements.

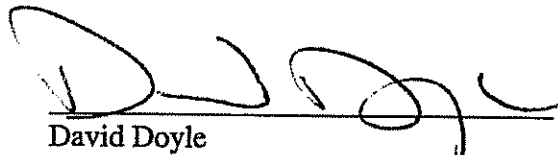
9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the City would have the discretion to impose under California law to recover any portion of these new and/or enhanced programs/activities without a vote of the affected electorate.

10. I am further informed and believe and therefore state that the City cannot recoup the costs of any of the programs described above by imposing fees.

11. I am further informed and believe and therefore state that, subject to the sources identified in Paragraph 8, the only available source to pay for the above-described new and/or enhanced programs/activities is the City's General Fund.

Executed this 14th day of August 2016 at Aliso Viejo, California.

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



David Doyle
City Manager

**DECLARATION OF BRAD FOWLER
FOR CITY OF DANA POINT**

DECLARATION OF BRAD FOWLER ON BEHALF OF THE CITY OF DANA POINT
IN SUPPORT OF TEST CLAIM

I, Brad Fowler, declare as follows:

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

2. I am employed by the City of Dana Point (hereafter, "City") as the Director of Public Works and Engineering Services. I have knowledge of the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately twelve years. My duties include managing the Public Works and Engineering Department and I oversee divisional supervisors in Engineering and Water Quality.

4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 ("2013 Permit"), as amended by Order No. R9-2015-0001 ("Amended Permit") and Order No. R9-2015-0100 ("Second Amended Permit") (collectively, "Regional Permit"), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 ("2009 Permit").

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County (including the City), the County of Orange and the Orange County Flood Control District (collectively, "South Orange County Permittees"), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the City, which amendment became effective on January 7, 2016. The City first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year ("FY") 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the City to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the City to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the City to significantly increase its existing resource commitments to develop, administer and maintain a multitude of costly new program elements. Meeting those requirements

would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in the City. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the City of \$ 3,864 in Fiscal Year (“FY”) 2014-15, \$ 14,226 in FY 2015-16 and is estimated to be \$ 16,788 during FY 2016-17. Additionally, the City spent \$ 240 in FY 2015-16 and is estimated to spend \$ 43,275 during FY 2016-17.

b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the City to strictly comply with the numeric effluent limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I – Twenty

Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research, meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. I am informed and believe and therefore state that as part of the cost sharing, the City was assessed \$ 3,864 in FY 2014-15, \$ 3,566 in FY 2015-16 and is estimated to be assessed \$ 7,407 during FY 2016-17. Additionally, the City spent \$ 2,159 in FY 2015-16 and is estimated to spend \$ 15,312 during FY 2016-17.

c. Water Quality Improvement Plan. Provisions A.4, B, and F of the Regional Permit require the South Orange County Permittees, including the City, to develop, implement, and update a water quality improvement plan (“WQIP”). To comply with these Provisions, the South Orange County Permittees, including the City, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. These costs may also include City staffing, materials and supplies, and contract work. The South Orange County Permittees have retained consultants to assist in developing a WQIP, and the City is required, under a cost-sharing agreement, to pay a

portion of the costs of such consultants. I am informed and believe and therefore state that as part of the cost sharing, the City was assessed \$ 10,660 in FY 2015-16 and is estimated to be assessed \$ 8,528 during FY 2016-17. Additionally, the City spent \$15,331 in FY 2015-16 and is estimated to spend \$ 16,613 during FY 2016-17.

d. Alternative Compliance Requirements. Provision B.3.c. of the Regional Permit provides that if the South Orange County Permittees, including the City, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the City must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing these programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates a cost share of an estimated \$ 853 during FY 2016-17 with respect to such requirements.

e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the City, to ensure that Priority Development Projects either avoid critical sediment yield areas or

implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation of new program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the update their existing Hydromodification Management Plan to implement these new requirements, and the City is required to pay a portion of the cost of those consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates a cost share of an estimated \$ 1,279 during FY 2016-17 with respect to such requirements. Additionally, the City spent \$ 0 in FY 2015-16 and is estimated to spend \$ 1,775 during FY 2016-17.

f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the City, to update their BMP Design Manual (termed “Model Water Quality Management Plan” in Orange County) with specific criteria and procedures. To comply with the Regional Permit’s stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the City, must expend resources to update the Model Water Quality Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The City must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops,

etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South Orange County Permittees, including the City, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The City is required to pay a portion of such costs pursuant to a cost-sharing agreement. The City also will be required to fund development of the City's local Water Quality Management Plan. I am informed and believe and therefore state that the City's share of costs required to address such requirements was \$ 367 in FY 2015-16 and is estimated to be \$ 365 during FY 2016-17. Additionally, the City spent \$ 2,312 in FY 2015-16 and is estimated to spend \$ 7,513 during FY 2016-17.

g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Permit require the City to develop and implement a residential inspection program. To comply with these Provisions, the City must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection requirements. These costs include those to conduct studies and investigations (mapping, modeling, pilot studies, etc.), to plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain compliance with Provision E.5.a. and E.5.c. These costs may include City staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City was not assessed any funds in FY 2015-16 and is not expected to be assessed any costs in FY 2016-17. Additionally, the City spent \$ 0 in FY 2015-16 and is expected to spend \$ 3,302 in FY 2016-17.

h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the City, to develop and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the South Orange County Permittees, including the City, must expend funds to develop, administer, and maintain a new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes funds needed to conduct studies and investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.5.e. These costs may include City staff resources, materials and supplies, and contract work. The South Orange County Permittees, including the City, have retained consultants to undertake screening for existing development retrofit and stream rehabilitation project opportunities. The City is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates no costs during FY 2016-17 with respect to such requirements.

i. Enforcement Response Plan. Provision E.6 of the Regional Permit requires development and implementation by the City of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal

authority for ensuring water quality protection. The South Orange County Permittees, including the City, have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. The City is required to pay a portion of the cost of this update through a cost-sharing agreement. The City also will be required to expend funds to implement the update through training of staff and other implementation activities. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates a cost share of an estimated \$ 119 during FY 2016-17 with respect to such requirements. Additionally, the City spent \$ 0 in FY 2015-16 and is estimated to spend \$ 3,189 in FY 2016-17.

j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the City must update its Jurisdictional Urban Runoff Program (“JRMP”) document in FY 2016-17. The City must also submit updates to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with the Regional Permit. These costs may include requirements for City employee staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates a cost share of an estimated \$ 274 during FY 2016-17 with respect to such requirements. Additionally, the

City spent \$ 0 in FY 2015-16 and is estimated to spend \$ 13,210 in FY 2016-17.

k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the City, to periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the City and its staff to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The City was assessed no funds for this requirement in FY 2015-16. I am informed and believe and therefore state that the City's share of a progress report made on behalf of the South County Copermittees by the County will be at least \$107 during FY 2016-17. Additionally, the City spent \$ 0 in FY 2015-16 and is estimated to spend \$ 1,176 in FY 2016-17.

8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for any of these new and/or enhanced programs/activities, with the exception of the Orange County Measure M2 Environmental Cleanup Program, which is a countywide competitive grant program that offers limited funding for certain transportation-related water quality programs. I am informed and believe and therefore state that the funds received from Measure M2 or other competitive grant or limited rebate programs, would, if received, pay only for a portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that projects employing Measure M2 funds and funds from other programs also require some element of City matching funds. Thus, to the extent that such funds were available with respect to the requirements set forth in the Regional Permit, such funds do not provide offsetting savings that

result in no net costs to the City nor do they provide any additional revenue in an amount sufficient to fund the cost of the state mandates and therefore would not fully recompense the City for such requirements.

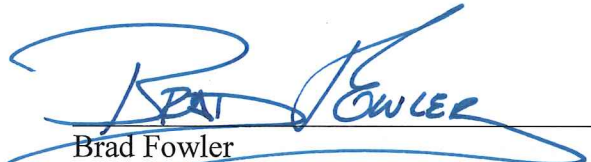
9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the City would have the discretion to impose under California law to recover any portion of these new and/or enhanced programs/activities without a vote of the affected electorate.

10. I am further informed and believe and therefore state that the City cannot recoup the costs of any of the programs described above by imposing fees.

11. I am further informed and believe and therefore state that, subject to the sources identified in Paragraph 8, the only available source to pay for the above-described new and/or enhanced programs/activities is the City's General Fund.

Executed this 19th day of August 2016 at Dana Point, California.

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



Brad Fowler
Director of Public Works & Engineering Services

**DECLARATION OF DAVID SHISSLER
FOR CITY OF LAGUNA BEACH**

DECLARATION OF DAVID SHISSLER ON BEHALF OF THE
CITY OF LAGUNA BEACH IN SUPPORT OF TEST CLAIM

I, David Shissler, declare as follows:

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

2. I am employed by the City of Laguna Beach (hereafter, "City") as the Director of Water Quality. I have knowledge of the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately fourteen years. My duties include managing the Water Quality Department and I oversee divisional supervisors in Water Quality.

4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 ("2013 Permit"), as amended by Order No. R9-2015-0001 ("Amended Permit") and Order No. R9-2015-0100 ("Second Amended Permit") (collectively, "Regional Permit"), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 ("2009 Permit").

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County (including the City), the County of Orange and the Orange County Flood Control District (collectively, "South Orange County Permittees"), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the City, which amendment became effective on January 7, 2016. The City first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year ("FY") 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the City to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the City to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the City to significantly increase its existing resource commitments to develop, administer and maintain a multitude of costly new program elements. Meeting those requirements

would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in the City. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the City of \$3,170 in Fiscal Year (“FY”) 2014-15, \$17,114 in FY 2015-16 and is estimated to be \$19,901.83 during FY 2016-17. Additionally, the City estimates spending \$1,978 of non-cost shared City funds in FY 2016-17 to comply with the requirements of Sections A.2 and A.3.

b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the City to strictly comply with the numeric effluent limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I – Twenty

Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research, meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The City has also retained consultant services independent of the County to support the City specific development and compliance efforts for the TMDL and related programs. I am informed and believe and therefore state that as part of the cost sharing, the City was assessed \$3,170 in FY 2014-15, \$7,389 in FY 2015-16 and is estimated to be assessed \$11,344 during FY 2016-17. Additionally, the City separately spent \$11,691 in FY 2015-16 and is estimated to spend \$12,060 in FY 2016-17 on meeting the mandates imposed in Provision A.3.b and Attachment E of the Regional Permit.

c. Water Quality Improvement Plan. Provisions A.4, B, and F of the Regional Permit require the South Orange County Permittees, including the City, to develop, implement, and update a water quality improvement plan (“WQIP”). To comply with these Provisions, the South Orange County Permittees, including the City, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with

each WQIP. These costs may also include City staffing, materials and supplies, and contract work. The South Orange County Permittees have retained consultants to assist in developing a WQIP, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The City has also retained consultant services independent of the County to support the City with WQIP development and implementation. I am informed and believe and therefore state that the City's share of costs required to address such requirements was \$9,725 in FY 2015-16 and is estimated to be \$7,780 during FY 2016-17. Additionally, the City separately spent \$17,342 in FY 2015-16, and is estimated to spend \$2,472 in FY 2016-17 on meeting the mandates imposed in Provisions A.4, B, and F of the Regional Permit.

d. Alternative Compliance Requirements. Provision B.3.c. of the Regional Permit provides that if the South Orange County Permittees, including the City, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the City must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing these programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such

consultants. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates a cost share of an estimated \$778 during FY 2016-17 with respect to such requirements.

e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the City, to ensure that Priority Development Projects either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation of new program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the update of their existing Hydromodification Management Plan and to implement these new requirements. The City is required to pay a portion of the cost of those consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates a cost share of an estimated \$1,167 during FY 2016-17 with respect to such requirements. Additionally, the City anticipates separately spending an estimated \$141 in FY 2016-17 to comply with Provision E.3.c.(2) of the Regional Permit.

f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the City, to update their BMP Design Manual (termed "Model Water Quality Management Plan" in Orange County) with specific criteria and procedures. To comply with the Regional Permit's stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the City, must expend resources to update the Model Water Quality

Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The City must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South Orange County Permittees, including the City, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The City is required to pay a portion of such costs pursuant to a cost-sharing agreement. The City also will be required to fund development of the City's local Water Quality Management Plan. I am informed and believe and therefore state that the City's share of costs required to address such requirements was \$368 in FY 2015-16 and is estimated to be \$367 during FY 2016-17. Additionally, the City separately spent \$1,978 in FY 2015-16 and anticipates spending an estimated \$565 in FY 2016-17 to comply with Provisions E.3.d and F.2.b of the Regional Permit

g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Regional Permit require the City to develop and implement a residential inspection program. To comply with these Provisions, the City must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection requirements. These costs include those to conduct studies and investigations (mapping, modeling, pilot studies, etc.), to plan and implement inspection and

enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain compliance with Provision E.5.a. and E.5.c. These costs may include City staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City expended no fees in FY 2015-16 and anticipates spending an estimated \$1,412 during FY 2016-17 with respect to such requirements imposed by Provisions E.5.a and E.5.c of the Regional Permit.

h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the City, to develop and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the South Orange County Permittees, including the City, must expend funds to develop, administer, and maintain a new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes funds needed to conduct studies and investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.5.e. These costs may include City staff resources, materials and supplies, and contract work. The South Orange County Permittees, including the City, have retained consultants to undertake screening

for existing development retrofit and stream rehabilitation project opportunities. The City is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City expended no cost shared funds in FY 2015-16 but anticipates separately spending an estimated \$972 during FY 2016-17. Additionally, the City anticipates separately spending an estimated \$283 in FY 2016-17 with respect to compliance with requirements imposed by Provision E.5.e of the Regional Permit.

i. Enforcement Response Plan. Provision E.6 of the Regional Permit requires development and implementation by the City of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal authority for ensuring water quality protection. The South Orange County Permittees, including the City, have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. The City is required to pay a portion of the cost of this update through a cost-sharing agreement. The City also will be required to expend funds to implement the update through training of staff and other implementation activities. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates a cost share of an estimated \$119 during FY 2016-17 with respect to such requirements. Additionally, the City anticipates separately spending an estimated \$283 in FY 2016-17 complying with Provision E.6 of the Regional Permit.

j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the City must update its Jurisdictional Urban Runoff Program (“JRMP”) document in FY 2016-17. The City must also submit updates

to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with the Regional Permit. These costs may include requirements for City employee staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates a cost share of an estimated \$275 during FY 2016-17 with respect to such requirements. Additionally, the City anticipates separately spending an estimated \$1,766 in FY 2016-17 complying with Provision F.2, Provision F.3.b. (3), and/or Provision F.5.b of the Regional Permit.

k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the City, to periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the City and its staff to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The City expended no funds for this requirement in FY 2015-16. I am informed and believe and therefore state that the City's share of a progress report made on behalf of the South County Copermittees by the County will be at least \$97 during FY 2016-17. Additionally, the City anticipates separately spending an estimated \$141 in FY 2016-17 complying with Provision F.3.a of the Regional Permit.

8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for any of these new and/or enhanced programs/activities mandated by the Regional Permit, with the exception of the Orange County Measure M2 Environmental Cleanup Program, which is a countywide competitive grant program that offers limited funding for certain transportation-related water quality programs. I am informed and believe and therefore state that the funds received from Measure M2, would, if received, pay only for a portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that projects employing Measure M2 funds also require some element of City matching funds. Thus, to the extent that Measure M2 funds were available with respect to some of the requirements set forth in the Regional Permit, such funds would not fully recompense the City for such requirements.

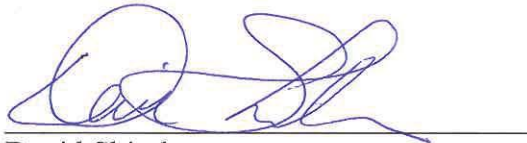
9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the City would have the discretion to impose under California law to recover any portion of these new and/or enhanced programs/activities without a vote of the affected electorate.

10. I am further informed and believe and therefore state that the City cannot recoup the costs of any of the programs described above by imposing fees.

11. I am further informed and believe and therefore state that, subject to the sources identified in Paragraph 8, the only available source to pay for the above-described new and/or enhanced programs/activities is the City's General Fund.

Executed this 22th day of August 2016 at Laguna Beach, California.

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



David Shissler
Director of Water Quality

DECLARATION OF KENNETH H. ROSENFELD, P.E.
FOR CITY OF LAGUNA HILLS

**DECLARATION OF KENNETH H. ROSENFELD, P.E., ON BEHALF OF THE CITY
OF LAGUNA HILLS IN SUPPORT OF TEST CLAIM**

I, Kenneth H. Rosenfield, declare as follows:

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

2. I am employed by the City of Laguna Hills (hereafter, "City") as the Director of Public Services/City Engineer. I have knowledge of the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately twenty one years. My duties include overseeing the Public Services Department and I oversee divisional supervisors in engineering, Public Works (including water quality compliance) and Parks divisions. I am a Professional Engineer in the State of California.

4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 ("2013 Permit"), as amended by Order No. R9-2015-0001 ("Amended Permit") and Order No. R9-2015-0100 ("Second Amended Permit") (collectively, "Regional Permit"), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 (“2009 Permit”).

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County (including the City), the County of Orange and the Orange County Flood Control District (collectively, “South Orange County Permittees”), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the City, which amendment became effective on January 7, 2016. The City first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year (“FY”) 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the City to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the City to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision

A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the City to significantly increase its existing resource commitments to develop, administer and maintain a multitude of costly new program elements. Meeting those requirements would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in the City. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the City of \$14,237 in Fiscal Year (“FY”) 2014-15, \$38,835 in FY 2015-16 and an estimated assessment during FY 2016-17 of \$54,982.

b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the City to strictly comply with the numeric effluent limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research, meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$14,237 in FY 2014-15, \$30,063 in FY 2015-16 and anticipates an assessment of \$47,264 in FY 2016-17.

c. Water Quality Improvement Plan. Provisions A.4, B, and F of the Regional Permit require the South Orange County Permittees, including the City, to develop, implement, and update a water quality improvement plan (“WQIP”). To comply with these Provisions, the South Orange County Permittees, including the City, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. These costs may also include City staffing, materials and supplies, and contract work. The South Orange County Permittees have retained consultants to assist

in developing a WQIP, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$8,771 in FY 2015-16 and anticipates an assessment of an estimated \$7,016 in FY 2016-17.

d. Alternative Compliance Requirements. Provision B.3.c. of the Regional Permit provides that if the South Orange County Permittees, including the City, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the City must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing these programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of that cost-sharing, I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$701 during FY 2016-17 with respect to such requirements.

e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the City, to ensure that Priority Development Projects either avoid critical sediment yield areas or

implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation of new program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the update of their existing Hydromodification Management Plan to implement these new requirements, and the City is required to pay a portion of the cost of those consultants through a cost-sharing agreement. As part of that cost-sharing, I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$1,052 during FY 2016-17 with respect to such requirements.

f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the City, to update their BMP Design Manual (termed “Model Water Quality Management Plan” in Orange County) with specific criteria and procedures. To comply with the Regional Permit’s stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the City, must expend resources to update the Model Water Quality Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The City must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops,

etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South Orange County Permittees, including the City, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The City is required to pay a portion of such costs pursuant to a cost-sharing agreement. The City also will be required to fund development of the City's local Water Quality Management Plan. I am informed and believe and therefore state that the City was assessed \$353 in FY 2015-16 and anticipates an assessment of an estimated \$352 during FY 2016-17 with respect to such requirements.

g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Permit require the City to develop and implement a residential inspection program. To comply with these Provisions, the City must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection requirements. These costs include those to conduct studies and investigations (mapping, modeling, pilot studies, etc.), to plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain compliance with Provision E.5.a. and E.5.c. These costs may include City staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and does not anticipate expending any funds FY 2016-17 with respect to such requirements. I am informed and believe and therefore state that expenditures will be required for future fiscal years.

h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the City, to develop and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the South Orange County Permittees, including the City, must expend funds to develop, administer, and maintain a new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes funds needed to conduct studies and investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.5.e. These costs may include City staff resources, materials and supplies, and contract work. The South Orange County Permittees, including the City, have retained consultants to undertake screening for existing development retrofit and stream rehabilitation project opportunities. The City is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$877 during FY 2016-17 with respect to such requirements.

i. Enforcement Response Plan. Provision E.6 of the Regional Permit requires development and implementation by the City of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal

authority for ensuring water quality protection. The South Orange County Permittees, including the City, have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. The City is required to pay a portion of the cost of this update through a cost-sharing agreement. The City also will be required to expend funds to implement the update through training of staff and other implementation activities. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$114 during FY 2016-17 with respect to such requirements.

j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the City must update its Jurisdictional Urban Runoff Program (“JRMP”) document in FY 2016-17. The City must also submit updates to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with the Regional Permit. These costs may include requirements for City employee staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$265 during FY 2016-17 with respect to such requirements.

k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the City, to periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the City and its staff to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The City was assessed no funds for this requirement in FY 2015-16. I am informed and believe and therefore state that the assessment to the City of this requirement to date is approximately \$88 during FY 2016-17, which represents the City's share of an appearance on behalf of it and other copermittees by the County of Orange.

8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for any of these new and/or enhanced programs/activities, with the exception of the Orange County Measure M2 Environmental Cleanup Program, which is a countywide competitive grant program that offers funding for transportation-related water quality programs, and other competitive grant programs and limited rebate programs, such as Metropolitan Water District's ("Met") funding programs and the Municipal Water District of Orange County's ("MWDOC") rebate programs. I am informed and believe and therefore state that the funds received from Measure M2, Met and MWDOC's programs, would, if received, pay only for a portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that projects employing Measure M2 funds, Met funds, and MWDOC funds also require some element of City matching funds. The City has not received any such funds for the purpose of funding any portion of the new and/or enhanced programs/activities described in this Declaration. Thus, to

the extent that these funds are available with respect to the requirements set forth in the Regional Permit, such funds do not provide offsetting savings that result in no net costs to the City nor do they provide any additional revenue in an amount sufficient to fund the cost of the state mandates and therefore would not fully recompense the City for such requirements.


9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the City would have the discretion to impose under California law to recover any portion of these new and/or enhanced programs/activities without a vote of the affected electorate.

10. I am further informed and believe and therefore state that the City cannot recoup the costs of any of the programs described above by imposing fees.

11. I am further informed and believe and therefore state that, subject to the sources identified in Paragraph 8, the only available source to pay for the above-described new and/or enhanced programs/activities is the City's General Fund.

Executed this 19th day of August 2016 at Laguna Hills, California.

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


Kenneth H. Rosenfield, P.E.
Director of Public Services/City Engineer
City of Laguna Hills, California

**DECLARATION OF NANCY PALMER
FOR CITY OF LAGUNA NIGUEL**

DECLARATION OF NANCY PALMER ON BEHALF OF THE
CITY OF LAGUNA NIGUEL IN SUPPORT OF TEST CLAIM

I, Nancy Palmer, declare as follows:

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

2. I am employed by the City of Laguna Niguel (hereafter, "City") as the City Landscape Architect/Environmental Programs Manager. I have knowledge of the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately 10 years. My duties include oversight of the City's National Pollutant Discharge Elimination System activities, and management of capital improvement projects relating to urban runoff and environmental restoration.

4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 ("2013 Permit"), as amended by Order No. R9-2015-0001 ("Amended Permit") and Order No. R9-2015-0100 ("Second Amended Permit") (collectively, "Regional Permit"), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 ("2009

Permit”).

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County (including the City), the County of Orange and the Orange County Flood Control District (collectively, “South Orange County Permittees”), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the City, which amendment became effective on January 7, 2016. The City first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year (“FY”) 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the City to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the City to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the City to significantly increase its existing resource commitments to develop, administer

and maintain a multitude of costly new program elements. Meeting those requirements would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in the City. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in expenditures by the City of \$22,890 as its cost share, a portion yet to be determined of \$2,306,214 in capital improvement costs for the Crown Valley Parkway Runoff Elimination Project, and \$17,460 in increased staff allocation in Fiscal Year (“FY”) 2014-15; expenditures by the City in FY 2015-16 of \$71,814 as its cost share, a yet-to-be-determined portion of \$165,494 in capital improvement costs for the Crown Valley Parkway Runoff Elimination Project, and \$1,746 in increased staff allocation; and

expenditures of \$97,205 as the City's cost share, a portion yet to be determined of \$6,445,232 in capital improvement costs for the Crown Valley Park Channel Entry Improvements Project, and \$18,451 in increased staffing allocation for FY 2016-17, with respect to such requirements.

b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the City to strictly comply with the numeric effluent limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research, meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. I am informed and believe and therefore state that the City has expended \$22,890 as its cost share, a portion yet to be determined of \$2,306,214 in capital improvement costs for the Crown Valley Parkway Runoff Elimination Project, and \$873 in increased staff allocation in FY 2014-15; \$50,186 as its cost share and \$923 in increased staff allocation in FY 2015-16; and anticipates spending an estimated \$78,173 as its cost share, \$923 in increased staff allocation, and a portion yet to be determined of \$6,445,232 in capital improvement costs for the Crown Valley Park Channel Entry Improvements Project during FY 2016-17 with respect to such requirements.

c. Water Quality Improvement Plan. Provisions A.4, B, and F of the

Regional Permit require the South Orange County Permittees, including the City, to develop, implement, and update a water quality improvement plan (“WQIP”). To comply with these Provisions, the South Orange County Permittees, including the City, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. These costs may also include City staffing, materials and supplies, and contract work. The South Orange County Permittees have retained consultants to assist in developing a WQIP, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. I am informed and believe and therefore state that the City has expended \$21,267 as its cost share and \$923 in increased staff allocation in FY 2015-16; and anticipates spending an estimated \$17,301 as its cost share and \$1,845 in increased staff allocation during FY 2016-17 with respect to such requirements.

d. Alternative Compliance Requirements. Provision B.3.c. of the Regional Permit provides that if the South Orange County Permittees, including the City, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the City must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding

the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing these programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. I am informed and believe and therefore state that the City expended no funds in FY 2015-16; and anticipates spending an estimated \$1,730 as its cost share during FY 2016-17 with respect to such requirements.

e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the City, to ensure that Priority Development Projects either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation of new program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the update their existing Hydromodification Management Plan to implement these new requirements, and the City is required to pay a portion of the cost of those consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City expended no funds on this item in FY 2015-16; and anticipates spending an estimated \$ 2,595 as its cost share during FY 2016-17 with respect to such requirements.

f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the City, to update their BMP Design Manual (termed “Model Water Quality Management Plan” in Orange County)

with specific criteria and procedures. To comply with the Regional Permit's stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the City, must expend resources to update the Model Water Quality Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The City must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South Orange County Permittees, including the City, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The City is required to pay a portion of such costs pursuant to a cost-sharing agreement. The City also will be required to fund development of the City's local Water Quality Management Plan. I am informed and believe and therefore state that the City has expended \$763 as its cost share in FY 2015-16; and anticipates spending an estimated \$761 as its cost share and \$1,230 in increased staff allocation during FY 2016-17 with respect to such requirements.

g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Permit require the City to develop and implement a residential inspection program. To comply with these Provisions, the City must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection

requirements. These costs include those to conduct studies and investigations (mapping, modeling, pilot studies, etc.), to plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain compliance with Provision E.5.a. and E.5.c. These costs may include City staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City has expended no funds on this item in FY 2015-16; and anticipates spending an estimated \$2,306 in increased staff allocation during FY 2016-17 with respect to such requirements.

h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the City, to develop and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the South Orange County Permittees, including the City, must expend funds to develop, administer, and maintain a new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes funds needed to conduct studies and investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.5.e. These costs may

include City staff resources, materials and supplies, and contract work. The South Orange County Permittees, including the City, have retained consultants to undertake screening for existing development retrofit and stream rehabilitation project opportunities. The City is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City has expended \$10,838 in increased staff allocation, and a portion yet to be determined of \$1,521,878 in capital improvements costs for the Oso Creek Multi-Use Trail project in FY 2015-16; and anticipates spending an estimated \$2,163 as its cost share, \$18,451 in increased staffing allocation, and a portion yet to be determined of \$6,445,232 in capital improvement costs for the Crown Valley Park Channel Entry Improvements project during FY 2016-17 with respect to such requirements.

i. Enforcement Response Plan. Provision E.6 of the Regional Permit requires development and implementation by the City of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal authority for ensuring water quality protection. The South Orange County Permittees, including the City, have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. The City is required to pay a portion of the cost of this update through a cost-sharing agreement. The City also will be required to expend funds to implement the update through training of staff and other implementation activities. I am informed and believe and therefore state that the City has expended no funds in FY 2015-16; and anticipates spending an estimated \$247 as its cost share and \$923 in increased staff allocation during FY 2016-17 with respect to such requirements.

j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the City must update its Jurisdictional Urban Runoff Program (“JRMP”) document in FY 2016-17. The City must also submit updates to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with the Regional Permit. These costs may include requirements for City employee staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City has expended no funds for this item in FY 2015-16; and anticipates spending an estimated \$571 as its cost share and \$12,301 in increased staff allocation during FY 2016-17 with respect to such requirements.

k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the City, to periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the City and its staff to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The City expended no funds for this requirement in FY 2015-16. I am informed and believe and therefore state that the assessment to the City of this requirement to date is approximately \$216 during FY 2016,17, which represents the

City's share of an appearance on behalf of it and other copermittees by the County of Orange.

8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for these new and/or enhanced programs/activities, with the exception of the Orange County Measure M2 Environmental Cleanup Program, which is a countywide competitive grant program that offers funding for transportation-related water quality capital improvement projects; and the State Proposition 84 and Proposition 1 Integrated Regional Water Management Program and Stormwater Program Funds, which are statewide competitive grant programs that offer funding for multi-purpose urban runoff management capital improvement projects. I am informed and believe and therefore state that grant funds received from Measure M2 and the State, would, if received, pay only for a portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that capital improvement projects employing Measure M2 and State Proposition 84 and Proposition 1 funds also require some element of City matching funds; and I further state that all such grant funds known to have been received or expected to be received, have been subtracted as an offset from the capital improvement projects costs identified in sub-paragraphs 7a, 7b and 7h above. Thus, to the extent that Measure M2 and State Proposition 84 and Proposition 1 funds have been or will become available with respect to the requirements set forth in the Regional Permit, such funds would not fully recompense the City for such requirements.

9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the City would have the discretion to impose under California law to recover any portion of these new and/or enhanced programs/activities without a vote of the

affected electorate.

10. I am further informed and believe and therefore state that the City cannot recoup the costs of any of the programs described above by imposing fees.

11. I am further informed and believe and therefore state that, subject to the sources identified in Paragraph 8, the only available source to pay for the above-described new and/or enhanced programs/activities is the City's General Fund.

Executed this 19th day of August, 2016 at Laguna Niguel, California.

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

 8/19/2016

Nancy Palmer

City Landscape Architect/Environmental Programs Manager



DECLARATION OF THOMAS WHEELER

FOR CITY OF LAKE FOREST



**DECLARATION OF THOMAS WHEELER ON BEHALF OF THE CITY OF LAKE
FOREST IN SUPPORT OF TEST CLAIM**

I, Tom Wheeler, declare as follows:

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

2. I am employed by the City of Lake Forest (hereafter, "City") as the Public Works Director/ City Engineer. I have knowledge of the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for over 4 years. My duties include management responsibilities for the Public Works Department. I am a member of the American Society of Civil Engineers and the American Public Works Association.

4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 ("2013 Permit"), as amended by Order No. R9-2015-0001 ("Amended Permit") and Order No. R9-2015-0100 ("Second Amended Permit") (collectively, "Regional Permit"), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 ("2009 Permit").

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County (including the City), the County of Orange and the Orange County Flood Control District (collectively, "South Orange County Permittees"), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the City, which amendment became effective on January 7, 2016. The City first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year ("FY") 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

- a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the City to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the City to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the City to significantly increase its existing resource commitments to develop, administer and maintain a multitude of costly new program elements. Meeting those requirements

would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in the City. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants through assessments. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the City of \$41,047 in Fiscal Year (“FY”) 2015-16 and an estimated expenditure during FY 2016-17 of \$57,610.

b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the City to strictly comply with the numeric effluent limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research,

meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$14,070 in FY 2014-15, \$32,796 in FY 2015-16 and anticipates an estimated assessment of \$50,350 in FY 2016-17. Also, the City, together with three other South Orange County municipalities, initiated the Dairy Fork Constructed Wetland project, a regional structural BMP for the reduction of bacteria in compliance with the TMDL. I am informed and believe and therefore state that the City spent \$13,249 in FY 2014-15, and spent \$28,369 in local matching funds in FY 2015-16 and anticipants spending an additional \$27,670 in FY 2016-17 with respect to such requirements. In addition, the City anticipates spending \$33,325 of its share of a \$133,300 project to install trash and debris screens on catch basins and funded in part by Orange County Measure M2 during FY2015-16.

c. Water Quality Improvement Plan. Provisions A.4, B, and F of the Regional Permit require the South Orange County Permittees, including the City, to develop, implement, and update a water quality improvement plan ("WQIP"). To comply with these Provisions, the South Orange County Permittees, including the City, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor,

assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. These costs may also include City staffing, materials and supplies, and contract work. The South Orange County Permittees have retained consultants to assist in developing a WQIP, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$8,250 in FY 2015-16 and anticipates an assessment of an estimated \$6,600 in FY 2016-17.

d. Alternative Compliance Requirements. Provision B.3.c. of the Regional Permit provides that if the South Orange County Permittees, including the City, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the City must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing these programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of that cost-sharing, I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$660 during FY 2016-17 with respect to such requirements.

e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the City, to ensure that Priority Development Projects either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation of new program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the update of their existing Hydromodification Management Plan to implement these new requirements, and the City is required to pay a portion of the cost of those consultants through a cost-sharing agreement. As part of that cost-sharing, I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$990 during FY 2016-17 with respect to such requirements.

f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the City, to update their BMP Design Manual (termed "Model Water Quality Management Plan" in Orange County) with specific criteria and procedures. To comply with the Regional Permit's stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the City, must expend resources to update the Model Water Quality Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The City must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan

to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South Orange County Permittees, including the City, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The City is required to pay a portion of such costs pursuant to a cost-sharing agreement. The City also will be required to fund development of the City's local Water Quality Management Plan. I am informed and believe and therefore state that the City was assessed \$900 in FY 2015-16 and anticipates an assessment of an estimated \$900 during FY 2016-17 with respect to such requirements.

g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Permit require the City to develop and implement a residential inspection program. To comply with these Provisions, the City must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection requirements. These costs include those to conduct studies and investigations (mapping, modeling, pilot studies, etc.), to plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain compliance with Provision E.5.a. and E.5.c. These costs may include City staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 or FY 2016-17 with respect to such

requirements. I am informed and believe and therefore state that expenditures will be required for future fiscal years.

h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the City, to develop and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the South Orange County Permittees, including the City, must expend funds to develop, administer, and maintain a new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes funds needed to conduct studies and investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.5.e. These costs may include City staff resources, materials and supplies, and contract work. The South Orange County Permittees, including the City, have retained consultants to undertake screening for existing development retrofit and stream rehabilitation project opportunities. The City is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$825 during FY 2016-17 with respect to such requirements.

i. Enforcement Response Plan. Provision E.6 of the Regional Permit

requires development and implementation by the City of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal authority for ensuring water quality protection. The South Orange County Permittees, including the City, have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. The City is required to pay a portion of the cost of this update through a cost-sharing agreement. The City also will be required to expend funds to implement the update through training of staff and other implementation activities. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates spending an estimated \$292 during FY 2016-17 with respect to such requirements.

j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the City must update its Jurisdictional Urban Runoff Program ("JRMP") document in FY 2016-17. The City must also submit updates to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with the Regional Permit. These costs may include requirements for City employee staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an

estimated \$676 during FY 2016-17 with respect to such requirements.

k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the City, to periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the City and its staff to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The City was assessed no funds for this requirement in FY 2015-16. I am informed and believe and therefore state that the assessment to the City of this requirement to date is approximately \$83 during FY 2016-17, which represents the City's share of an appearance on behalf of it and other copermittees by the County of Orange.

8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for any of these new and/or enhanced programs/activities, with the exception of the Orange County Measure M2 Environmental Cleanup Program, which is a countywide competitive grant program that offers funding for transportation-related water quality programs, and other competitive grant programs and limited rebate programs, such as Metropolitan Water District's ("Met") funding programs and the Municipal Water District of Orange County's ("MWDOC") rebate programs. I am informed and believe and therefore state that the funds received from Measure M2, Met and MWDOC's programs, would, if received, pay only for a portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that projects employing Measure M2 funds, Met funds, and MWDOC funds also require some element of City matching funds. Thus, to the extent that these funds are available with respect to the

requirements set forth in the Regional Permit, such funds do not provide offsetting savings that result in no net costs to the City nor do they provide any additional revenue in an amount sufficient to fund the cost of the state mandates and therefore would not fully recompense the City for such requirements.

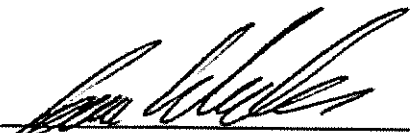
9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the City would have the discretion to impose under California law to recover any portion of these new and/or enhanced programs/activities without a vote of the affected electorate.

10. I am further informed and believe and therefore state that the City cannot recoup the costs of any of the programs described above by imposing fees.

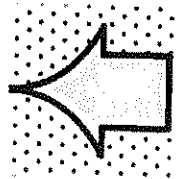
11. I am further informed and believe and therefore state that, subject to the sources identified in Paragraph 8, the only available source to pay for the above-described new and/or enhanced programs/activities is the City's General Fund.

Executed this 19th day of August 2016 at Lake Forest, California.

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



Thomas Wheeler, P.E.
Director of Public Works/City Engineer
City of Lake Forest



**DECLARATION OF RICHARD SCHLESINGER
FOR CITY OF MISSION VIEJO**

DECLARATION OF RICHARD SCHLESINGER ON BEHALF OF THE CITY OF
MISSION VIEJO IN SUPPORT OF TEST CLAIM

I, Richard Schlesinger, declare as follows:

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

2. I am employed by the City of Mission Viejo (hereafter, "City") as the City Engineer. I have knowledge of the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately 12 years. My duties include managing the Public Works Department and overseeing divisional supervisors in Engineering Services and Water Quality.

4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 ("2013 Permit"), as amended by Order No. R9-2015-0001 ("Amended Permit") and Order No. R9-2015-0100 ("Second Amended Permit") (collectively, "Regional Permit"), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 ("2009 Permit").

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County (including the City), the County of Orange and the Orange County Flood Control District (collectively, "South Orange County Permittees"), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the City, which amendment became effective on January 7, 2016. The City first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year ("FY") 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the City to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the City to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the City to significantly increase its existing resource commitments to develop, administer and maintain a multitude of costly new program elements. Meeting those requirements

would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in the City. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the City of \$45,327 in FY 2014-15, \$85,955 in FY 2015-16 and an estimated assessment during FY 2016-17 of \$51,833.

b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the City to strictly comply with the numeric effluent limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research,

meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$26,304 in FY 2014-15, 56,137 in FY 2015-16 and anticipates an assessment of \$103,766 in FY 2016-17.

c. Water Quality Improvement Plan. Provisions A.4, B, and F of the Regional Permit require the South Orange County Permittees, including the City, to develop, implement, and update a water quality improvement plan (“WQIP”). To comply with these Provisions, the South Orange County Permittees, including the City, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. These costs may also include City staffing, materials and supplies, and contract work. The South Orange County Permittees have retained consultants to assist in developing a WQIP, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$29,858 in FY 2015-16 and anticipates an assessment of an estimated \$23,866 in FY 2016-17.

d. Alternative Compliance Requirements. Provision B.3.c. of the Regional

Permit provides that if the South Orange County Permittees, including the City, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the City must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing these programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of that cost-sharing, I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates being assessed an estimated \$2,388 during FY 2016-17 with respect to such requirements.

e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the City, to ensure that Priority Development Projects either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation of new program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the update of their existing Hydromodification Management Plan to implement these new

requirements, and the City is required to pay a portion of the cost of those consultants through a cost-sharing agreement. As part of that cost-sharing, I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$3,583 during FY 2016-17 with respect to such requirements.

f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the City, to update their BMP Design Manual (termed “Model Water Quality Management Plan” in Orange County) with specific criteria and procedures. To comply with the Regional Permit’s stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the City, must expend resources to update the Model Water Quality Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The City must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South Orange County Permittees, including the City, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The City is required to pay a portion of such costs pursuant to a cost-sharing agreement. The City also will be required to fund development

of the City's local Water Quality Management Plan. I am informed and believe and therefore state that the City was assessed \$1,026 in FY 2015-16 and anticipates an assessment of an estimated \$1,028 during FY 2016-17 with respect to such requirements.

g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Permit require the City to develop and implement a residential inspection program. To comply with these Provisions, the City must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection requirements. These costs include those to conduct studies and investigations (mapping, modeling, pilot studies, etc.), to plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain compliance with Provision E.5.a. and E.5.c. These costs may include City staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 or FY 2016-17 with respect to such requirements. I am informed and believe and therefore state that expenditures will be required for future fiscal years.

h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the City, to develop and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the South Orange County Permittees, including the City, must expend funds to develop, administer, and maintain a new program to comply with the Regional Permit's retrofit and stream rehabilitation

requirements. This includes funds needed to conduct studies and investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.5.e. These costs may include City staff resources, materials and supplies, and contract work. The South Orange County Permittees, including the City, have retained consultants to undertake screening for existing development retrofit and stream rehabilitation project opportunities. The City is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$2,985 during FY 2016-17 with respect to such requirements.

i. Enforcement Response Plan. Provision E.6 of the Regional Permit requires development and implementation by the City of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal authority for ensuring water quality protection. The South Orange County Permittees, including the City, have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. The City is required to pay a portion of the cost of this update through a cost-sharing agreement. The City also will be required to expend funds to implement the update through training of staff and other implementation activities. I am informed and

believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$334 during FY 2016-17 with respect to such requirements.

j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the City must update its Jurisdictional Urban Runoff Program (“JRMP”) document in FY 2016-17. The City must also submit updates to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with the Regional Permit. These costs may include requirements for City employee staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$771 during FY 2016-17 with respect to such requirements.

k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the City, to periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the City and its staff to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The City was assessed no funds for this requirement in FY 2015-16. I am

informed and believe and therefore state that the assessment to the City of this requirement to date is approximately \$299 during FY 2016-17, which represents the City's share of an appearance on behalf of it and other copermittees by the County of Orange.

8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for any of these new and/or enhanced programs/activities, with the exception of the Orange County Measure M2 Environmental Cleanup Program, which is a countywide competitive grant program that offers funding for transportation-related water quality programs, and other competitive grant programs and limited rebate programs, such as Metropolitan Water District's ("Met") funding programs and the Municipal Water District of Orange County's ("MWDOC") rebate programs. I am informed and believe and therefore state that the funds received from such programs, would, if received, pay only for a portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that projects employing Measure M2 funds, Met funds, and MWDOC funds also require some element of City matching funds. The City has not received any such funds. Thus, to the extent that these funds are available with respect to the requirements set forth in the Regional Permit, such funds do not provide offsetting savings that result in no net costs to the City nor do they provide any additional revenue in an amount sufficient to fund the cost of the state mandates and therefore would not fully recompense the City for such requirements.

9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the City would have the discretion to impose under California law to recover any portion of these new and/or enhanced programs/activities without a vote of the

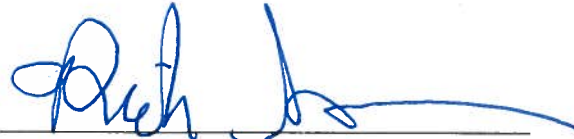
affected electorate.

10. I am further informed and believe and therefore state that the City cannot recoup the costs of any of the programs described above by imposing fees.

11. I am further informed and believe and therefore state that, subject to the sources identified in Paragraph 8, the only available source to pay for the above-described new and/or enhanced programs/activities is the City's General Fund.

Executed this 22nd day of August 2016 at Mission Viejo, California.

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



Richard Schlesinger
City Engineer

**DECLARATION OF EHAB MAXIMOUS
FOR CITY OF RANCHO SANTA MARGARITA**

**DECLARATION OF EHAB MAXIMOUS ON BEHALF OF THE CITY OF RANCHO
SANTA MARGARITA IN SUPPORT OF TEST CLAIM**

I, Ehab Maximous, declare as follows:

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

2. I am employed by the City of Rancho Santa Margarita (hereafter, "City") as the Public Works Director/City Engineer. I have knowledge of the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately five years. My duties include overseeing the Public Works Department and I oversee divisional supervisors in the Engineering Department.

4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 ("2013 Permit"), as amended by Order No. R9-2015-0001 ("Amended Permit") and Order No. R9-2015-0100 ("Second Amended Permit") (collectively, "Regional Permit"), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 ("2009 Permit").

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County (including the City), the County of Orange and the Orange County Flood Control District (collectively, "South Orange County Permittees"), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the City, which amendment became effective on January 7, 2016. The City first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year ("FY") 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the City to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the City to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the City to significantly increase its existing resource commitments to develop, administer and maintain a multitude of costly new program elements. Meeting those requirements

would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in the City. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the City of \$24,716 in Fiscal Year (“FY”) 2014-15, \$40,149 in FY 2015-16 and an estimated assessment during FY 2016-17 of \$62,635.

b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the City to strictly comply with the numeric effluent limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research,

meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$24,716 in FY 2014-15, \$22,810 in FY 2015-16 and anticipates an assessment of \$47,377 in FY 2016-17.

c. Water Quality Improvement Plan. Provisions A.4, B, and F of the Regional Permit require the South Orange County Permittees, including the City, to develop, implement, and update a water quality improvement plan (“WQIP”). To comply with these Provisions, the South Orange County Permittees, including the City, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. These costs may also include City staffing, materials and supplies, and contract work. The South Orange County Permittees have retained consultants to assist in developing a WQIP, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$17,339 in FY 2015-16 and anticipates an assessment of an estimated \$13,871 in FY 2016-17.

d. Alternative Compliance Requirements. Provision B.3.c. of the Regional Permit provides that if the South Orange County Permittees, including the City, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the City must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing these programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of that cost-sharing, I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$1,387 during FY 2016-17 with respect to such requirements.

e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the City, to ensure that Priority Development Projects either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation of new program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the

update of their existing Hydromodification Management Plan to implement these new requirements, and the City is required to pay a portion of the cost of those consultants through a cost-sharing agreement. As part of that cost-sharing, I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$2,080 during FY 2016-17 with respect to such requirements.

f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the City, to update their BMP Design Manual (termed “Model Water Quality Management Plan” in Orange County) with specific criteria and procedures. To comply with the Regional Permit’s stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the City, must expend resources to update the Model Water Quality Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The City must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South Orange County Permittees, including the City, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The City is required to pay a portion of such costs

pursuant to a cost-sharing agreement. The City also will be required to fund development of the City's local Water Quality Management Plan. I am informed and believe and therefore state that the City was assessed \$623 in FY 2015-16 and anticipates an assessment of an estimated \$622 during FY 2016-17 with respect to such requirements.

g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Permit require the City to develop and implement a residential inspection program. To comply with these Provisions, the City must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection requirements. These costs include those to conduct studies and investigations (mapping, modeling, pilot studies, etc.), to plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain compliance with Provision E.5.a. and E.5.c. These costs may include City staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and does not anticipate expending any funds in FY 2016-17 with respect to such requirements. I am informed and believe and therefore state that expenditures will be required for future fiscal years.

h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the City, to develop and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the South Orange County Permittees, including the City, must expend funds to develop, administer, and maintain a

new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes funds needed to conduct studies and investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.5.e. These costs may include City staff resources, materials and supplies, and contract work. The South Orange County Permittees, including the City, have retained consultants to undertake screening for existing development retrofit and stream rehabilitation project opportunities. The City is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$1,733 during FY 2016-17 with respect to such requirements.

i. Enforcement Response Plan. Provision E.6 of the Regional Permit requires development and implementation by the City of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal authority for ensuring water quality protection. The South Orange County Permittees, including the City, have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. The City is required to pay a portion of the cost of this update through a cost-sharing agreement. The City also will be required to expend funds to implement the

update through training of staff and other implementation activities. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$202 during FY 2016-17 with respect to such requirements.

j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the City must update its Jurisdictional Urban Runoff Program (“JRMP”) document in FY 2016-17. The City must also submit updates to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with the Regional Permit. These costs may include requirements for City employee staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$467 during FY 2016-17 with respect to such requirements.

k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the City, to periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the City and its staff to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The City was assessed no funds for this requirement in FY 2015-16. I am

informed and believe and therefore state that the assessment to the City of this requirement to date is approximately \$173 during FY 2016-17, which represents the City's share of an appearance on behalf of it and other copermittees by the County of Orange.

8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for any of these new and/or enhanced programs/activities, with the exception of the Orange County Measure M2 Environmental Cleanup Program, which is a countywide competitive grant program that offers funding for transportation-related water quality programs, and other competitive grant programs and limited rebate programs, such as Metropolitan Water District's ("Met") funding programs and the Municipal Water District of Orange County's ("MWDOC") rebate programs. I am informed and believe and therefore state that the funds received from Measure M2, Met and MWDOC's programs, would, if received, pay only for a portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that projects employing Measure M2 funds, Met funds, and MWDOC funds also require some element of City matching funds. The City has not received any such funds for the purpose of funding any portion of the new and/or enhanced programs/activities described in this Declaration. Thus, to the extent that these funds are available with respect to the requirements set forth in the Regional Permit, such funds do not provide offsetting savings that result in no net costs to the City nor do they provide any additional revenue in an amount sufficient to fund the cost of the state mandates and therefore would not fully recompense the City for such requirements.

9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the City would have the discretion to impose under California law to


recover any portion of these new and/or enhanced programs/activities without a vote of the affected electorate.

10. I am further informed and believe and therefore state that the City cannot recoup the costs of any of the programs described above by imposing fees.

11. I am further informed and believe and therefore state that, subject to the sources identified in Paragraph 8, the only available source to pay for the above-described new and/or enhanced programs/activities is the City's General Fund.

Executed this 19th day of August 2016 at Rancho Santa Margarita, California.

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



Ehab Maximous
Public Works Director/City Engineer
City of Rancho Santa Margarita, California

**DECLARATION OF TOM BONIGUT
FOR CITY OF SAN CLEMENTE**

**DECLARATION OF TOM BONIGUT ON BEHALF OF THE CITY OF SAN
CLEMENTE IN SUPPORT OF TEST CLAIM**

I, Tom Bonigut, declare as follows:

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

2. I am employed by the City of San Clemente (hereafter, "City") as the Deputy Public Works Director. I have knowledge of the City's sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately 7 years. My duties include providing management and oversight of the City's Environmental (Surface Water Quality and recycling), Traffic & Transportation, Land Development Engineering, and Public Works Inspection programs.

4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 ("2013 Permit"), as amended by Order No. R9-2015-0001 ("Amended Permit") and Order No. R9-2015-0100 ("Second Amended Permit") (collectively, "Regional Permit"), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 ("2009

Permit”).

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County (including the City), the County of Orange and the Orange County Flood Control District (collectively, “South Orange County Permittees”), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the City, which amendment became effective on January 7, 2016. The City first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year (“FY”) 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

- a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the City to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the City to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the City to significantly increase its existing resource commitments to develop, administer and

maintain a multitude of costly new program elements. Meeting those requirements would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in the City. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the City of \$23,431 in Fiscal Year (“FY”) 2015-16 and an estimated assessment during FY 2016-17 of \$20,619.

- b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the City to strictly comply with the numeric effluent limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I – Twenty

Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research, meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. I am informed and believe and therefore state that the City expended \$33,782 in FY 2014-15 and \$28,624 in FY 2015-16. I estimate an expenditure of approximately \$30,000 in FY 2016-17 with respect to such requirements.

- c. Water Quality Improvement Plan. Provisions A.4, B, and F of the Regional Permit require the South Orange County Permittees, including the City, to develop, implement, and update a water quality improvement plan (“WQIP”). To comply with these Provisions, the South Orange County Permittees, including the City, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. These costs may also include City staffing, materials and supplies, and contract work. The South Orange County Permittees have retained consultants to assist in developing a WQIP, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of

the cost-sharing, the City was assessed \$23,430 in FY 2015-16 and anticipates an assessment of an estimated \$18,744 in FY 2016-17. Also, I am informed and believe and therefore state that the City has itself expended \$4,100 in FY 2014-15 and \$19,000 in FY 2015-16 in City staff time and other internal expenses. I am further informed and believe and therefore state that the City anticipates spending an estimated \$5,000 during FY 2016-17 with respect to such requirements.

- d. Alternative Compliance Requirements. Provision B.3.c. of the Regional Permit provides that if the South Orange County Permittees, including the City, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the City must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing these programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of that cost-sharing, I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$1,874 during FY 2016-17 with respect to such requirements.

- e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the City, to ensure that Priority Development Projects either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation of new program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the update of their existing Hydromodification Management Plan to implement these new requirements, and the City is required to pay a portion of the cost of those consultants through a cost-sharing agreement. As part of that cost-sharing, I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$2,811 during FY 2016-17 with respect to such requirements. In addition, I am informed and believe and therefore state that the City spent \$5,000 in FY 2014-15, \$2,000 in FY 2015-16 and anticipates spending an estimated \$2,000 in FY 2016-17 in City staff time and other internal expenses with respect to such requirements.
- f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the City, to update their BMP Design Manual (termed “Model Water Quality Management Plan” in Orange County) with specific criteria and procedures. To comply with the Regional Permit’s stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the City, must expend resources to update the Model Water Quality

Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The City must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South Orange County Permittees, including the City, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The City is required to pay a portion of such costs pursuant to a cost-sharing agreement. The City also will be required to fund development of the City's local Water Quality Management Plan. I am informed and believe and therefore state that the City was assessed \$847 in FY 2015-16 and anticipates an assessment of an estimated \$846 during FY 2016-17 with respect to such requirements. In addition, I am informed and believe and therefore state that the City will spend an estimated \$1,500 during FY 2016-17 in City staff time and other internal expenses with respect to such requirements.

- g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Permit require the City to develop and implement a residential inspection program. To comply with these Provisions, the City must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection requirements. These costs include those to conduct studies and investigations

(mapping, modeling, pilot studies, etc.), to plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain compliance with Provision E.5.a. and E.5.c. These costs may include City staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 or FY 2016-17 with respect to such requirements. I anticipate spending an estimated \$4,000 during FY 2016-17 in City staff time and other internal expenses with respect to such requirements.

- h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the City, to develop and implement a program to retrofit existing development and rehabilitate streams within existing development. To comply with these Provisions, the South Orange County Permittees, including the City, must expend funds to develop, administer, and maintain a new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes funds needed to conduct studies and investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision

E.5.e. These costs may include City staff resources, materials and supplies, and contract work. The South Orange County Permittees, including the City, have retained consultants to undertake screening for existing development retrofit and stream rehabilitation project opportunities. The City is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$2,343 during FY 2016-17 with respect to such requirements. In addition, I anticipate spending an estimated \$2,000 during FY 2016-17 in City staff time and other internal expenses with respect to such requirements.

- i. Enforcement Response Plan. Provision E.6 of the Regional Permit requires development and implementation by the City of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal authority for ensuring water quality protection. The South Orange County Permittees, including the City, have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in Provision E.6. The City is required to pay a portion of the cost of this update through a cost-sharing agreement. The City also will be required to expend funds to implement the update through training of staff and other implementation activities. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$275 during FY 2016-17 with respect to such requirements. In addition, the City anticipates spending an estimated \$5,000 during FY 2016-17 in City staff time and other internal expenses with respect to such requirements.

- j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the City must update its Jurisdictional Urban Runoff Program (“JRMP”) document in FY 2016-17. The City must also submit updates to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with the Regional Permit. These costs may include requirements for City employee staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$635 during FY 2016-17 with respect to such requirements. In addition, the City anticipates spending an estimated \$6,000 during FY 2016-17 in City staff time and other internal expenses with respect to such requirements.
- k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the City, to periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the City and its staff to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The City was assessed no funds for this requirement in FY 2015-16. I am informed

and believe and therefore state that the assessment to the City of this requirement to date is approximately \$234 during FY 2016-17, which represents the City's share of an appearance on behalf of it and other copermitees by the County of Orange. I also am informed and believe that the City would spend an additional \$2,000 in FY 2016-17 in City staff time and other internal expenses with respect to such requirements.

8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for any of these new and/or enhanced programs/activities, with the exception of the Orange County Measure M2 Environmental Cleanup Program, which is a countywide competitive grant program that offers funding for transportation-related water quality programs, and other competitive grant programs and limited rebate programs, such as Metropolitan Water District's ("Met") funding programs and the Municipal Water District of Orange County's ("MWDOC") rebate programs. I am informed and believe and therefore state that the funds received from Measure M2, Met and MWDOC's programs, would, if received, pay only for a portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that projects employing Measure M2 funds, Met funds, and MWDOC funds also require some element of City matching funds. The City also has an existing stormwater fee program, approved by the City's electorate and which expires in 2020, at which time its continuation and/or increase will be subject to voter approval. Further, the proceeds from the assessment do not fully recompense the City for the cost of complying with the provisions of the Regional Permit described in this Declaration. The storm water fee program, approved by the electorate, did not anticipate the increased program costs resulting from the challenged Regional Permit provisions described in this Declaration. Thus, to the extent that these funds are available with respect to the

requirements set forth in the Regional Permit, such funds do not provide offsetting savings that result in no net costs to the City nor do they provide any additional revenue in an amount sufficient to fund the cost of the state mandates and therefore would not fully recompense the City for such requirements.

9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the City would have the discretion to impose under California law to recover any portion of these new and/or enhanced programs/activities without a vote of the affected electorate.

10. I am further informed and believe and therefore state that the City cannot recoup the costs of any of the programs described above by imposing fees.

11. I am further informed and believe and therefore state that, subject to the sources identified in Paragraph 8, the only available source to pay for the above-described new and/or enhanced programs/activities is the City's General Fund.

Executed this 19th day of August 2016 at San Clemente, California.

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



Tom Bonigut
Deputy Public Works Director

**DECLARATION OF BENJAMIN SIEGEL
FOR CITY OF SAN JUAN CAPISTRANO**

DECLARATION OF BENJAMIN SIEGEL ON BEHALF OF THE CITY OF SAN JUAN
CAPISTRANO IN SUPPORT OF TEST CLAIM

I, Benjamin Siegel, declare as follows:

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

2. I am employed by the City of San Juan Capistrano (hereafter, “City”) as the City Manager. I have knowledge of the City’s sources of funding for the programs and activities set forth in this declaration.

3. I have held my current position for approximately six months. My duties include overseeing all departments in the City, including the Public Works Department and its stormwater management duties.

4. I have reviewed relevant portions of the California Regional Water Quality Control Board, San Diego Region (“RWQCB”) Order No. R9-2013-0001 (NPDES No. CAS0109266) issued on May 8, 2013 (“2013 Permit”), as amended by Order No. R9-2015-0001 (“Amended Permit”) and Order No. R9-2015-0100 (“Second Amended Permit”) (collectively, “Regional Permit”), and I am familiar with such portions of the requirements of the Regional Permit.

5. I have also reviewed and am familiar with relevant portions of Order No. R9-2009-0002 (NPDES CAS0108740) issued by the RWQCB on December 16, 2009 (“2009 Permit”).

6. Based on my understanding of the requirements of the 2009 Permit and the Regional Permit, I understand that the Regional Permit requires the Permittees to perform various new activities unique to local government not required by the 2009 Permit or federal law and/or perform requirements at higher levels of service than that required by the 2009 Permit or federal law. I am informed and believe and therefore state that on February 11, 2015, the RWQCB amended the 2013 Permit to extend coverage to the cities of south Orange County (including the City), the County of Orange and the Orange County Flood Control District (collectively, "South Orange County Permittees"), which permit became effective on April 1, 2015. I am further informed and believe and therefore state that on November 18, 2015, the RWQCB adopted the Second Amended Permit to extend coverage to municipalities in Riverside County and to impose additional new and increased mandates on the South Orange County Permittees, including the City, which amendment became effective on January 7, 2016. The City first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year ("FY") 2014-15.

7. These new and enhanced mandates set forth in the Regional Permit include the following:

a. Receiving Water Limitations and Effluent Limitations. Provision A.2 of the Regional Permit requires the City to strictly comply with Receiving Water Limitations. Provision A.3 of the Regional Permit requires the City to strictly comply with effluent limitations. Compliance with the receiving water limitations of Provision A.2 and the effluent limitations of Provision A.3 of the Regional Permit will require the City to significantly increase its existing resource commitments to develop, administer and maintain a multitude of costly new program elements. Meeting those requirements

would require a significant expansion of all existing program activities, including construction and/or implementing or expanding structural and non-structural “best management practices” (“BMPs”), including potentially the construction and operation of treatment control BMPs in the City. Required activities also include conducting studies and investigations, planning and implementing new program activities (research, meetings, stakeholder coordination, etc.), and monitoring, assessing, reporting on, and modifying programs as necessary to achieve and maintain compliance with receiving water limitations. Projects required may include additional BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs and other programs. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees also have retained consultants to assist in addressing these requirements, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. The total eventual cost of carrying out new and expanded programs at a level sufficient to meet those standards is not currently known. However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the City of \$33,563 in Fiscal Year (“FY”) 2015-16 and an estimated assessment during FY 2016-17 of \$51,833.

b. Beaches and Creeks TMDL. Provision A.3.b. and Attachment E of the Regional Permit require the City to strictly comply with the numeric effluent limitations of the Revised Total Maximum Daily Load for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region. The efforts to attain such limitations will require studies and investigations, new programs for BMPs (including research,

meetings, stakeholder coordination, etc.), monitoring, assessment and potential modification of program elements. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing the TMDL and related programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$20,184 in FY 2014-15, \$18,627 in FY 2015-16 and anticipates an assessment of \$38,689 in FY 2016-17. In addition, the City spent an additional \$14,427 in FY 2015-16 with respect to such requirements.

c. Water Quality Improvement Plan. Provisions A.4, B, and F of the Regional Permit require the South Orange County Permittees, including the City, to develop, implement, and update a water quality improvement plan (“WQIP”). To comply with these Provisions, the South Orange County Permittees, including the City, must expend resources to develop, administer, and maintain new programs for the WQIP. These expenditures include costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. These costs may also include City staffing, materials and supplies, and contract work. The South Orange County Permittees have retained consultants to assist in developing a WQIP, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of the cost-sharing, the City was assessed \$14,936 in FY 2015-16 and anticipates an assessment of an estimated \$11,948

in FY 2016-17. In addition, the City spent \$3,550 in FY 2015-16 and anticipates spending \$3,841 in FY 2016-17 with respect to such requirements.

d. Alternative Compliance Requirements. Provision B.3.c. of the Regional Permit provides that if the South Orange County Permittees, including the City, wish to avoid immediate liability for exceedances of water quality standards they must undertake certain additional requirements in conjunction with the development of their WQIP. To comply with these provisions, the City must expend funds to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), identify and implement annual milestones, conduct analyses regarding the ability of identified water quality strategies to meet numeric goals and to monitor, assess, report on and modify these programs as necessary. These efforts may include City staffing, materials and supplies, as well as contract work. The South Orange County Permittees have retained consultants to assist in developing these programs, and the City is required, under a cost-sharing agreement, to pay a portion of the costs of such consultants. As part of that cost-sharing, I am informed and believe and therefore state that the City expended no funds in FY 2015-16 and anticipates spending an estimated \$1,194 during FY 2016-17 with respect to such requirements.

e. Hydromodification Management BMP Requirements. Provision E.3.c.(2) of the Regional Permit requires the South Orange County Permittees, including the City, to ensure that Priority Development Projects either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. This work includes modeling and studies, planning and implementation of new

program activities, and monitoring, assessment, reporting and modifying programs as required. The South Orange County Permittees have retained consultants to assist in the update of their existing Hydromodification Management Plan to implement these new requirements, and the City is required to pay a portion of the cost of those consultants through a cost-sharing agreement. As part of that cost-sharing, I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$1,792 during FY 2016-17 with respect to such requirements.

f. BMP Design Manual. Provisions E.3.d and F.2.b of the Regional Permit requires the South Orange County Permittees, including the City, to update their BMP Design Manual (termed “Model Water Quality Management Plan” in Orange County) with specific criteria and procedures. To comply with the Regional Permit’s stricter onsite requirements for Priority Development Projects, the South Orange County Permittees, including the City, must expend resources to update the Model Water Quality Management Plan to include revised standards, procedures, and criteria required by the Regional Permit. The City must collaborate with other South Orange County Permittees to update the regional Model Water Quality Management Plan for submission concurrent with each WQIP, and then develop its own local Model Water Quality Management Plan to institute the minimum standards of the regional Manual. This effort requires costs to plan and implement new program requirements (research and development of required deliverables, meetings, stakeholder coordination, public outreach and training workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.3.d. The South Orange County Permittees,

including the City, have retained consultants to assist in updating the regional Model Water Quality Management Plan. The City is required to pay a portion of such costs pursuant to a cost-sharing agreement. The City also will be required to fund development of the City's local Water Quality Management Plan. I am informed and believe and therefore state that the City was assessed \$563 in FY 2015-16 and anticipates an assessment of an estimated \$563 during FY 2016-17 with respect to such requirements.

g. Residential Inspection Program. Provisions E.5.a and E.5.c of the Permit require the City to develop and implement a residential inspection program. To comply with these Provisions, the City must expend resources to develop, administer and maintain a new program to comply with the Regional Permit's residential inspection requirements. These costs include those to conduct studies and investigations (mapping, modeling, pilot studies, etc.), to plan and implement inspection and enforcement activities (research and development of program approaches, modification of ordinances, development of forms and tracking systems, meetings, public outreach and workshops, etc.) and to monitor, assess, report on, and modify programs as necessary to maintain compliance with Provision E.5.a. and E.5.c. These costs may include City staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 or FY 2016-17 with respect to such requirements. In addition, the City spent \$1,056 in FY 2015-16 and anticipates spending \$6,400 in FY 2016-17 with respect to such requirements.

h. Retrofit and Rehabilitation Program. Provision E.5.e of the Regional Permit requires the South Orange County Permittees, including the City, to develop and implement a program to retrofit existing development and rehabilitate streams within

existing development. To comply with these Provisions, the South Orange County Permittees, including the City, must expend funds to develop, administer, and maintain a new program to comply with the Regional Permit's retrofit and stream rehabilitation requirements. This includes funds needed to conduct studies and investigations (mapping, modeling, etc.), to plan and implement program activities (identification, evaluation, and prioritization of candidate projects), to select projects for implementation, to conduct project design and engineering, to coordinate with regulatory agencies, to engage in outreach and coordination with stakeholders and project partners, to acquire and manage project funding, and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with Provision E.5.e. These costs may include City staff resources, materials and supplies, and contract work. The South Orange County Permittees, including the City, have retained consultants to undertake screening for existing development retrofit and stream rehabilitation project opportunities. The City is required to pay a portion of the cost of such consultants through a cost-sharing agreement. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$1,493 during FY 2016-17 with respect to such requirements.

i. Enforcement Response Plan. Provision E.6 of the Regional Permit requires development and implementation by the City of an Enforcement Response Plan intended to describe the applicable approaches and options for enforcing local legal authority for ensuring water quality protection. The South Orange County Permittees, including the City, have retained legal counsel to undertake an update of the existing Enforcement Consistency Guide to ensure its conformance with the requirements in

Provision E.6. The City is required to pay a portion of the cost of this update through a cost-sharing agreement. The City also will be required to expend funds to implement the update through training of staff and other implementation activities. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$183 during FY 2016-17 with respect to such requirements.

j. Jurisdictional Urban Runoff Management Program Update. In compliance with Provision F.2 of the Regional Permit, the City must update its Jurisdictional Urban Runoff Program (“JRMP”) document in FY 2016-17. The City must also submit updates to its JRMP, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provisions F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. These requirements will require the expenditure of funds to conduct meetings and draft correspondence to coordinate content development with staff; develop, distribute, and revise draft content; and monitor, assess, report on, and modify programs and activities as necessary to maintain compliance with the Regional Permit. These costs may include requirements for City employee staffing, materials and supplies, and contract work. I am informed and believe and therefore state that the City was assessed no funds in FY 2015-16 and anticipates an assessment of an estimated \$422 during FY 2016-17 with respect to such requirements. In addition, the City anticipates spending an additional \$14,080 in FY 2016-17 with respect to such requirements.

k. Progress Report Presentations. Provision F.3.a of the Regional Permit requires the Permittees for each Watershed Management Area, including the City, to

periodically appear before the RWQCB, as requested by the Board, to provide progress reports on the implementation of the WQIP and JRMPs. Such presentations would require the City and its staff to conduct research, meet with or confer with other South Orange County Permittees, write materials for distribution at the meeting and other activities. The City was assessed no funds for this requirement in FY 2015-16. I am informed and believe and therefore state that the assessment to the City of this requirement to date is approximately \$149 during FY 2016-17, which represents the City's share of an appearance on behalf of it and other copermittees by the County of Orange.

8. I am informed and believe and therefore state that I am not aware of any state, federal or regional funds that are or will be available to pay for any of these new and/or enhanced programs/activities, with the exception of the Orange County Measure M2 Environmental Cleanup Program, which is a countywide competitive grant program that offers funding for transportation-related water quality programs, and other competitive grant programs and limited rebate programs, such as Metropolitan Water District's ("Met") funding programs and the Municipal Water District of Orange County's ("MWDOC") rebate programs. I am informed and believe and therefore state that the funds received from Measure M2, Met and MWDOC's programs, would, if received, pay only for a portion of the expected costs required by the Regional Permit. Additionally, I am informed and believe and therefore state that projects employing Measure M2 funds, Met funds, and MWDOC funds also require some element of City matching funds. The City has not received any such funds. Thus, to the extent that these funds are available with respect to the requirements set forth in the Regional Permit, such funds do not provide offsetting savings that result in no net costs to the City nor do they provide any

additional revenue in an amount sufficient to fund the cost of the state mandates and therefore would not fully recompense the City for such requirements.

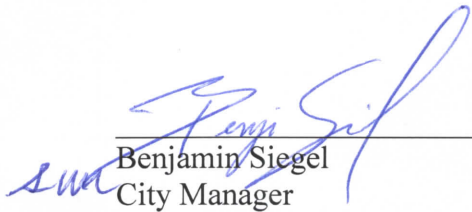
9. I am informed and believe and therefore state that I am not aware of any authority to assess a fee or tax which the City would have the discretion to impose under California law to recover any portion of these new and/or enhanced programs/activities without a vote of the affected electorate.

10. I am further informed and believe and therefore state that the City cannot recoup the costs of any of the programs described above by imposing fees.

11. I am further informed and believe and therefore state that, subject to the sources identified in Paragraph 8, the only available source to pay for the above-described new and/or enhanced programs/activities is the City's General Fund.

Executed this 23rd day of August 2016 at San Juan Capistrano, California.

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



Benjamin Siegel
City Manager

**SECTION 7
DOCUMENTATION
IN SUPPORT OF JOINT TEST CLAIM
IN RE
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD
ORDER NO. R9-2015-0001, AS AMENDED BY R9-2015-0100
NPDES NO. CAS 0109266
OF
ORANGE COUNTY, ET AL.
VOLUME I
EXECUTIVE ORDER
AND SUPPORTING DOCUMENTATION**

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SECTION 7
DOCUMENTATION
IN SUPPORT OF JOINT TEST CLAIM
IN RE
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD
ORDER NO. R9-2015-0001, AS AMENDED BY R9-2015-0100
NPDES NO. CAS 0109266
OF
ORANGE COUNTY, ET AL.
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SECTION 7
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<i>Natural Resources Defense Council Inc. v. County of Los Angeles</i> (9th Cir. 2013) 725 F.3d 1194	4
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VOLUME I

TAB 1

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

**ORDER NO. R9-2013-0001,
AS AMENDED BY ORDER NOS. R9-2015-0001 AND R9-2015-0100
NPDES NO. CAS0109266**

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

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

Table 1a. San Diego County Copermittees

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

The Orange County Copermittees in Table 1b are subject to waste discharge requirements set forth in this Order.

Table 1b. Orange County Copermittees¹

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

¹ While not listed in Table 1b., the City of Lake Forest remains a Copermittee under this Order until the later effective date of this Order or the effective date of Santa Ana Water Board Tentative Order No. R8-2015-0001. Thereafter, the City of Lake Forest will no longer be considered a Copermittee under this Order because its Phase I MS4 discharges will be regulated by the Santa Ana Water Board pursuant to Water Code section 13228 designation. The requirements of this Order that apply to the City of Lake Forest for the duration of this Order, however, are described in Finding 29 and Footnote 2 to Table B-1.

The Riverside County Copermittees in Table 1c are subject to waste discharge requirements set forth in this Order.

Table 1c. Riverside County Copermittees

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

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

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

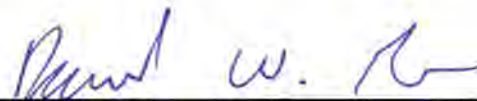
Table 2. Discharge Locations and Receiving Waters

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

Table 3. Administrative Information

This Order was adopted by the San Diego Water Board on:	May 8, 2013
Order No. R9-2013-0001 became effective on:	June 27, 2013
This Order as amended by R9-2015-0001 became effective on:	April 1, 2015
This Order as amended by R9-2015-0100 became effective on:	January 7, 2016
This Order will expire on:	June 27, 2018
The Copermittees must file a Report of Waste Discharge in accordance with Title 23, California Code of Regulations, as application for issuance of new waste discharge requirements no later than 180 days in advance of the Order expiration date.	

I, David W. Gibson, Executive Officer, do hereby certify that this Order with all attachments is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on May 8, 2013, as amended by adoption of Order No. R9-2015-0001 on February 11, 2015, and as amended by adoption of Order No. R9-2015-0100 on November 18, 2015.



David W. Gibson
 Executive Officer

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ATTACHMENTS

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I. FINDINGS

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

JURISDICTION

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

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

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

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

4. CWA and CWC Monitoring Requirements. CWA section 308(a) and 40 CFR 122.41(h),(j)-(l) and 122.48 require that NPDES permits must specify monitoring and reporting requirements. Federal regulations applicable to large and medium MS4s also specify additional monitoring and reporting requirements in 40 CFR 122.26(d)(1)(iv)(D), 122.26(d)(1)(v)(B), 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)(D), 122.26(d)(2)(iv)(B)(2) and 122.42(c). CWC section 13383 authorizes the San Diego Water Board to establish monitoring, inspection, entry, reporting and recordkeeping requirements. This Order establishes monitoring and reporting requirements to implement federal and State requirements. This Order also includes requirements for the Orange County Copermittees to participate in, and together with South Orange County Wastewater Authority and Orange County Health Care Agency, share responsibility for implementing the unified approach to beach water quality monitoring and assessment program set forth in the October 2014 report, *Workgroup Recommendation for a Unified Beach Water Quality Monitoring and Assessment Program in South Orange County*, issued pursuant to CWC section 13383 in the San Diego Water Board December 5, 2014 Letter Directive.

5. Total Maximum Daily Loads. CWA section 303(d)(1)(A) requires that “[e]ach state shall identify those waters within its boundaries for which the effluent limitations are not stringent enough to implement any water quality standard applicable to such waters.” The CWA also requires states to establish a priority ranking of impaired water bodies known as Water Quality Limited Segments and to establish Total Maximum Daily Loads (TMDLs) for such waters. This priority list of impaired water bodies is called the Clean Water Act Section 303(d) List of Water Quality Limited Segments, commonly referred to as the 303(d) List. The CWA requires the 303(d) List to be updated every two years.

TMDLs are numerical calculations of the maximum amount of a pollutant that a water body can assimilate and still meet water quality standards. A TMDL is the sum of the allowable loads of a single pollutant from all contributing point sources (waste load allocations or WLAs) and non-point sources (load allocations or LAs), background contribution, plus a margin of safety. Discharges from MS4s are point source discharges. The federal regulations (40 CFR 122.44(d)(1)(vii)(B)) require that NPDES permits incorporate water quality based effluent limitations (WQBELs) developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, consistent with the assumptions and requirements of any available WLA for the discharge. Requirements of this Order implement the TMDLs established by the San Diego Water Board or USEPA as of the date this Order was amended in 2015. This Order establishes WQBELs consistent with the assumptions and requirements of all available TMDL WLAs assigned to discharges from the Copermittees’ MS4s.

6. Non-Storm Water Discharges. Pursuant to CWA section 402(p)(3)(B)(ii), this Order requires each Copermittee to effectively prohibit discharges of non-storm water into its MS4. Nevertheless, non-storm water discharges into and from the

MS4s continue to be reported to the San Diego Water Board by the Copermittees and other persons. Monitoring conducted by the Copermittees, as well as the 303(d) List, have identified dry weather, non-storm water discharges from the MS4s as a source of pollutants causing or contributing to receiving water quality impairments in the San Diego Region. The federal regulations (40 CFR 122.26(d)(2)(iv)(B)(1)) require the Copermittees to have a program to prevent illicit discharges to the MS4. The federal regulations, however, allow for specific categories of non-storm water discharges or flows to be addressed as illicit discharges only where such discharges are identified as sources of pollutants to waters of the U.S.

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

DISCHARGE CHARACTERISTICS AND RUNOFF MANAGEMENT

- 8. Point Source Discharges of Pollutants.** Discharges from the MS4s contain waste, as defined in the CWC, and pollutants that adversely affect the quality of the waters of the state. A discharge from an MS4 is a “discharge of pollutants from a point source” into waters of the U.S. as defined in the CWA. Storm water and non-storm water discharges from the MS4s contain pollutants that cause or threaten to cause a violation of surface water quality standards, as outlined in the Water Quality Control Plan for the San Diego Basin (Basin Plan). Storm water and non-storm water discharges from the MS4s are subject to the conditions and requirements established in the Basin Plan for point source discharges.
- 9. Potential Beneficial Use Impairment.** The discharge of pollutants and/or increased flows from MS4s may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives and impair or threaten to impair designated beneficial uses resulting in a condition of pollution, contamination, or nuisance.
- 10. Pollutants Generated by Land Development.** Land development has created and continues to create new sources of non-storm water discharges and pollutants in storm water discharges as human population density increases. This brings higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, and trash. Pollutants from these sources are dumped or washed off the surface by non-storm water or storm water flows into

and from the MS4s. When development converts natural vegetated pervious ground cover to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost. Therefore, runoff leaving a developed area without BMPs that can maintain pre-development runoff conditions will contain greater pollutant loads and have significantly greater runoff volume, velocity, and peak flow rate than pre-development runoff conditions from the same area.

11. Runoff Discharges to Receiving Waters. The MS4s discharge runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within the eleven hydrologic units comprising the San Diego Region. Historic and current development makes use of natural drainage patterns and features as conveyances for runoff. Rivers, streams and creeks in developed areas used in this manner are part of the Copermittees' MS4s regardless of whether they are natural, anthropogenic, or partially modified features. In these cases, the rivers, streams and creeks in the developed areas of the Copermittees' jurisdictions are both an MS4 and receiving water. Numerous receiving water bodies and water body segments have been designated as impaired by the San Diego Water Board pursuant to CWA section 303(d).

12. Pollutants in Runoff. The most common pollutants in runoff discharged from the MS4s include total suspended solids, sediment, pathogens (e.g., bacteria, viruses, protozoa), heavy metals (e.g., cadmium, copper, lead, and zinc), petroleum products and polynuclear aromatic hydrocarbons, synthetic organics (e.g., pesticides, herbicides, and PCBs), nutrients (e.g., nitrogen and phosphorus), oxygen-demanding substances (e.g., decaying vegetation, animal waste), detergents, and trash. As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or otherwise control. These discharges may cause or contribute to a condition of pollution or a violation of water quality standards.

13. Human Health and Aquatic Life Impairment. Pollutants in runoff discharged from the MS4s can threaten and adversely affect human health and aquatic organisms. Adverse responses of organisms to chemicals or physical agents in runoff range from physiological responses such as impaired reproduction or growth anomalies to mortality. Increased volume, velocity, rate, and duration of storm water runoff greatly accelerate the erosion of downstream natural channels. This alters stream channels and habitats and can adversely affect aquatic and terrestrial organisms.

14. Water Quality Effects. The Copermittees' water quality monitoring data submitted to date documents persistent exceedances of Basin Plan water quality objectives for runoff-related pollutants at various watershed monitoring stations. Persistent toxicity has also been observed at several watershed monitoring stations. In addition, bioassessment data indicate that the majority of the monitored receiving waters have

Poor to Very Poor Index of Biological Integrity (IBI) ratings. These findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in the San Diego Region. Non-storm water discharges from the MS4s have been shown to contribute significant levels of pollutants and flow in arid, developed Southern California watersheds, and contribute significantly to exceedances of applicable receiving water quality objectives.

15. Non-Storm Water and Storm Water Discharges. Non-storm water discharges from the MS4s are not considered storm water discharges and therefore are not subject to the MEP standard of CWA section 402(p)(3)(B)(iii), which is explicitly for “Municipal ... *Stormwater Discharges* (emphasis added)” from the MS4s. Pursuant to CWA 402(p)(3)(B)(ii), non-storm water discharges into the MS4s must be effectively prohibited.

16. Best Management Practices. Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the U.S. unless they are removed. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. For this reason, pollutants in storm water discharges from the MS4s can be and must be effectively reduced in runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Pollution prevention is the reduction or elimination of pollutant generation at its source and is the best “first line of defense.” Source control BMPs (both structural and non-structural) minimize the contact between pollutants and runoff, therefore keeping pollutants onsite and out of receiving waters. Treatment control BMPs remove pollutants that have been mobilized by storm water or non-storm water flows.

17. BMP Implementation. Runoff needs to be addressed during the three major phases of development (planning, construction, and use) in order to reduce the discharge of storm water pollutants to the MEP, effectively prohibit non-storm water discharges, and protect receiving waters. Development which is not guided by water quality planning policies and principles can result in increased pollutant load discharges, flow rates, and flow durations which can negatively affect receiving water beneficial uses. Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. Existing development can generate substantial pollutant loads which are discharged in runoff to receiving waters. Retrofitting areas of existing development with storm water pollutant control and hydromodification management BMPs is necessary to address storm water discharges from existing development that may cause or contribute to a condition of pollution or a violation of water quality standards.

18. Water Quality Improvements. Since 1990, the Copermittees have been developing and implementing programs and BMPs intended to effectively prohibit non-storm water discharges to the MS4s and control pollutants in storm water

discharges from the MS4s to receiving waters. As a result, several water body / pollutant combinations have been de-listed from the CWA Section 303(d) List, beach closures have been significantly reduced, and public awareness of water quality issues has increased. The Copermittees have been able to achieve improvements in water quality in some respects, but significant improvements to the quality of receiving waters and discharges from the MS4s are still necessary to meet the requirements and objectives of the CWA.

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

WATER QUALITY STANDARDS

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

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

21. Ocean Plan. The State Water Board adopted the Water Quality Control Plan for Ocean Waters of California, California Ocean Plan (Ocean Plan) in 1972 and amended it in 1978, 1983, 1988, 1990, 1997, 2000, and 2005. The State Water Board adopted the latest amendment on October 16, 2012 and it became effective on August 19, 2013. The Ocean Plan is applicable, in its entirety, to point source discharges to the ocean. Requirements of this Order implement the Ocean Plan.

The Ocean Plan identifies the following beneficial uses of ocean waters of the state to be protected: Industrial water supply; water contact and non-contact recreation, including aesthetic enjoyment; navigation; commercial and sport fishing; mariculture; preservation and enhancement of designated Areas of Special Biological Significance; rare and endangered species; marine habitat; fish spawning and shellfish harvesting.

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

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

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

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

CONSIDERATIONS UNDER FEDERAL AND STATE LAW

26. Coastal Zone Act Reauthorization Amendments. Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point source pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point source pollution: agriculture, silviculture, urban, marinas, and hydromodification. This Order addresses the management measures required for the urban category, with the exception of septic systems. The runoff management programs developed pursuant to this Order fulfill the need for coastal cities to develop a runoff non-point source plan identified in the Non-Point Source Program Strategy and Implementation Plan. The San Diego Water Board addresses septic systems through the administration of other programs.

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

28. Report of Waste Discharge Process. The waste discharge requirements set forth in this Order are based upon the Report of Waste Discharge submitted by the San Diego County Copermittees prior to the expiration of Order No. R9-2007-0001 (NPDES No. CAS0109266), the Report of Waste Discharge submitted by the Orange County Copermittees prior to the expiration of Order No. R9-2009-0002 (CAS0108740), and the Report of Waste Discharge submitted by the Riverside County Copermittees prior to the expiration of Order No. R9-2010-0016 (CAS0108766).

The federal regulations (40 CFR 122.21(d)(2)) and CWC section 13376 impose a duty on the Copermittees to reapply for continued coverage through submittal of a Report of Waste Discharge no later than 180 days prior to expiration of a currently effective permit. The expiration date of this Order as shown in Table 3, and requirement to file a Report of Waste Discharge no later than 180 days prior to the

expiration date of the Order, applies jointly to the San Diego County, Orange County, and Riverside County Copermittees.

29. Regional Water Board Designation. The Cities of Laguna Hills, Laguna Woods, Lake Forest, Menifee, Murrieta, and Wildomar are located partially within the jurisdictions of the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board) and the San Diego Water Board and their discharges are subject to regulation by both Regional Water Boards. CWC section 13228 provides a way to streamline the regulation of entities whose jurisdictions straddle the border of two or more Regions. CWC section 13228 is implemented in this Order at the request of these six cities and to ease the regulatory burden of municipalities that lie in both the San Diego Water Board's and the adjacent Santa Ana Water Board's jurisdiction. MS4 discharges from these municipalities are regulated by the San Diego Water Board and Santa Ana Water Board as follows:

- a. Pursuant to CWC section 13228, the Cities of Laguna Hills, Laguna Woods, and Lake Forest submitted written requests that one Regional Water Board be designated to regulate Phase I MS4 discharges for each of the Cities. The Santa Ana Water Board and the San Diego Water Board have entered into an agreement dated February 10, 2015, whereby the Cities of Laguna Woods and Laguna Hills are largely regulated by the San Diego Water Board under this Order, including those portions of the Cities of Laguna Woods and Laguna Hills not within the San Diego Water Board's jurisdiction, upon the effective date of this Order or Santa Ana Water Board Order No. R8-2015-0001, whichever is later. Similarly, the City of Lake Forest, including those portions of the City of Lake Forest within the San Diego Water Board's jurisdiction, is largely regulated by the Santa Ana Water Board under Order No. R8-2015-0001 (NPDES No. CAS618030) upon the later effective date of this Order or Order No. R8-2015-0001. The agreement provides that the City of Lake Forest is required to retain, and continue implementation of, its over-irrigation discharge prohibition in Title 15, Chapter 14.030, List (b) of the City Municipal Code for regulating storm water quality throughout its jurisdiction. The agreement also requires the City of Lake Forest to actively participate during development and implementation of the Aliso Creek Watershed Management Area Water Quality Improvement Plan required pursuant to this Order. Each Regional Water Board retains the authority to enforce provisions of its Phase I MS4 permits issued to each city but compliance will be determined based upon the Phase I MS4 permit in which a particular city is regulated as a Copermittee under the terms of the agreement (Water Code section 13228 (b)). Under the terms of the agreement, any TMDL and associated MS4 permit requirements issued by the San Diego Water Board or the Santa Ana Water Board which include the Cities of Laguna Woods, Laguna Hills or Lake Forest as a responsible party, will be incorporated into the appropriate Phase I MS4 permit by reference. Enforcement of the applicable TMDL will remain with the Regional Water Board which has jurisdiction over the targeted impaired water body. Applicable TMDLs subject to the terms of the agreement include, but are not limited to, the Santa Ana Water Board's San

Diego Creek/Newport Bay TMDL and the San Diego Water Board's Indicator Bacteria Project I Beaches and Creeks TMDL. The San Diego Water Board will periodically review the effectiveness of the agreement during each MS4 permit reissuance. Based on this periodic review the San Diego Water Board may terminate the agreement with Santa Ana Water Board or otherwise modify the agreement subject to the approval of the Santa Ana Water Board.

- b. Pursuant to CWC section 13228, the Cities of Murrieta, Wildomar, and Menifee submitted written requests that one Regional Water Board be designated to regulate Phase I MS4 discharges for each of the Cities. The Santa Ana Water Board and the San Diego Water Board have entered into an agreement dated October 26, 2015, whereby the Cities of Murrieta and Wildomar are largely regulated by the San Diego Water Board under this Order, including those portions of the Cities of Murrieta and Wildomar not within the San Diego Water Board's jurisdiction, upon the effective date of this Order. Similarly, the City of Menifee is largely regulated by the Santa Ana Water Board under Order No. R8-2010-0033 as it may be amended or reissued, including those portions of the City of Menifee within the San Diego Water Board's jurisdiction, upon the effective date of this Order. The agreement also requires the City of Menifee to actively participate during development and implementation of the Santa Margarita River Watershed Management Area Water Quality Improvement Plan required pursuant to this Order. Each Regional Water Board retains the authority to enforce provisions of its Phase I MS4 permits issued to each city but compliance will be determined based upon the Phase I MS4 permit in which a particular city is regulated as a Copermittee under the terms of the agreement (Water Code section 13228 (b)). Under the terms of the agreement, any TMDL and associated MS4 permit requirements issued by the San Diego Water Board or the Santa Ana Water Board which include the Cities of Menifee, Murrieta, or Wildomar as a responsible party, will be incorporated into the appropriate Phase I MS4 permit by reference. Enforcement of the applicable TMDL will remain with the Regional Water Board which has jurisdiction over the targeted impaired water body. Applicable TMDLs subject to the terms of the agreement include, but are not limited to, the Santa Ana Water Board's Lake Elsinore/Canyon Lake Nutrient TMDLs. The San Diego Water Board will periodically review the effectiveness of the agreement during each MS4 permit reissuance. Based on this periodic review the San Diego Water Board may terminate the agreement with Santa Ana Water Board or otherwise modify the agreement subject to the approval of the Santa Ana Water Board.

30. Integrated Report and Clean Water Act Section 303(d) List. The San Diego Water Board and State Water Board submit an Integrated Report to USEPA to comply with the reporting requirements of CWA sections 303(d), 305(b) and 314, which lists the attainment status of water quality standards for water bodies in the San Diego Region. USEPA issued its *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act* on July 29, 2005, which advocates the use of a five category approach for

classifying the attainment status of water quality standards for water bodies in the Integrated Report. Water bodies included in Category 5 in the Integrated Report indicate at least one beneficial use is not being supported or is threatened, and a TMDL is required. Water bodies included in Category 5 in the Integrated Report are placed on the 303(d) List.

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

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

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

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

32. Unfunded Mandates. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIII B, Section (6) of the California Constitution for several reasons, including, but not limited to, the following:

- a. This Order implements federally mandated requirements under CWA section 402 (33 USC section 1342(p)(3)(B)).
- b. The local agency Copermittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental and new dischargers who are issued NPDES permits for storm water and non-storm water discharges.
- c. The local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order.
- d. The Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA section 301(a) (33 USC section 1311(a)) and in lieu of numeric restrictions on their MS4 discharges (i.e. effluent limitations).
- e. The local agencies' responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under State law predates the enactment of Article XIII B, Section (6) of the California Constitution.
- f. The provisions of this Order to implement TMDLs are federal mandates. The CWA requires TMDLs to be developed for water bodies that do not meet federal water quality standards (33 USC section 1313(d)). Once the USEPA or a state develops a TMDL, federal law requires that permits must contain water quality based effluent limitations consistent with the assumptions and requirements of any applicable wasteload allocation (40 CFR 122.44(d)(1)(vii)(B)).

See the Fact Sheet for further discussion of unfunded mandates.

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

STATE WATER BOARD DECISIONS

34. Compliance with Prohibitions and Limitations. The receiving water limitation language specified in this Order is consistent with language recommended by the USEPA and established in State Water Board Order WQ 99-05, *Own Motion Review of the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03, NPDES Permit No. CAS0108740*, adopted by the State Water Board on June 17, 1999. The receiving water limitation language in this Order requires storm water discharges from MS4s to not cause or contribute to a violation of water quality standards, which is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time. Implementation of the iterative approach to comply with receiving water

limitations based on applicable water quality standards is necessary to ensure that storm water discharges from the MS4 will not ultimately cause or contribute to violations of water quality standards and will not create conditions of pollution, contamination, or nuisance.

The San Diego, Orange County, and Riverside County Copermittees have asserted that the prohibitions and limitations may result in many years of noncompliance because years of technical efforts may ultimately be required to achieve compliance with the prohibitions and limitations, especially for wet weather discharges. To address this concern, this Order includes an option that allows a Copermittee to be deemed in compliance with the prohibitions and limitations where more than one permit term may be necessary to achieve full compliance with the prohibitions and limitations. One or more Copermittees within a Watershed Management Area can choose to implement this option.

An alternative compliance pathway option has been included in this Order consistent with the approach described in Order WQ 2015-0075, *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4*, adopted by the State Water Board on June 16, 2015. State Water Board Order WQ 2015-0075 directs the Regional Water Boards to consider a watershed-based planning and implementation approach to compliance with receiving water limitations when issuing Phase I MS4 permits going forward. Order WQ 2015-0075 included seven principles that the Regional Water Boards are expected to follow when incorporating an alternative compliance pathway into an MS4 permit. The Fact Sheet discusses the incorporation of the seven principles stipulated in State Water Board Order WQ 2015-0075 into the alternative compliance pathway option in this Order.

35. Special Conditions for Areas of Special Biological Significance. On March 20, 2012, the State Water Board approved Resolution No. 2012-0012 approving a general exception to the Ocean Plan prohibition against discharges to Areas of Special Biological Significance (ASBS) for certain nonpoint source discharges and NPDES permitted municipal storm water discharges (General Exception). On June 19, 2012, the State Water Board adopted Order No. 2012-0031, amending the General Exception to require pollutant reductions to be achieved within six years in accordance with ASBS Compliance Plans and ASBS Pollution Prevention Plans. The General Exception requires monitoring and testing of marine aquatic life and water quality in several ASBS to protect California's coastline during storms when rain water overflows into coastal waters. Specific terms, prohibitions, and special conditions were adopted to provide special protections for marine aquatic life and natural water quality in ASBS. The City of San Diego's municipal storm water discharges to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach's municipal storm water discharges to the Heisler Park ASBS are subject to the terms and conditions of the General Exception as amended. The Special Protections contained in Attachment B to the General Exception as amended are

applicable to these discharges, and are hereby incorporated into Attachment A of this Order.

ADMINISTRATIVE FINDINGS

- 36. Executive Officer Delegation of Authority.** The San Diego Water Board by prior resolution has delegated all matters that may legally be delegated to its Executive Officer to act on its behalf pursuant to CWC section 13223. Therefore, the Executive Officer is authorized to act on the San Diego Water Board's behalf on any matter within this Order unless such delegation is unlawful under CWC section 13223 or this Order explicitly states otherwise.
- 37. Standard Provisions.** Standard Provisions, which apply to all NPDES permits in accordance with 40 CFR 122.41, and additional conditions applicable to specified categories of permits in accordance with 40 CFR 122.42, are provided in Attachment B to this Order.
- 38. Fact Sheet.** The Fact Sheet for this Order contains background information, regulatory and legal citations, references and additional explanatory information and data in support of the requirements of this Order. The Fact Sheet is hereby incorporated into this Order and constitutes part of the Findings of this Order.
- 39. Public Notice.** In accordance with State and federal laws and regulations, the San Diego Water Board notified the Copermittees, and interested agencies and persons of its intent to prescribe waste discharge requirements for the control of discharges into and from the MS4s to waters of the U.S. and has provided them with an opportunity to submit their written comments and recommendations. Details of notification are provided in the Fact Sheet.
- 40. Public Hearings.** The San Diego Water Board held a public hearing on April 10 and 11, 2013, that was continued to May 8, 2013 and heard and considered all comments pertaining to the terms and conditions of this Order. The San Diego Water Board also held a public workshop on October 8, 2015, and a public hearing on February 11, 2015, and heard and considered all comments pertaining to the amendment of this Order through Order No. R9-2015-0001. The San Diego Water Board also held a public hearing on November 18, 2015, and heard and considered all comments pertaining to the amendment of this Order through Order No. R9-2015-0100. Details of these public hearings are provided in the Fact Sheet.
- 41. Effective Date.** This Order serves as an NPDES permit pursuant to CWA section 402 or amendments thereto, and as to the San Diego County Copermittees listed in Table 1a, became effective fifty (50) days after the date of its adoption, and as to the Orange County Copermittees listed in Table 1b, became effective on April 1, 2015, after Order No. R9-2015-0001 was adopted, and as to the Riverside County Copermittees listed in Table 1c, became effective on January 7, 2016, after Order No. R9-2015-0100 was adopted, provided that the Regional Administrator, USEPA, Region IX, does not object to this Order.

42. Review by the State Water Board. Any person aggrieved by this action of the San Diego Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050, and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday or State holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

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

II. PROVISIONS

A. PROHIBITIONS AND LIMITATIONS

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

1. Discharge Prohibitions

- a.** Discharges from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters of the state are prohibited.
- b.** Non-storm water discharges into MS4s are to be effectively prohibited, through the implementation of Provision E.2, unless such discharges are authorized by a separate NPDES permit.
- c.** Discharges from MS4s are subject to all waste discharge prohibitions in the Basin Plan, included in Attachment A to this Order.
- d.** Storm water discharges from the City of San Diego's MS4 to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach's MS4 to the Heisler Park ASBS are authorized under this Order subject to the Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012, as amended by State Water Board Resolution No. 2012-0031, applicable to these discharges, included in Attachment A to this Order. All other discharges from the Copermitees' MS4s to ASBS are prohibited.

2. Receiving Water Limitations

- a. Discharges from MS4s must not cause or contribute to the violation of water quality standards in any receiving waters, including but not limited to all applicable provisions contained in:
- (1) The San Diego Water Board's Basin Plan, including beneficial uses, water quality objectives, and implementation plans;
 - (2) State Water Board plans for water quality control including the following:
 - (a) Water Quality Control Plan for Control of Temperature in the Coastal and Interstate Waters and Enclosed Bays and Estuaries (Thermal Plan), and
 - (b) The Ocean Plan, including beneficial uses, water quality objectives, and implementation plans;
 - (3) State Water Board policies for water and sediment quality control including the following:
 - (a) Water Quality Control Policy for the Enclosed Bays and Estuaries of California,
 - (b) Sediment Quality Control Plan which includes the following narrative objectives for bays and estuaries:
 - (i) Pollutants in sediments shall not be present in quantities that, alone or in combination, are toxic to benthic communities, and
 - (ii) Pollutants shall not be present in sediments at levels that will bioaccumulate in aquatic life to levels that are harmful to human health,
 - (c) The Statement of Policy with Respect to Maintaining High Quality of Waters in California;²
 - (4) Priority pollutant criteria promulgated by the USEPA through the following:
 - (a) National Toxics Rule (NTR)³ (promulgated on December 22, 1992 and amended on May 4, 1995), and
 - (b) California Toxics Rule (CTR).^{4,5}
- b. Discharges from MS4s composed of storm water runoff must not alter natural ocean water quality in an ASBS.

² State Water Board Resolution No. 68-16

³ 40 CFR 131.36

⁴ 65 Federal Register 31682-31719 (May 18, 2000), adding Section 131.38 to 40 CFR

⁵ If a water quality objective and a CTR criterion are in effect for the same priority pollutant, the more stringent of the two applies.

3. Effluent Limitations

a. TECHNOLOGY BASED EFFLUENT LIMITATIONS

Pollutants in storm water discharges from MS4s must be reduced to the MEP.⁶

b. WATER QUALITY BASED EFFLUENT LIMITATIONS

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

4. Compliance with Discharge Prohibitions and Receiving Water Limitations

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

a. If exceedance(s) of water quality standards persist in receiving waters notwithstanding implementation of this Order, the Copermittees must comply with the following procedures:

(1) For exceedance(s) of a water quality standard in the process of being addressed by the Water Quality Improvement Plan, the Copermittee(s) must implement the Water Quality Improvement Plan as accepted by the San Diego Water Board, and update the Water Quality Improvement Plan, as necessary, pursuant to Provision F.2.c;

(2) Upon a determination by either the Copermittees or the San Diego Water Board that discharges from the MS4 are causing or contributing to a new exceedance of an applicable water quality standard not addressed by the Water Quality Improvement Plan, the Copermittees must submit the following updates to the Water Quality Improvement Plan pursuant to Provision F.2.c or as part of the Water Quality Improvement Plan Annual Report required under Provision F.3.b, unless the San Diego Water Board directs an earlier submittal:

(a) The water quality improvement strategies being implemented that are effective and will continue to be implemented,

⁶ This does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants in storm water discharges to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer). Runoff treatment must occur prior to the discharge of runoff into receiving waters per Finding 7.

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

B. WATER QUALITY IMPROVEMENT PLANS

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

1. Watershed Management Areas

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

Table B-1. Watershed Management Areas

Hydrologic Unit(s)	Watershed Management Area	Major Surface Water Bodies	Responsible Copermittees
San Juan (901.00)	South Orange County	<ul style="list-style-type: none"> - Aliso Creek - San Juan Creek - San Mateo Creek - Pacific Ocean - Heisler Park ASBS 	<ul style="list-style-type: none"> - City of Aliso Viejo - City of Dana Point - City of Laguna Beach - City of Laguna Hills¹ - City of Laguna Niguel - City of Laguna Woods¹ - City of Lake Forest² - City of Mission Viejo - City of Rancho Santa Margarita - City of San Clemente - City of San Juan Capistrano - County of Orange - Orange County Flood Control District
Santa Margarita (902.00)	Santa Margarita River	<ul style="list-style-type: none"> - Murrieta Creek - Temecula Creek - Santa Margarita River - Santa Margarita Lagoon - Pacific Ocean 	<ul style="list-style-type: none"> - City of Menifee³ - City of Murrieta⁴ - City of Temecula - City of Wildomar⁴ - County of Riverside - County of San Diego - Riverside County Flood Control and Water Conservation District
San Luis Rey (903.00)	San Luis Rey River	<ul style="list-style-type: none"> - San Luis Rey River - San Luis Rey Estuary - Pacific Ocean 	<ul style="list-style-type: none"> - City of Oceanside - City of Vista - County of San Diego

Table B-1. Watershed Management Areas

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

Notes:

1. By agreement dated February 10, 2015, pursuant to Water Code section 13228, the Phase I MS4 discharges within the jurisdiction of the City of Laguna Hills and the City of Laguna Woods located in the Santa Ana Region are regulated by San Diego Water Board Order No. R9-2013-0001 as amended by Order No. R9-2015-0001, upon the later effective date of Order No. R9-2015-0001 or Santa Ana Water Board Tentative Order No. R8-2015-0001. The City of Laguna Hills and Laguna Woods must also comply with the requirements of the San Diego Creek/Newport Bay TMDL in section XVIII of Santa Ana Water Board Order No. R8-2015-0001.
2. By agreement dated February 10, 2015, pursuant to Water Code section 13228, Phase I MS4 discharges within the City of Lake Forest located within the San Diego Water Board Region are regulated by the Santa Ana Water Board Order No. R8-2015-0001 (NPDES No. CAS618030) upon the later effective date of this Order or Santa Ana Water Board Tentative Order No. R8-2015-0001. In accordance with the terms of the agreement between the San Diego Water Board and the Santa Ana Water Board, the City of Lake Forest must implement the requirements of the Bacteria TMDL in Attachment E of this Order, participate in preparation and implementation of the Water Quality Improvement Plan for the Aliso Creek Watershed Management Area as described in Provision B of this Order and continue implementation of its over-irrigation discharge prohibition in its City Ordinance, Title 15, Chapter 15, section 14.030, List (b).
3. By agreement dated October 26, 2015, pursuant to Water Code section 13228, Phase I MS4 discharges within the City of Menifee located within the San Diego Water Board Region are regulated by the Santa Ana Water Board Order No. R8-2010-0033 as it may be amended or reissued (NPDES No. CAS618033) upon the later effective date of this Order. In accordance with the terms of the agreement between the San Diego Water Board and the Santa Ana Water Board, the City of Menifee must participate in preparation and implementation of the Water Quality Improvement Plan for the Santa Margarita River Watershed Management Area as described in Provision B of this Order.
4. By agreement dated October 26, 2015, pursuant to Water Code section 13228, the Phase I MS4 discharges within the jurisdiction of the City of Murrieta and the City of Wildomar located in the Santa Ana Region are regulated by San Diego Water Board Order No. R9-2013-0001 as amended by Orders No. R9-2015-0001 and R9-2015-0100. The City of Murrieta and City of Wildomar must also comply with the requirements of the Lake Elsinore/Canyon Lake Nutrient TMDLs in section VI.D.2 of Santa Ana Water Board Order No. R8-2010-0033, or corresponding section as it may be amended or reissued.

2. Priority Water Quality Conditions

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

a. ASSESSMENT OF RECEIVING WATER CONDITIONS

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

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

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

b. ASSESSMENT OF IMPACTS FROM MS4 DISCHARGES

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

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

c. IDENTIFICATION OF PRIORITY WATER QUALITY CONDITIONS

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

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

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

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

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

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

e. IDENTIFICATION OF POTENTIAL WATER QUALITY IMPROVEMENT STRATEGIES

The Copermittees must evaluate the findings identified under Provisions B.2.a-d, and identify potential strategies that can result in improvements to water quality in MS4 discharges and/or receiving waters within the Watershed Management Area. Potential water quality improvement strategies that may be implemented within the Watershed Management Area must include the following:

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

3. Water Quality Improvement Goals, Strategies and Schedules

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

a. WATER QUALITY IMPROVEMENT GOALS AND SCHEDULES

(1) Numeric Goals

The Copermittees must develop and incorporate numeric goals⁷ into the Water Quality Improvement Plan. Numeric goals must be used to support

⁷ Interim and final numeric goals may take a variety of forms such as TMDL established WQBELs, action levels, pollutant concentration, load reductions, number of impaired water bodies delisted from the List of Water Quality Impaired Segments, Index of Biotic Integrity (IBI) scores, or other appropriate metrics. Interim and final numeric goals are not necessarily limited to one criterion or indicator, but may include multiple criteria and/or indicators. Except for TMDL established WQBELs, interim and final numeric goals and corresponding schedules may be revised through the adaptive management process under Provision B.5.

Water Quality Improvement Plan implementation and measure reasonable progress towards addressing the highest priority water quality conditions identified under Provision B.2.c. The Copermittees must establish and incorporate the following numeric goals in the Water Quality Improvement Plan:

- (a) Final numeric goals must be based on measureable criteria or indicators capable of demonstrating one or more of the following:
 - (i) Discharges from the Copermittees' MS4s will not cause or contribute to exceedances of water quality standards in receiving waters, AND/OR
 - (ii) The conditions of receiving waters and associated habitat are protected from MS4 discharges, AND/OR
 - (iii) Beneficial uses of receiving waters are protected from MS4 discharges and will be supported.

- (b) Interim numeric goals must be based on measureable criteria or indicators capable of demonstrating reasonable incremental progress toward achieving the final numeric goals in the receiving waters and/or MS4 discharges as follows:
 - (i) One or more interim numeric goals may be established to demonstrate progress toward achieving each final numeric goal,
 - (ii) For each final numeric goal, at least one interim numeric goal must be expressed as a reasonable increment toward achievement of the final numeric goal,
 - (iii) For each final numeric goal, reasonable interim numeric goals must be established to be accomplished during each 5 year period between the acceptance of the Water Quality Improvement Plan and the achievement of the final numeric goals.

(2) Schedules for Achieving Numeric Goals

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

- (a) Final dates for achieving all final numeric goals must be established considering the following:

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

b. WATER QUALITY IMPROVEMENT STRATEGIES AND SCHEDULES

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

(1) Jurisdictional Strategies

- (a) Each Copermittee in the Watershed Management Area must identify the strategies that will be implemented within its jurisdiction as part of its jurisdictional runoff management program requirements under Provisions E.2 through E.7, including descriptions of the following:
- (i) For each of the inventories developed for its jurisdiction, as required under Provisions D.2.a.(1), E.3.e.(2), E.4.b, and E.5.a, each Copermittee must identify the known and suspected areas or sources causing or contributing to the highest priority water quality conditions in the Watershed Management Area that the Copermittee will focus on in its efforts to effectively prohibit non-storm water discharges to its MS4, reduce pollutants in storm water discharges from its MS4 to the MEP, and achieve the interim and final numeric goals identified under Provision B.3.a;
 - (ii) BMPs that each Copermittee will implement, or require to be implemented, as applicable, for those areas or sources within its jurisdiction;
 - (iii) Education programs that each Copermittee will implement, as applicable, for those areas or sources within its jurisdiction;
 - (iv) Frequencies that each Copermittee will conduct inspections on those areas or sources within its jurisdiction;
 - (v) Incentive and enforcement programs that each Copermittee will implement, as applicable, for those areas or sources within its jurisdiction; and
 - (vi) Any other BMPs, incentives, or programs that each Copermittee will implement for those areas or sources within its jurisdiction.
- (b) Identify the optional jurisdictional strategies that each Copermittee will implement within its jurisdiction, as necessary, to effectively prohibit non-storm water discharges to its MS4, reduce pollutants in storm water discharges from its MS4 to the MEP, protect the beneficial uses of receiving waters from MS4 discharges, and/or achieve the interim and final numeric goals identified under Provision B.3.a. Descriptions of the optional jurisdictional strategies must include:
- (i) BMPs, incentives, or programs that may be implemented by the Copermittee within its jurisdiction in addition to the requirements of Provisions B.3.b.(1)(a);
 - (ii) Incentives or programs that may be implemented by the Copermittee to encourage or implement projects to retrofit areas of existing development within its jurisdiction;

- (iii) Incentives or programs that may be implemented by the Copermittee to encourage or implement projects that will rehabilitate the conditions of channels or habitats within its jurisdiction;
 - (iv) The funds and/or resources that must be secured by the Copermittee to implement the optional strategies described for Provisions B.3.b.(1)(b)(i)-(iii) within its jurisdiction; and
 - (v) The circumstances necessary to trigger implementation of the optional jurisdictional strategies, in addition to the requirements of Provision B.3.b.(1)(a), to achieve the interim and final numeric goals within the schedules established under Provision B.3.a.
- (c) Identify the strategies that will be implemented by the Copermittee in coordination with or with the cooperation of other agencies (e.g. Caltrans, water districts, school districts) and/or entities (e.g. non-governmental organizations) within its jurisdiction.

(2) Watershed Management Area Strategies

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

- (a) Regional or multi-jurisdictional BMPs, incentives, or programs that may be implemented by the Copermittees in the Watershed Management Area;
- (b) Incentives or programs that may be implemented by the Copermittees in the Watershed Management Area to encourage or implement regional or multi-jurisdictional projects to retrofit areas of existing development;
- (c) Incentives or programs that may be implemented by the Copermittees to encourage or implement regional or multi-jurisdictional projects that will rehabilitate the conditions of channels, streams, or habitats within the Watershed Management Area;
- (d) The funds and/or resources that must be secured by the Copermittees to implement the optional strategies described for Provisions B.3.b.(2)(a)-(c) within the Watershed Management Area; and

- (e) The circumstances necessary to trigger implementation of the optional regional or multi-jurisdictional strategies to achieve the interim and final numeric goals within the schedules established under Provision B.3.a.

(3) Schedules for Implementing Strategies

The Copermittees must develop reasonable schedules for implementing the water quality improvement strategies identified under Provisions B.3.b.(1) and B.3.b.(2) to achieve the interim and final numeric goals identified and schedules established under Provision B.3.a. The Copermittees must incorporate the schedules to implement the water quality improvement strategies into the Water Quality Improvement Plan as follows:

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

- (b) The Copermittees in the Watershed Management Area must develop schedules for the regional or multi-jurisdictional strategies identified pursuant to Provision B.3.b.(2). Each schedule must specify:
- (i) A realistic assessment of the shortest practicable time to:
 - [a] Secure the resources needed to fund the optional regional or multi-jurisdictional strategy, and
 - [b] Procure the resources, materials, labor, and permits necessary to initiate the implementation of the optional regional or multi-jurisdictional strategy;
 - (ii) If each regional or multi-jurisdictional strategy identified pursuant to Provision B.3.b.(2) is expected to be continuously implemented (e.g. inspections) or completed within a schedule (e.g. construction of structural BMP); and
 - (iii) If a regional or multi-jurisdictional strategy and/or activity identified pursuant to Provisions B.3.b.(2) is expected to be completed within a schedule, the anticipated time to complete based on a realistic assessment of the shortest practicable time required.

(4) Optional Watershed Management Area Analysis

- (a) For each Watershed Management Area, the Copermittees have the option to perform a Watershed Management Area Analysis for the purpose of developing watershed-specific requirements for structural BMP implementation, as described in Provision E.3.c.(3). The Watershed Management Area Analysis must include GIS layers (maps) as output. The analysis must include the following information, to the extent it is available, in order to characterize the Watershed Management Areas:
- (i) A description of dominant hydrologic processes, such as areas where infiltration or overland flow likely dominates;
 - (ii) A description of existing streams in the watershed, including bed material and composition, and if they are perennial or ephemeral;
 - (iii) Current and anticipated future land uses;
 - (iv) Potential coarse sediment yield areas; and
 - (v) Locations of existing flood control structures and channel structures, such as stream armoring, constrictions, grade control structures, and hydromodification or flood management basins.
- (b) The Copermittees must use the results of the Watershed Management Area Analysis performed pursuant to Provision B.3.b.(4)(a) to identify and compile a list of candidate projects that could potentially be used as

alternative compliance options for Priority Development Projects, to be implemented in lieu of onsite structural BMP performance requirements described in Provisions E.3.c.(1) and E.3.c.(2)(a). Specifically, the Copermitees must identify opportunities to be included in the list of candidate projects in each Watershed Management Area, such as:

- (i) Stream or riparian area rehabilitation;
 - (ii) Retrofitting existing infrastructure to incorporate storm water retention or treatment;
 - (iii) Regional BMPs;
 - (iv) Groundwater recharge projects;
 - (v) Water supply augmentation projects; and
 - (vi) Land purchases to preserve floodplain functions.
- (c) The Copermitees must use the results of the Watershed Management Area Analysis performed pursuant to Provision B.3.b.(4)(a) to identify areas within the Watershed Management Area where it is appropriate to allow Priority Development Projects to be exempt from the hydromodification management BMP performance requirements described in Provision E.3.c.(2), including supporting rationale.

C. PROHIBITIONS AND LIMITATIONS COMPLIANCE OPTION

Each Copermitee has the option to utilize the implementation of the Water Quality Improvement Plan to demonstrate compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b within a Watershed Management Area subject to the following conditions:

- (1) A Copermitee is eligible to be deemed in compliance with Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b within a Watershed Management Area when the Water Quality Improvement Plan for a Watershed Management Area incorporates the following:
- (a) Numeric goals, water quality improvement strategies, and schedules developed pursuant to Provisions B.3.a and B.3.b that include the following:
 - (i) Interim and final WQBELs established by the TMDLs in Attachment E to this Order applicable to the Copermitee's jurisdiction within the Watershed Management Area; AND
 - (ii) Interim and final numeric goals for any ASBS subject to the provisions of Attachment B to State Water Board Resolution No. 2012-0012

(included as Attachment A to this Order) applicable to the Copermittee's jurisdiction within the Watershed Management Area; AND

- (iii) Interim and final numeric goals applicable to the Copermittee's MS4 discharges within the Watershed Management Area expressed as numeric concentration-based or load-based goals for all pollutants and conditions listed on the Clean Water Act Section 303(d) List of Water Quality Impaired Segments⁸ for the receiving waters in the Watershed Management Area that do not have a TMDL incorporated into Attachment E to this Order; AND/OR
- (iv) Interim and final numeric goals for pollutants and conditions identified as receiving water priorities in the Water Quality Improvement Plan that will result in chemical, physical, and biological conditions protective of the beneficial uses of the receiving waters impacted by the Copermittee's MS4 discharges within the Watershed Management Area; AND
- (v) The Copermittee has the option to include interim and final numeric goals applicable to the Copermittee's MS4 discharges and/or receiving waters within the Watershed Management Area for any pollutants or conditions in addition to those described in Provisions B.3.c.(1)(a)(i)-(iv); AND
- (vi) Schedules for achieving each final numeric goal that reflect a realistic assessment of the shortest practicable time needed for achievement; AND
- (vii) For each final numeric goal developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(v), annual milestones⁹ and the dates for their achievement must be included within each of the next five (5) Water Quality Improvement Plan Annual Report reporting periods, or until the final numeric goal is achieved. Annual milestones and the dates for their achievement for the 5 Water Quality Improvement Plan Annual Report reporting periods of the next permit term, or until the final numeric goal is achieved, must be provided as part of the Report of Waste Discharge required pursuant to Provision F.5.

(b) An analysis that meets all of the following conditions:

- (i) The analysis, with clearly stated assumptions included in the analysis, must quantitatively demonstrate that the implementation of

⁸ 2010 and subsequent 303(d) Lists

⁹ Annual milestones for each final numeric goal must be clearly and directly linked to, or demonstrate progress is being made toward the achievement of the final numeric goal. The annual milestones may consist of water quality improvement strategy implementation phases, interim numeric goals, and other acceptable metrics. The annual milestones may address multiple numeric goals and/or multiple water bodies, as applicable and appropriate.

- the water quality improvement strategies required under Provision B.3.b will achieve the final numeric goals within the schedules developed pursuant to Provisions B.3.a and B.3.c.(1)(a).
- (ii) The development of the analysis must include a public participation process which allows the public to review and provide comments on the analysis methodology utilized and the assumptions included in the analysis. Public comments and responses must be included as part of the analysis documentation included in the Water Quality Improvement Plan.
 - (iii) The analysis may be performed by an individual Copermittee or jointly by two or more Copermittees choosing to utilize this compliance option for their jurisdictions within the Watershed Management Area.
 - (iv) The analysis must be updated as part of the iterative approach and adaptive management process required under Provisions B.5.a-b.
- (c) Specific monitoring and assessments required pursuant to Provision B.4.a that will be performed by the Copermittee capable of 1) demonstrating whether the implementation of the water quality improvement strategies are making progress toward achieving the numeric goals in accordance with the established schedules developed pursuant to Provisions B.3.a and B.3.c.(1)(a), and 2) determining whether interim and final numeric goals have been achieved. The specific monitoring and assessments must be updated as part of the iterative approach and adaptive management process required under Provision B.5.c.
- (d) Documentation showing that the numeric goals, schedules, and annual milestones proposed pursuant to Provision B.3.c.(1)(a), the analysis performed pursuant to Provision B.3.c.(1)(b), and the specific monitoring and assessments proposed pursuant to Provision B.3.c.(1)(c) have been reviewed by the Water Quality Improvement Consultation Panel (see Provision F.1.a.(1)(b)). Updates must be reviewed by the Water Quality Improvement Consultation Panel for any recommendations.
- (2) Each Copermittee that voluntarily completes the requirements of Provision B.3.c.(1) is deemed in compliance with Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b for the pollutants and conditions for which numeric goals are developed when the Water Quality Improvement Plan, incorporating the requirements of Provision B.3.c.(1), is accepted by the San Diego Water Board pursuant to Provision F.1.b or F.2.c. The Copermittee is deemed in compliance during the term of this Order as long as:
- (a) The Copermittee is implementing the water quality improvement strategies within its jurisdiction developed pursuant to Provision B.3.b.(1) and in

compliance with the schedules for implementing the strategies established pursuant to Provisions B.3.b.(3)(a) and B.3.c.(1)(a)(vii); AND

- (b) The Copermittee is performing the monitoring and assessments developed pursuant to Provision B.3.c.(1)(c); AND
- (c) The Copermittee's assessments in the Water Quality Improvement Plan Annual Report submitted pursuant to Provision F.3.b.(3) support a conclusion that: 1) the Copermittee is in compliance with the annual milestones and dates for achievement developed pursuant to Provision B.3.c.(1)(a)(vii), OR 2) the Copermittee has provided acceptable rationale and recommends appropriate modifications to the interim numeric goals, and/or water quality improvement strategies, and/or schedules to improve the rate of progress toward achieving the final numeric goals developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(vi); AND
- (d) Any proposed modifications to the numeric goals, strategies, schedules, and/or annual milestones are accepted by the San Diego Water Board as part of subsequent updates to the Water Quality Improvement Plan pursuant to Provision F.2.c;¹⁰ AND
- (e) The Copermittee is implementing the requirements of Provision A.4.a.

4. Water Quality Improvement Monitoring and Assessment Program

- a. The Copermittees in each Watershed Management Area must develop and incorporate an integrated monitoring and assessment program into the Water Quality Improvement Plan that assesses: 1) the progress toward achieving the numeric goals and schedules, 2) the progress toward addressing the highest priority water quality conditions for each Watershed Management Area, and 3) each Copermittee's overall efforts to implement the Water Quality Improvement Plan.
- b. The monitoring and assessment program must incorporate the monitoring and assessment requirements of Provision D, which may allow the Copermittees to modify the program to be consistent with and focus on the highest priority water quality conditions for each Watershed Management Area.
- c. For Watershed Management Areas with applicable TMDLs, the monitoring and assessment program must incorporate the specific monitoring and assessment requirements of Attachment E.

¹⁰ A request for proposed changes to the Water Quality Improvement Plan does not stay any permit condition.

- d. For Watershed Management Areas with any ASBS, the water quality monitoring and assessment program must incorporate the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012 (see Attachment A).

5. Iterative Approach and Adaptive Management Process

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

a. RE-EVALUATION OF PRIORITY WATER QUALITY CONDITIONS

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

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

b. ADAPTATION OF GOALS, STRATEGIES AND SCHEDULES

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

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

c. ADAPTATION OF MONITORING AND ASSESSMENT PROGRAM

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

d. ADAPTATION OF PROHIBITIONS AND LIMITATIONS COMPLIANCE OPTION

If a Copermittee has implemented the Prohibitions and Limitations Compliance Option allowed to be included in the Water Quality Improvement Plan pursuant to Provision B.3.c, the Copermittee must re-evaluate and adapt the numeric goals, water quality improvement strategies, schedules, and annual milestones required under Provision B.3.c.(1) when significant new information becomes available, or with the Report of Waste Discharge required pursuant to Provision F.5. Significant changes in the numeric goals, water quality improvement strategies, schedules, or annual milestones requires an update to the analysis required under Provision B.3.c.(2).

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

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

C. ACTION LEVELS

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

1. Non-Storm Water Action Levels¹¹

The Copermittees must develop and incorporate numeric non-storm water action levels (NALs) into the Water Quality Improvement Plan to: 1) support the development and prioritization of water quality improvement strategies for effectively prohibiting non-storm water discharges to the MS4s, 2) assess the effectiveness of the water quality improvement strategies toward addressing MS4 non-storm water discharges, required pursuant to Provision D.4.b.(1), and 3) support the detection and elimination of non-storm water and illicit discharges to the MS4, required pursuant to Provision E.2.¹²

a. The following NALs must be incorporated:

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

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

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

Abbreviations/Acronyms

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

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

Notes:

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

¹¹ NALs incorporated into the Water Quality Improvement Plans are not considered by the San Diego Water Board to be enforceable effluent limitations, unless the NAL is based on a WQBEL expressed as an interim or final effluent limitation for a TMDL in Attachment E and the interim or final compliance date has passed.

¹² The Copermittees may utilize NALs or other benchmarks currently established by the Copermittees as interim NALs until the Water Quality Improvement Plans are accepted by the San Diego Water Board Executive Officer.

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

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

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

Abbreviations/Acronyms:

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

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

Notes:

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

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

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

Abbreviations/Acronyms:

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

Notes:

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

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

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

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

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

Abbreviations/Acronyms:

AMAL – average monthly action level	MDAL – maximum daily action level
BP – Basin Plan water quality objective	WARM – warm freshwater habitat beneficial use
COLD – cold freshwater habitat beneficial use	MBAS – Methylene Blue Active Substances
NTU – Nephelometric Turbidity Units	MPN/100 ml – most probable number per 100 milliliters
mg/L – milligrams per liter	µg/L – micrograms per liter

Notes:

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

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

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

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

elimination of non-storm water and illicit discharges to and from the MS4. The secondary NALs may be developed using an approach acceptable to the San Diego Water Board.

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

2. Storm Water Action Levels¹³

The Copermittees must develop and incorporate numeric storm water action levels (SALs) in the Water Quality Improvement Plans to: 1) support the development and prioritization of water quality improvement strategies for reducing pollutants in storm water discharges from the MS4s, and 2) assess the effectiveness of the water quality improvement strategies toward reducing pollutants in storm water discharges, required pursuant to Provision D.4.b.(2).¹⁴

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

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

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

Abbreviations/Acronyms:

NTU – Nephelometric Turbidity Units
mg/L – milligrams per liter
µg/L – micrograms per liter

Notes:

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

¹³ SALs incorporated into the Water Quality Improvement Plans are not considered by the San Diego Water Board to be enforceable effluent limitations, unless the SAL is based on a WQBEL expressed as an interim or final effluent limitation for a TMDL in Attachment E and the interim or final compliance date has passed.

¹⁴ The Copermittees may utilize SALs or other benchmarks currently established by the Copermittees as interim SALs until the Water Quality Improvement Plans are accepted by the San Diego Water Board Executive Officer.

- b.** If not identified in Provision C.2.a, SALs must be identified, developed and incorporated in the Water Quality Improvement Plan for pollutants or waste constituents that cause or contribute, or are threatening to cause or contribute to a condition of pollution or nuisance in receiving waters associated with the highest priority water quality conditions related to storm water discharges from the MS4s. SALs must be based on:
- (1) Federal and State water quality guidance and/or water quality standards; and
 - (2) Site-specific or receiving water-specific conditions; or
 - (3) Applicable numeric WQBELs required to meet the WLAs established for the TMDLs in Attachment E to this Order.
- c.** For the SALs incorporated into the Water Quality Improvement Plan, the Copermittees may develop and incorporate secondary SALs specific to the Watershed Management Area at levels greater than the SALs required by Provisions C.2.a and C.2.b which can be utilized to further refine the prioritization and assessment of water quality improvement strategies for reducing pollutants in storm water discharges from the MS4s. The secondary SALs may be developed based on the approaches recommended by the State Water Board's Storm Water Panel¹⁵ or using an approach acceptable to the San Diego Water Board.
- d.** Wet weather monitoring data from MS4 outfalls collected in accordance with Provision D.2.c may be used to develop or revise SALs based upon watershed-specific data, subject to San Diego Water Board Executive Officer approval.

¹⁵ Storm Water Panel Recommendations to the California State Water Resources Control Board: The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (June 2006)

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D. MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS

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

1. Receiving Water Monitoring Requirements

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

a. TRANSITIONAL RECEIVING WATER MONITORING

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

- (1) Continue the receiving water monitoring programs required in Order Nos. R9-2007-0001 (Monitoring and Reporting Program No. R9-2007-0001 Sections II.A.1-A.5), R9-2009-0002, and R9-2010-0016, unless the Executive Officer provides conditional approval for Copermittees to proceed with implementation of the proposed monitoring and assessment program developed in accordance with Provision B.4;
- (2) Continue the monitoring in the Hydromodification Management Plans approved by the San Diego Water Board;
- (3) Participate in the following regional receiving water monitoring programs, as applicable to the Watershed Management Area:

- (a) Storm Water Monitoring Coalition Regional Monitoring,
 - (b) Southern California Bight Regional Monitoring, and
 - (c) Sediment Quality Monitoring;
- (4) Implement the monitoring programs developed as part of any implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) for the TMDLs in Attachment E to this Order; and
- (5) For Watershed Management Areas with ASBS, implement the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012, included in Attachment A to this Order.

b. LONG-TERM RECEIVING WATER MONITORING STATIONS

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

c. DRY WEATHER RECEIVING WATER MONITORING

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

(1) Dry Weather Receiving Water Field Observations

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

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

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

(2) Dry Weather Receiving Water Field Monitoring

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

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

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

(3) Dry Weather Receiving Water Analytical Monitoring

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

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

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

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

Conventionals, Nutrients	Metals (Total and Dissolved)	Pesticides	Indicator Bacteria
<ul style="list-style-type: none"> • Total Dissolved Solids • Total Suspended Solids • Turbidity • Total Hardness • Total Organic Carbon • Dissolved Organic Carbon • Sulfate • Methylene Blue Active Substances (MBAS) • Total Phosphorus • Orthophosphate • Nitrite¹ • Nitrate¹ • Total Kjeldhal Nitrogen • Ammonia 	<ul style="list-style-type: none"> • Arsenic • Cadmium • Chromium • Copper • Iron • Lead • Mercury • Nickel • Selenium • Thallium • Zinc 	<ul style="list-style-type: none"> • Organophosphate Pesticides • Pyrethroid Pesticides 	<ul style="list-style-type: none"> • Total Coliform • Fecal Coliform² • <i>Enterococcus</i>

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

(4) Dry Weather Receiving Water Toxicity Monitoring

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

Table D-4. Dry Weather Chronic¹ Toxicity Testing for Receiving Water Monitoring Stations

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

Notes:

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

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

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

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

required under Provision D.4.a.(2), and develop a plan for implementing the TIE/TRE to be incorporated in the Water Quality Improvement Plan.

(5) Dry Weather Receiving Water Bioassessment Monitoring

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

- (a) The following bioassessment samples and measurements must be collected:
- (i) Macroinvertebrate samples must be collected in accordance with the “Reachwide Benthos (Multihabitat) Procedure” in the most current Surface Water Ambient Monitoring Program (SWAMP) Bioassessment Standard Operating Procedures (SOP), and amendments, as applicable;¹⁶
 - (ii) The “Full” suite of physical habitat characterization measurements must be collected in accordance with the most current SWAMP Bioassessment SOP, and as summarized in the SWAMP Stream Habitat Characterization Form – Full Version;¹⁷ and
 - (iii) Freshwater algae samples must be collected in accordance with the SWAMP Standard Operating Procedures for Collecting Algae Samples.¹⁸ Analysis of samples must include algal taxonomic composition (diatoms and soft algae) and algal biomass.
- (b) The bioassessment samples, measurements, and appropriate water chemistry data must be used to calculate the following:
- (i) An Index of Biological Integrity (IBI) for macroinvertebrates for each monitoring station where bioassessment monitoring was conducted, based on the most current calculation method;¹⁹ and

¹⁶ Ode, P.R.. 2007. Standard operating procedures for collecting macroinvertebrate samples and associated physical and chemical data for ambient bioassessments in California. California State Water Resources Control Board Surface Water Ambient Monitoring Program (SWAMP) Bioassessment SOP 001. http://www.swrcb.ca.gov/water_issues/programs/swamp/tools.shtml#monitoring

¹⁷ Available at:

http://www.waterboards.ca.gov/water_issues/programs/swamp/docs/reports/fieldforms_fullversion052908.pdf

¹⁸ Fetscher et al. 2009. Standard Operating Procedures for Collecting Stream Algae Samples and Associated Physical Habitat and Chemical Data for Ambient Bioassessments in California.

¹⁹ The most current calculation method at the time the Order was adopted is outlined in “A Quantitative Tool for Assessing the Integrity of Southern California Coastal Streams” (Ode, et al. 2005. Environmental Management. Vol. 35, No. 1, pp. 1-13). If an updated or new calculation method is developed, either both

- (ii) An IBI for algae for each monitoring station where bioassessment monitoring was conducted, when a calculation method is developed.²⁰
- (c) In lieu of the requirements of Provision D.1.c.(5)(a), the Copermittees may conduct the bioassessment monitoring in accordance with the “Triad” assessment approach²¹ to calculate the IBIs required for Provision D.1.c.(5)(b). The Copermittees must conduct sampling, analysis, and reporting of specified in-stream biological and habitat data according to the protocols specified in the SCCWRP Technical Report No. 539, or subsequent protocols, if developed.

(6) Dry Weather Receiving Water Hydromodification Monitoring

In addition to the hydromodification monitoring conducted as part of the Copermittees’ Hydromodification Management Plans, hydromodification monitoring for each long-term receiving water monitoring station is required at least once during the term of this Order. The Copermittees must collect the following hydromodification monitoring observations and measurements within an appropriate domain of analysis during at least one dry weather monitoring event for each long-term receiving water monitoring station:

- (a) Channel conditions, including:
 - (i) Channel dimensions,
 - (ii) Hydrologic and geomorphic conditions, and
 - (iii) Presence and condition of vegetation and habitat;
- (b) Location of discharge points;
- (c) Habitat integrity;
- (d) Photo documentation of existing erosion and habitat impacts, with location (i.e. latitude and longitude coordinates) where photos were taken;
- (e) Measurement or estimate of dimensions of any existing channel bed or bank eroded areas, including length, width, and depth of any incisions; and

(i.e. current and updated/new) methods must be used, or historical IBIs must be recalculated with the updated or new calculation method.

²⁰ When a calculation method is developed, IBIs must be calculated for all available and appropriate historical data.

²¹ Stormwater Monitoring Coalition Model Monitoring Technical Committee, 2004. Model Monitoring Program for Municipal Separate Storm Sewer Systems in Southern California. Technical Report #419. August 2004.

- (f) Known or suspected cause(s) of existing downstream erosion or habitat impact, including flow, soil, slope, and vegetation conditions, as well as upstream land uses and contributing new and existing development.

d. WET WEATHER RECEIVING WATER MONITORING

During the term of the Order, the Copermittees must perform monitoring during at least three wet weather monitoring events at each long-term receiving water monitoring station. At least one wet weather monitoring event must be conducted during the first wet weather event of the wet season (October 1 – April 30), and at least one wet weather monitoring event during a wet weather event that occurs after February 1.

(1) Wet Weather Receiving Water Field Observations

For each wet weather monitoring event, the following narrative descriptions and observations must be recorded at each long-term receiving water monitoring station:

- (a) A narrative description of the station that includes the location, date and duration of the storm event(s) sampled, rainfall estimates of the storm event, and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;
- (b) The flow rates and volumes measured or estimated (data from nearby USGS gauging stations may be utilized, or flow rates may be measured or estimated in accordance with the USEPA Storm Water Sampling Guidance Document (EPA-833-B-92-001), section 3.2.1, or other method proposed by the Copermittees that is acceptable to the San Diego Water Board);
- (c) Station condition (i.e. deposits or stains, vegetation condition, structural condition, observable biology); and
- (d) Presence and assessment of trash in and around station.

(2) Wet Weather Receiving Water Field Monitoring

For each wet weather monitoring event, the Copermittees must monitor and record the parameters in Table D-2 at each long-term receiving water monitoring station.

(3) Wet Weather Receiving Water Analytical Monitoring

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

- (a) Analytes that are field measured are not required to be analyzed by a laboratory;
- (b) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;
- (c) Grab samples may be collected for pH, temperature, specific conductivity, dissolved oxygen, turbidity, hardness, and indicator bacteria;
- (d) For all other constituents, composite samples must be collected for a duration adequate to be representative of changes in pollutant concentrations and runoff flows using one of the following techniques:
 - (i) Time-weighted composites composed of 24 discrete hourly samples, which may be collected through the use of automated equipment, or
 - (ii) Flow-weighted composites collected over the length of the storm event or a typical 24-hour period, which may be collected through the use of automated equipment;
- (e) Only one analysis of the composite of aliquots is required;
- (f) Analysis for the following constituents is required:
 - (i) Constituents contributing to the highest priority water quality conditions identified in the Water Quality Improvement Plan,
 - (ii) Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,
 - (iii) Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in Attachment E to this Order,
 - (iv) Applicable SAL constituents, and
 - (v) Constituents listed in Table D-3.

(4) Wet Weather Receiving Water Toxicity Monitoring

For each wet weather monitoring event, the Copermittees must collect grab or composite samples from each long-term receiving water monitoring station to be analyzed for chronic aquatic toxicity in accordance with Provisions D.1.c.(4)(a)-(f).

e. OTHER RECEIVING WATER MONITORING REQUIREMENTS

(1) Regional Monitoring

The Copermittees must participate in the following regional receiving waters monitoring programs, as applicable to the Watershed Management Area:

(a) Storm Water Monitoring Coalition Regional Monitoring; and

(b) Southern California Bight Regional Monitoring and

(c) Unified Beach Water Quality Monitoring and Assessment Program.

The Orange County Copermittees shall participate in and, together with South Orange County Wastewater Authority and Orange County Health Care Agency, shall share responsibility for implementation of a unified regional beach water quality monitoring and assessment program in south Orange County, as set forth in the October 2014 report, *Workgroup Recommendation for a Unified Beach Water Quality Monitoring and Assessment Program in South Orange County*, issued pursuant to CWC section 13383 and subject to future revision in the San Diego Water Board December 5, 2014 Letter Directive.

(2) Sediment Quality Monitoring

The Copermittees must perform sediment monitoring to assess compliance with sediment quality receiving water limits applicable to MS4 discharges to enclosed bays and estuaries. The monitoring may be performed either by individual or multiple Copermittees to assess compliance with receiving water limits, or through participation in a water body monitoring coalition. A Sediment Monitoring Plan which satisfies the requirements of the State Water Board's Water Quality Control Plan for Enclosed Bays and Estuaries of California – Part 1 Sediment Quality (Sediment Control Plan) must be submitted as part of the monitoring and assessment program in the Water Quality Improvement Plan.

(a) The Sediment Monitoring Plan design must include the following:

(i) The elements required under Section VII.D (Receiving Water Limits Monitoring Frequency) and Section VII.E (Sediment Monitoring) of the Sediment Control Plan;

(ii) A Quality Assurance Project Plan (QAPP) describing the project objectives and organization, functional activities, and quality assurance/quality control protocols for the water and sediment monitoring; and

(iii) A schedule for completion of all sample collection and analysis activities and submission of Sediment Monitoring Reports.

- (b) The Copermittees must implement the Sediment Monitoring Plan in accordance with the schedule contained in the Sediment Monitoring Plan, unless otherwise directed in writing by the San Diego Water Board Executive Officer.
- (c) The Copermittees must incorporate a Sediment Monitoring Report as part of the Water Quality Improvement Plan Annual Report in accordance with the schedule contained in the Sediment Monitoring Plan, unless otherwise directed in writing by the San Diego Water Board Executive Officer. The Sediment Monitoring Report must contain the following information:
 - (i) Analysis: An evaluation, interpretation and tabulation of the water and sediment monitoring data, including interpretations and conclusions as to whether applicable Receiving Water Limitations in this Order have been attained at each sample station;
 - (ii) Sample Location Map: The locations, type, and number of samples must be identified and shown on a site map; and
 - (iii) California Environmental Data Exchange Network: A statement certifying that the monitoring data and results have been uploaded into the California Environmental Data Exchange Network (CEDEN).
- (d) Based on the Sediment Monitoring Report conclusions the San Diego Water Board may require a human health risk assessment to determine if the human health objective contained in Receiving Water Limitations in Provision A.2.a.(3)(b)(ii) has been attained at each sample station. In conducting a risk assessment, the Copermittees must consider any applicable and relevant information, including California Environmental Protection Agency's (Cal/EPA) Office of Environmental Health Hazard Assessment (OEHHA) policies for fish consumption and risk assessment, Cal/EPA's Department of Toxic Substances Control (DTSC) Risk Assessment, and USEPA Human Health Risk Assessment policies.

(3) ASBS Monitoring

For Watershed Management Areas with ASBS, the Copermittees must implement the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012, included in Attachment A to this Order.

f. ALTERNATIVE WATERSHED MONITORING REQUIREMENTS

The San Diego Water Board may direct the Copermittees to participate in an effort to develop alternative watershed monitoring with other regulated entities, other interested parties, and the San Diego Water Board to refine, coordinate, and implement regional monitoring and assessment programs to determine the status and trends of water quality conditions in 1) coastal waters, 2) enclosed bays, harbors, estuaries, and lagoons, and 3) streams.

2. MS4 Outfall Discharge Monitoring Requirements

The Copermittees must develop and conduct a program to monitor the discharges from the MS4 outfalls in each Watershed Management Area during dry weather and wet weather. Following San Diego Water Board acceptance of the Water Quality Improvement Plans for each Watershed Management Area, the Copermittees must conduct MS4 outfall discharge monitoring during implementation of the Water Quality Improvement Plan to assess the effectiveness of their jurisdictional runoff management programs toward effectively prohibiting non-storm water discharges into the MS4 and reducing pollutants in storm water discharges from their MS4s to the MEP. Any available monitoring data not collected specifically for this Order that meet the quality assurance criteria of the Copermittees and the monitoring requirements of this Order may be utilized by the Copermittees. The Copermittees must conduct the following MS4 outfall monitoring procedures:

a. TRANSITIONAL MS4 OUTFALL DISCHARGE MONITORING

Until the monitoring requirements and schedules of Provisions D.2.b-c are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board pursuant to Provision F.1.b, the Copermittees must conduct the following MS4 outfall discharge monitoring in the Watershed Management Area:

(1) MS4 Outfall Discharge Monitoring Station Inventory

Each Copermittee must identify all major MS4 outfalls that discharge directly to receiving waters within its jurisdiction and geo-locate those outfalls on a map of the MS4 pursuant to Provision E.2.b.(1). This information must be compiled into a MS4 outfall discharge monitoring station inventory, and must include the following information:

- (a) Latitude and longitude of MS4 outfall point of discharge;
- (b) Watershed Management Area;
- (c) Hydrologic subarea;
- (d) Outlet size;
- (e) Accessibility (i.e. safety and without disturbance of critical habitat);
- (f) Approximate drainage area; and

- (g) Classification of whether the MS4 outfall is known to have persistent dry weather flows, transient dry weather flows, no dry weather flows, or unknown dry weather flows.

(2) Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring

Until the monitoring requirements and schedules of Provision D.2.b are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board pursuant to Provision F.1.b, each Copermittee must perform dry weather MS4 outfall field screening monitoring to identify non-storm water and illicit discharges within its jurisdiction in accordance with Provision E.2.c, to determine which discharges are transient flows and which are persistent flows, and prioritize the dry weather MS4 discharges that will be investigated and eliminated in accordance with Provision E.2.d.

(a) Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring Frequency

Each Copermittee must field screen the MS4 outfalls in its inventory developed pursuant to Provision D.2.a.(1) as follows:

- (i) For Copermittees with less than 125 major MS4 outfalls that discharge to receiving waters within a Watershed Management Area, at least 80 percent of the outfalls must be visually inspected two times per year during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision D.2.a.(2)(a)(iv).
- (ii) For Copermittees with 125 major MS4 outfalls or more, but less than or equal to 500 that discharge to receiving waters within a Watershed Management Area, all the outfalls must be visually inspected at least annually during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision D.2.a.(2)(a)(iv).
- (iii) For Copermittees with more than 500 major MS4 outfalls that discharge to receiving waters within a Watershed Management Area, at least 500 outfalls must be visually inspected at least annually during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision D.2.a.(2)(a)(iv). Copermittees with more than 500 major MS4 outfalls within a Watershed Management Area must identify and prioritize at least 500 outfalls to be inspected considering the following:

- [a] Assessment of connectivity of the discharge to a flowing receiving water;
 - [b] Reported exceedances of NALs in water quality monitoring data;
 - [c] Surrounding land uses;
 - [d] Presence of constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List; and
 - [e] Flow rate.
- (iv) For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major MS4 outfalls within its jurisdiction, at least 500 major MS4 outfalls within its inventory must be visually inspected at least annually during dry weather conditions. Copermittees with more than 500 major MS4 outfalls in more than one Watershed Management Area must identify and prioritize at least 500 outfalls to be inspected considering the following:
- [a] Assessment of connectivity of the discharge to a flowing receiving water;
 - [b] Reported exceedances of NALs in water quality monitoring data;
 - [c] Surrounding land uses;
 - [d] Presence of constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List; and
 - [e] Flow rate.
- (v) Inspections of major MS4 outfalls conducted in response to public reports and staff or contractor reports and notifications may count toward the required visual inspections of MS4 outfall discharge monitoring stations.
- (b) Transitional Dry Weather MS4 Outfall Discharge Field Screening Visual Observations
- (i) An antecedent dry period of at least 72 hours following any storm event producing measurable rainfall greater than 0.1 inch is required prior to conducting field screening visual observations during a field screening monitoring event.
 - (ii) During the field screening monitoring event, each Copermittee must record visual observations consistent with Table D-5 at each MS4 outfall discharge monitoring station inspected.

Table D-5. Field Screening Visual Observations for MS4 Outfall Discharge Monitoring Stations

Field Observations
<ul style="list-style-type: none">• Station identification and location• Presence of flow, or pooled or ponded water• If flow is present:<ul style="list-style-type: none">- Flow estimation (i.e. width of water surface, approximate depth of water, approximate flow velocity, flow rate)- Flow characteristics (i.e. presence of floatables, surface scum, sheens, odor, color)- Flow source(s) suspected or identified from non-storm water source investigation- Flow source(s) eliminated during non-storm water source identification• If pooled or ponded water is present:<ul style="list-style-type: none">- Characteristics of pooled or ponded water (i.e. presence of floatables, surface scum, sheens, odor, color)- Known or suspected source(s) of pooled or ponded water• Station description (i.e. deposits or stains, vegetation condition, structural condition, observable biology)• Presence and assessment of trash in and around station• Evidence or signs of illicit connections or illegal dumping

- (iii) Each Copermittee must implement the requirements of Provisions E.2.d.(2)(c)-(e) based on the field observations required pursuant to Provision D.2.a.(2)(b)(ii).
- (iv) Each Copermittee must evaluate field observations together with existing information available from prior reports, inspections and monitoring results to determine whether any observed flowing, pooled, or ponded waters are likely to be transient or persistent flow.²²

(c) **Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring Records**

Based upon the results of the transitional dry weather MS4 outfall discharge field screening monitoring conducted pursuant to Provisions D.2.a.(2)(a)-(b), each Copermittee must update its MS4 outfall discharge monitoring station inventory, compiled pursuant to Provision D.2.a.(1), with any new information on the classification of whether the MS4 outfall produces persistent flow, transient flow, or no dry weather flow.

(3) **Transitional Wet Weather MS4 Outfall Discharge Monitoring**

Until the monitoring requirements and schedules of Provision D.2.c are incorporated into a Water Quality Improvement Plan that is accepted by the

²² Persistent flow is defined as the presence of flowing, pooled, or ponded water more than 72 hours after a measureable rainfall event of 0.1 inch or greater during three consecutive monitoring and/or inspection events. All other flowing, pooled, or ponded water is considered transient.

San Diego Water Board pursuant to Provision F.1.b, the Copermittees must conduct the following wet weather MS4 outfall discharge monitoring within the Watershed Management Area:

(a) Transitional Wet Weather MS4 Outfall Discharge Monitoring Stations

The Copermittees must select wet weather MS4 outfall discharge monitoring stations from the inventories developed pursuant to Provision D.2.a.(1) for each Watershed Management Area as follows:

- (i) At least five wet weather MS4 outfall discharge monitoring stations that are representative of storm water discharges from areas consisting primarily of residential, commercial, industrial, and typical mixed-use land uses present within the Watershed Management Area;
- (ii) At least one wet weather MS4 outfall discharge monitoring station for each Copermittee within the Watershed Management Area; and
- (iii) The County of San Diego may select at least two (2) wet weather MS4 outfall discharge monitoring stations for the portion of the Santa Margarita River Watershed Management Area within its jurisdiction to be monitored during the transitional period until the Riverside County Copermittees are notified of coverage under this Order. After the Riverside County Copermittees are notified of coverage under this Order, the Copermittees in the Watershed Management Area must select wet weather MS4 outfall discharge monitoring stations consistent with the requirements above.

(b) Transitional Wet Weather MS4 Outfall Discharge Monitoring Frequency

Each wet weather MS4 outfall discharge monitoring station selected pursuant to Provision D.2.a.(3)(a) must be monitored once during the wet season (October 1 – April 30). The wet weather monitoring events must be selected to be representative of the range of hydrological conditions experienced in the region. At least 10 percent of samples must be conducted during the first wet weather event of the wet season, to include at least one such sample in each Watershed Management Area..

(c) Transitional Wet Weather MS4 Outfall Discharge Field Observations

For each wet weather monitoring event, the following narrative descriptions and observations must be recorded at each wet weather MS4 outfall discharge monitoring station:

- (i) A narrative description of the station that includes the location, date and duration of the storm event(s) sampled, rainfall estimates of the storm event, and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and
 - (ii) The flow rates and volumes measured or estimated from the MS4 outfall (data from nearby USGS gauging stations may be utilized, or flow rates may be measured or estimated in accordance with the USEPA Storm Water Sampling Guidance Document (EPA-833-B-92-001), section 3.2.1, or other method proposed by the Copermittees that is acceptable to the San Diego Water Board);
- (d) Transitional Wet Weather MS4 Outfall Discharge Field Monitoring

For each wet weather monitoring event, the Copermittees must monitor and record the parameters in Table D-2 at each wet weather MS4 outfall discharge monitoring station.

(e) Transitional Wet Weather MS4 Outfall Discharge Analytical Monitoring

For each wet weather monitoring event, the Copermittees must collect and analyze samples from each wet weather MS4 outfall discharge monitoring station as follows:

- (i) Analytes that are field measured are not required to be analyzed by a laboratory;
- (ii) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;
- (iii) Grab samples may be collected for pH, temperature, specific conductivity, dissolved oxygen, turbidity, and indicator bacteria;
- (iv) For all other constituents, composite samples must be collected for a duration adequate to be representative of changes in pollutant concentrations and runoff flows using one of the following techniques:
 - [a] Time-weighted composites collected over the length of the storm event or the first 24 hour period whichever is shorter, composed of discrete samples, which may be collected through the use of automated equipment, or
 - [b] Flow-weighted composites collected over the length of the storm event or a typical 24 hour period, whichever is shorter, which may be collected through the use of automated equipment, or
 - [c] If automated compositing is not feasible, a composite sample may be collected using a minimum of 4 grab samples, collected during

the first 24 hours of the storm water discharge, or for the entire storm water discharge if the storm event is less than 24 hours;

- (v) Only one analysis of the composite of aliquots is required;
- (vi) The samples must be analyzed for the following constituents:
 - [a] Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,
 - [b] Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in Attachment E to this Order, and
 - [c] Constituents listed in Table D-6.

Table D-6. Analytical Monitoring Constituents for Wet Weather MS4 Outfall Discharge Monitoring Stations

Conventionals, Nutrients	Metals (Total and Dissolved)	Indicator Bacteria
<ul style="list-style-type: none"> • Total Dissolved Solids • Total Suspended Solids • Turbidity • Total Hardness • Total Organic Carbon • Dissolved Organic Carbon • Sulfate • Methylene Blue Active Substances (MBAS) • Total Phosphorus • Orthophosphate • Nitrite¹ • Nitrate¹ • Total Kjeldhal Nitrogen • Ammonia 	<ul style="list-style-type: none"> • Arsenic • Cadmium • Chromium • Copper • Iron • Lead • Nickel • Selenium • Thallium • Zinc 	<ul style="list-style-type: none"> • Total Coliform • Fecal Coliform² • <i>Enterococcus</i>

Notes:

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

(f) Other Transitional Wet Weather MS4 Outfall Discharge Monitoring

The San Diego County Copermittees must continue the wet weather MS4 outfall monitoring program developed under Order No. R9-2007-0001, as approved by the San Diego Water Board, through its planned completion.

b. DRY WEATHER MS4 OUTFALL DISCHARGE MONITORING

Each Copermittee must perform dry weather MS4 outfall monitoring to identify non-storm water and illicit discharges within its jurisdiction pursuant to Provision

E.2.c, and to prioritize the dry weather MS4 discharges that will be investigated and eliminated pursuant to Provision E.2.d. Each Copermittee must conduct the following dry weather MS4 outfall discharge monitoring within its jurisdiction:

(1) Dry Weather MS4 Outfall Discharge Field Screening Monitoring

Each Copermittee must continue to perform the dry weather MS4 outfall discharge field screening monitoring in accordance with the requirements of Provision D.2.a.(2). The Copermittee may adjust the field screening monitoring frequencies and locations for the MS4 outfalls in its inventory, as needed, to identify and eliminate sources of persistent flow non-storm water discharges in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan, provided the number of visual inspections performed is equivalent to the number of visual inspections required under Provision D.2.a.(2)(a).

(2) Non-Storm Water Persistent Flow MS4 Outfall Discharge Monitoring

Each Copermittee must perform non-storm water persistent flow MS4 outfall discharge monitoring to determine which persistent non-storm water discharges contain concentrations of pollutants below NALs, and which persistent non-storm water discharges impact receiving water quality during dry weather. Each Copermittee must conduct the following non-storm water persistent flow MS4 outfall discharge monitoring within its jurisdiction:

(a) Prioritization of Non-Storm Water Persistent Flow MS4 Outfalls

Based upon the dry weather MS4 outfall discharge field screening monitoring records developed pursuant to Provision D.2.a.(2)(c), each Copermittee must identify and prioritize the MS4 outfalls with persistent flows based on the highest priority water quality conditions identified in the Water Quality Improvement Plan and any additional criteria developed by the Copermittee, which may include historical data and data from sources other than what the Copermittee collects.

(b) Non-Storm Water Persistent Flow MS4 Outfall Discharge Monitoring Frequency

- (i) Based on the prioritization of major MS4 outfalls developed under Provision D.2.b.(2)(a), each Copermittee must identify, at a minimum, the 5 highest priority major MS4 outfalls with non-storm water persistent flows that the Copermittee will monitor within its jurisdiction in each Watershed Management Area. For Responsible Copermittees identified by a TMDL in Attachment E to this Order, if the 5 chosen outfall locations are not sufficient to determine compliance with the TMDL(s), then each Responsible Copermittee

must identify additional MS4 outfall monitoring locations within its jurisdiction sufficient to address compliance with the TMDL(s). If a Copermitttee has less than 5 major outfalls within a Watershed Management Area, then the Copermitttee must monitor all of its major MS4 outfalls with persistent flows within each Watershed Management Area. The location of the highest priority non-storm water persistent flow MS4 outfall monitoring stations must be identified on the map required pursuant to Provision E.2.b.(1). The map must specify which MS4 outfalls are being monitored for compliance with a TMDL.

- (ii) Each of the highest priority non-storm water persistent flow MS4 outfall monitoring stations identified pursuant to Provision D.2.b.(2)(b)(i) must be monitored under dry weather conditions at least semi-annually until one of the following occurs:
 - [a] The non-storm water discharges have been effectively eliminated (i.e. no flowing, pooled, or ponded water) for three consecutive dry weather monitoring events; or
 - [b] The source(s) of the persistent flows has been identified as a category of non-storm water discharges that does not require an NPDES permit and does not have to be addressed as an illicit discharge because it was not identified as a source of pollutants (i.e. constituents in non-storm water discharge do not exceed NALs), and the persistent flow can be re-prioritized to a lower priority; or
 - [c] The constituents in the persistent flow non-storm water discharge do not exceed NALs, and the persistent flow can be re-prioritized to a lower priority; or
 - [d] The source(s) of the persistent flows has been identified as a non-storm water discharge authorized by a separate NPDES permit.
- (iii) Where the criteria under Provision D.2.b.(2)(b)(ii) are not met, but the threat to water quality has been reduced by the Copermitttee, the highest priority persistent flow MS4 outfall monitoring stations may be reprioritized accordingly for continued dry weather MS4 outfall discharge field screening monitoring required pursuant to Provision D.2.b.(1).
- (iv) Each Copermitttee must document removal or re-prioritization of the highest priority persistent flow MS4 outfall monitoring stations identified under Provision D.2.b.(2)(a) in the Water Quality Improvement Plan Annual Report. Persistent flow MS4 outfall monitoring stations that have been removed must be replaced with the next highest prioritized major MS4 outfall in the Watershed Management Area within its jurisdiction, unless there are no remaining qualifying major MS4 outfalls within the Copermitttee's jurisdiction in the Watershed Management Area.

(c) Non-Storm Water Persistent Flow MS4 Outfall Discharge Field Observations

During each semi-annual monitoring event, each Copermittee must record field observations consistent with Table D-5 at each of the highest priority persistent flow MS4 outfall monitoring stations within its jurisdiction.

(d) Non-Storm Water Persistent Flow MS4 Outfall Discharge Field Monitoring

During each semi-annual monitoring event, if conditions allow the collection of the data, each Copermittee must monitor and record the parameters in Table D-2 at each of the highest priority persistent flow MS4 outfall monitoring stations within its jurisdiction.

(e) Non-Storm Water Persistent Flow MS4 Outfall Discharge Analytical Monitoring

During each semi-annual monitoring event in which measurable flow is present, each Copermittee must collect and analyze samples from each of the highest priority persistent flow MS4 outfall monitoring stations within its jurisdiction as follows:

- (i) Analytes that are field measured are not required to be analyzed by a laboratory;
- (ii) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;
- (iii) Collect grab or composite samples to be analyzed at a qualified laboratory for the following constituents:
 - [a] Constituents contributing to the highest priority water quality conditions identified in the Water Quality Improvement Plan,
 - [b] Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,
 - [c] Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in Attachment E to this Order,
 - [d] Applicable NAL constituents, and
 - [e] Constituents listed in Table D-7. The Copermittees may adjust the list of constituents for the Watershed Management Area if historical data or supporting information can be provided that demonstrates or justifies the analysis of a constituent is not necessary.

Table D-7. Analytical Monitoring Constituents for Persistent Flow MS4 Outfall Discharge Monitoring Stations

Conventional, Nutrients	Metals (Total and Dissolved)	Indicator Bacteria
<ul style="list-style-type: none"> • Total Dissolved Solids • Total Suspended Solids • Total Hardness • Total Phosphorus • Orthophosphate • Nitrite¹ • Nitrate¹ • Total Kjeldhal Nitrogen • Ammonia 	<ul style="list-style-type: none"> • Cadmium • Copper • Lead • Zinc 	<ul style="list-style-type: none"> • Total Coliform • Fecal Coliform² • <i>Enterococcus</i>

Notes:

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

- (iv) If the Copermittee identifies and eliminates the source of the persistent flow non-storm water discharge, analysis of the sample is not required.

C. WET WEATHER MS4 OUTFALL DISCHARGE MONITORING

The Copermittees must perform wet weather MS4 outfall monitoring to identify pollutants in storm water discharges from the MS4s, to guide pollutant source identification efforts, and to determine compliance with the WQBELs associated with the applicable TMDLs in Attachment E to this Order. The Copermittees must conduct the following wet weather MS4 outfall discharge monitoring within the Watershed Management Area:

(1) Wet Weather MS4 Outfall Discharge Monitoring Stations

The Copermittees may adjust the wet weather MS4 outfall discharge monitoring locations in the Watershed Management Area, as needed, to identify pollutants in storm water discharges from MS4s, to guide pollutant source identification efforts, and to determine compliance with the WQBELs associated with the applicable TMDLs in Attachment E to this Order in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan, provided the number of stations is at least equivalent to the number of stations required under Provision D.2.a.(3)(a). Additional outfall monitoring locations, above the minimum per jurisdiction, may be required to demonstrate compliance with the WQBELs associated with the applicable TMDLs in Attachment E.

(2) Wet Weather MS4 Outfall Discharge Monitoring Frequency

The Copermitees must monitor the wet weather MS4 outfall discharge monitoring stations in the Watershed Management Area at least once (1) per year. The Copermitees may need to increase the frequency of monitoring in order to identify pollutants in storm water discharges from the MS4s causing or contributing to the highest priority water quality conditions, to guide pollutant source identification efforts, or to determine compliance with the WQBELs associated with the applicable TMDLs in Attachment E to this Order.

(3) Wet Weather MS4 Outfall Discharge Field Observations

For each wet weather monitoring event, the following narrative descriptions and observations must be recorded at each wet weather MS4 outfall discharge monitoring station:

- (a) A narrative description of the station that includes the location, date and duration of the storm event(s) sampled, rainfall estimates of the storm event, and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and
- (b) The flow rates and volumes measured or estimated (data from nearby USGS gauging stations may be utilized, or flow rates may be measured or estimated in accordance with the USEPA Storm Water Sampling Guidance Document (EPA-833-B-92-001), section 3.2.1, or other method proposed by the Copermitees that is acceptable to the San Diego Water Board);

(4) Wet Weather MS4 Outfall Discharge Field Monitoring

For each wet weather monitoring event, the Copermitees must monitor and record the parameters in Table D-2 at each wet weather MS4 outfall discharge monitoring station.

(5) Wet Weather MS4 Outfall Discharge Analytical Monitoring

For each wet weather monitoring event, the Copermitees must collect and analyze samples from each wet weather MS4 outfall discharge monitoring station as follows:

- (a) Analytes that are field measured are not required to be analyzed by a laboratory;

- (b) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;
- (c) Grab samples may be collected for pH, temperature, specific conductivity, dissolved oxygen, turbidity, hardness, and indicator bacteria;
- (d) For all other constituents, composite samples must be collected for a duration adequate to be representative of changes in pollutant concentrations and runoff flows using one of the following techniques:
 - (i) Time-weighted composites collected over the length of the storm event or the first 24 hour period, whichever is shorter, composed of discrete samples, which may be collected through the use of automated equipment, or
 - (ii) Flow-weighted composites collected over the length of the storm event or a typical 24 hour period, whichever is shorter, which may be collected through the use of automated equipment, or
 - (iii) If automated compositing is not feasible, a composite sample may be collected using a minimum of 4 grab samples, collected during the first 24 hours of the storm water discharge, or for the entire storm water discharge if the storm event is less than 24 hours.
- (e) Only one analysis of the composite of aliquots is required;
- (f) Analysis for the following constituents is required:
 - (i) Constituents contributing to the highest priority water quality conditions identified in the Water Quality Improvement Plan,
 - (ii) Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,
 - (iii) Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in Attachment E to this Order,
 - (iv) Applicable SAL constituents, and
 - (v) The Copermittees may adjust the analytical monitoring required for the Watershed Management Area, if the Copermittees have historical data or supporting information that can demonstrate or provide justification that the analysis of a constituent is not necessary.

3. Special Studies

- a. Within the term of this Order, the Copermittees must initiate the following special studies:
 - (1) At least two special studies in each Watershed Management Area to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address the pollutants and/or stressors that cause or contribute to highest priority water quality conditions identified in the Water Quality Improvement Plan.
 - (2) At least one special study for the San Diego Region to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address the pollutants and/or stressors that are impacting receiving waters on a regional basis in the San Diego Region.
 - (3) One of the two special studies in each Watershed Management Area required pursuant to Provision D.3.a.(1) may be replaced by a special study implemented pursuant to Provision D.3.a.(2).
- b. The special studies must, at a minimum, be in conformance with the following criteria:
 - (1) The special studies must be related to the highest priority water quality conditions identified by the Copermittees in the Watershed Management Area and/or for the entire San Diego Region;
 - (2) The special studies developed pursuant to Provision D.3.a.(1) must:
 - (a) Be implemented within the applicable Watershed Management Area, and
 - (b) Require some form of participation by all the Copermittees within the Watershed Management Area;
 - (3) The special studies developed pursuant to Provision D.3.a.(2) must:
 - (a) Be implemented within the San Diego Region, and
 - (b) Require some form of participation by all Copermittees covered under the requirements of this Order.
 - (4) The Copermittees are encouraged to partner with environmental groups or third parties knowledgeable of watershed conditions to complete the required special studies.

- c.** Special studies developed to identify sources of pollutants and/or stressors should be pollutant and/or stressor specific and based on historical monitoring data and monitoring performed pursuant to Provisions D.1 and D.2. Development of source identification special studies should include the following:
- (1) A compilation of known information on the specific pollutant and/or stressor, including data on potential sources and movement of the pollutant and/or stressor within the watershed. Data generated by the Copermittees and others, as well as information available from a literature research on the pollutant and/or stressor should be compiled and analyzed as appropriate.
 - (2) An identification of data gaps, based on the compiled information generated on the specific pollutant and/or stressor identified in Provision D.3.c.(1). Source identification special studies should be developed to fill identified data gaps.
 - (3) A monitoring plan that will collect and provide data the Copermittees can utilize to do the following:
 - (a) Quantify the relative loading or impact of a pollutant and/or stressor from a particular source or pollutant generating activity;
 - (b) Improve understanding of the fate of a pollutant and/or stressor in the environment;
 - (c) Develop an inventory of known and suspected sources of a pollutant and/or stressor in the Watershed Management Area; and/or
 - (d) Prioritize known and suspected sources of a pollutant and/or stressor based on relative magnitude in discharges, geographical distribution (i.e., regional or localized), frequency of occurrence in discharges, human health risk, and controllability.
- d.** Special studies initiated prior to the effective date of this Order that meet the requirements of Provision D.3.b and are implemented during the term of this Order as part of the Water Quality Improvement Plan may be utilized to fulfill the special study requirements of Provision D.3.a. Special studies completed before the effective date of this Order cannot be utilized to fulfill the special study requirements of Provision D.3.a.
- e.** The Copermittees must submit the monitoring plans for the special studies in the Water Quality Improvement Plans required pursuant to Provision F.1.

- f. The Copermittees are encouraged to share the results of the special studies regionally among the Copermittees to provide information useful in improving and adapting the management of non-storm water and storm water runoff through the implementation of the Water Quality Improvement Plans.

4. Assessment Requirements

Each Copermittee must evaluate the data collected pursuant to Provisions D.1, D.2 and D.3, and information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision E, to assess the progress of the water quality improvement strategies in the Water Quality Improvement Plan toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a. Assessments must be performed as described in the following provisions:

a. RECEIVING WATERS ASSESSMENTS

- (1) The Copermittees must assess and report the conditions of the receiving waters in the Watershed Management Area as follows:
 - (a) Based on data collected pursuant to Provision D.1.a, the assessments under Provision D.4.a.(2) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.3.b.(2).
 - (b) Based on the data collected pursuant to Provisions D.1.a-e, the assessments required under Provision D.4.a.(2) must be included in the Report of Waste Discharge required pursuant to Provision F.5.b.
- (2) The Copermittees must assess the status and trends of receiving water quality conditions in 1) coastal waters, 2) enclosed bays, harbors, estuaries, and lagoons, and 3) streams under dry weather and wet weather conditions. For each of the three types of receiving waters in each Watershed Management Area the Copermittees must:
 - (a) Determine whether or not the conditions of the receiving waters are meeting the numeric goals established pursuant to Provision B.3.a;
 - (b) Identify the most critical beneficial uses that must be protected to ensure overall health of the receiving water;
 - (c) Determine whether or not those critical beneficial uses are being protected;
 - (d) Identify short-term and/or long-term improvements or degradation of those critical beneficial uses;

- (e) Determine whether or not the strategies established in the Water Quality Improvement Plan contribute towards progress in achieving the interim and final numeric goals of the Water Quality Improvement Plan; and
- (f) Identify data gaps in the monitoring data necessary to assess Provisions D.4.a.(2)(a)-(e).

b. MS4 OUTFALL DISCHARGES ASSESSMENTS

(1) Non-Storm Water Discharges Reduction Assessments

- (a) Each Copermittee must assess and report the progress of its illicit discharge detection and elimination program, required to be implemented pursuant to Provision E.2, toward effectively prohibiting non-storm water and illicit discharges into the MS4 within its jurisdiction as follows:
 - (i) Based on data collected pursuant to Provisions D.2.a.(2), the assessments under Provision D.4.b.(1)(b) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.3.b.(2).
 - (ii) Based on the data collected pursuant to Provisions D.2.b, the assessments required under Provision D.4.b.(1)(c) must be included in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3).
 - (iii) Based on the data collected pursuant to Provisions D.2.b, the assessment required under Provision D.4.b.(1)(c) must be included in the Report of Waste Discharge required pursuant to F.5.b.
- (b) Based on the transitional dry weather MS4 outfall discharge field screening monitoring required pursuant to Provision D.2.a.(2), each Copermittee must assess and report the following:
 - (i) Identify the known and suspected controllable sources (e.g. facilities, areas, land uses, pollutant generating activities) of transient and persistent flows within the Copermittee's jurisdiction in the Watershed Management Area;
 - (ii) Identify sources of transient and persistent flows within the Copermittee's jurisdiction in the Watershed Management Area that have been reduced or eliminated; and
 - (iii) Identify modifications to the field screening monitoring locations and frequencies for the MS4 outfalls in its inventory necessary to identify and eliminate sources of persistent flow non-storm water discharges pursuant to Provision D.2.b.

- (c) Based on the dry weather MS4 outfall discharge field screening monitoring required pursuant to Provision D.2.b.(1), each Copermittee must assess and report the following:
- (i) The assessments required pursuant to Provision D.4.b.(1)(b);
 - (ii) Based on the data collected and applicable NALs in the Water Quality Improvement Plan, rank the MS4 outfalls in the Copermittee's jurisdiction according to potential threat to receiving water quality, and produce a prioritized list of major MS4 outfalls for follow-up action to update the Water Quality Improvement Plan, with the goal of eliminating persistent flow non-storm water discharges and/or pollutant loads in order of the ranked priority list through targeted programmatic actions and source investigations;
 - (iii) For the highest priority major MS4 outfalls with persistent flows that are in exceedance of NALs, identify the known and suspected sources within the Copermittee's jurisdiction in the Watershed Management Area that may cause or contribute to the NAL exceedances;
 - (iv) Each Copermittee must analyze the data collected pursuant to Provision D.2.b, and utilize a model or other method, to calculate or estimate the non-storm water volumes and pollutant loads collectively discharged from all the major MS4s outfalls in its jurisdiction identified as having persistent dry weather flows during the monitoring year. These calculations or estimates must be updated annually.
 - [a] Each Copermittee must calculate or estimate the annual non-storm water volumes and pollutant loads collectively discharged from the Copermittee's major MS4 outfalls to receiving waters within the Copermittee's jurisdiction, with an estimate of the percent contribution from each known source for each MS4 outfall;
 - [b] Each Copermittee must annually identify and quantify (i.e. volume and pollutant loads) sources of non-storm water not subject to the Copermittee's legal authority that are discharged from the Copermittee's major MS4 outfalls to downstream receiving waters.
 - (v) Each Copermittee must review the data collected pursuant to Provision D.2.b and findings from the assessments required pursuant to Provision D.4.b.(1)(c)(i)-(iv) at least once during the term of this Order to:

- [a] Identify reductions and progress in achieving reductions in non-storm water and illicit discharges to the Copermittee's MS4 in the Watershed Management Area;
 - [b] Assess the effectiveness of water quality improvement strategies being implemented by the Copermittees within the Watershed Management Area toward reducing or eliminating non-storm water and pollutant loads discharging from the MS4 to receiving waters within its jurisdiction, with an estimate, if possible, of the non-storm water volume and/or pollutant load reductions attributable to specific water quality strategies implemented by the Copermittee; and
 - [c] Identify modifications necessary to increase the effectiveness of the water quality improvement strategies implemented by the Copermittee in the Watershed Management Area toward reducing or eliminating non-storm water and pollutant loads discharging from the MS4 to receiving waters within its jurisdiction.
- (vi) Identify data gaps in the monitoring data necessary to assess Provisions D.4.b.(1)(c)(i)-(v).

(2) Storm Water Pollutant Discharges Reduction Assessments

- (a) The Copermittees must assess and report the progress of the water quality improvement strategies, required to be implemented pursuant to Provisions B and E, toward reducing pollutants in storm water discharges from the MS4s within the Watershed Management Area as follows:
- (i) Based on data collected pursuant to Provisions D.2.a.(3), the assessments under Provision D.4.b.(2)(b) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.3.b.(2).
 - (ii) Based on the data collected pursuant to Provisions D.2.c, the assessments required under Provision D.4.b.(2)(c) must be included in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3).
 - (iii) Based on the data collected pursuant to Provisions D.2.c, the assessment required under Provisions D.4.b.(2)(c)-(d) must be included in the Report of Waste Discharge required pursuant to F.5.b.
- (b) Based on the transitional wet weather MS4 outfall discharge monitoring required pursuant to Provision D.2.a.(3) the Copermittees must assess and report the following:

- (i) The Copermittees must analyze the monitoring data collected pursuant to Provision D.2.a.(3), and utilize a watershed model or other method, to calculate or estimate the following for each monitoring year:
 - [a] The average storm water runoff coefficient for each land use type within the Watershed Management Area;
 - [b] The volume of storm water and pollutant loads discharged from each of the Copermittee's monitored MS4 outfalls in its jurisdiction to receiving waters within the Watershed Management Area for each storm event with measurable rainfall greater than 0.1 inch;
 - [c] The total flow volume and pollutant loadings discharged from the Copermittee's jurisdiction within the Watershed Management Area over the course of the wet season, extrapolated from the data produced from the monitored MS4 outfalls; and
 - [d] The percent contribution of storm water volumes and pollutant loads discharged from each land use type within each hydrologic subarea with a major MS4 outfall to receiving waters or within each major MS4 outfall to receiving waters in the Copermittee's jurisdiction within the Watershed Management Area for each storm event with measurable rainfall greater than 0.1 inch.
 - (ii) Identify modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies necessary to identify pollutants in storm water discharges from the MS4s in the Watershed Management Area pursuant to Provision D.2.c.(1).
- (c) Based on the wet weather MS4 outfall discharge monitoring required pursuant to Provision D.2.c the Copermittees must assess and report the following:
- (i) The assessments required pursuant to Provision D.4.b.(2)(b);
 - (ii) Based on the data collected and applicable SALs in the Water Quality Improvement Plan, analyze and compare the monitoring data to the analyses and assumptions used to develop the Water Quality Improvement Plans, including strategies developed pursuant to Provision B.3, and evaluate whether those analyses and assumptions should be updated as a component of the adaptive management efforts pursuant to Provision B.5 for follow-up action to update the Water Quality Improvement Plan;
 - (iii) The Copermittees must review the data collected pursuant to Provision D.2.c and findings from the assessments required pursuant to Provisions D.4.b.(2)(c)(i)-(ii) at least once during the term of this Order to:

- [a] Identify reductions or progress in achieving reductions in pollutant concentrations and/or pollutant loads from different land uses and/or drainage areas discharging from the Copermitees' MS4s in the Watershed Management Area;
- [b] Assess the effectiveness of water quality improvement strategies being implemented by the Copermitees within the Watershed Management Area toward reducing pollutants in storm water discharges from the MS4s to receiving waters within the Watershed Management Area to the MEP, with an estimate, if possible, of the pollutant load reductions attributable to specific water quality strategies implemented by the Copermitees; and
- [c] Identify modifications necessary to increase the effectiveness of the water quality improvement strategies implemented by the Copermitees in the Watershed Management Area toward reducing pollutants in storm water discharges from the MS4s to receiving waters in the Watershed Management Area to the MEP.

(iv) Identify data gaps in the monitoring data necessary to assess Provisions D.4.b.(2)(c)(i)-(iii).

(d) The Copermitees must evaluate all the data collected pursuant to Provision D.2.c, and incorporate new outfall monitoring data into time series plots for each long-term monitoring constituent for the Watershed Management Area, and perform statistical trends analysis on the cumulative long-term wet weather MS4 outfall discharge water quality data set.

c. SPECIAL STUDIES ASSESSMENTS

The Copermitees must annually evaluate the results and findings from the special studies developed and implemented pursuant to Provision D.3, and assess their relevance to the Copermitees' efforts to characterize receiving water conditions, understand sources of pollutants and/or stressors, and control and reduce the discharges of pollutants from the MS4 outfalls to receiving waters in the Watershed Management Area. The Copermitees must report the results of the special studies assessments applicable to the Watershed Management Area, and identify any necessary modifications or updates to the Water Quality Improvement Plan based on the results in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3).

d. INTEGRATED ASSESSMENT OF WATER QUALITY IMPROVEMENT PLAN

As part of the iterative approach and adaptive management process required for the Water Quality Improvement Plan pursuant to Provision B.5, the Copermitees in each Watershed Management Area must integrate the data collected pursuant to Provisions D.1-D.3, the findings from the assessments required pursuant to

Provisions D.4.a-c, and information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision E to assess the effectiveness of, and identify necessary modifications to, the Water Quality Improvement Plan as follows:

- (1) The Copermittees must re-evaluate the priority water quality conditions and numeric goals for the Watershed Management Area, as needed, during the term of this Order pursuant to Provision B.5.a. The re-evaluation and recommendations for modifications to the priority water quality conditions, and/or numeric goals and corresponding schedules may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), but must at least be provided in the Report of Waste Discharge pursuant to Provision F.5.b. The priority water quality conditions and numeric goals for the Watershed Management Area must be re-evaluated as follows:
 - (a) Re-evaluate the receiving water conditions in the Watershed Management Area in accordance with Provision B.2.a;
 - (b) Re-evaluate the impacts on receiving waters in the Watershed Management Area from MS4 discharges in accordance with Provision B.2.b;
 - (c) Re-evaluate the identification of MS4 sources of pollutants and/or stressors in accordance with Provision B.2.d;
 - (d) Identify beneficial uses of the receiving waters that are protected in accordance with Provision D.4.a;
 - (e) Evaluate the progress toward achieving the interim and final numeric goals for protecting impacted beneficial uses in the receiving waters.
- (2) The Copermittees must re-evaluate the water quality improvement strategies for the Watershed Management Area during the term of this Order pursuant to Provision B.5.b. The re-evaluation and recommendations for modifications to the water quality improvement strategies and schedules may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), but must at least be provided in the Report of Waste Discharge pursuant to Provision F.5.b. The water quality improvement strategies for the Watershed Management Area must be re-evaluated as follows:
 - (a) Identify the non-storm water and storm water pollutant loads from the Copermittees' MS4 outfalls in the Watershed Management Area, calculated or estimated pursuant to Provisions D.4.b;

- (b) Identify the non-storm water and storm water pollutant load reductions, or other improvements to receiving water or water quality conditions, that are necessary to attain the interim and final numeric goals identified in the Water Quality Improvement Plan for protecting beneficial uses in the receiving waters;
 - (c) Identify the non-storm water and storm water pollutant load reductions, or other improvements to the quality of MS4 discharges, that are necessary for the Copermittees to demonstrate that non-storm water and storm water discharges from their MS4s are not causing or contributing to exceedances of receiving water limitations;
 - (d) Evaluate the progress of the water quality improvement strategies toward achieving the interim and final numeric goals identified in the Water Quality Improvement Plan for protecting beneficial uses in the receiving waters.
- (3) The Copermittees must re-evaluate and adapt the water quality monitoring and assessment program for the Watershed Management Area when new information becomes available to improve the monitoring and assessment program pursuant to Provision B.5.c. The re-evaluation and recommendations for modifications to the monitoring and assessment program may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), but must at least be provided in the Report of Waste Discharge pursuant to Provision F.5.b. Modifications to the water quality monitoring and assessment program must be consistent with the requirements of Provision D.1-D.3. The re-evaluation of the water quality monitoring and assessment program for the Watershed Management Area must consider the data gaps identified by the assessments required pursuant to Provisions D.4.a-b, and results of the special studies implemented pursuant to Provision D.4.c.

5. Monitoring Provisions

Each Copermittee must comply with all the monitoring, reporting, and recordkeeping provisions of the Standard Permit Provisions and General Provisions contained in Attachment B to this Order.

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E. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS

The purpose of this provision is for each Copermittee to implement a program to control the contribution of pollutants to and the discharges from the MS4 within its jurisdiction. The goal of the jurisdictional runoff management programs is to implement strategies that effectively prohibit non-storm water discharges to the MS4 and reduce the discharge of pollutants in storm water to the MEP. This goal will be accomplished through implementing the jurisdictional runoff management programs in accordance with the strategies identified in the Water Quality Improvement Plans.

Each Copermittee must update its jurisdictional runoff management program document, in accordance with Provision F.2.a, to incorporate all the requirements of Provision E. Until the Copermittee has updated its jurisdictional runoff management program document with the requirements of Provision E, the Copermittee must continue implementing its current jurisdictional runoff management program.

1. Legal Authority Establishment and Enforcement

- a. Each Copermittee must establish, maintain, and enforce adequate legal authority within its jurisdiction to control pollutant discharges into and from its MS4 through statute, ordinance, permit, contract, order, or similar means. This legal authority must, at a minimum, authorize the Copermittee to:
 - (1) Prohibit and eliminate all illicit discharges and illicit connections to its MS4;
 - (2) Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites, including industrial and construction sites which have coverage under the statewide General Permit for Discharges of Storm Water Associated with Industrial Activities (Industrial General Permit) or General Permit for Discharges of Storm Water Associated with Construction Activities (Construction General Permit), as well as to those sites which do not;
 - (3) Control the discharge of spills, dumping, or disposal of materials other than storm water into its MS4;
 - (4) Control through interagency agreements among Copermittees the contribution of pollutants from one portion of the MS4 to another portion of the MS4;
 - (5) Control, by coordinating and cooperating with other owners of the MS4 such as Caltrans, the U.S. federal government, or sovereign Native American Tribes through interagency agreements, where possible, the contribution of pollutants from their portion of the MS4 to the portion of the MS4 within the Copermittee's jurisdiction;

- (6) Require compliance with conditions in its statutes, ordinances, permits, contracts, orders, or similar means to hold dischargers to its MS4 accountable for their contributions of pollutants and flows;
 - (7) Require the use of BMPs to prevent or reduce the discharge of pollutants in storm water from its MS4 to the MEP;
 - (8) Require documentation on the effectiveness of BMPs implemented to prevent or reduce the discharge of pollutants in storm water from its MS4 to the MEP;
 - (9) Utilize enforcement mechanisms to require compliance with its statutes, ordinances, permits, contracts, orders, or similar means; and
 - (10) Carry out all inspections, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with its statutes, ordinances, permits, contracts, orders, or similar means and with the requirements of this Order, including the prohibition of illicit discharges and connections to its MS4; the Copermittee must also have authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from industrial facilities, including construction sites, discharging into its MS4.
- b. With the first Water Quality Improvement Plan Annual Report required pursuant to Provision F.3.b.(3), each Copermittee must submit a statement certified by its Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative that the Copermittee has taken the necessary steps to obtain and maintain full legal authority within its jurisdiction to implement and enforce each of the requirements contained in this Order.

2. Illicit Discharge Detection and Elimination

Each Copermittee must implement a program to actively detect and eliminate illicit discharges and improper disposal into the MS4, or otherwise require the discharger to apply for and obtain a separate NPDES permit. The illicit discharge detection and elimination program must be implemented in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and include, at a minimum, the following requirements:

a. NON-STORM WATER DISCHARGES

Each Copermittee must address all non-storm water discharges as illicit discharges unless a non-storm water discharge is either identified as a discharge authorized by a separate NPDES permit, or identified as a category of non-storm water discharges or flows that must be addressed pursuant to the following requirements:

- PROVISION E: JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS
- E.1. Legal Authority Establishment and Enforcement
 - E.2. Illicit Discharge Detection and Elimination

- (1) Discharges of non-storm water to the MS4 from the following categories must be addressed as illicit discharges unless the discharge has coverage or meets the exception criteria under NPDES Permit No. CAG919003(Order No. R9-2015-0013, as it may be amended or reissued) for discharges to surface waters within the San Diego Region:
 - (1) Uncontaminated pumped ground water;
 - (2) Discharges from foundation drains;²³
 - (3) Water from crawl space pumps; and
 - (4) Water from footing drains.²⁰
- (2) Discharges of non-storm water from water line flushing and water main breaks to the MS4 must be addressed as illicit discharges unless the discharge has coverage under NPDES Permit No. CAG679001 (Order No. R9-2010-0003, as it may be amended or reissued) or NPDES General Permit No. CAG140001 (Order 2014-0194-DWQ, as it may be amended or reissued). This category includes water line flushing and water main break discharges from water purveyors issued a water supply permit by the California Department of Public Health or federal military installations. Discharges from recycled or reclaimed water lines to the MS4 must be addressed as illicit discharges, unless the discharges have coverage under a separate NPDES permit.
- (3) Discharges of non-storm water to the MS4 from the following categories must be addressed by the Copermittee as illicit discharges only if the Copermittee or the San Diego Water Board identifies the discharge as a source of pollutants to receiving waters:
 - (a) Diverted stream flows;
 - (b) Rising ground waters;
 - (c) Uncontaminated ground water infiltration to MS4s;
 - (d) Springs;
 - (e) Flows from riparian habitats and wetlands;
 - (f) Discharges from potable water sources;

²³ Provision E.2.a.(1) only applies to this category of non-storm water if the system is designed to be located at or below the groundwater table to actively or passively extract groundwater during any part of the year.

- (g) Discharges from foundation drains;²⁴ and
 - (h) Discharges from footing drains.²¹
- (4) Discharges of non-storm water to the MS4 from the following categories must be controlled by the requirements given below through statute, ordinance, permit, contract, order, or similar means. Discharges of non-storm water to the MS4 from the following categories not controlled by the requirements given below through statute, ordinance, permit, contract, order, or similar means must be addressed by the Copermittee as illicit discharges.
- (a) Air conditioning condensation
 - The discharge of air conditioning condensation should be directed to landscaped areas or other pervious surfaces, or to the sanitary sewer, where feasible.
 - (b) Individual residential vehicle washing
 - (i) The discharge of wash water should be directed to landscaped areas or other pervious surfaces where feasible; and
 - (ii) The minimization of water, washing detergent and other vehicle wash products used for residential vehicle washing, and the implementation of other practices or behaviors that will prevent the discharge of pollutants associated with individual residential vehicle washing from entering the MS4 must be encouraged.
 - (c) Dechlorinated swimming pool discharges
 - (i) Residual chlorine, algaecide, filter backwash, or other pollutants from swimming pools must be eliminated prior to discharging to the MS4; and
 - (ii) The discharge of saline swimming pool water must be directed to the sanitary sewer, landscaped areas, or other pervious surfaces that can accommodate the volume of water, unless the saline swimming pool water can be discharged via a pipe or concrete channel directly to a naturally saline water body (e.g. Pacific Ocean).
- (5) Firefighting discharges to the MS4 must be addressed by the Copermittee as illicit discharges only if the Copermittee or the San Diego Water Board identifies the discharge as a significant source of pollutants to receiving waters. Firefighting discharges to the MS4 not identified as a significant

²⁴ Provision E.2.a.(3) only applies to this category of non-storm water discharge if the system is designed to be located above the groundwater table at all times of the year, and the system is only expected to discharge non-storm water under unusual circumstances.

source of pollutants to receiving waters, must be addressed, at a minimum, as follows:

(a) Non-emergency firefighting discharges

- (i) Building fire suppression system maintenance discharges (e.g. sprinkler line flushing) to the MS4 must be addressed as illicit discharges unless BMPs are implemented to prevent pollutants associated with such discharges to the MS4.
- (ii) Non-emergency firefighting discharges (i.e., discharges from controlled or practice blazes, firefighting training, and maintenance activities not associated with building fire suppression systems) must be addressed by a program, to be developed and implemented by the Copermittee, to reduce or eliminate pollutants in such discharges from entering the MS4.

(b) Emergency firefighting discharges

Each Copermittee should develop and encourage implementation of BMPs to reduce or eliminate pollutants in emergency firefighting discharges to the MS4s and receiving waters within its jurisdiction. During emergency situations, priority of efforts should be directed toward life, property, and the environment (in descending order). BMPs should not interfere with immediate emergency response operations or impact public health and safety.

- (6) If the Copermittee or San Diego Water Board identifies any category of non-storm water discharges listed under Provisions E.2.a.(1)-(4) as a source of pollutants to receiving waters, the category must be prohibited through ordinance, order, or similar means and addressed as an illicit discharge. Alternatively, the Copermittee may propose controls to be implemented for the category of non-storm water discharges as part of the Water Quality Improvement Plan instead of prohibiting the category of non-storm water discharges, and implement the controls if accepted by the San Diego Water Board as part of the Water Quality Improvement Plan.
- (7) Each Copermittee must, where feasible and priorities and resources allow, reduce or eliminate non-storm water discharges listed under Provisions E.2.a.(1)-(4) into its MS4, unless a non-storm water discharge is identified as a discharge authorized by a separate NPDES permit.

b. PREVENT AND DETECT ILLICIT DISCHARGES AND CONNECTIONS

Each Copermittee must include the following measures within its program to prevent and detect illicit discharges to the MS4:

- (1) Each Copermittee must maintain an updated map of its entire MS4 and the

corresponding drainage areas. The accuracy of the MS4 map must be confirmed during the field screening required pursuant to Provision E.2.c. The MS4 map must be included as part of the jurisdictional runoff management program document. Any geographic information system (GIS) layers or files used by the Copermittee to maintain the MS4 map must be made available to the San Diego Water Board upon request. The MS4 map must identify the following:

- (a) All segments of the MS4 owned, operated, and maintained by the Copermittee;
 - (b) All known locations of inlets that discharge and/or collect runoff into the Copermittee's MS4;
 - (c) All known locations of connections with other MS4s not owned or operated by the Copermittee (e.g. Caltrans MS4s);
 - (d) All known locations of MS4 outfalls and private outfalls that discharge runoff collected from areas within the Copermittee's jurisdiction;
 - (e) All segments of receiving waters within the Copermittee's jurisdiction that receive and convey runoff discharged from the Copermittee's MS4 outfalls;
 - (f) Locations of the MS4 outfalls, identified pursuant to Provision D.2.a.(1), within its jurisdiction; and
 - (g) Locations of the non-storm water persistent flow MS4 outfall discharge monitoring stations, identified pursuant to Provision D.2.b.(2), within its jurisdiction.
- (2) Each Copermittee must use Copermittee personnel and contractors to assist in identifying and reporting illicit discharges and connections during their daily employment activities.
 - (3) Each Copermittee must promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges to or from the MS4, including the following methods for public reporting:
 - (a) Operate a public hotline, which can be Copermittee-specific or shared by the Copermittees, and must be capable of receiving reports in both English and Spanish 24 hours per day and seven days per week; and
 - (b) Designate an e-mail address for receiving electronic reports from the public, which can be Copermittee-specific or shared by the Copermittees,

and must be prominently displayed on the Copermittee's webpage and the Regional Clearinghouse required pursuant to Provision F.4.

- (4) Each Copermittee must implement practices and procedures (including a notification mechanism) to prevent, respond to, contain, and clean up any spills that may discharge into the MS4 within its jurisdiction from any source. The Copermittee must coordinate, to the extent possible, with spill response teams to prevent entry of spills into the MS4, and prevent contamination of surface water, ground water, and soil. The Copermittee must coordinate spill prevention, containment, and response activities throughout all appropriate Copermittee departments, programs, and agencies.
- (5) Each Copermittee must implement practices and procedures to prevent and limit infiltration of seepage from sanitary sewers (including private laterals and failing septic systems) to the MS4.
- (6) Each Copermittee must coordinate, when necessary, with upstream Copermittees and/or entities to prevent illicit discharges from upstream sources into the MS4 within its jurisdiction.

c. FIELD SCREENING

Each Copermittee must conduct field screening (i.e. visual observations, field testing, and/or analytical testing) of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect non-storm water and illicit discharges and connections to the MS4 in accordance with the dry weather MS4 outfall discharge monitoring requirements in Provisions D.2.a.(2) and D.2.b.(1).

d. INVESTIGATE AND ELIMINATE ILLICIT DISCHARGES AND CONNECTIONS

Each Copermittee must include the following measures within its program to investigate and eliminate illicit discharges to the MS4:

- (1) Each Copermittee must prioritize and determine when follow-up investigations will be performed in response to visual observations and/or water quality monitoring data collected during an investigation of a detected non-storm water or illicit discharge to or from the MS4. The criteria for prioritizing investigations must consider the following:
 - (a) Pollutants identified as causing or contributing to the highest water quality priorities identified in the Water Quality Improvement Plan;
 - (b) Pollutants identified as causing or contributing, or threatening to cause or contribute to impairments in water bodies on the 303(d) List and/or in environmentally sensitive areas (ESAs), located within its jurisdiction;
 - (c) Pollutants identified from sources or land uses known to exist within the

area, drainage basin, or watershed that discharges to the portion of the MS4 within its jurisdiction included in the investigation;

- (d) Pollutants identified as causing or contributing to an exceedance of a NAL in the Water Quality Improvement Plan; and
 - (e) Pollutants identified as a threat to human health or the environment.
- (2) Each Copermittee must implement procedures to investigate and inspect portions of its MS4 that, based on reports or notifications, field screening, or other appropriate information, indicate a reasonable potential of receiving, containing, or discharging pollutants due to illicit discharges, illicit connections, or other sources of non-storm water. The procedures must include the following:
- (a) Each Copermittee must develop criteria to:
 - (i) Assess the validity of each report or notification received; and
 - (ii) Prioritize the response to each report or notification received.
 - (b) Each Copermittee must prioritize and respond to each valid report or notification (e.g., public reports, staff or contractor reports and notifications, etc.) of an incident in a timely manner.
 - (c) In accordance with the requirements of Provision E.2.d.(1), each Copermittee must investigate and seek to identify the source(s) of discharges of non-storm water where flows are observed in and from the MS4 during the field screening required pursuant to Provision D.2.b.(1) as follows:
 - (i) Obvious illicit discharges must be immediately investigated to identify the source(s) of non-storm water discharges;
 - (ii) The investigation must include field investigations to identify sources or potential sources for the discharge, unless the source or potential source has already been identified during previous investigations; and
 - (iii) The investigation may include follow-up field investigations and/or reviewing Copermittee inventories and other land use data to identify potential sources of the discharge.
 - (d) Each Copermittee must maintain records and a database of the following information:
 - (i) Location of incident, including hydrologic subarea, portion of MS4

- receiving the non-storm water or illicit discharge, and point of discharge or potential discharge from MS4 to receiving water;
- (ii) Source of information initiating the investigation (e.g., public reports, staff or contractor reports and notifications, field screening, etc.);
 - (iii) Date the information used to initiate the investigation was received;
 - (iv) Date the investigation was initiated;
 - (v) Dates of follow-up investigations;
 - (vi) Identified or suspected source of the illicit discharge or connection, if determined;
 - (vii) Known or suspected related incidents, if any;
 - (viii) Result of the investigation; and
 - (ix) If a source cannot be identified and the investigation is not continued, document the response pursuant to the requirements of Provision E.2.d.(4).
- (e) Each Copermittee must maintain records and, in accordance with the priorities of the Water Quality Improvement Plan, seek to identify the source(s) of non-storm water discharges from the MS4 where there is evidence of non-storm water having been discharged into or from the MS4 (e.g., pooled water), in accordance with MS4 outfall discharge monitoring requirements in Provisions D.2.a.(2) and D.2.b.(1).
- (3) Each Copermittee must initiate the implementation of procedures, in a timely manner, to eliminate all detected and identified illicit discharges and connections within its jurisdiction. The procedures must include the following responses:
- (a) Each Copermittee must enforce its legal authority, as required under Provision E.1, to eliminate illicit discharges and connections to the MS4.
 - (b) If the Copermittee identifies the source as a controllable source of non-storm water or illicit discharge or connection, the Copermittee must implement its Enforcement Response Plan pursuant to Provision E.6 and enforce its legal authority to prohibit and eliminate illicit discharges and connections to its MS4.
 - (c) If the Copermittee identifies the source of the discharge as a category of non-storm water discharges in Provision E.2.a, and the discharge is in exceedance of NALs in the Water Quality Improvement Plan, then the Copermittee must determine if: (1) this is an isolated incident or set of circumstances that will be addressed through its Enforcement Response Plan pursuant to Provision E.6, or (2) the category of discharge must be

addressed through the prohibition of that category of discharge as an illicit discharge pursuant to Provision E.2.a.(6).

- (d) If the Copermittee suspects the source of the non-storm water discharge as natural in origin (i.e. non-anthropogenically influenced) and in conveyance into the MS4, then the Copermittee must document and provide the data and evidence necessary to demonstrate to the San Diego Water Board that it is natural in origin and does not require further investigation.
 - (e) If the Copermittee is unable to identify and document the source of a recurring non-storm water discharge to or from the MS4, then the Copermittee must address the discharge as an illicit discharge and update its jurisdictional runoff management program to address the common and suspected sources of the non-storm water discharge within its jurisdiction in accordance with the Copermittee's priorities.
- (4) Each Copermittee must submit a summary of the non-storm water discharges and illicit discharges and connections investigated and eliminated within its jurisdiction with each Water Quality Improvement Plan Annual Report required under Provision F.3.b.(3) of this Order.

3. Development Planning

Each Copermittee must use their land use and planning authorities to implement a development planning program in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and includes, at a minimum, the following requirements:

a. BMP REQUIREMENTS FOR ALL DEVELOPMENT PROJECTS

Each Copermittee must prescribe the following BMP requirements during the planning process (i.e. prior to project approval and issuance of local permits) for all development projects (regardless of project type or size), where local permits are issued, including unpaved roads and flood management projects:

(1) General Requirements

- (a) Onsite BMPs must be located so as to remove pollutants from runoff prior to its discharge to any receiving waters, and as close to the source as possible;
- (b) Structural BMPs must not be constructed within waters of the U.S.
- (c) Onsite BMPs must be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors (e.g.

mosquitos, rodents, or flies).

(2) Source Control BMP Requirements

The following source control BMPs must be implemented at all development projects where applicable and feasible:

- (a) Prevention of illicit discharges into the MS4;
- (b) Storm drain system stenciling or signage;
- (c) Protect outdoor material storage areas from rainfall, run-on, runoff, and wind dispersal;
- (d) Protect materials stored in outdoor work areas from rainfall, run-on, runoff, and wind dispersal;
- (e) Protect trash storage areas from rainfall, run-on, runoff, and wind dispersal; and
- (f) Any additional BMPs determined to be necessary by the Copermittee to minimize pollutant generation at each project.

(3) Low Impact Development (LID) BMP Requirements

The following LID BMPs must be implemented at all development projects where applicable and feasible:

- (a) Maintenance or restoration of natural storage reservoirs and drainage corridors (including topographic depressions, areas of permeable soils, natural swales, and ephemeral and intermittent streams);²⁵
- (b) Buffer zones for natural water bodies (where buffer zones are technically infeasible, require project applicant to include other buffers such as trees, access restrictions, etc.);
- (c) Conservation of natural areas within the project footprint including existing trees, other vegetation, and soils;
- (d) Construction of streets, sidewalks, or parking lot aisles to the minimum widths necessary, provided public safety is not compromised;
- (e) Minimization of the impervious footprint of the project;

²⁵ Development projects proposing to dredge or fill materials in waters of the U.S. must obtain a CWA Section 401 Water Quality Certification. Projects proposing to dredge or fill waters of the state must obtain waste discharge requirements.

- (f) Minimization of soil compaction to landscaped areas;
- (g) Disconnection of impervious surfaces through distributed pervious areas;
- (h) Landscaped or other pervious areas designed and constructed to effectively receive and infiltrate, retain and/or treat runoff from impervious areas, prior to discharging to the MS4;
- (i) Small collection strategies located at, or as close as possible to, the source (i.e. the point where storm water initially meets the ground) to minimize the transport of runoff and pollutants to the MS4 and receiving waters;
- (j) Use of permeable materials for projects with low traffic areas and appropriate soil conditions;
- (k) Landscaping with native or drought tolerant species; and
- (l) Harvesting and using precipitation.

b. PRIORITY DEVELOPMENT PROJECTS

Priority Development Projects are land development projects that fall under the planning and building authority of the Copermittee for which the Copermittee must impose specific requirements, in addition to those described in Provision E.3.a, including the implementation of structural BMPs to meet the performance requirements described in Provision E.3.c.

(1) Definition of Priority Development Project

Priority Development Projects include the following:

- (a) New development projects that create 10,000 square feet or more of impervious surfaces (collectively over the entire project site). This includes commercial, industrial, residential, mixed-use, and public development projects on public or private land.
- (b) Redevelopment projects that create and/or replace 5,000 square feet or more of impervious surface (collectively over the entire project site on an existing site of 10,000 square feet or more of impervious surfaces). This includes commercial, industrial, residential, mixed-use, and public development projects on public or private land.
- (c) New and redevelopment projects that create and/or replace 5,000 square feet or more of impervious surface (collectively over the entire project

site), and support one or more of the following uses:

- (i) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812).
 - (ii) Hillside development projects. This category includes development on any natural slope that is twenty-five percent or greater.
 - (iii) Parking lots. This category is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.
 - (iv) Streets, roads, highways, freeways, and driveways. This category is defined as any paved impervious surface used for the transportation of automobiles, trucks, motorcycles, and other vehicles.
- (d) New or redevelopment projects that create and/or replace 2,500 square feet or more of impervious surface (collectively over the entire project site), and discharging directly to an Environmentally Sensitive Area (ESA). "Discharging directly to" includes flow that is conveyed overland a distance of 200 feet or less from the project to the ESA, or conveyed in a pipe or open channel any distance as an isolated flow from the project to the ESA (i.e. not commingled with flows from adjacent lands).
- (e) New development projects, or redevelopment projects that create and/or replace 5,000 square feet or more of impervious surface, that support one or more of the following uses:
- (i) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.
 - (ii) Retail gasoline outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.
- (f) New or redevelopment projects that result in the disturbance of one or more acres of land and are expected to generate pollutants post construction.

(2) Special Considerations for Redevelopment Projects

The structural BMP performance requirements of Provision E.3.c are applicable to redevelopment Priority Development Projects, as defined in E.3.b.(1), as follows:

- (a) Where redevelopment results in the creation or replacement of impervious surface in an amount of less than fifty percent of the surface area of the previously existing development, then the structural BMP performance requirements of Provision E.3.c apply only to the creation or replacement of impervious surface, and not the entire development; or
- (b) Where redevelopment results in the creation or replacement of impervious surface in an amount of more than fifty percent of the surface area of the previously existing development, then the structural BMP performance requirements of Provision E.3.c apply to the entire development.

(3) Priority Development Project Exemptions

Each Copermittee has the discretion to exempt the following projects from being defined as Priority Development Projects:

- (a) New or retrofit paved sidewalks, bicycle lanes, or trails that meet the following criteria:
 - (i) Designed and constructed to direct storm water runoff to adjacent vegetated areas, or other non-erodible permeable areas; OR
 - (ii) Designed and constructed to be hydraulically disconnected from paved streets or roads; OR
 - (iii) Designed and constructed with permeable pavements or surfaces in accordance with USEPA Green Streets guidance.²⁶
- (b) Retrofitting or redevelopment of existing paved alleys, streets or roads that are designed and constructed in accordance with the USEPA Green Streets guidance.²⁷

C. PRIORITY DEVELOPMENT PROJECT STRUCTURAL BMP PERFORMANCE REQUIREMENTS

In addition to the BMP requirements listed for all development projects under Provision E.3.a, Priority Development Projects must also implement structural BMPs that conform to performance requirements described below.

(1) Storm Water Pollutant Control BMP Requirements

Each Copermittee must require each Priority Development Project to implement onsite structural BMPs to control pollutants in storm water that may be discharged from a project as follows:

²⁶ See “Managing Wet Weather with Green Infrastructure – Municipal Handbook: Green Streets” (USEPA, 2008).

²⁷ Ibid.

- (a) Each Priority Development Project must be required to implement LID BMPs that are designed to retain (i.e. intercept, store, infiltrate, evaporate, and evapotranspire) onsite the pollutants contained in the volume of storm water runoff produced from a 24-hour 85th percentile storm event (design capture volume);²⁸
- (i) If a Copermittee determines that implementing BMPs to retain the full design capture volume onsite for a Priority Development Project is not technically feasible, then the Copermittee may allow the Priority Development Project to utilize biofiltration BMPs. Biofiltration BMPs must be designed to have an appropriate hydraulic loading rate to maximize storm water retention and pollutant removal, as well as to prevent erosion, scour, and channeling within the BMP,²⁹ and must be sized to:
- [a] Treat 1.5 times the design capture volume not reliably retained onsite, OR
- [b] Treat the design capture volume not reliably retained onsite with a flow-thru design that has a total volume, including pore spaces and pre-filter detention volume, sized to hold at least 0.75 times the portion of the design capture volume not reliably retained onsite.
- (ii) If a Copermittee determines that biofiltration is not technically feasible, then the Copermittee may allow the Priority Development Project to utilize flow-thru treatment control BMPs to treat runoff leaving the site, AND mitigate for the design capture volume not reliably retained onsite pursuant to Provision E.3.c.(1)(b). Flow thru treatment control BMPs must be sized and designed to:
- [a] Remove pollutants from storm water to the MEP;
- [b] Filter or treat either: 1) the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour of a storm event, or 2) the maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity (for each hour of a storm event), as determined from the local historical rainfall record, multiplied by a factor of two;

²⁸ This volume is not a single volume to be applied to all areas covered by this Order. The size of the 85th percentile storm event is different for various parts of the San Diego Region. The Copermittees are encouraged to calculate the 85th percentile storm event for each of its jurisdictions using local rain data pertinent to its particular jurisdiction. In addition, isopluvial maps may be used to extrapolate rainfall data to areas where insufficient data exists in order to determine the volume of the local 85th percentile storm event in such areas. Where the Copermittees will use isopluvial maps to determine the 85th percentile storm event in areas lacking rain data, the Copermittees must describe their method for using isopluvial maps in its BMP Design Manuals.

²⁹ As part of the Copermittee's update to its BMP Design Manual, pursuant to Provision E.3.d, the Copermittee must provide guidance for hydraulic loading rates and other biofiltration design criteria necessary to maximize storm water retention and pollutant removal.

[c] Be ranked with high or medium pollutant removal efficiency for the Priority Development Project's most significant pollutants of concern. Flow-thru treatment control BMPs with a low removal efficiency ranking must only be approved by a Copermittee when a feasibility analysis has been conducted which exhibits that implementation of flow-thru treatment control BMPs with high or medium removal efficiency rankings are infeasible for a Priority Development Project or portion of a Priority Development Project.

(b) A Priority Development Project may be allowed to utilize alternative compliance under Provision E.3.c.(3) in lieu of complying with the storm water pollutant control BMP performance requirements of Provision E.3.c.(1)(a). The Priority Development Project must mitigate for the portion of the pollutant load in the design capture volume not retained onsite if Provision E.3.c.(3) is utilized. If a Priority Development Project is allowed to utilize alternative compliance, flow-thru treatment control BMPs must be implemented to treat the portion of the design capture volume that is not reliably retained onsite. Flow-thru treatment control BMPs must be sized and designed in accordance with Provisions E.3.c.(1)(a)(ii)[a]-[c].

(2) Hydromodification Management BMP Requirements

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

- (a) Post-project runoff conditions (flow rates and durations) must not exceed pre-development runoff conditions by more than 10 percent (for the range of flows that result in increased potential for erosion, or degraded instream habitat downstream of Priority Development Projects).
 - (i) In evaluating the range of flows that results in increased potential for erosion of natural (non-hardened) channels, the lower boundary must correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks.
 - (ii) The Copermittees may use monitoring results collected pursuant to Provision D.1.a.(2) to re-define the range of flows resulting in increased potential for erosion, or degraded instream habitat conditions, as warranted by the data.
- (b) Each Priority Development Project must avoid critical sediment yield areas known to the Copermittee or identified by the optional Watershed Management Area Analysis pursuant to Provision B.3.b.(4), or implement measures that allow critical coarse sediment to be discharged to receiving waters, such that there is no net impact to the receiving water.

- (c) A Priority Development Project may be allowed to utilize alternative compliance under Provision E.3.c.(3) in lieu of complying with the performance requirements of Provision E.3.c.(2)(a). The Priority Development Project must mitigate for the post-project runoff conditions not fully managed onsite if Provision E.3.c.(3) is utilized.

(d) Exemptions

Each Copermittee has the discretion to exempt a Priority Development Project from the hydromodification management BMP performance requirements of Provisions E.3.c.(2) where the project discharges storm water runoff to:

- (i) Existing underground storm drains discharging directly to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean;
- (ii) Conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean; or
- (iii) An area identified by the Copermittees as appropriate for an exemption by the optional Watershed Management Area Analysis incorporated into the Water Quality Improvement Plan pursuant to Provision B.3.b.(4).

(e) Interim Timeframe Exemptions

Until the Copermittees have updated their BMP Design Manual in accordance with Provision F.2.b with the requirements of Provision E, the Copermittees have the discretion to exempt a Priority Development Project from the hydromodification management BMP performance requirements of Provision E.3.c.(2) where the project discharges storm water runoff directly to:

- (i) An engineered channel conveyance system with a capacity to convey peak flows generated by the 10-year storm event all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean; and
- (ii) Large river reaches with a drainage area larger than 100 square miles and a 100-year flow capacity in excess of 20,000 cubic feet per second, provided that properly sized energy dissipation is included at all Priority Development Project discharge points.

(3) Alternative Compliance Program to Onsite Structural BMP Implementation

At the discretion of each Copermittee, Priority Development Projects may be allowed to participate in an alternative compliance program in lieu of implementing the onsite structural BMP performance requirements of Provisions E.3.c.(1) and E.3.c.(2)(a), provided that the Water Quality Improvement Plan includes the optional Watershed Management Area Analysis described in Provision B.3.b.(4), and Water Quality Equivalency calculations have been accepted by the San Diego Water Board's Executive Officer pursuant to Provision E.3.c.(3)(a). The alternative compliance program is available to a Priority Development Project only if the Priority Development Project applicant enters into a voluntary agreement with the Copermittee authorizing this arrangement. In addition to the voluntary agreement, relief from implementing structural BMPs onsite may be authorized by the Copermittee under the following conditions:

(a) Water Quality Equivalency

Copermittees must submit Water Quality Equivalency calculations for acceptance by the San Diego Water Board's Executive Officer prior to administering an alternative compliance program in order to establish a regional and technical basis for determining the water quality benefits associated with alternative compliance projects. Accepted Water Quality Equivalency calculations must be incorporated as part of any Copermittee's alternative compliance program necessary for evaluating Watershed Management Area Analysis candidate projects, project applicant-proposed alternative compliance projects, alternative compliance in lieu fee structures, and alternative compliance water quality credit systems as described in Provisions E.3.c.(3)(b)-(e).

(b) Watershed Management Area Analysis Candidate Projects

The Priority Development Project applicant agrees to fund, contribute funds to, or implement a candidate project identified by the Copermittees in the Watershed Management Area Analysis included in the Water Quality Improvement Plan, pursuant to Provisions B.3.b.(4) subject to the following conditions:

- (i) The Copermittee must determine that implementation of the candidate project will have a greater overall water quality benefit for the Watershed Management Area than fully complying with the performance requirements of Provisions E.3.c.(1) and E.3.c.(2)(a) onsite;
- (ii) If the Priority Development Project applicant chooses to fully or partially fund a candidate project, then the in-lieu fee structure described in Provision E.3.c.(3)(c) must be followed;

- (iii) If the Priority Development Project applicant chooses to fully or partially fund a candidate project, then the Copermittee must ensure that the funds to be obtained from the Priority Development Project applicant are sufficient to mitigate for impacts caused by not fully implementing structural BMPs onsite, pursuant to the performance requirements described in Provisions E.3.c.(1) and E.3.c.(2)(a);
 - (iv) If the Priority Development Project applicant chooses to implement a candidate project, then the Copermittee must ensure that pollutant control and/or hydromodification management within the candidate project are sufficient to mitigate for impacts caused by not implementing structural BMPs fully onsite, pursuant to the performance requirements described in Provisions E.3.c.(1) and E.3.c.(2)(a);
 - (v) The voluntary agreement to fund, partially fund, or implement a candidate project must include reliable sources of funding for operation and maintenance of the candidate project;
 - (vi) Design of the candidate project must be conducted under an appropriately qualified engineer, geologist, architect, landscape architect, or other professional, licenses where applicable, and competent and proficient in the fields pertinent to the candidate project design;
 - (vii) The candidate project must be constructed as soon as possible, but no later than 4 years after the certificate of occupancy is granted for the first Priority Development Project that contributed funds toward the construction of the candidate project, unless a longer period of time is authorized by the San Diego Water Board Executive Officer; and
 - (viii) If the candidate project is constructed after the Priority Development Project is constructed, the Copermittee must require temporal mitigation for pollutant loads and altered flows that are discharged from the Priority Development Project.
- (c) Project Applicant Proposed Alternative Compliance Projects

The Copermittee may allow a Priority Development Project applicant to propose and fund, contribute funds to, or implement an alternative compliance project not identified by the Watershed Management Area Analysis included in the Water Quality Improvement Plan pursuant to Provisions B.3.b.(4). This option is allowed provided the Copermittee determines that implementation of the alternative compliance project will have a greater overall water quality benefit for the Watershed Management Area than fully complying with the performance requirements of Provisions E.3.c.(1) and E.3.c.(2)(a) onsite, and is subject to the requirements described in Provisions E.3.c.(3)(a)(ii)-(viii).

(d) Alternative Compliance In-Lieu Fee Structure

If a Copermittee chooses to allow a Priority Development Project applicant to fund, or partially fund a candidate project or an alternative compliance project, then the Copermittee must develop and implement an in-lieu fee structure. This may be developed individually or with other Copermittees and/or entities, as a means for designing, developing, constructing, operating and maintaining offsite alternative compliance projects. The in-lieu fee must be transferred to the Copermittee (for public projects) or an escrow account (for private projects) prior to the construction of the Priority Development Project.

(e) Alternative Compliance Water Quality Credit System Option

The Copermittee may develop and implement an alternative compliance water quality credit system option, individually or with other Copermittees and/or entities, provided that such a credit system clearly exhibits that it will not allow discharges from Priority Development Projects to cause or contribute to a net impact over and above the impact caused by projects meeting the onsite structural BMP performance requirements of Provisions E.3.c.(1) and E.3.c.(2)(a). Any credit system that a Copermittee chooses to implement must be submitted to the San Diego Water Board Executive Officer for review and acceptance as part of the Water Quality Improvement Plan.

(4) Long-Term Structural BMP Maintenance

Each Copermittee must require the project applicant to submit proof of the mechanism under which ongoing long-term maintenance of all structural BMPs will be conducted.

(5) Infiltration and Groundwater Protection

(a) Structural BMPs designed to primarily function as large, centralized infiltration devices (such as large infiltration trenches and infiltration basins) must not cause or contribute to an exceedance of an applicable groundwater quality objective. At a minimum, such infiltration BMPs must be in conformance with the design criteria listed below, unless the development project applicant demonstrates to the Copermittee that one or more of the specific design criteria listed below are not necessary to protect groundwater quality. The design criteria listed below do not apply to small infiltration systems dispersed throughout a development project.

- (i) Runoff must undergo pretreatment such as sedimentation or filtration prior to infiltration;

- (ii) Pollution prevention and source control BMPs must be implemented at a level appropriate to protect groundwater quality at sites where infiltration BMPs are to be used;
 - (iii) Infiltration BMPs must be adequately maintained to remove pollutants in storm water to the MEP;
 - (iv) The vertical distance from the base of any infiltration BMP to the seasonal high groundwater mark must be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained;
 - (v) The soil through which infiltration is to occur must have physical and chemical characteristics (e.g., appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of runoff for the protection of groundwater beneficial uses;
 - (vi) Infiltration BMPs must not be used for areas of industrial or light industrial activity, and other high threat to water quality land uses and activities as designated by each Copermittee, unless source control BMPs to prevent exposure of high threat activities are implemented, or runoff from such activities is first treated or filtered to remove pollutants prior to infiltration; and
 - (vii) Infiltration BMPs must be located a minimum of 100 feet horizontally from any water supply wells.
- (b) The Copermittee may develop, individually or with other Copermittees, alternative mandatory design criteria to that listed above for infiltration BMPs which are designed to primarily function as centralized infiltration devices. Before implementing the alternative design criteria in the development planning process the Copermittee(s) must:
- (i) Notify the San Diego Water Board of the intent to implement the alternative design criteria submitted; and
 - (ii) Comply with any conditions set by the San Diego Water Board.

d. BMP DESIGN MANUAL UPDATE

Each Copermittee must update its BMP Design Manual³⁰ pursuant to Provision F.2.b. Until the Copermittee has updated its BMP Design Manual pursuant to Provision F.2.b.(1), the Copermittee must continue implementing its current BMP Design Manual. The Copermittee must implement the updated BMP Design Manual within 180 days following completion of the update pursuant to Provision

³⁰ The BMP Design Manual was formerly known as the Standard Storm Water Mitigation Plan under Order Nos. R9-2007-0001, R9-2009-0002, and R9-2010-0016.

F.2.b.(1), unless directed otherwise by the San Diego Water Board Executive Officer. The date the BMP Design Manual is implemented is the “effective date” of the BMP Design Manual. The update of the BMP Design Manual required pursuant to Provision F.2.b.(1) must include the following:

- (1) Updated procedures to determine the nature and extent of storm water requirements applicable to a potential development or redevelopment projects. These procedures must inform project applicants of the storm water management requirements applicable to their project including, but not limited to, general requirements for all development projects, structural BMP design procedures and requirements, hydromodification management requirements, requirements specific to phased projects, and procedures specific to private developments and public improvement projects;
- (2) Updated procedures to identify pollutants and conditions of concern for selecting the most appropriate structural BMPs that consider, at a minimum, the following:
 - (a) Receiving water quality (including pollutants for which receiving waters are listed as impaired under the CWA section 303(d) List);
 - (b) Pollutants, stressors, and/or receiving water conditions that cause or contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;
 - (c) Land use type of the project and pollutants associated with that land use type; and
 - (d) Pollutants expected to be present onsite.
- (3) Updated procedures for designing structural BMPs, including any updated performance requirements to be consistent with the requirements of Provision E.3.c for all structural BMPs listed in the BMP Design Manual;
- (4) Long-term maintenance criteria for each structural BMP listed in the BMP Design Manual; and
- (5) Alternative compliance criteria, in accordance with the requirements under Provision E.3.c.(3), if the Copermittee elects to allow Priority Development Projects within its jurisdiction to utilize alternative compliance.

e. PRIORITY DEVELOPMENT PROJECT BMP IMPLEMENTATION AND OVERSIGHT

Each Copermittee must implement a program that requires and confirms structural BMPs on all Priority Development Projects are designed, constructed, and maintained to remove pollutants in storm water to the MEP.

(1) Structural BMP Approval and Verification Process

- (a) Each Copermittee must require and confirm that all Priority Development Projects implement the requirements of Provision E.3, except that the Copermittee may allow previous land development requirements to apply to a Priority Development Project if the conditions of Provision E.3.e.(1)(a)(i) or Provision E.3.e.(1)(a)(ii) are met:
- (i) The Copermittee has, prior to the effective date of the BMP Design Manual required to be developed pursuant to Provision E.3.d:
- [a] Approved³¹ a design that incorporates the storm water drainage system for the Priority Development Project in its entirety, including all applicable structural pollutant treatment control and hydromodification management BMPs consistent with the previous applicable MS4 permit requirements;³² AND
 - [b] Issued a private project permit or approval, or functional equivalent for public projects, that authorizes the Priority Development Project applicant to commence construction activities based on a design that incorporates the storm water drainage system approved in conformance with Provision E.3.e.(1)(a)(i)[a]; AND
 - [c] Confirmed that there have been construction activities on the Priority Development Project site within the 365 days prior to the effective date of the BMP Design Manual, *OR* the Copermittee confirms that construction activities have commenced on the Priority Development Project site within the 180 days after the effective date of the BMP Design Manual, where construction activities are undertaken in reliance on the permit or approval, or functional equivalent for public projects, issued by the Copermittee in conformance with Provision E.3.e.(1)(a)(i)[b]; AND
 - [d] Issued all subsequent private project permits or approvals, or functional equivalent for public projects, that are needed to implement the design initially approved in conformance with Provision E.3.e.(1)(a)(i)[a] within 5 years of the effective date of the BMP Design Manual. The storm water drainage system for the Priority Development Project in its entirety, including all applicable structural pollutant treatment control and hydromodification management BMPs must remain in substantial conformity with the design initially approved in conformance with Provision E.3.e.(1)(a)(i)[a].

³¹ For public projects, a design stamped by the City or County Engineer, or engineer of record for the project is considered an approved design.

³² Order Nos. R9-2007-0001, R9-2009-0002, and R9-2010-0016 for San Diego County, Orange County, and Riverside County Copermittees, respectively

- (ii) The Copermittee demonstrates it lacks the land use authority or legal authority to require a Priority Development Project to implement the requirements of Provision E.3.
- (b) Each Copermittee must identify the roles and responsibilities of its various municipal departments in implementing the structural BMP requirements, including each stage of a project from application review and approval through BMP maintenance and inspections.
- (c) Each Copermittee must require and confirm that appropriate easements and ownerships are properly recorded in public records and the information is conveyed to all appropriate parties when there is a change in project or site ownership.
- (d) Each Copermittee must require and confirm that prior to occupancy and/or intended use of any portion of the Priority Development Project, each structural BMP is inspected to verify that it has been constructed and is operating in compliance with all of its specifications, plans, permits, ordinances, and the requirements of this Order.

(2) Priority Development Project Inventory and Prioritization

- (a) Each Copermittee must develop, maintain, and update at least annually, a watershed-based database to track and inventory all Priority Development Projects and associated structural BMPs within its jurisdiction. Inventories must be accurate and complete beginning from December 2002 for the San Diego County Copermittees, February 2003 for the Orange County Copermittees, and July 2005 for the Riverside County Copermittees. The use of an automated database system, such as GIS, is highly recommended. The database must include, at a minimum, the following information:
 - (i) Priority Development Project location (address and hydrologic subarea);
 - (ii) Descriptions of structural BMP type(s);
 - (iii) Date(s) of construction;
 - (iv) Party responsible for structural BMP maintenance;
 - (v) Dates and findings of structural BMP maintenance verifications; and
 - (vi) Corrective actions and/or resolutions, when applicable.
- (b) Each Copermittee must prioritize the Priority Development Projects with structural BMPs within its jurisdiction. The designation of Priority Development Projects as high priority must consider the following:

- (i) The highest water quality priorities identified in the Water Quality Improvement Plan;
- (ii) Receiving water quality;
- (iii) Number and sizes of structural BMPs;
- (iv) Recommended maintenance frequency of structural BMPs;
- (v) Likelihood of operation and maintenance issues of structural BMPs;
- (vi) Land use and expected pollutants generated; and
- (vii) Compliance record.

(3) Structural BMP Maintenance Verifications and Inspections

Each Copermittee is required to verify that structural BMPs on each Priority Development Project are adequately maintained, and continue to operate effectively to remove pollutants in storm water to the MEP through inspections, self-certifications, surveys, or other equally effective approaches.

- (a) All (100 percent) of the structural BMPs at Priority Development Projects that are designated as high priority must be inspected directly by the Copermittee annually prior to each rainy season;
- (b) For verifications performed through a means other than direct Copermittee inspection, adequate documentation must be required by the Copermittee to provide assurance that the required maintenance of structural BMPs at each Priority Development Project has been completed; and
- (c) Appropriate follow-up measures (including re-inspections, enforcement, etc.) must be conducted to ensure that structural BMPs at each Priority Development Project continue to reduce pollutants in storm water to the MEP as originally designed.

f. DEVELOPMENT PROJECT ENFORCEMENT

Each Copermittee must enforce its legal authority established pursuant to Provision E.1 for all development projects, as necessary, to achieve compliance with the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision E.6.

4. Construction Management

Each Copermittee must implement a construction management program in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and includes, at a minimum, the following requirements:

a. PROJECT APPROVAL PROCESS

Prior to issuance of any local permit(s) that allows the commencement of construction projects that involve ground disturbance or soil disturbing activities that can potentially generate pollutants in storm water runoff, each Copermittee must:

- (1) Require a pollution control plan, construction BMP plan, and/or an erosion and sediment control plan, to be submitted by the project applicant to the Copermittee;
- (2) Confirm the pollution control plan, construction BMP plan, and/or erosion and sediment control plan, complies with the local grading ordinance, other applicable local ordinances, and the requirements of this Order;
- (3) Confirm the pollution control, construction BMP, and/or erosion and sediment control plan, includes seasonally appropriate and effective BMPs and management measures described in Provision E.4.c, as applicable to the project; and
- (4) Verify that the project applicant has obtained coverage under the statewide Construction General Permit (Order 2009-0009-DWQ or subsequent Order), if applicable.

b. CONSTRUCTION SITE INVENTORY AND TRACKING

- (1) Each Copermittee must maintain and update, at least quarterly, a watershed-based inventory of all construction projects issued a local permit that allows ground disturbance or soil disturbing activities that can potentially generate pollutants in storm water runoff. The use of an automated database system, such as GIS, is highly recommended. The inventory must include:
 - (a) Relevant contact information for each site (e.g., name, address, phone, and email for the owner and contractor);
 - (b) The basic site information including location (address and hydrologic subarea), Waste Discharge Identification (WDID) number (if applicable), size of the site, and approximate area of disturbance;

- (c) Whether or not the site is considered a high threat to water quality, as defined in Provision E.4.b.(2) below;
 - (d) The project start and completion dates;
 - (e) The required inspection frequency, as defined in the Copermittee's jurisdictional runoff management program document;
 - (f) The date the Copermittee accepted or approved the pollution control plan, construction BMP plan, and/or erosion and sediment control plan; and
 - (g) Whether or not there are ongoing enforcement actions administered to the site.
- (2) Each Copermittee must identify all construction sites within its jurisdiction that represent a high threat to downstream surface water quality. The designation of construction sites as high threat to water quality must consider the following:
- (a) Sites located within a hydrologic subarea where sediment is known or suspected to contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;
 - (b) Sites located within the same hydrologic subarea and tributary to a water body segment listed as impaired for sediment on the CWA section 303(d) List;
 - (c) Sites located within, directly adjacent to, or discharging directly to a receiving water within an ESA; and
 - (d) Other sites determined by the Copermittees or the San Diego Water Board as a high threat to water quality.

c. CONSTRUCTION SITE BMP IMPLEMENTATION

Each Copermittee must implement, or require the implementation of effective BMPs to reduce discharges of pollutants in storm water from construction sites to the MEP, and effectively prohibit non-storm water discharges from construction sites into the MS4. These BMPs must be site specific, seasonally appropriate, and construction phase appropriate. BMPs must be implemented at each construction site year round. Dry season BMP implementation must plan for and address unseasonal rain events that may occur during the dry season (May 1 through September 30). Copermittees must implement, or require the implementation of, BMPs in the following categories:

- (1) Project Planning;
- (2) Good Site Management “Housekeeping”, including waste management;
- (3) Non-storm Water Management;
- (4) Erosion Control;
- (5) Sediment Control;
- (6) Run-on and Run-off Control; and
- (7) Active/Passive Sediment Treatment Systems, where applicable.

d. CONSTRUCTION SITE INSPECTIONS

Each Copermittee must conduct construction site inspections to require and confirm compliance with its local permits and applicable local ordinances, and the requirements of this Order. Priority for site inspections must consider threat to water quality pursuant to Provision E.4.b as well as the nature of the construction activity, topography, and the characteristics of soils and receiving water quality.

(1) Inspection Frequency

- (a) Each Copermittee must conduct inspections at all inventoried sites, including high threat to water quality sites, at an appropriate frequency for each phase of construction to confirm the site reduces the discharge of pollutants in storm water from construction sites to the MEP, and effectively prohibits non-storm water discharges from entering the MS4.
- (b) Each Copermittee must establish appropriate inspection frequencies for high threat to water quality sites, and all other sites, for each phase of construction. Inspection frequencies appropriate for addressing the highest water quality priorities identified in the Water Quality Improvement Plan, and for complying with the requirements of this Order must be identified in each Copermittee’s jurisdictional runoff management program document.
- (c) Based upon inspection findings, each Copermittee must implement all follow-up actions (i.e., re-inspection, enforcement) necessary to require and confirm site compliance with its local permits and applicable local ordinances, and the requirements of this Order.

(2) Inspection Content

Inspections of construction sites by the Copermittee must include, at a minimum:

- (a) Verification of coverage under the Construction General Permit (Notice of Intent (NOI) and/or WDID number) during initial inspections, when applicable;
- (b) Assessment of compliance with its local permits and applicable local ordinances related to pollution prevention, including the implementation and maintenance of applicable BMPs;
- (c) Assessment of BMP adequacy and effectiveness;
- (d) Visual observations of actual non-storm water discharges;
- (e) Visual observations of actual or potential discharge of sediment and/or construction related materials from the site;
- (f) Visual observations of actual or potential illicit connections; and
- (g) If any violations are found and BMP corrections are needed, inspectors must take and document appropriate actions in accordance with the Enforcement Response Plan pursuant to Provision E.6.

(3) Inspection Tracking and Records

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

- (a) Site name, location (address and hydrologic subarea), and WDID number (if applicable);
- (b) Inspection date;
- (c) Approximate amount of rainfall since last inspection;
- (d) Description of problems observed with BMPs and indication of need for BMP addition/repair/replacement and any scheduled re-inspection, and date of re-inspection;
- (e) Descriptions of any other specific inspection comments which must, at a minimum, include rationales for longer compliance time;

- (f) Description of enforcement actions issued in accordance with the Enforcement Response Plan pursuant to Provision E.6; and
- (g) Resolution of problems noted and date problems fixed.

e. CONSTRUCTION SITE ENFORCEMENT

Each Copermittee must enforce its legal authority established pursuant to Provision E.1 for all its inventoried construction sites, as necessary, to achieve compliance with the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision E.6.

5. Existing Development Management

Each Copermittee must implement an existing development management program in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and includes, at a minimum, the following requirements:

a. EXISTING DEVELOPMENT INVENTORY AND TRACKING

Each Copermittee must maintain, and update at least annually, a watershed-based inventory of the existing development within its jurisdiction that may discharge a pollutant load to and from the MS4. The use of an automated database system, such as GIS, is highly recommended. The inventory must, at a minimum, include:

- (1) Name, location (hydrological subarea and address, if applicable) of the following types of existing development with its jurisdiction:
 - (a) Commercial facilities or areas;
 - (b) Industrial facilities;
 - (c) Municipal facilities, including:
 - (i) MS4 and related structures,³³
 - (ii) Roads, streets, and highways;
 - (iii) Parking facilities;
 - (iv) Municipal airfields;
 - (v) Parks and recreation facilities;

³³ The inventory may refer to the MS4 map required to be maintained pursuant to Provision E.2.b.(1).

- (vi) Flood management facilities, flood control devices and structures;
 - (vii) Operating or closed municipal landfills;
 - (viii) Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewer collection systems;
 - (ix) Corporate yards, including maintenance and storage yards for materials, waste, equipment, and vehicles;
 - (x) Hazardous waste collection facilities;
 - (xi) Other treatment, storage or disposal facilities for municipal waste; and
 - (xii) Other municipal facilities that the Copermittee determines may contribute a significant pollutant load to the MS4.
- (d) Residential areas, which may be designated by one or more of the following:
- (i) Residential management area;
 - (ii) Drainage basin or area;
 - (iii) Land use (e.g., single family, multi-family, rural);
 - (iv) Neighborhood;
 - (v) Common Interest Area;
 - (vi) Home Owner Association;
 - (vii) Mobile home park; and/or
 - (viii) Other designations accepted by the San Diego Water Board Executive Officer.
- (2) A description of the facility or area, including the following information:
- (a) Classification as commercial, industrial, municipal, or residential;
 - (b) Status of facility or area as active or inactive;
 - (c) Identification if a business is a mobile business;
 - (d) SIC Code or NAICS Code, if applicable;
 - (e) Industrial General Permit NOI and/or WDID number, if applicable;
 - (f) Identification if a residential area is or includes a Common Interest Area / Home Owner Association, or mobile home park;

- (g) Identification of pollutants generated and potentially generated by the facility or area;
 - (h) Whether the facility or area is adjacent to an ESA;
 - (i) Whether the facility or area is tributary to and within the same hydrologic subarea as a water body segment listed as impaired on the CWA section 303(d) List and generates pollutants for which the water body segment is impaired; and
- (3) An annually updated map showing the location of inventoried existing development, watershed boundaries, and water bodies.

b. EXISTING DEVELOPMENT BMP IMPLEMENTATION AND MAINTENANCE

Each Copermittee must designate a minimum set of BMPs required for all inventoried existing development, including special event venues. The designated minimum BMPs must be specific to facility or area types and pollutant generating activities, as appropriate.

(1) Commercial, Industrial, and Municipal Facilities and Areas

(a) Pollution Prevention

Each Copermittee must require the use of pollution prevention methods by the commercial, industrial, and municipal facilities and areas in its inventoried existing development to address the priorities and strategies in the Water Quality Improvement Plan.

(b) BMP Implementation

Each Copermittee must require the implementation of designated BMPs at commercial facilities and areas, industrial facilities, and implement designated BMPs at municipal facilities in its inventoried existing development.

(c) BMP Operation and Maintenance

- (i) Each Copermittee must properly operate and maintain, or require the proper operation and maintenance of designated BMPs at commercial facilities and areas, industrial facilities, and municipal facilities in its inventoried existing development.
- (ii) Each Copermittee must implement a schedule of operation and maintenance activities for its MS4 and related structures (including

but not limited to catch basins, storm drain inlets, detention basins, etc.), and verify proper operation of all its municipal structural treatment controls designed to reduce pollutants (including floatables) in storm water discharges to or from its MS4s and related drainage structures. Operation and maintenance activities may include, but is not limited to, the following:

- [a] Inspections of the MS4 and related structures;
- [b] Cleaning of the MS4 and related structures; and
- [c] Proper disposal of materials removed from cleaning of the MS4 and related structures.

- (iii) Each Copermittee must implement a schedule of operation and maintenance for public streets, unpaved roads, paved roads, and paved highways within its jurisdiction to minimize pollutants that can be discharged in storm water.
- (iv) Each Copermittee must implement controls to prevent infiltration of sewage into the MS4 from leaking sanitary sewers. Copermittees that operate both a municipal sanitary sewer system and a MS4 must implement controls and measures to prevent and eliminate seeping sewage from infiltrating the MS4. Copermittees that do not operate both a municipal sanitary sewer system and a MS4 must coordinate with sewerage agencies to keep themselves informed of relevant and appropriate maintenance activities and sanitary sewage projects in their jurisdiction that may cause or contribute to seepage of sewage into the MS4.

(d) Pesticides, Herbicides, and Fertilizers BMPs

Each Copermittee must require the implementation of BMPs to reduce pollutants in storm water discharges to the MEP and effectively prohibit non-storm water discharges associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from commercial facilities and areas and industrial facilities, and implement BMPs at municipal facilities in its inventoried existing development. Such BMPs must include, as appropriate, educational activities, permits, certifications and other measures for applicators and distributors.

(2) Residential Areas

(a) Pollution Prevention

Each Copermittee must promote and encourage the use of pollution prevention methods, where appropriate, by the residential areas in its inventoried existing development.

(b) BMP Implementation

Each Copermittee must promote and encourage the implementation of designated BMPs at residential areas in its inventoried existing development.

(c) BMP Operation and Maintenance

Each Copermittee must properly operate and maintain, or require the proper operation and maintenance of designated BMPs at residential areas in its inventoried existing development.

(d) Pesticides, Herbicides, and Fertilizers BMPs

Each Copermittee must promote and encourage the implementation of BMPs to reduce pollutants in storm water discharges to the MEP and effectively prohibit non-storm water discharges associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from residential areas in its inventoried existing development.

c. EXISTING DEVELOPMENT INSPECTIONS

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

(1) Inspection Frequency

- (a) Each Copermittee must establish appropriate inspection frequencies for inventoried existing development in accordance with the following requirements:
- (i) At a minimum, inventoried existing development must be inspected once every five years utilizing one or more of the following methods:
 - [a] Drive-by inspections by Copermittee municipal and contract staff;
 - [b] Onsite inspections by Copermittee municipal and contract staff; and/or
 - [c] Visual inspections of publicly accessible inventoried facilities or areas by volunteer monitoring or patrol programs that have been trained by the Copermittee;
 - (ii) The frequency of inspections must be appropriate to confirm that BMPs are being implemented to reduce the discharge of pollutants in storm water from the MS4 to the MEP and effectively prohibit non-storm water discharges to the MS4;

- (iii) The frequency of inspections must be based on the potential for a facility or area to discharge non-storm water and pollutants in storm water, and should reflect the priorities set forth in the Water Quality Improvement Plan;
 - (iv) Each Copermittee must annually perform onsite inspections of an equivalent of at least 20 percent of the commercial facilities and areas, industrial facilities, and municipal facilities in its inventoried existing development;³⁴ and
 - (v) Inventoried existing development must be inspected by the Copermittee, as needed, in response to valid public complaints.
- (b) Based upon inspection findings, each Copermittee must implement all follow-up actions (i.e. education and outreach, re-inspection, enforcement) necessary to require and confirm compliance with its applicable local ordinances and permits and the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision E.6.

(2) Inspection Content

- (a) Inspections of existing development must include, at a minimum:
- (i) Visual inspections for the presence of actual non-storm water discharges;
 - (ii) Visual inspections for the presence of actual or potential discharge of pollutants;
 - (iii) Visual inspections for the presence of actual or potential illicit connections; and
 - (iv) Verification that the description of the facility or area in the inventory, required pursuant to Provision E.5.a.(2), has not changed.
- (b) Onsite inspections of existing development by the Copermittee must include, at a minimum:
- (i) Assessment of compliance with its applicable local ordinances and permits related to non-storm water and storm water discharges and runoff;
 - (ii) Assessment of the implementation of the designated BMPs;
 - (iii) Verification of coverage under the Industrial General Permit, when applicable; and

³⁴ If any commercial, industrial, or municipal facilities or areas require multiple onsite inspections during any given year, those additional inspection may count toward the total annual inspection requirement. This requirement excludes linear municipal facilities (i.e., MS4 linear channels, sanitary sewer collection systems, streets, roads and highways).

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

(3) Inspection Tracking and Records

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

- (a) Name and location of the facility or area (address and hydrologic subarea) consistent with the inventory name and location, pursuant to Provision E.5.a.(1);
- (b) Inspection and re-inspection date(s);
- (c) Inspection method(s) (i.e. drive-by, onsite);
- (d) Observations and findings from the inspection(s);
- (e) For onsite inspections of existing development by Copermittee municipal or contract staff, the records must also include, as applicable:
 - (i) Description of any problems or violations found during the inspection(s);
 - (ii) Description of enforcement actions issued in accordance with the Enforcement Response Plan pursuant to Provision E.6; and
 - (iii) The date problems or violations were resolved.

d. EXISTING DEVELOPMENT ENFORCEMENT

Each Copermittee must enforce its legal authority established pursuant to Provision E.1 for all its inventoried existing development, as necessary, to achieve compliance with the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision E.6.

e. RETROFITTING AND REHABILITATING AREAS OF EXISTING DEVELOPMENT

(1) Retrofitting Areas of Existing Development

Each Copermittee must describe in its jurisdictional runoff management program document, a program to retrofit areas of existing development within its jurisdiction to address identified sources of pollutants and/or stressors that

contribute to the highest priority water quality conditions in the Watershed Management Area. The program must be implemented as follows:

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

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

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

- (a) Each Copermittee must identify streams, channels, and/or habitats in areas of existing development as candidates for rehabilitation, focusing on areas where stream, channel, and/or habitat rehabilitation projects will address the highest priority water quality conditions identified in the Water Quality Improvement Plan;

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

6. Enforcement Response Plans

Each Copermittee must develop and implement an Enforcement Response Plan as part of its jurisdictional runoff management program document. The Enforcement Response Plan must describe the applicable approaches and options to enforce its legal authority established pursuant to Provision E.1, as necessary, to achieve compliance with the requirements of this Order. The Enforcement Response Plan must be in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and include the following:

a. ENFORCEMENT RESPONSE PLAN COMPONENTS

The Enforcement Response Plan must include the following individual components:

- (1) Illicit Discharge Detection and Elimination Enforcement Component;
- (2) Development Planning Enforcement Component;
- (3) Construction Management Enforcement Component; and

PROVISION E: JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS
E.5. Existing Development Management
E.6. Enforcement Response Plans

(4) Existing Development Enforcement Component.

b. ENFORCEMENT RESPONSE APPROACHES AND OPTIONS

Each component of the Enforcement Response Plan must describe the enforcement response approaches that the Copermittee will implement to compel compliance with its statutes, ordinances, permits, contracts, orders, or similar means, and the requirements of this Order. The description must include the protocols for implementing progressively stricter enforcement responses. The enforcement response approaches must include appropriate sanctions to compel compliance, including, at a minimum, the following tools or their equivalent:

- (1) Verbal and written notices of violation;
- (2) Cleanup requirements;
- (3) Fines;
- (4) Bonding requirements;
- (5) Administrative and criminal penalties;
- (6) Liens;
- (7) Stop work orders; and
- (8) Permit and occupancy denials.

c. CORRECTION OF VIOLATIONS

- (1) Violations must be corrected in a timely manner with the goal of correcting the violations within 30 calendar days after the violations are discovered, or prior to the next predicted rain event, whichever is sooner.
- (2) If more than 30 calendar days are required to achieve compliance, then a rationale must be recorded in the applicable electronic database or tabular system used to track violations.

d. ESCALATED ENFORCEMENT

- (1) The Enforcement Response Plan must include a definition of “escalated enforcement.” Escalated enforcement must include any enforcement scenario where a violation or other non-compliance is determined to cause or contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan. Escalated enforcement may be defined differently for development planning, construction sites, commercial facilities or areas, industrial facilities, municipal facilities, and residential areas.

- (2) Where the Copermittee determines escalated enforcement is not required, a rationale must be recorded in the applicable electronic database or tabular system used to track violations.
- (3) Escalated enforcement actions must continue to increase in severity, as necessary, to compel compliance as soon as possible.

e. REPORTING OF NON-COMPLIANT SITES

- (1) Each Copermittee must notify the San Diego Water Board in writing within five (5) calendar days of issuing escalated enforcement (as defined in the Copermittee's Enforcement Response Plan) to a construction site that poses a significant threat to water quality as a result of violations or other non-compliance with its permits and applicable local ordinances, and the requirements of this Order. Written notification may be provided electronically by email to the appropriate San Diego Water Board staff.
- (2) Each Copermittee must notify the San Diego Water Board of any persons required to obtain coverage under the statewide Industrial General Permit and Construction General Permit and failing to do so, within five (5) calendar days from the time the Copermittee become aware of the circumstances. Written notification may be provided electronically by email to RB9_Nonfilers@waterboards.ca.gov.

7. Public Education and Participation

Each Copermittee must implement, individually or with other Copermittees, a public education and participation program in accordance with the strategies identified in the Water Quality Improvement Plan to promote and encourage the development of programs, management practices, and behaviors that reduce the discharge of pollutants in storm water to the MEP, prevent controllable non-storm water discharges from entering the MS4, and protect water quality standards in receiving waters. The public education and participation program must be implemented in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and include, at a minimum, the following requirements:

a. PUBLIC EDUCATION

The public education program component implemented within the Copermittee's jurisdiction must include, at a minimum, the following:

- (1) Educational activities, public information activities, and other appropriate outreach activities intended to reduce pollutants associated with the application of pesticides, herbicides and fertilizer and other pollutants of

- concern in storm water discharges to and from its MS4 to the MEP, as determined and prioritized by the Copermittee(s) by jurisdiction and/or watershed to address the highest priority water quality conditions identified in the Water Quality Improvement Plan;
- (2) Educational activities, public information activities, and other appropriate outreach activities to facilitate the proper management and disposal of used oil and toxic materials; and
 - (3) Appropriate education and training measures for specific target audiences, such as construction site operators, residents, underserved target audiences and school-aged children, as determined and prioritized by the Copermittee(s) by jurisdiction and/or watershed, based on high risk behaviors and pollutants of concern.

b. PUBLIC PARTICIPATION

The public participation program component implemented within the Copermittee's jurisdiction must include, at a minimum, the following:

- (1) A process for members of the public to participate in updating the highest priority water quality conditions, numeric goals, and water quality improvement strategies in the Water Quality Improvement Plan;
- (2) Opportunities for members of the public to participate in providing the Copermittee recommendations for improving the effectiveness of the water quality improvement strategies implemented within its jurisdiction; and
- (3) Opportunities for members of the public to participate in programs and/or activities that can result in the prevention or elimination of non-storm water discharges to the MS4, reduction of pollutants in storm water discharges from the MS4, and/or protection of the quality of receiving waters.

8. Fiscal Analysis

- a. Each Copermittee must secure the resources necessary to meet all the requirements of this Order.
- b. Each Copermittee must conduct an annual fiscal analysis of its jurisdictional runoff management program in its entirety. The fiscal analysis must include the following:
 - (1) Identification of the various categories of expenditures necessary to implement the requirements of this Order, including a description of the specific capital, operation and maintenance, and other expenditure items to be accounted for in each category of expenditures;

- (2) The staff resources needed and allocated to meet the requirements of this Order, including any development, implementation, and enforcement activities required;
 - (3) The estimated expenditures for Provisions E.8.b.(1) and E.8.b.(2) for the current fiscal year; and
 - (4) The source(s) of funds that are proposed to meet the necessary expenditures described in Provisions E.8.b.(1) and E.8.b.(2), including legal restrictions on the use of such funds, for the current fiscal year and next fiscal year.
- c. Each Copermittee must submit a summary of the annual fiscal analysis with each Water Quality Improvement Plan Annual Report required pursuant to Provision F.3.b.(3).
 - d. Each Copermittee must provide the documentation used to develop the summary of the annual fiscal analysis upon request by the San Diego Water Board.

F. REPORTING

The purpose of this provision is to determine and document compliance with the requirements set forth in this Order. The goal of reporting is to communicate to the San Diego Water Board and the people of the State of California the implementation status of each jurisdictional runoff management program and compliance with the requirements of this Order. This goal is to be accomplished through the submittal of specific deliverables to the San Diego Water Board by the Copermittees.

1. Water Quality Improvement Plans

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

a. WATER QUALITY IMPROVEMENT PLAN DEVELOPMENT

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

(1) Public Participation Process

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

- (a) The Copermittees must develop a publicly available and noticed schedule of the opportunities for the public to participate and provide comments during the development of the Water Quality Improvement Plan. The schedule may be adjusted as necessary by the Copermittees, provided the public is provided timely notification of the changes to the schedule.
- (b) The Copermittees must form a Water Quality Improvement Consultation Panel to provide recommendations during the development of the Water Quality Improvement Plan. The Water Quality Improvement Consultation Panel must consist of at least the following members:
 - (i) A representative of the San Diego Water Board;
 - (ii) A representative of the environmental community familiar with the water quality conditions of concern of the receiving waters in the Watershed Management Area, preferably from an environmental interest group associated with a water body within the Watershed Management Area; and
 - (iii) A representative of the development community familiar with the opportunities and constraints for implementing structural BMPs,

retrofitting projects, and stream, channel or habitat rehabilitation projects in the Watershed Management Area, preferably with relevant engineering, hydrology, and/or geomorphology experience in the Watershed Management Area.

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

(2) Priority Water Quality Conditions

- (a) The Copermittees must solicit data, information and recommendations from the public to be utilized in the development and identification of the priority water quality conditions and potential water quality improvement strategies for the Watershed Management Area.
- (b) The Copermittees must review the priority water quality conditions the Copermittees plan on including in the Water Quality Improvement Plan with the Water Quality Improvement Consultation Panel to receive recommendations or concurrence.
- (c) The Copermittees must consider revisions to the priority water quality conditions based on recommendations from the Water Quality Improvement Consultation Panel.
- (d) The Copermittees must include all the potential water quality improvement strategies identified by the public and the Water Quality Improvement Consultation Panel with the submittal of the priority water quality conditions to the San Diego Water Board.
- (e) The Copermittees must submit the Water Quality Improvement Plan requirements of Provision B.2 to the San Diego Water Board as early as 6 months and no later than 12 months after the commencement of coverage under this Order. Upon receipt, the San Diego Water Board will issue a public notice and release the proposed priority water quality conditions and potential water quality improvement strategies for public review and comment for a minimum of 30 days.
- (f) The Copermittees must consider revisions to the priority water quality conditions and potential water quality improvement strategies developed pursuant to Provision B.2 based on public comments received by the close of the comment period.

(3) Water Quality Improvement Goals, Strategies and Schedules

- (a) The Copermittees must solicit recommendations from the public on potential numeric goals for the highest priority water quality conditions identified for the Watershed Management Area, and recommendations on the strategies that should be implemented to achieve the potential numeric goals.
- (b) The Copermittees must consult with the Water Quality Improvement Consultation Panel and consider revisions to the following items based on the Panel's recommendations:
 - (i) The numeric goals and schedules the Copermittees propose to include in the Water Quality Improvement Plan;
 - (ii) The water quality improvement strategies and schedules the Copermittees propose to implement in the Watershed Management Area and include in the Water Quality Improvement Plan; and
 - (iii) If the Copermittees choose to implement Provision B.3.b.(4), the results of the Watershed Management Area Analysis the Copermittees proposed to incorporate into the Water Quality Improvement Plan.
- (c) The Copermittees must submit the Water Quality Improvement Plan requirements of Provision B.3 to the San Diego Water Board as early as 9 months and no later than 18 months after the commencement of coverage under this Order. Upon receipt, the San Diego Water Board will issue a public notice and release the proposed water quality improvement goals, strategies and schedules for public review and comment for a minimum of 30 days.
- (d) The Copermittees must consider revisions to the water quality improvement goals, strategies and schedules developed pursuant to Provision B.3 based on public comments received by the close of the comment period.

b. WATER QUALITY IMPROVEMENT PLAN SUBMITTAL AND IMPLEMENTATION

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

- (2) The Copermittees must consider revisions to the Water Quality Improvement Plan based on written comments received by the close of the public comment period.
- (3) The Copermittees must promptly submit any revisions to the Water Quality Improvement Plan to the San Diego Water Board no later than 60 days after the close of the public comment period.
- (4) If issues concerning the Water Quality Improvement Plan are resolved informally through discussions among the Copermittees, the San Diego Water Board and interested parties, the San Diego Water Board Executive Officer may provide written notification of acceptance to the Copermittees that the Water Quality Improvement Plan meets the requirements of Provision B. However, if the Executive Officer determines that significant issues with the Water Quality Improvement Plan remain, the matter will be scheduled for San Diego Water Board consideration at a public meeting.
- (5) The Copermittees must commence with implementation of the Water Quality Improvement Plan, in accordance with the water quality improvement strategies and schedules therein, upon written notification of acceptance with the Water Quality Improvement Plan by the San Diego Water Board Executive Officer.
- (6) During implementation of the Water Quality Improvement Plan the Copermittees must correct any deficiencies in the Plan identified by the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report following a request by the Board to do so.
- (7) The Water Quality Improvement Plan must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of receiving notification of acceptance with the Water Quality Improvement Plan by the San Diego Water Board Executive Officer.

2. Updates

a. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM DOCUMENT UPDATES

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

- (1) Each Copermittee is encouraged to seek public and key stakeholder participation and comments, as early and often as possible during the process of developing updates to its jurisdictional runoff management program document;

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

b. BMP DESIGN MANUAL UPDATES

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

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

incorporate the amended Provision E.3.a-d requirements as soon as possible but not later than 90 days after the date the San Diego Water Board adopts the amendments to Provisions E.3.a-d, unless otherwise directed by the San Diego Water Board Executive Officer. Under these circumstances, the effective date of the BMP Design Manual is no later than 90 days after the date the San Diego Water Board adopts the amendments to Provisions E.3.a-d, unless otherwise directed by the San Diego Water Board Executive Officer.

c. WATER QUALITY IMPROVEMENT PLAN UPDATES

- (1) The Water Quality Improvement Plans must be updated in accordance with the following process:
 - (a) The Copermittees must develop and implement a public participation process to obtain data, information and recommendations for updating the Water Quality Improvement Plan. The public participation process must provide for a publicly available and noticed schedule of opportunities for the public to participate and provide comments during the development of updates to the Water Quality Improvement Plan;
 - (b) The Copermittees must consult with the Water Quality Improvement Consultation Panel on proposed updates of the Water Quality Improvement Plan, and consider the Water Quality Improvement Consultation Panel's recommendations in finalizing the proposed updates;
 - (c) The Copermittees for each Watershed Management Area must submit 1) proposed updates to the Water Quality Improvement Plan and supporting rationale, and 2) recommendations received from the public and the Water Quality Improvement Consultation Panel and the rationale for the requested updates, either in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. The updates submitted will be deemed accepted for inclusion in the Water Quality Improvement Plan ninety (90) days after submission unless otherwise directed in writing by the San Diego Water Board Executive Officer;
 - (d) The Copermittees must revise the requested updates as directed by the San Diego Water Board Executive Officer; and
 - (e) Updated Water Quality Improvement Plans must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of acceptance of the requested updates by the San Diego Water Board.
- (2) No later than six months following Office of Administrative Law and USEPA approval of any TMDL Basin Plan amendment with wasteload allocations (WLAs) assigned to the Copermittees during the term of this Order, the

Copermittees must initiate an update to the applicable Water Quality Improvement Plans in accordance with Provision F.1 or Provision F.2.c.(1) to incorporate the requirements of the TMDL WLAs.

3. Progress Reporting

a. PROGRESS REPORT PRESENTATIONS

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

b. ANNUAL REPORTS

(1) Transitional Jurisdictional Runoff Management Program Annual Reports

- (a) Each Copermittee must complete and submit a Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D to this Order or a revised form accepted by the San Diego Water Board) no later than October 31 of each year for each jurisdictional runoff management program reporting period (i.e. July 1 to June 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted.
- (b) Each Copermittee must submit the information on the Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D to this Order or a revised form accepted by the San Diego Water Board) specific to the area within its jurisdiction in each Watershed Management Area.
- (c) In addition to submitting the Jurisdictional Runoff Management Program Annual Report Form during the transitional reporting period, each Copermittee may continue to utilize and submit the jurisdictional runoff management program annual reporting format of its previous NPDES permit until the first Water Quality Improvement Plan Annual Report is required to be submitted.

(2) Transitional Monitoring and Assessment Program Annual Reports

The Copermittees for each Watershed Management Area must submit a Transitional Monitoring and Assessment Program Annual Report no later than January 31 for each complete transitional monitoring and assessment program reporting period (i.e. October 1 to September 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted under this Order. The Transitional

Monitoring and Assessment Program Annual Reports must include:

- (a) The receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1.a and D.2.a, summarized and presented in tabular and graphical form; and
- (b) The findings from the assessments required pursuant to Provisions D.4.a.(1)(a), D.4.b.(1)(a)(i), D.4.b.(2)(a)(i).

(3) Water Quality Improvement Plan Annual Reports

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

- (a) The receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1 and D.2, summarized and presented in tabular and graphical form;
- (b) The progress of the special studies required pursuant to Provision D.3, and the findings, interpretations and conclusions of a special study, or each phase of a special study, upon its completion;
- (c) The findings, interpretations and conclusions from the assessments required pursuant to Provision D.4;
- (d) The progress of implementing the Water Quality Improvement Plan, including, but not limited to, the following:
 - (i) The progress toward achieving the interim and final numeric goals for the highest water quality priorities for the Watershed Management Area;
 - (ii) The water quality improvement strategies that were implemented and/or no longer implemented by each of the Copermittees during the reporting period and previous reporting periods;
 - (iii) The water quality improvement strategies planned for implementation during the next reporting period;
 - (iv) Proposed modifications to the water quality improvement strategies, the public comments received and the supporting rationale for the

proposed modifications;

- (v) Previous modifications or updates incorporated into the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document and implemented by the Copermittees in the Watershed Management Area; and
 - (vi) Proposed modifications or updates to the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document;
- (e) A completed Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D to this Order or a revised form accepted by the San Diego Water Board) for each Copermittee in the Watershed Management Area, certified by a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative; and
- (f) Each Copermittee must provide any data or documentation utilized in developing the Water Quality Improvement Plan Annual Report upon request by the San Diego Water Board. Any Copermittee monitoring data utilized in developing the Water Quality Improvement Plan Annual Report must be uploaded to the California Environmental Data Exchange Network (CEDEN).³⁵ Any Copermittee monitoring and assessment data utilized in developing the Water Quality Improvement Plan Annual Report must be available for access on the Regional Clearinghouse required pursuant to Provision F.4.

C. REGIONAL MONITORING AND ASSESSMENT REPORT

- (1) The Copermittees must submit a Regional Monitoring and Assessment Report no later than 180 days prior to the expiration date of this Order. The Regional Monitoring and Assessment Report may be submitted as part of the Report of Waste Discharge required pursuant to Provision F.5.b. In preparing the report the Copermittees must consider the receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1 and D.2, and the findings, interpretations, and conclusions from the assessments required pursuant to Provision D.4. Based on these considerations the report must assess the following:

³⁵ Data must be uploaded to CEDEN Southern California Regional Data Center (<http://www.sccwrp.org/Data/DataSubmission/SouthernCaliforniaRegionalDataCenter.aspx>) using the templates provided on the CEDEN website.

- (a) The beneficial uses of the receiving waters within the San Diego Region that are supported and not adversely affected by the Copermittees' MS4 discharges;
 - (b) The beneficial uses of the receiving waters within the San Diego Region that are adversely impacted by the Copermittees' MS4 discharges;
 - (c) The progress toward protecting the beneficial uses in the receiving waters within the San Diego Region from the Copermittees' discharges; and
 - (d) Pollutants or conditions of emerging concern that may impact beneficial uses in the receiving waters within the San Diego Region.
- (2) The Regional Monitoring and Assessment Report must include recommendations for improving the implementation and assessment of the Water Quality Improvement Plans and jurisdictional runoff management programs.
 - (3) Each Copermittee must provide any data or documentation utilized in developing the Regional Monitoring and Assessment Report upon request by the San Diego Water Board. Any Copermittee monitoring and assessment data utilized in developing the Regional Monitoring and Assessment Report must be available for access on the Regional Clearinghouse required pursuant to Provision F.4.

4. Regional Clearinghouse

The Copermittees must develop, update, and maintain an internet-based Regional Clearinghouse that is made available to the public no later than 18 months after the effective date of this Order.³⁶

- a. The Copermittees, through the Regional Clearinghouse, must make the following documents and data available for access, and organized by Watershed Management Area. The documents and data may be linked to other internet-based data portals and databases where the original documents are stored:
 - (1) Water Quality Improvement Plan for the Watershed Management Area, and all updated versions with date of update;
 - (2) Annual Reports for the Watershed Management Area;
 - (3) Jurisdictional Runoff Management Program document for each Copermittee within the Watershed Management Area, and all updated versions with date of update;

³⁶ The Copermittees may develop, update and maintain the clearinghouse(s) of other Copermittees or agencies.

- (4) BMP Design Manual for each Copermittee within the Watershed Management Area, and all updated versions with date of update;
 - (5) Reports from special studies (e.g. source identification, BMP effectiveness assessment) conducted in the Watershed Management Area;
 - (6) Monitoring data collected pursuant to Provision D for each Watershed Management Area must be uploaded to CEDEN,³⁷ with links to the uploaded data; and
 - (7) Available GIS data, layers, and/or shapefiles used to develop the maps generated and maintained by the Copermittees for the Water Quality Improvement Plans, Annual Reports, and jurisdictional runoff management program documents.
- b.** The Copermittees, through the Regional Clearinghouse, must make the following information and documents available for access:
- (1) Contact information (point of contact, phone number, email address, and mailing address) for each Copermittee;
 - (2) Public hotline number for reporting non-storm water and illicit discharges for each Copermittee;
 - (3) Email address for reporting non-storm water and illicit discharges for each Copermittee;
 - (4) Link to each Copermittee's website, if available, where the public may find additional information about the Copermittee's storm water management program and for requesting records for the implementation of its program;
 - (5) Information about opportunities for the public to participate in programs and/or activities that can result in the prevention or elimination of non-storm water discharges to the MS4, reduction of pollutants in storm water discharges from the MS4, and/or protection of the quality of receiving waters; and
 - (6) Reports from regional monitoring programs in which the Copermittees participate (e.g. Southern California Monitoring Coalition, Southern California Coastal Water Research Project Bight Monitoring);
 - (7) Regional Monitoring and Assessment Reports; and
 - (8) Any other information, data, and documents the Copermittees determine as appropriate for making available to the public.

³⁷ Data must be uploaded to CEDEN Southern California Regional Data Center (<http://www.sccwrp.org/Data/DataSubmission/SouthernCaliforniaRegionalDataCenter.aspx>) using the templates provided on the CEDEN website.

5. Report of Waste Discharge

The Copermittees subject to the requirements of this Order must submit to the San Diego Water Board a complete Report of Waste Discharge as an application for the re-issuance of this Order and NPDES permit. The Report of Waste Discharge must be submitted no later than 180 days in advance of the expiration date of this Order. The Report of Waste Discharge must contain the following minimum information:

- a. Names and addresses of the Copermittees;
- b. Names and titles of the primary contacts of the Copermittees;
- c. Proposed changes to the Copermittees' Water Quality Improvement Plans and the supporting justification;
- d. Proposed changes to the Copermittees' jurisdictional runoff management programs and the supporting justification;
- e. Any other information necessary for the re-issuance of this Order;
- f. Any information to be included as part of the Report of Waste Discharge pursuant to the requirements of this Order; and
- g. Any other information required by federal regulations for NPDES permit reissuance.

6. Reporting Provisions

Each Copermittee must comply with all the reporting and recordkeeping provisions of the Standard Permit Provisions and General Provisions contained in Attachment B to this Order.

G. PRINCIPAL WATERSHED COPERMITTEE RESPONSIBILITIES

- 1.** The Copermittees within each Watershed Management Area must designate a Principal Watershed Copermittee and notify the San Diego Water Board of the name of the Principal Watershed Copermittee. An individual Copermittee should not be designated a Principal Watershed Copermittee for more than two Watershed Management Areas. The notification may be submitted with the Water Quality Improvement Plan required pursuant to Provision F.1 of this Order.
- 2.** The Principal Watershed Copermittee is responsible for, at a minimum, the following:
 - a.** Serving as liaison between the Copermittees in the Watershed Management Area and the San Diego Water Board on general permit issues, and when necessary and appropriate, representing the Copermittees in the Watershed Management Area before the San Diego Water Board;
 - b.** Facilitating the development of the Water Quality Improvement Plan in accordance with the requirements of Provision B of this Order;
 - c.** Coordinating the submittal of the deliverables required by Provisions F.1, F.2, F.3.a, and F.3.b of this Order; and
 - d.** Coordinating and developing, with the other Principal Watershed Copermittees, the requirements of Provisions F.3.c, F.4, and F.5.b of this Order.
- 3.** The Principal Watershed Copermittee is not responsible for ensuring that the other Copermittees within the Watershed Management Area are in compliance with the requirements of this Order. Each Copermittee within the Watershed Management Area is responsible for complying with the requirements of this Order.

H. MODIFICATION OF ORDER

- 1.** Modifications of the Order may be initiated by the San Diego Water Board or by the Copermittees. Requests by Copermittees must be made to the San Diego Water Board.
- 2.** Minor modifications to the Order may be made by the San Diego Water Board where the proposed modification complies with all the prohibitions and limitations, and other requirements of this Order.
- 3.** This Order may also be re-opened and modified, revoked and, reissued or terminated in accordance with the provisions of 40 CFR 122.44, 122.62 to 122.64, and 124.5. Causes for taking such actions include, but are not limited to, failure to comply with any condition of this Order and permit, and endangerment to human health or the environment resulting from the permitted activity.
- 4.** This Order may be re-opened for modification for cause including but not limited to the following:
 - a.** Any of the TMDLs in Attachment E to this Order are amended in the Basin Plan by San Diego Water Board, and the amendment is approved by the State Water Board, Office of Administrative Law, and the USEPA;
 - b.** The Basin Plan is amended by the San Diego Water Board to incorporate a new TMDL, and the amendment is approved by the State Water Board, Office of Administrative Law, and the USEPA; or
 - c.** Updating or revising the monitoring and reporting requirements is determined to be necessary, at the discretion of the San Diego Water Board. Such modification(s) may include, but is (are) not limited to, revision(s) to: (i) implement recommendations from Southern California Coastal Water Research Project (SCCWRP), (ii) develop, refine, implement, and/or coordinate a regional monitoring program, (iii) develop and implement improved monitoring and assessment programs in keeping with San Diego Water Board Resolution No. R9-2012-0069, Resolution in Support of a Regional Monitoring Framework, and/or (iv) add provisions to require the Copermittees to evaluate and provide information on cost and values of the monitoring and reporting program.

I. STANDARD PERMIT PROVISIONS AND GENERAL PROVISIONS

Each Copermittee must comply with all the Standard Permit Provisions and General Provisions contained in Attachment B to this Order.

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ATTACHMENT A

DISCHARGE PROHIBITIONS AND SPECIAL PROTECTIONS

1. Basin Plan Waste Discharge Prohibitions

California Water Code Section 13243 provides that a Regional Water Board, in a water quality control plan, may specify certain conditions or areas where the discharge of waste or certain types of waste is not permitted. The following waste discharge prohibitions in the Water Quality Control Plan for the San Diego Basin (Basin Plan) are applicable to any person, as defined by Section 13050(c) of the California Water Code, who is a citizen, domiciliary, or political agency or entity of California whose activities in California could affect the quality of waters of the state within the boundaries of the San Diego Region.

1. The discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in California Water Code Section 13050, is prohibited.
2. The discharge of waste to land, except as authorized by waste discharge requirements or the terms described in California Water Code Section 13264 is prohibited.
3. The discharge of pollutants or dredged or fill material to waters of the United States except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit or a dredged or fill material permit (subject to the exemption described in California Water Code Section 13376) is prohibited.
4. Discharges of recycled water to lakes or reservoirs used for municipal water supply or to inland surface water tributaries thereto are prohibited, unless this San Diego Water Board issues a NPDES permit authorizing such a discharge; the proposed discharge has been approved by the State Department of Health Services (DHS) and the operating agency of the impacted reservoir; and the discharger has an approved fail-safe long-term disposal alternative.
5. The discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited. Allowances for dilution may be made at the discretion of the San Diego Water Board. Consideration would include streamflow data, the degree of treatment provided and safety measures to ensure reliability of facility performance. As an example, discharge of secondary effluent would probably be permitted if streamflow provided 100:1 dilution capability.
6. The discharge of waste in a manner causing flow, ponding, or surfacing on lands not owned or under the control of the discharger is prohibited, unless the discharge is authorized by the San Diego Water Board.

7. The dumping, deposition, or discharge of waste directly into waters of the state, or adjacent to such waters in any manner which may permit its being transported into the waters, is prohibited unless authorized by the San Diego Water Board.
8. Any discharge to a storm water conveyance system that is not composed entirely of "*storm water*" is prohibited unless authorized by the San Diego Water Board. [The federal regulations, 40 CFR 122.26(b)(13), define storm water as storm water runoff, snow melt runoff, and surface runoff and drainage. 40 CFR 122.26(b)(2) defines an illicit discharge as any discharge to a storm water conveyance system that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities.] [§122.26 amended at 56 FR 56553, November 5, 1991; 57 FR 11412, April 2, 1992].
9. The unauthorized discharge of treated or untreated sewage to waters of the state or to a storm water conveyance system is prohibited.
10. The discharge of industrial wastes to conventional septic tank/subsurface disposal systems, except as authorized by the terms described in California Water Code Section 13264, is prohibited.
11. The discharge of radioactive wastes amenable to alternative methods of disposal into the waters of the state is prohibited.
12. The discharge of any radiological, chemical, or biological warfare agent into waters of the state is prohibited.
13. The discharge of waste into a natural or excavated site below historic water levels is prohibited unless the discharge is authorized by the San Diego Water Board.
14. The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited.
15. The discharge of treated or untreated sewage from vessels to Mission Bay, Oceanside Harbor, Dana Point Harbor, or other small boat harbors is prohibited.
16. The discharge of untreated sewage from vessels to San Diego Bay is prohibited.
17. The discharge of treated sewage from vessels to portions of San Diego Bay that are less than 30 feet deep at mean lower low water (MLLW) is prohibited.
18. The discharge of treated sewage from vessels, which do not have a properly functioning US Coast Guard certified Type I or Type II marine sanitation device, to portions of San Diego Bay that are greater than 30 feet deep at mean lower low water (MLLW) is prohibited.

2. Attachment B to State Water Board Resolution 2012-0012, as amended by State Water Board Resolution No. 2012-0031.

Special Protections for Areas of Special Biological Significance (ASBS), Governing Point Source Discharges of Storm Water and Nonpoint Source Waste Discharges

I. PROVISIONS FOR POINT SOURCE DISCHARGES OF STORM WATER AND NONPOINT SOURCE WASTE DISCHARGES

The following terms, prohibitions, and special conditions (hereafter collectively referred to as special conditions) are established as limitations on point source storm water and nonpoint source discharges. These special conditions provide Special Protections for marine aquatic life and natural water quality in Areas of Special Biological Significance (ASBS), as required for State Water Quality Protection Areas pursuant to California Public Resources Code Sections 36700(f) and 36710(f). These Special Protections are adopted by the State Water Board as part of the California Ocean Plan (Ocean Plan) General Exception.

The special conditions are organized by category of discharge. The State Water Resources Control Board (State Water Board) and Regional Water Quality Control Boards (Regional Water Boards) will determine categories and the means of regulation for those categories [e.g., Point Source Storm Water National Pollutant Discharge Elimination System (NPDES) or Nonpoint Source].

A. PERMITTED POINT SOURCE DISCHARGES OF STORM WATER

1. General Provisions for Permitted Point Source Discharges of Storm Water

- a. Existing storm water discharges into an ASBS are allowed only under the following conditions:
 - (1) The discharges are authorized by an NPDES permit issued by the State Water Board or Regional Water Board;
 - (2) The discharges comply with all of the applicable terms, prohibitions, and special conditions contained in these Special Protections; and
 - (3) The discharges:
 - (i) Are essential for flood control or slope stability, including roof, landscape, road, and parking lot drainage;
 - (ii) Are designed to prevent soil erosion;
 - (iii) Occur only during wet weather;
 - (iv) Are composed of only storm water runoff.
- b. Discharges composed of storm water runoff shall not alter natural ocean water quality in an ASBS.
- c. The discharge of trash is prohibited.

- d. Only discharges from existing storm water outfalls are allowed. Any proposed or new storm water runoff discharge shall be routed to existing storm water discharge outfalls and shall not result in any new contribution of waste to an ASBS (i.e., no additional pollutant loading). "Existing storm water outfalls" are those that were constructed or under construction prior to January 1, 2005. "New contribution of waste" is defined as any addition of waste beyond what would have occurred as of January 1, 2005. A change to an existing storm water outfall, in terms of re-location or alteration, in order to comply with these special conditions, is allowed and does not constitute a new discharge.
 - e. Non-storm water discharges are prohibited except as provided below:
 - (1) The term "non-storm water discharges" means any waste discharges from a municipal separate storm sewer system (MS4) or other NPDES permitted storm drain system to an ASBS that are not composed entirely of storm water.
 - (2) (i) The following non-storm water discharges are allowed, provided that the discharges are essential for emergency response purposes, structural stability, slope stability or occur naturally:
 - (a) Discharges associated with emergency fire fighting operations.
 - (b) Foundation and footing drains.
 - (c) Water from crawl space or basement pumps.
 - (d) Hillside dewatering.
 - (e) Naturally occurring groundwater seepage via a storm drain.
 - (f) Non-anthropogenic flows from a naturally occurring stream via a culvert or storm drain, as long as there are no contributions of anthropogenic runoff.
 - (ii) An NPDES permitting authority may authorize non-storm water discharges to an MS4 with a direct discharge to an ASBS only to the extent the NPDES permitting authority finds that the discharge does not alter natural ocean water quality in the ASBS.
 - (3) Authorized non-storm water discharges shall not cause or contribute to a violation of the water quality objectives in Chapter II of the Ocean Plan nor alter natural ocean water quality in an ASBS.
2. Compliance Plans for Inclusion in Storm Water Management Plans (SWMP) and Storm Water Pollution Prevention Plans (SWPPP).

The discharger shall specifically address the prohibition of non-storm water runoff and the requirement to maintain natural water quality for storm water discharges to an ASBS in an ASBS Compliance Plan to be included in its SWMP or a SWPPP, as appropriate to permit type. If a statewide permit includes a SWMP, then the discharger shall prepare a stand-alone compliance plan for ASBS discharges. The ASBS Compliance Plan is subject to approval by the Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (for permits issued by Regional Water Boards).

- a. The Compliance Plan shall include a map of surface drainage of storm water runoff, showing areas of sheet runoff, prioritize discharges, and describe any structural Best Management Practices (BMPs) already employed and/or BMPs to be employed in the future. Priority discharges are those that pose the greatest water quality threat and which are identified to require installation of structural BMPs. The map shall also show the storm water conveyances in relation to other features such as service areas, sewage conveyances and treatment facilities, landslides, areas prone to erosion, and waste and hazardous material storage areas, if applicable. The SWMP or SWPPP shall also include a procedure for updating the map and plan when changes are made to the storm water conveyance facilities.
- b. The ASBS Compliance Plan shall describe the measures by which all non-authorized non-storm water runoff (e.g., dry weather flows) has been eliminated, how these measures will be maintained over time, and how these measures are monitored and documented.
- c. For Municipal Separate Storm Sewer System (MS4s), the ASBS Compliance Plan shall require minimum inspection frequencies as follows:
 - (1) The minimum inspection frequency for construction sites shall be weekly during rainy season;
 - (2) The minimum inspection frequency for industrial facilities shall be monthly during the rainy season;
 - (3) The minimum inspection frequency for commercial facilities (e.g., restaurants) shall be twice during the rainy season; and
 - (4) Storm water outfall drains equal to or greater than 18 inches (457 mm) in diameter or width shall be inspected once prior to the beginning of the rainy season and once during the rainy season and maintained to remove trash and other anthropogenic debris.
- d. The ASBS Compliance Plan shall address storm water discharges (wet weather flows) and, in particular, describe how pollutant reductions in storm water runoff, that are necessary to comply with these special conditions, will be achieved through BMPs. Structural BMPs need not be installed if the discharger can document to the satisfaction of the State Water Board Executive Director (statewide permits) or Regional Water Board Executive Officer (Regional Water Board permits) that such installation would pose a threat to health or safety. BMPs to control storm water runoff discharges (at the end-of-pipe) during a design storm shall be designed to achieve on average the following target levels:
 - (1) Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan; or
 - (2) A 90% reduction in pollutant loading during storm events, for the applicant's total discharges.

The baseline for these determinations is the effective date of the Exception, except for those structural BMPs installed between January 1, 2005 and adoption of these Special Protections, and the reductions must be achieved and documented within six (6) years of the effective date.

- e. The ASBS Compliance Plan shall address erosion control and the prevention of anthropogenic sedimentation in ASBS. The natural habitat conditions in the ASBS shall not be altered as a result of anthropogenic sedimentation.
- f. The ASBS Compliance Plan shall describe the non-structural BMPs currently employed and planned in the future (including those for construction activities), and include an implementation schedule. The ASBS Compliance Plan shall include non-structural BMPs that address public education and outreach. Education and outreach efforts must adequately inform the public that direct discharges of pollutants from private property not entering an MS4 are prohibited. The ASBS Compliance Plan shall also describe the structural BMPs, including any low impact development (LID) measures, currently employed and planned for higher threat discharges and include an implementation schedule. To control storm water runoff discharges (at the end-of-pipe) during a design storm, permittees must first consider, and use where feasible, LID practices to infiltrate, use, or evapotranspire storm water runoff on-site, if LID practices would be the most effective at reducing pollutants from entering the ASBS.
- g. The BMPs and implementation schedule shall be designed to ensure that natural water quality conditions in the receiving water are achieved and maintained by either reducing flows from impervious surfaces or reducing pollutant loading, or some combination thereof.
- h. If the results of the receiving water monitoring described in IV.B. of these special conditions indicate that the storm water runoff is causing or contributing to an alteration of natural ocean water quality in the ASBS, the discharger shall submit a report to the State Water Board and Regional Water Board within 30 days of receiving the results.
 - (1) The report shall identify the constituents in storm water runoff that alter natural ocean water quality and the sources of these constituents.
 - (2) The report shall describe BMPs that are currently being implemented, BMPs that are identified in the SWMP or SWPPP for future implementation, and any additional BMPs that may be added to the SWMP or SWPPP to address the alteration of natural water quality. The report shall include a new or modified implementation schedule for the BMPs.
 - (3) Within 30 days of the approval of the report by the State Water Board Executive Director (statewide permits) or Regional Water Board Executive Officer (Regional Water Board permits), the discharger shall revise its ASBS Compliance Plan to incorporate any new or modified BMPs that have been or will be implemented, the implementation schedule, and any additional monitoring required.
 - (4) As long as the discharger has complied with the procedures described above and is implementing the revised SWMP or SWPPP, the discharger does not have to repeat the same procedure for continuing or recurring exceedances of natural ocean water quality conditions due to the same constituent.

(5) The requirements of this section are in addition to the terms, prohibitions, and conditions contained in these Special Protections.

3. Compliance Schedule

- a. On the effective date of the Exception, all non-authorized non-storm water discharges (e.g., dry weather flow) are effectively prohibited.
- b. Within eighteen (18) months from the effective date of the Exception, the discharger shall submit a draft written ASBS Compliance Plan to the State Water Board Executive Director (statewide permits) or Regional Water Board Executive Officer (Regional Water Board permits) that describes its strategy to comply with these special conditions, including the requirement to maintain natural water quality in the affected ASBS. The ASBS Compliance Plan shall include a description of appropriate non-structural controls and a time schedule to implement structural controls (implementation schedule) to comply with these special conditions for inclusion in the discharger's SWMP or SWPPP, as appropriate to permit type. The final ASBS Compliance Plan, including a description and final schedule for structural controls based on the results of runoff and receiving water monitoring, must be submitted within thirty (30) months from the effective date of the Exception.
- c. Within 18 months of the effective date of the Exception, any non-structural controls that are necessary to comply with these special conditions shall be implemented.
- d. Within six (6) years of the effective date of the Exception, any structural controls identified in the ASBS Compliance Plan that are necessary to comply with these special conditions shall be operational.
- e. Within six (6) years of the effective date of the Exception, all dischargers must comply with the requirement that their discharges into the affected ASBS maintain natural ocean water quality. If the initial results of post-storm receiving water quality testing indicate levels higher than the 85th percentile threshold of reference water quality data and the pre-storm receiving water levels, then the discharger must re-sample the receiving water, pre- and post-storm. If after re-sampling the post-storm levels are still higher than the 85th percentile threshold of reference water quality data, and the pre-storm receiving water levels, for any constituent, then natural ocean water quality is exceeded. See attached Flowchart.
- f. The Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (Regional Water Board permits) may only authorize additional time to comply with the special conditions d. and e., above if good cause exists to do so. Good cause means a physical impossibility or lack of funding.

If a discharger claims physical impossibility, it shall notify the Board in writing within thirty (30) days of the date that the discharger first knew of the event or circumstance that caused or would cause it to fail to meet the deadline in d. or e. The notice shall describe the reason for the noncompliance or anticipated noncompliance and specifically refer to this Section of this Exception. It shall describe the anticipated length of time the delay in compliance may persist, the cause or causes of the delay as well as measures to minimize the impact of the delay on water quality, the measures taken or to be taken by

the discharger to prevent or minimize the delay, the schedule by which the measures will be implemented, and the anticipated date of compliance. The discharger shall adopt all reasonable measures to avoid and minimize such delays and their impact on water quality.

The discharger may request an extension of time for compliance based on lack of funding. The request for an extension shall require:

1. for municipalities, a demonstration of significant hardship to discharger ratepayers, by showing the relationship of storm water fees to annual household income for residents within the discharger's jurisdictional area, and the discharger has made timely and complete applications for all available bond and grant funding, and either no bond or grant funding is available, or bond and/or grant funding is inadequate; or
2. for other governmental agencies, a demonstration and documentation of a good faith effort to acquire funding through that agency's budgetary process, and a demonstration that funding was unavailable or inadequate.

B. NONPOINT SOURCE DISCHARGES

1. General Provisions for Nonpoint Sources

a. Existing nonpoint source waste discharges are allowed into an ASBS only under the following conditions:

- (1) The discharges are authorized under waste discharge requirements, a conditional waiver of waste discharge requirements, or a conditional prohibition issued by the State Water Board or a Regional Water Board.
- (2) The discharges are in compliance with the applicable terms, prohibitions, and special conditions contained in these Special Protections.
- (3) The discharges:
 - (i) Are essential for flood control or slope stability, including roof, landscape, road, and parking lot drainage;
 - (ii) Are designed to prevent soil erosion;
 - (iii) Occur only during wet weather;
 - (iv) Are composed of only storm water runoff.

b. Discharges composed of storm water runoff shall not alter natural ocean water quality in an ASBS.

c. The discharge of trash is prohibited.

d. Only existing nonpoint source waste discharges are allowed. "Existing nonpoint source waste discharges" are discharges that were ongoing prior to January 1, 2005. "New nonpoint source discharges" are defined as those that commenced on or after January 1,

2005. A change to an existing nonpoint source discharge, in terms of relocation or alteration, in order to comply with these special conditions, is allowed and does not constitute a new discharge.

e. Non-storm water discharges from nonpoint sources (those not subject to an NPDES Permit) are prohibited except as provided below:

(1) The term “non-storm water discharges” means any waste discharges that are not composed entirely of storm water.

(2) The following non-storm water discharges are allowed, provided that the discharges are essential for emergency response purposes, structural stability, slope stability, or occur naturally:

(i) Discharges associated with emergency fire fighting operations.

(ii) Foundation and footing drains.

(iii) Water from crawl space or basement pumps.

(iv) Hillside dewatering.

(v) Naturally occurring groundwater seepage via a storm drain.

(vi) Non-anthropogenic flows from a naturally occurring stream via a culvert or storm drain, as long as there are no contributions of anthropogenic runoff.

(3) Authorized non-storm water discharges shall not cause or contribute to a violation of the water quality objectives in Chapter II of the Ocean Plan nor alter natural ocean water quality in an ASBS.

f. At the San Clemente Island ASBS, discharges incidental to military training and research, development, test, and evaluation operations are allowed. Discharges incidental to underwater demolition and other in-water explosions are not allowed in the two military closure areas in the vicinity of Wilson Cove and Castle Rock. Discharges must not result in a violation of the water quality objectives, including the protection of the marine aquatic life beneficial use, anywhere in the ASBS.

g. At the San Nicolas Island and Begg Rock ASBS, discharges incidental to military research, development, testing, and evaluation of, and training with, guided missile and other weapons systems, fleet training exercises, small-scale amphibious warfare training, and special warfare training are allowed. Discharges incidental to underwater demolition and other in-water explosions are not allowed. Discharges must not result in a violation of the water quality objectives, including the protection of the marine aquatic life beneficial use, anywhere in the ASBS.

h. All other nonpoint source discharges not specifically authorized above are prohibited.

2. Planning and Reporting

- a. The nonpoint source discharger shall develop an ASBS Pollution Prevention Plan, including an implementation schedule, to address storm water runoff and any other nonpoint source discharges from its facilities. The ASBS Pollution Prevention Plan must be equivalent in contents to an ASBS Compliance Plan as described in I (A)(2) in this document. The ASBS Pollution Prevention Plan is subject to approval by the Executive Director of the State Water Board (statewide waivers or waste discharge requirements) or Executive Officer of the Regional Water Board (Regional Water Board waivers or waste discharge requirements).
- b. The ASBS Pollution Prevention Plan shall address storm water discharges (wet weather flows) and, in particular, describe how pollutant reductions in storm water runoff that are necessary to comply with these special conditions, will be achieved through Management Measures and associated Management Practices (Management Measures/Practices). Structural BMPs need not be installed if the discharger can document to the satisfaction of the State Water Board Executive Director or Regional Water Board Executive Officer that such installation would pose a threat to health or safety. Management Measures to control storm water runoff during a design storm shall achieve on average the following target levels:
 - (1) Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan; or
 - (2) A 90% reduction in pollutant loading during storm events, for the applicant's total discharges.

The baseline for these determinations is the effective date of the Exception, except for those structural BMPs installed between January 1, 2005 and adoption of these Special Protections, and the reductions must be achieved and documented within six (6) years of the effective date.

- c. If the results of the receiving water monitoring described in IV.B. of these special conditions indicate that the storm water runoff or other nonpoint source pollution is causing or contributing to an alteration of natural ocean water quality in the ASBS, the discharger shall submit a report to the State Water Board and the Regional Water Board within 30 days of receiving the results.
 - (1) The report shall identify the constituents that alter natural water quality and the sources of these constituents.
 - (2) The report shall describe Management Measures/Practices that are currently being implemented, Management Measures/Practices that are identified in the ASBS Pollution Prevention Plan for future implementation, and any additional Management Measures/Practices that may be added to the Pollution Prevention Plan to address the alteration of natural water quality. The report shall include a new or modified implementation schedule for the Management Measures/Practices.
 - (3) Within 30 days of the approval of the report by the State Water Board Executive Director (statewide waivers or waste discharge requirements) or Executive Officer of the Regional Water Board (Regional Water Board waivers or waste discharge requirements), the discharger shall revise its ASBS Pollution Prevention Plan to incorporate any new or modified Management Measures/Practices that have been or

will be implemented, the implementation schedule, and any additional monitoring required.

(4) As long as the discharger has complied with the procedures described above and is implementing the revised ASBS Pollution Prevention Plan, the discharger does not have to repeat the same procedure for continuing or recurring exceedances of natural water quality conditions due to the same constituent.

(5) The requirements of this section are in addition to the terms, prohibitions, and conditions contained in these Special Protections.

3. Compliance Schedule

- a. On the effective date of the Exception, all non-authorized non-storm water discharges (e.g., dry weather flow) are effectively prohibited.
- b. Within eighteen (18) months from the effective date of the Exception, the dischargers shall submit a draft written ASBS Pollution Prevention Plan to the State Water Board Executive Director (statewide waivers or waste discharge requirements) or Executive Officer of the Regional Water Board (Regional Water Board waivers or waste discharge requirements) that describes its strategy to comply with these special conditions, including the requirement to maintain natural ocean water quality in the affected ASBS. The Pollution Prevention Plan shall include a description of appropriate non-structural controls and a time schedule to implement structural controls to comply with these special conditions for inclusion in the discharger's Pollution Prevention Plan. The final ASBS Pollution Prevention Plan, including a description and final schedule for structural controls based on the results of runoff and receiving water monitoring, must be submitted within thirty (30) months from the effective date of the Exception.
- c. Within 18 months of the effective date of the Exception, any non-structural controls that are necessary to comply with these Special Protections shall be implemented.
- d. Within six (6) years of the effective date of the Exception, any structural controls identified in the ASBS Pollution Prevention Plan that are necessary to comply with these special conditions shall be operational.
- e. Within six (6) years of the effective date of the Exception, all dischargers must comply with the requirement that their discharges into the affected ASBS maintain natural ocean water quality. If the initial results of post-storm receiving water quality testing indicate levels higher than the 85th percentile threshold of reference water quality data and the pre-storm receiving water levels, then the discharger must re-sample the receiving water pre- and post-storm. If after re-sampling the post-storm levels are still higher than the 85th percentile threshold of reference water quality data and the pre-storm receiving water levels, for any constituent, then natural ocean water quality is exceeded. See attached Flowchart.
- f. The Executive Director of the State Water Board (statewide waivers or waste discharge requirements) or Executive Officer of the Regional Water Board (Regional Water Board waivers or waste discharge requirements) may only authorize additional time to comply with the special conditions d. and e., above if good cause exists to do so. Good cause means a physical impossibility or lack of funding.

If a discharger claims physical impossibility, it shall notify the Board in writing within thirty (30) days of the date that the discharger first knew of the event or circumstance that caused or would cause it to fail to meet the deadline in (d.) or (e.). The notice shall describe the reason for the noncompliance or anticipated noncompliance and specifically refer to this Section of this Exception. It shall describe the anticipated length of time the delay in compliance may persist, the cause or causes of the delay as well as measures to minimize the impact of the delay on water quality, the measures taken or to be taken by the discharger to prevent or minimize the delay, the schedule by which the measures will be implemented, and the anticipated date of compliance. The discharger shall adopt all reasonable measures to avoid and minimize such delays and their impact on water quality.

The discharger may request an extension of time for compliance based on lack of funding. The request for an extension shall require:

1. a demonstration that the discharger has made timely and complete applications for all available bond and grant funding, and either no bond or grant funding is available, or bond and/or grant funding is inadequate; or
2. for governmental agencies, a demonstration and documentation of a good faith effort to acquire funding through that agency's budgetary process, and a demonstration that funding was unavailable or inadequate.

II. ADDITIONAL REQUIREMENTS FOR PARKS AND RECREATION FACILITIES

In addition to the provisions in Section I (A) or I (B), respectively, a discharger with parks and recreation facilities shall comply with the following:

- A. The discharger shall include a section in an ASBS Compliance Plan (for NPDES dischargers) or an ASBS Pollution Prevention Plan (for nonpoint source dischargers) to address storm water runoff from parks and recreation facilities.
 1. The plan shall identify all pollutant sources, including sediment sources, which may result in waste entering storm water runoff. Pollutant sources include, but are not limited to, roadside rest areas and vistas, picnic areas, campgrounds, trash receptacles, maintenance facilities, park personnel housing, portable toilets, leach fields, fuel tanks, roads, piers, and boat launch facilities.
 2. The plan shall describe BMPs or Management Measures/Practices that will be implemented to control soil erosion (both temporary and permanent erosion controls) and reduce or eliminate pollutants in storm water runoff in order to achieve and maintain natural water quality conditions in the affected ASBS. The plan shall include BMPs or Management Measures/Practices to ensure that trails and culverts are maintained to prevent erosion and minimize waste discharges to ASBS.
 3. The plan shall include BMPs or Management Measures/Practices to prevent the discharge of pesticides or other chemicals, including agricultural chemicals, in storm water runoff to the affected ASBS.

4. The plan shall include BMPs or Management Measures/Practices that address public education and outreach. The goal of these BMPs or Management Measures/Practices is to ensure that the public is adequately informed that waste discharges to the affected ASBS are prohibited or limited by special conditions in these Special Protections. The BMPs or Management Measures/Practices shall include signage at camping, picnicking, beach and roadside parking areas, and visitor centers, or other appropriate measures, which notify the public of any applicable requirements of these Special Protections and identify the ASBS boundaries.
 5. The plan shall include BMPs or Management Measures/Practices that address the prohibition against the discharge of trash to ASBS. The BMPs or Management Measures/Practices shall include measures to ensure that adequate trash receptacles are available for public use at visitor facilities, including parking areas, and that the receptacles are adequately maintained to prevent trash discharges into the ASBS. Appropriate measures include covering trash receptacles to prevent trash from being wind blown and periodically emptying the receptacles to prevent overflows.
 6. The plan shall include BMPs or Management Measures/Practices to address runoff from parking areas and other developed features to ensure that the runoff does not alter natural water quality in the affected ASBS. BMPs or Management Measures/Practices shall include measures to reduce pollutant loading in runoff to the ASBS through installation of natural area buffers (LID), treatment, or other appropriate measures.
- B. Maintenance and repair of park and recreation facilities must not result in waste discharges to the ASBS. The practice of road oiling must be minimized or eliminated, and must not result in waste discharges to the ASBS.

III. ADDITIONAL REQUIREMENTS – WATERFRONT AND MARINE OPERATIONS

In addition to the provisions in Section I (A) or I (B), respectively, a discharger with waterfront and marine operations shall comply with the following:

- A. For discharges related to waterfront and marine operations, the discharger shall develop a Waterfront and Marine Operations Management Plan (Waterfront Plan). This plan shall contain appropriate Management Measures/Practices to address nonpoint source pollutant discharges to the affected ASBS.
 1. The Waterfront Plan shall contain appropriate Management Measures/Practices for any waste discharges associated with the operation and maintenance of vessels, moorings, piers, launch ramps, and cleaning stations in order to ensure that beneficial uses are protected and natural water quality is maintained in the affected ASBS.
 2. For discharges from marinas and recreational boating activities, the Waterfront Plan shall include appropriate Management Measures, described in The Plan for California's Nonpoint Source Pollution Control Program, for marinas and recreational boating, or equivalent practices, to ensure that nonpoint source pollutant discharges do not alter natural water quality in the affected ASBS.
 3. The Waterfront Plan shall include Management Practices to address public education and outreach to ensure that the public is adequately informed that waste discharges to the affected ASBS are prohibited or limited by special conditions in these Special

Protections. The management practices shall include appropriate signage, or similar measures, to inform the public of the ASBS restrictions and to identify the ASBS boundaries.

4. The Waterfront Plan shall include Management Practices to address the prohibition against trash discharges to ASBS. The Management Practices shall include the provision of adequate trash receptacles for marine recreation areas, including parking areas, launch ramps, and docks. The plan shall also include appropriate Management Practices to ensure that the receptacles are adequately maintained and secured in order to prevent trash discharges into the ASBS. Appropriate Management Practices include covering the trash receptacles to prevent trash from being windblown, staking or securing the trash receptacles so they don't tip over, and periodically emptying the receptacles to prevent overflow.
 5. The discharger shall submit its Waterfront Plan to the by the State Water Board Executive Director (statewide waivers or waste discharge requirements) or Executive Officer of the Regional Water Board (Regional Water Board waivers or waste discharge requirements) within six months of the effective date of these special conditions. The Waterfront Plan is subject to approval by the State Water Board Executive Director or the Regional Water Board Executive Officer, as appropriate. The plan must be fully implemented within 18 months of the effective date of the Exception.
- B. The discharge of chlorine, soaps, petroleum, other chemical contaminants, trash, fish offal, or human sewage to ASBS is prohibited. Sinks and fish cleaning stations are point source discharges of wastes and are prohibited from discharging into ASBS. Anthropogenic accumulations of discarded fouling organisms on the sea floor must be minimized.
- C. Limited-term activities, such as the repair, renovation, or maintenance of waterfront facilities, including, but not limited to, piers, docks, moorings, and breakwaters, are authorized only in accordance with Chapter III.E.2 of the Ocean Plan.
- D. If the discharger anticipates that the discharger will fail to fully implement the approved Waterfront Plan within the 18 month deadline, the discharger shall submit a technical report as soon as practicable to the State Water Board Executive Director or the Regional Water Board Executive Officer, as appropriate. The technical report shall contain reasons for failing to meet the deadline and propose a revised schedule to fully implement the plan.
- E. The State Water Board or the Regional Water Board may, for good cause, authorize additional time to comply with the Waterfront Plan. Good cause means a physical impossibility or lack of funding.

If a discharger claims physical impossibility, it shall notify the Board in writing within thirty (30) days of the date that the discharger first knew of the event or circumstance that caused or would cause it to fail to meet the deadline in Section III.A.5. The notice shall describe the reason for the noncompliance or anticipated noncompliance and specifically refer to this Section of this Exception. It shall describe the anticipated length of time the delay in compliance may persist, the cause or causes of the delay as well as measures to minimize the impact of the delay on water quality, the measures taken or to be taken by the

discharger to prevent or minimize the delay, the schedule by which the measures will be implemented, and the anticipated date of compliance. The discharger shall adopt all reasonable measures to avoid and minimize such delays and their impact on water quality. The discharger may request an extension of time for compliance based on lack of funding. The request for an extension shall require:

1. a demonstration of significant hardship by showing that the discharger has made timely and complete applications for all available bond and grant funding, and either no bond or grant funding is available, or bond and/or grant funding is inadequate.
2. for governmental agencies, a demonstration and documentation of a good faith effort to acquire funding through that agency's budgetary process, and a demonstration that funding was unavailable or inadequate.

IV. MONITORING REQUIREMENTS

Monitoring is mandatory for all dischargers to assure compliance with the Ocean Plan. Monitoring requirements include both: (A) core discharge monitoring, and (B) ocean receiving water monitoring. The State and Regional Water Boards must approve sampling site locations and any adjustments to the monitoring programs. All ocean receiving water and reference area monitoring must be comparable with the Water Boards' Surface Water Ambient Monitoring Program (SWAMP).

Safety concerns: Sample locations and sampling periods must be determined considering safety issues. Sampling may be postponed upon notification to the State and Regional Water Boards if hazardous conditions prevail.

Analytical Chemistry Methods: All constituents must be analyzed using the lowest minimum detection limits comparable to the Ocean Plan water quality objectives. For metal analysis, all samples, including storm water effluent, reference samples, and ocean receiving water samples, must be analyzed by the approved analytical method with the lowest minimum detection limits (currently Inductively Coupled Plasma/Mass Spectrometry) described in the Ocean Plan.

A. CORE DISCHARGE MONITORING PROGRAM

1. General sampling requirements for timing and storm size:

Runoff must be collected during a storm event that is greater than 0.1 inch and generates runoff, and at least 72 hours from the previously measurable storm event. Runoff samples shall be collected during the same storm and at approximately the same time when post-storm receiving water is sampled, and analyzed for the same constituents as receiving water and reference site samples (see section IV B) as described below.

2. Runoff flow measurements

- a. For municipal/industrial storm water outfalls in existence as of December 31, 2007, 18 inches (457mm) or greater in diameter/width (including multiple outfall pipes in combination having a width of 18 inches, runoff flows must be measured or calculated, using a method acceptable to and approved by the State and Regional Water Boards.

b. This will be reported annually for each precipitation season to the State and Regional Water Boards.

3. Runoff samples – storm events

a. For outfalls equal to or greater than 18 inches (0.46m) in diameter or width:

- (1) samples of storm water runoff shall be collected during the same storm as receiving water samples and analyzed for oil and grease, total suspended solids, and, within the range of the southern sea otter indicator bacteria or some other measure of fecal contamination; and
- (2) samples of storm water runoff shall be collected and analyzed for critical life stage chronic toxicity (one invertebrate or algal species) at least once during each storm season when receiving water is sampled in the ASBS.
- (3) If an applicant has no outfall greater than 36 inches, then storm water runoff from the applicant's largest outfall shall be further collected during the same storm as receiving water samples and analyzed for Ocean Plan Table B metals for protection of marine life, Ocean Plan polynuclear aromatic hydrocarbons (PAHs), current use pesticides (pyrethroids and OP pesticides), and nutrients (ammonia, nitrate and phosphates).

b. For outfalls equal to or greater than 36 inches (0.91m) in diameter or width:

- (1) samples of storm water runoff shall be collected during the same storm as receiving water samples and analyzed for oil and grease, total suspended solids, and, within the range of the southern sea otter indicator bacteria or some other measure of fecal contamination; and
- (2) samples of storm water runoff shall be further collected during the same storm as receiving water samples and analyzed for Ocean Plan Table B metals for protection of marine life, Ocean Plan polynuclear aromatic hydrocarbons (PAHs), current use pesticides (pyrethroids and OP pesticides), and nutrients (ammonia, nitrate and phosphates); and
- (3) samples of storm water runoff shall be collected and analyzed for critical life stage chronic toxicity (one invertebrate or algal species) at least once during each storm season when receiving water is sampled in the ASBS.

c. For an applicant not participating in a regional monitoring program [see below in Section IV (B)] in addition to (a.) and (b.) above, a minimum of the two largest outfalls or 20 percent of the larger outfalls, whichever is greater, shall be sampled (flow weighted composite samples) at least three times annually during wet weather (storm event) and analyzed for all Ocean Plan Table A constituents, Table B constituents for marine aquatic life protection (except for toxicity, only chronic toxicity for three species shall be required), DDT, PCBs, Ocean Plan PAHs, OP pesticides, pyrethroids, nitrates, phosphates, and Ocean Plan indicator bacteria. For parties discharging to ASBS in

more than one Regional Water Board region, at a minimum, one (the largest) such discharge shall be sampled annually in each Region.

4. The Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (Regional Water Board permits) may reduce or suspend core monitoring once the storm runoff is fully characterized. This determination may be made at any point after the discharge is fully characterized, but is best made after the monitoring results from the first permit cycle are assessed.

B. Ocean Receiving Water and Reference Area Monitoring Program

In addition to performing the Core Discharge Monitoring Program in Section II.A above, all applicants having authorized discharges must perform ocean receiving water monitoring. In order to fulfill the requirements for monitoring the physical, chemical, and biological characteristics of the ocean receiving waters within their ASBS, dischargers may choose either (1) an individual monitoring program, or (2) participation in a regional integrated monitoring program.

1. Individual Monitoring Program: The requirements listed below are for those dischargers who elect to perform an individual monitoring program to fulfill the requirements for monitoring the physical, chemical, and biological characteristics of the ocean receiving waters within the affected ASBS. In addition to Core Discharge Monitoring, the following additional monitoring requirements shall be met:
 - a. Three times annually, during wet weather (storm events), the receiving water at the point of discharge from the outfalls described in section (IV)(A)(3)(c) above shall be sampled and analyzed for Ocean Plan Table A constituents, Table B constituents for marine aquatic life, DDT, PCBs, Ocean Plan PAHs, OP pesticides, pyrethroids, nitrates, phosphates, salinity, chronic toxicity (three species), and Ocean Plan indicator bacteria.

The sample location for the ocean receiving water shall be in the surf zone at the point of discharges; this must be at the same location where storm water runoff is sampled. Receiving water shall be sampled prior to (pre-storm) and during (or immediately after) the same storm (post storm). Post storm sampling shall be during the same storm and at approximately the same time as when the runoff is sampled. Reference water quality shall also be sampled three times annually and analyzed for the same constituents pre-storm and post-storm, during the same storm seasons when receiving water is sampled. Reference stations will be determined by the State Water Board's Division of Water Quality and the applicable Regional Water Board(s).

- b. Sediment sampling shall occur at least three times during every five (5) year period. The subtidal sediment (sand or finer, if present) at the discharge shall be sampled and analyzed for Ocean Plan Table B constituents for marine aquatic life, DDT, PCBs, PAHs, pyrethroids, and OP pesticides. For sediment toxicity testing, only an acute toxicity test using the amphipod *Eohaustorius estuarius* must be performed.
 - c. A quantitative survey of intertidal benthic marine life shall be performed at the discharge and at a reference site. The survey shall be performed at least once every five (5) year period. The survey design is subject to approval by the Regional Water Board and the State Water Board's Division of Water Quality. The results of the survey shall be

completed and submitted to the State Water Board and Regional Water Board at least six months prior to the end of the permit cycle.

- d. Once during each five (5) year period, a bioaccumulation study shall be conducted to determine the concentrations of metals and synthetic organic pollutants at representative discharge sites and at representative reference sites. The study design is subject to approval by the Regional Water Board and the State Water Board's Division of Water Quality. The bioaccumulation study may include California mussels (*Mytilus californianus*) and/or sand crabs (*Emerita analoga* or *Blepharipoda occidentalis*). Based on the study results, the Regional Water Board and the State Water Board's Division of Water Quality, may adjust the study design in subsequent permits, or add or modify additional test organisms (such as shore crabs or fish), or modify the study design appropriate for the area and best available sensitive measures of contaminant exposure.
 - e. Marine Debris: Representative quantitative observations for trash by type and source shall be performed along the coast of the ASBS within the influence of the discharger's outfalls. The design, including locations and frequency, of the marine debris observations is subject to approval by the Regional Water Board and State Water Board's Division of Water Quality.
 - f. The monitoring requirements of the Individual Monitoring Program in this section are minimum requirements. After a minimum of one (1) year of continuous water quality monitoring of the discharges and ocean receiving waters, the Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (Regional Water Board permits) may require additional monitoring, or adjust, reduce or suspend receiving water and reference station monitoring. This determination may be made at any point after the discharge and receiving water is fully characterized, but is best made after the monitoring results from the first permit cycle are assessed.
2. Regional Integrated Monitoring Program: Dischargers may elect to participate in a regional integrated monitoring program, in lieu of an individual monitoring program, to fulfill the requirements for monitoring the physical, chemical, and biological characteristics of the ocean receiving waters within their ASBS. This regional approach shall characterize natural water quality, pre- and post-storm, in ocean reference areas near the mouths of identified open space watersheds and the effects of the discharges on natural water quality (physical, chemical, and toxicity) in the ASBS receiving waters, and should include benthic marine aquatic life and bioaccumulation components. The design of the ASBS stratum of a regional integrated monitoring program may deviate from the otherwise prescribed individual monitoring approach (in Section IV.B.1) if approved by the State Water Board's Division of Water Quality and the Regional Water Boards.
 - a. Ocean reference areas shall be located at the drainages of flowing watersheds with minimal development (in no instance more than 10% development), and shall not be located in CWA Section 303(d) listed waterbodies or have tributaries that are 303(d) listed. Reference areas shall be free of wastewater discharges and anthropogenic non- storm water runoff. A minimum of low threat storm runoff discharges (e.g. stream highway overpasses and campgrounds) may be allowed on a case-by-case basis. Reference areas shall be located in the same region as the ASBS receiving water monitoring occurs. The reference areas for each Region are subject to approval by the participants in the regional monitoring program and the State Water

Board's Division of Water Quality and the applicable Regional Water Board(s). A minimum of three ocean reference water samples must be collected from each station, each from a separate storm during the same storm season that receiving water is sampled. A minimum of one reference location shall be sampled for each ASBS receiving water site sampled per responsible party. For parties discharging to ASBS in more than one Regional Water Board region, at a minimum, one reference station and one receiving water station shall be sampled in each region.

- b. ASBS ocean receiving water must be sampled in the surf zone at the location where the runoff makes contact with ocean water (i.e. at "point zero"). Ocean receiving water stations must be representative of worst-case discharge conditions (i.e. co-located at a large drain greater than 36 inches, or if drains greater than 36 inches are not present in the ASBS then the largest drain greater than 18 inches.) Ocean receiving water stations are subject to approval by the participants in the regional monitoring program and the State Water Board's Division of Water Quality and the applicable Regional Water Board(s). A minimum of three ocean receiving water samples must be collected during each storm season from each station, each from a separate storm. A minimum of one receiving water location shall be sampled in each ASBS per responsible party in that ASBS. For parties discharging to ASBS in more than one Regional Water Board region, at a minimum, one reference station and one receiving water station shall be sampled in each region.
 - c. Reference and receiving water sampling shall commence during the first full storm season following the adoption of these special conditions, and post-storm samples shall be collected during the same storm event when storm water runoff is sampled. Sampling shall occur in a minimum of two storm seasons. For those ASBS dischargers that have already participated in the Southern California Bight 2008 ASBS regional monitoring effort, sampling may be limited to only one storm season.
 - d. Receiving water and reference samples shall be analyzed for the same constituents as storm water runoff samples. At a minimum, constituents to be sampled and analyzed in reference and discharge receiving waters must include oil and grease, total suspended solids, Ocean Plan Table B metals for protection of marine life, Ocean Plan PAHs, pyrethroids, OP pesticides, ammonia, nitrate, phosphates, and critical life stage chronic toxicity for three species. In addition, within the range of the southern sea otter, indicator bacteria or some other measure of fecal contamination shall be analyzed.
3. Waterfront and Marine Operations: In addition to the above requirements for ocean receiving water monitoring, additional monitoring must be performed for marinas and boat launch and pier facilities:
- a. For all marina or mooring field operators, in mooring fields with 10 or more occupied moorings, the ocean receiving water must be sampled for Ocean Plan indicator bacteria, residual chlorine, copper, zinc, grease and oil, methylene blue active substances (MBAS), and ammonia nitrogen.
 - (1) For mooring field operators opting for an individual monitoring program (Section IV.B.1 above), this sampling must occur weekly (on the weekend) from May through October.

- (2) For mooring field operators opting to participate in a regional integrated monitoring program (Section IV.B.2 above), this sampling must occur monthly from May through October on a high use weekend in each month. The Water Boards may allow a reduction in the frequency of sampling, through the regional monitoring program, after the first year of monitoring.
- b. For all mooring field operators, the subtidal sediment (sand or finer, if present) within mooring fields and below piers shall be sampled and analyzed for Ocean Plan Table B metals (for marine aquatic life beneficial use), acute toxicity, PAHs, and tributyltin. For sediment toxicity testing, only an acute toxicity test using the amphipod *Eohaustorius estuarius* must be performed. This sampling shall occur at least three times during a five (5) year period. For mooring field operators opting to participate in a regional integrated monitoring program, the Water Boards may allow a reduction in the frequency of sampling after the first sampling effort's results are assessed.

Glossary

At the point of discharge(s) – Means in the surf zone immediately where runoff from an outfall meets the ocean water (a.k.a., at point zero).

Areas of Special Biological Significance (ASBS) – Those areas designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable. All Areas of Special Biological Significance are also classified as a subset of State Water Quality Protection Areas.

Design storm – For purposes of these Special Protections, a design storm is defined as the volume of runoff produced from one inch of precipitation per day or, if this definition is inconsistent with the discharger's applicable storm water permit, then the design storm shall be the definition included in the discharger's applicable storm water permit.

Development – Relevant to reference monitoring sites, means urban, industrial, agricultural, grazing, mining, and timber harvesting land uses.

Higher threat discharges - Permitted storm drains discharging equal to or greater than 18 inches, industrial storm drains, agricultural runoff discharged through an MS4, discharges associated with waterfront and marina operations (e.g., piers, launch ramps, mooring fields, and associated vessel support activities, except for passive discharges defined below), and direct discharges associated with commercial or industrial activities to ASBS.

Low Impact Development (LID) – A sustainable practice that benefits water supply and contributes to water quality protection. Unlike traditional storm water management, which entails collecting and conveying storm water runoff through storm drains, pipes, or other conveyances to a centralized storm water facility, LID focuses on using site design and storm water management to maintain the site's pre-development runoff rates and volumes. The goal of LID is to mimic a site's predevelopment hydrology by using design techniques that infiltrate, filter, store, evaporate, and detain runoff close to the source of rainfall.

Marine Operations – Marinas or mooring fields that contain slips or mooring locations for 10 or more vessels.

Management Measure (MM) - Economically achievable measures for the control of the addition of pollutants from various classes of nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives. For example, in the "marinas and recreational boating" land- use category specified in the Plan for California's Nonpoint Source Pollution Control Program (NPS Program Plan) (SWRCB, 1999), "boat cleaning and maintenance" is considered a MM or the source of a specific class or type of NPS pollution.

Management Practice (MP) - The practices (e.g., structural, non-structural, operational, or other alternatives) that can be used either individually or in combination to address a specific MM class or classes of NPS pollution. For example, for the “boat cleaning and maintenance” MM, specific MPs can include, but are not limited to, methods for the selection of environmentally sensitive hull paints or methods for cleaning/removal of hull copper anti-fouling paints.

Municipal Separate Storm Sewer System (MS4) – A municipally-owned storm sewer system regulated under the Phase I or Phase II storm water program implemented in compliance with Clean Water Act section 402(p). Note that an MS4 program’s boundaries are not necessarily congruent with the permittee’s political boundaries.

Natural Ocean Water Quality - The water quality (based on selected physical, chemical and biological characteristics) that is required to sustain marine ecosystems, and which is without apparent human influence, *i.e.*, an absence of significant amounts of: (a) man-made constituents (e.g., DDT); (b) other chemical (e.g., trace metals), physical (temperature/thermal pollution, sediment burial), and biological (e.g., bacteria) constituents at concentrations that have been elevated due to man’s activities above those resulting from the naturally occurring processes that affect the area in question; and (c) non-indigenous biota (e.g., invasive algal bloom species) that have been introduced either deliberately or accidentally by man. Discharges “*shall not alter natural ocean water quality*” as determined by a comparison to the range of constituent concentrations in reference areas agreed upon via the regional monitoring program(s). If monitoring information indicates that *natural ocean water quality* is not maintained, but there is sufficient evidence that a discharge is not contributing to the alteration of natural water quality, then the Regional Water Board may make that determination. In this case, sufficient information must include runoff sample data that has equal or lower concentrations for the range of constituents at the applicable reference area(s).

Nonpoint source – Nonpoint pollution sources generally are sources that do not meet the definition of a point source. Nonpoint source pollution typically results from land runoff, precipitation, atmospheric deposition, agricultural drainage, marine/boating operations or hydrologic modification. Nonpoint sources, for purposes of these Special Protections, include discharges that are not required to be regulated under an NPDES permit.

Non-storm water discharge – Any runoff that is not the result of a precipitation event. This is often referred to as “dry weather flow.”

Non-structural control – A Best Management Practice that involves operational, maintenance, regulatory (e.g., ordinances) or educational activities designed to reduce or eliminate pollutants in runoff, and that are not structural controls (*i.e.* there are no physical structures involved).

Physical impossibility - Means any act of God, war, fire, earthquake, windstorm, flood or natural catastrophe; unexpected and unintended accidents not caused by discharger or its employees’ negligence; civil disturbance, vandalism, sabotage or terrorism; restraint by court order or public authority or agency; or action or non-action by, or inability to

obtain the necessary authorizations or approvals from any governmental agency other than the permittee.

Representative sites and monitoring procedures – Are to be proposed by the discharger, with appropriate rationale, and subject to approval by Water Board staff.

Sheet-flow – Runoff that flows across land surfaces at a shallow depth relative to the cross-sectional width of the flow. These types of flow may or may not enter a storm drain system before discharge to receiving waters.

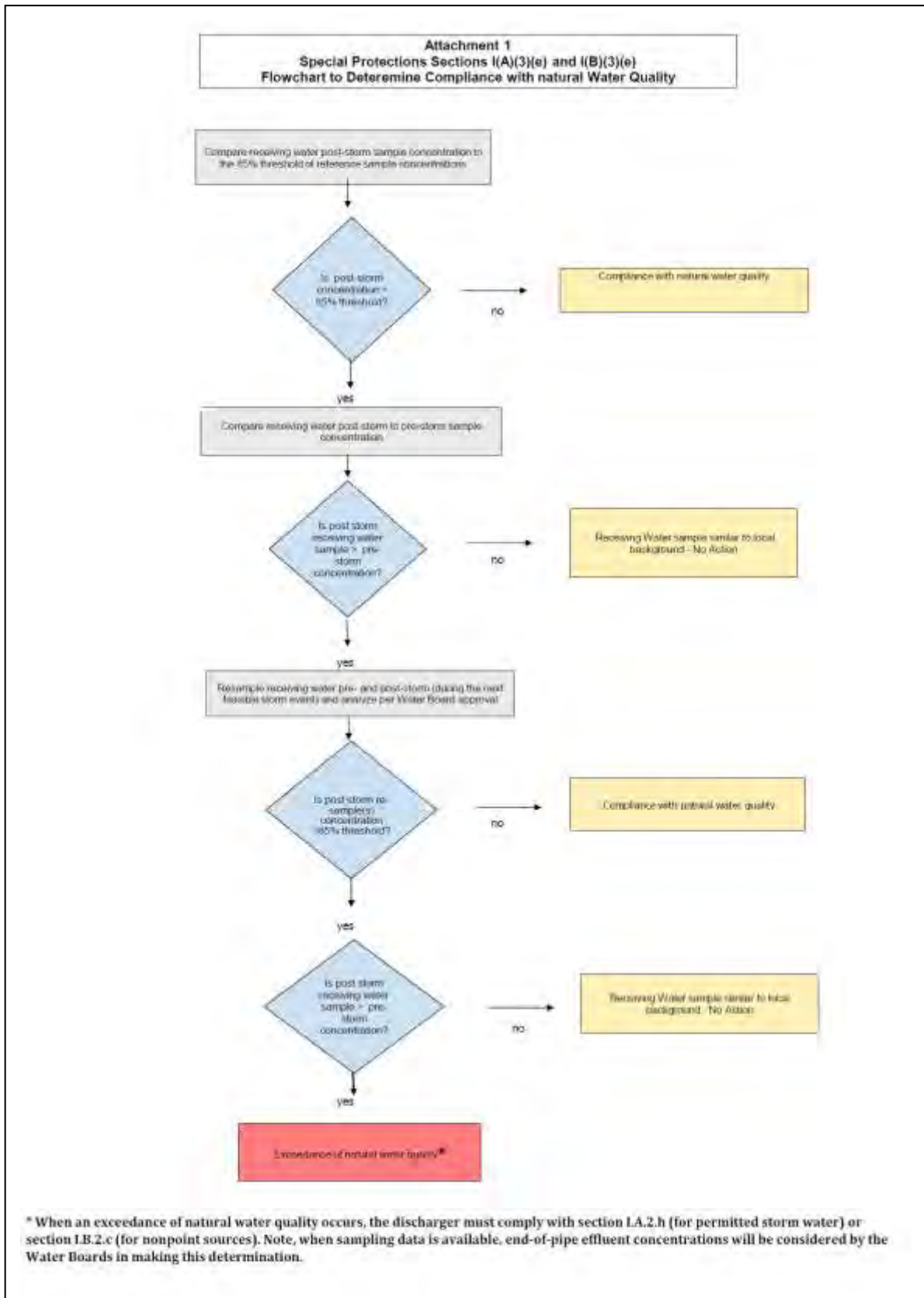
Storm Season – Also referred to as rainy season, means the months of the year from the onset of rainfall during autumn until the cessation of rainfall in the spring.

Structural control – A Best Management Practice that involves the installation of engineering solutions to the physical treatment or infiltration of runoff.

Surf Zone - The surf zone is defined as the submerged area between the breaking waves and the shoreline at any one time.

Surface Water Ambient Monitoring Program (SWAMP) comparable – Means that the monitoring program must 1) meet or exceed 2008 SWAMP Quality Assurance Program Management Plan (QAPP) Measurement Quality Objectives, or 2) have a Quality Assurance Project Plan that has been approved by SWAMP; in addition data must be formatted to match the database requirements of the SWAMP Information Management System. Adherence to the measurement quality objectives in the Southern California Bight 2008 ASBS Regional Monitoring Program QAPP and data base management comprises being SWAMP comparable.

Waterfront Operations - Piers, launch ramps, and cleaning stations in the water or on the adjacent shoreline.



ATTACHMENT B

STANDARD PERMIT PROVISIONS AND GENERAL PROVISIONS

1. Standard Permit Provisions

Code of Federal Regulations Title 40 Section 122.41 (40 CFR 122.41) includes conditions, or provisions, that apply to all National Pollutant Discharge Elimination System (NPDES) permits. Additional provisions applicable to NPDES permits are in 40 CFR 122.42. All applicable provisions in 40 CFR 122.41 and 40 CFR 122.42 must be incorporated into this Order and NPDES permit. The applicable 40 CFR 122.41 and 40 CFR 122.42 provisions are as follows:

a. DUTY TO COMPLY [40 CFR 122.41(a)]

The Copermittee must comply with all of the provisions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act (CWA) and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

- (1) The Copermittee must comply with effluent standards or prohibitions established under Section 307(a) of the CWA for toxic pollutants and with standards for sewage sludge use or disposal established under Section 405(d) of the CWA within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if the permit has not yet been modified to incorporate the requirement. [40 CFR 122.41(a)(1)]
- (2) The CWA provides that any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the CWA, or any permit condition or limitation implementing any such sections in a permit issued under Section 402, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the CWA, is subject to a civil penalty not to exceed \$25,000 per day for each violation. The CWA provides that any person who *negligently* violates Section 301, 302, 306, 307, 308, 318, or 405 of the CWA, or any condition or limitation implementing any of such sections in a permit issued under Section 402 of the CWA, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the CWA, is subject to criminal penalties of \$2,500 to \$25,000 per day of violation, or imprisonment of not more than 1 year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or both. Any person who *knowingly* violates such sections, or such conditions or limitations is subject to criminal penalties of \$5,000 to \$50,000 per day of violation, or imprisonment for not more than 3 years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than \$100,000 per day of violation, or imprisonment of not more than 6 years, or both. Any person who knowingly violates Section 301, 302, 303, 306, 307, 308, 318 or 405 of the CWA, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the CWA, and who knows at that time that he thereby places another person in imminent

danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than \$500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in Section 309(c)(3)(B)(iii) of the CWA, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than \$1,000,000 and can be fined up to \$2,000,000 for second or subsequent convictions.

[40 CFR 122.41(a)(2)]

- (3) Any person may be assessed an administrative penalty by the San Diego Regional Water Quality Control Board (San Diego Water Board), State Water Resources Control Board (State Water Board), or United States Environmental Protection Agency (USEPA) for violating Section 301, 302, 306, 307, 308, 318 or 405 of the CWA, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act. Administrative penalties for Class I violations are not to exceed \$10,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed \$25,000. Penalties for Class II violations are not to exceed \$10,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed \$125,000.

[40 CFR 122.41(a)(3)]

b. DUTY TO REAPPLY [40 CFR 122.41(b)]

If a Copermittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the Copermittee must apply for and obtain a new permit.

c. NEED TO HALT OR REDUCE ACTIVITY NOT A DEFENSE [40 CFR 122.41(c)]

It shall not be a defense for a Copermittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

d. DUTY TO MITIGATE [40 CFR 122.41(d)]

The Copermittee must take all reasonable steps to minimize or prevent any discharge or prevent any discharge or sludge use or disposal in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment.

e. PROPER OPERATION AND MAINTENANCE [40 CFR 122.41(e)]

The Copermittee must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Copermittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems that are installed by a Copermittee only when the operation is necessary to achieve compliance with the conditions of this permit.

f. PERMIT ACTIONS [40 CFR 122.41(f)]

This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the Copermittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

g. PROPERTY RIGHTS [40 CFR 122.41(g)]

This permit does not convey any property rights of any sort, or any exclusive privilege.

h. DUTY TO PROVIDE INFORMATION [40 CFR 122.41(h)]

The Copermittee must furnish to the San Diego Water Board, State Water Board, or USEPA within a reasonable time, any information which the San Diego Water Board, State Water Board, or USPEA may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The Copermittee must also furnish to the San Diego Water Board, State Water Board, or USPEA upon request, copies of records required to be kept by this permit.

i. INSPECTION AND ENTRY [40 CFR 122.41(i)]

The Copermittee must allow the San Diego Water Board, State Water Board, USEPA, and/or their authorized representative (including an authorized contractor acting as their representative), upon presentation of credentials and other documents as may be required by law, to:

- (1) Enter upon the Copermittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit; [40 CFR 122.41(i)(1)]
- (2) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit; [40 CFR 122.41(i)(2)]
- (3) Inspect and photograph at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; [40 CFR 122.41(i)(3)] and
- (4) Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the CWA, any substances or parameters at any location. [40 CFR 122.41(i)(4)]

j. MONITORING AND RECORDS [40 CFR 122.41(j)]

- (1) Samples and measurements taken for the purpose of monitoring must be representative of the monitored activity. [40 CFR 122.41(j)(1)]
- (2) Except for records of monitoring information required by this permit related to the Copermittee's sewage sludge use and disposal activities, which shall be retained for

a period of at least five (5) years (or longer as required by 40 CFR Part 503), the Copermittee must retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three (3) years from the date of the sample, measurement, report or application. This period may be extended by request of the San Diego Water Board at any time. [40 CFR 122.41(j)(2)]

- (3) Records for monitoring information must include: [40 CFR 122.41(j)(3)]
- (a) The date, exact place, and time of sampling or measurements; [40 CFR 122.41(j)(3)(i)]
 - (b) The individual(s) who performed the sampling or measurements; [40 CFR 122.41(j)(3)(ii)]
 - (c) The date(s) analyses were performed; [40 CFR 122.41(j)(3)(iii)]
 - (d) The individual(s) who performed the analyses; [40 CFR 122.41(j)(3)(iv)]
 - (e) The analytical techniques or methods used; [40 CFR 122.41(j)(3)(v)] and
 - (f) The results of such analyses. [40 CFR 122.41(j)(3)(vi)]
- (4) Monitoring must be conducted according to test procedures under 40 CFR Part 136 unless another method is required under 40 CFR Subchapters N or O. [40 CFR 122.41(j)(4)]

In the case of pollutants for which there are no approved methods under 40 CFR Part 136 or otherwise required under 40 CFR Subchapters N and O, monitoring must be conducted according to a test procedure specified in the permit for such pollutants. [40 CFR 122.44(i)(1)(iv)]

- (5) The CWA provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or both. [40 CFR 122.41(j)(5)]

k. SIGNATORY REQUIREMENT [40 CFR 122.41(k)]

- (1) All applications, reports, or information submitted to the San Diego Water Board, State Water Board, or USEPA must be signed and certified. (See 40 CFR 122.22) [40 CFR 122.41(k)(1)]
- (a) *For a municipality, State, Federal, or other public agency.* [All applications must be signed] by either a principal executive officer or ranking elected official. [40 CFR 122.22(a)(3)]
 - (b) All reports required by permits, and other information requested by the San Diego Water Board, State Water Board, or USEPA must be signed by a person described in paragraph (a) of this section, or by a duly authorized

representative of that person. A person is a duly authorized representative only if: [40 CFR 122.22(b)]

- (i) The authorization is made in writing by a person described in paragraph (a) of this section; [40 CFR 122.22(b)(1)]
- (ii) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company, (A duly authorized representative may thus be either a named individual or any individual occupying a named position.) [40 CFR 122.22(b)(2)] and,
- (iii) The written authorization is submitted to the San Diego Water Board and State Water Board. [40 CFR 122.22(b)(3)]

(c) *Changes to authorization.* If an authorization under paragraph (b) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph (b) of this section must be submitted to the San Diego Water Board prior to or together with any reports, information, or applications to be signed by an authorized representative. [40 CFR 122.22(c)]

(d) *Certification.* Any person signing a document under paragraph (a) or (b) of this section shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations." [40 CFR 122.22(d)]

(2) The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both. [40 CFR 122.41(k)(2)]

I. REPORTING REQUIREMENTS [40 CFR 122.41(l)]

(1) *Planned changes.* The Copermittee must give notice to the San Diego Water Board as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when: [40 CFR 122.41(l)(1)]

- (a) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in 40 CFR 122.29(b); [40 CFR 122.41(l)(1)(i)] or

- (b) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under 40 CFR 122.42(a)(1).
[40 CFR 122.41(l)(1)(ii)]
 - (c) The alteration or addition results in a significant change in the Copermitttee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan. [40 CFR 122.41(l)(1)(iii)]
- (2) *Anticipated noncompliance.* The Copermitttee must give advance notice to the San Diego Water Board or State Water Board of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.
[40 CFR 122.41(l)(2)]
- (3) *Transfers.* This permit is not transferable to any person except after notice to the San Diego Water Board. The San Diego Water Board may require modification or revocation and reissuance of the permit to change the name of the Copermitttee and incorporate such other requirements as may be necessary under the CWA.
[40 CFR 122.41(l)(3)]
- (4) *Monitoring reports.* Monitoring results must be reported at the intervals specified elsewhere in this permit. [40 CFR 122.41(l)(4)]
 - (a) Monitoring results must be reported on a Discharge Monitoring Report (DMR) form or forms provided or specified by the San Diego Water Board or State Water Board for reporting results of monitoring of sludge use or disposal practices. [40 CFR 122.41(l)(4)(i)]
 - (b) If the Copermitttee monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR Part 136 or another method required for an industry-specific waste stream under 40 CFR Subchapters N or O, the results of this monitoring must be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the San Diego Water Board or State Water Board.
[40 CFR 122.41(l)(4)(ii)]
 - (c) Calculations for all limitations which require averaging of measurements must utilize an arithmetic mean unless otherwise specified in the permit.
[40 CFR 122.41(l)(4)(iii)]
- (5) *Compliance schedules.* Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit must be submitted no later than 14 days following each schedule date. [40 CFR 122.41(l)(5)]

(6) *Twenty-four hour reporting.*

- (a) The Copermittee must report any noncompliance that may endanger health or the environment. Any information must be provided orally within 24 hours from the time the Copermittee becomes aware of the circumstances. A written submission must also be provided within five (5) days of the time the Copermittee becomes aware of the circumstances. The written submission must contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. [40 CFR 122.41(l)(6)(i)]
- (b) The following must be included as information which must be reported within 24 hours under this paragraph: [40 CFR 122.41(l)(6)(ii)]
 - (i) Any unanticipated bypass that exceeds any effluent limitation in the permit (See 40 CFR 122.41(g)). [40 CFR 122.41(l)(6)(ii)(A)]
 - (ii) Any upset which exceeds any effluent limitation in the permit. [40 CFR 122.41(l)(6)(ii)(B)] and,
 - (iii) Violation of a maximum daily discharge limitation for any of the pollutants listed by the San Diego Water Board in the permit to be reported within 24 hours. (See 40 CFR 122.44(g)) [40 CFR 122.41(l)(6)(ii)(C)]
- (c) The San Diego Water Board may waive the above-required written report on a case-by-case basis if the oral report has been received within 24 hours. [40 CFR 122.41(l)(6)(iii)]

(7) *Other noncompliance.* The Copermittee must report all instances of noncompliance not reported in accordance with the standard provisions required under 40 CFR 122.41(l)(4), (5), and (6), at the time monitoring reports are submitted. The reports must contain the information listed in the standard provisions required under 40 CFR 122.41(l)(6). [40 CFR 122.41(l)(7)]

(8) *Other information.* When the Copermittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the San Diego Water Board, State Water Board, or USEPA, the Copermittee must promptly submit such facts or information. [40 CFR 122.41(l)(8)]

m. BYPASS [40 CFR 122.41(m)]

(1) *Definitions.*

- (a) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility. [40 CFR 122.41(m)(1)(i)] or
- (b) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or

substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

[40 CFR 122.41(m)(1)(ii)]

- (2) *Bypass not exceeding limitations.* The Copermittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the standard provisions required under 40 CFR 122.41(m)(3) and (4).

[40 CFR 122.41(m)(2)]

- (3) *Notice.*

- (a) *Anticipated bypass.* If the Copermittee knows in advance of the need for a bypass, it must submit a notice, if possible at least ten days before the date of the bypass. [40 CFR 122.41(m)(3)(i)] or

- (b) *Unanticipated bypass.* The Copermittee must submit notice of an unanticipated bypass in accordance with the standard provisions required under 40 CFR 122.41(l)(6) (24-hour notice).

[40 CFR 122.41(m)(3)(ii)]

- (4) *Prohibition of Bypass.*

- (a) Bypass is prohibited, and the San Diego Water Board may take enforcement action against a Copermittee for bypass, unless:

[40 CFR 122.41(m)(4)(i)]

- (i) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; [40 CFR 122.41(m)(4)(i)(A)]

- (ii) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance;

[40 CFR 122.41(m)(4)(i)(B)] and,

- (iii) The Copermittee submitted notice in accordance with the standard provisions required under 40 CFR 122.41(m)(3).

[40 CFR 122.41(m)(4)(i)(C)]

- (b) The San Diego Water Board may approve an anticipated bypass, after considering its adverse effects, if the San Diego Water Board determines that it will meet the three conditions listed above.

[40 CFR 122.41(m)(4)(ii)]

n. UPSET [40 CFR 122.41(n)]

- (1) *Definition.* "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because

of factors beyond the reasonable control of the Copermittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation. [40 CFR 122.41(n)(1)]

- (2) *Effect of an upset.* An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the standard provisions required under 40 CFR 122.41(n)(3) are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review. [40 CFR 122.41(n)(2)]
- (3) *Conditions necessary for a demonstration of upset.* A Copermittee who wishes to establish the affirmative defense of upset must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
[40 CFR 122.41(n)(3)]
 - (a) An upset occurred and that the Copermittee can identify the cause(s) of the upset; [40 CFR 122.41(n)(3)(i)]
 - (b) The permitted facility was at the time being properly operated;
[40 CFR 122.41(n)(3)(ii)] and
 - (c) The Copermittee submitted notice of the upset in accordance with the standard provisions required under 40 CFR 122.41(l)(6)(ii)(B) (24-hour notice).
[40 CFR 122.41(n)(3)(iii)]
 - (d) The Copermittee complied with any remedial measures pursuant to the standard provisions required under 40 CFR 122.41(d).
[40 CFR 122.41(n)(3)(iii)]
- (4) *Burden of proof.* In any enforcement proceeding, the Copermittee seeking to establish the occurrence of an upset has the burden of proof.
[40 CFR 122.41(n)(4)]

o. STANDARD PERMIT PROVISIONS FOR MUNICIPAL SEPARATE STORM SEWER SYSTEMS
[40 CFR 122.42(c)]

The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the San Diego Water Board or State Water Board under 40 CFR 122.26(a)(1)(v) must submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report must include:

- (1) The status of implementing the components of the storm water management program that are established as permit conditions; [40 CFR 122.42(c)(1)]
- (2) Proposed changes to the storm water management programs that are established as permit conditions. Such proposed changes must be consistent with 40 CFR 122.26(d)(2)(iii); [40 CFR 122.42(c)(2)] and
- (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and (v);
[40 CFR 122.42(c)(3)]

- (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year; [40 CFR 122.42(c)(4)]
- (5) Annual expenditures and budget for year following each annual report; [40 CFR 122.42(c)(5)]
- (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; [40 CFR 122.42(c)(6)]
- (7) Identification of water quality improvements or degradation. [40 CFR 122.42(c)(7)]

p. STANDARD PERMIT PROVISIONS FOR STORM WATER DISCHARGES [40 CFR 122.42(d)]

The initial permits for discharges composed entirely of storm water issued pursuant to 40 CFR 122.26(e)(7) must require compliance with the conditions of the permit as expeditiously as practicable, but in no event later than three years after the date of issuance of the permit.

2. General Provisions

In addition to the standard provisions required to be incorporated into the Order and NPDES permit pursuant to 40 CFR 122.41 and 40 CFR 122.42, several other general provisions apply to this Order. The general provisions applicable to this Order and NPDES permit are as follows:

a. DISCHARGE OF WASTE IS A PRIVILEGE

No discharge of waste into the waters of the State, whether or not such discharge is made pursuant to waste discharge requirements, shall create a vested right to continue such discharge. All discharges of waste into waters of the State are privileges, not rights. [CWC Section 13263(g)]

b. DURATION OF ORDER AND NPDES PERMIT

- (1) *Effective date.* This Order supersedes Order No. R9-2007-0001 for the San Diego County Copermittees listed in Table 1a and became effective on June 27, 2013. This Order as amended by Order R9-2015-0001 supersedes Order No. R9-2009-0002 for the Orange County Copermittees listed in Table 1b and its amendments through Order No. R9-2015-0001 became effective April 1, 2015. This Order as amended by Order Nos. R9-2015-0001 and R9-2015-0100 supersedes Order No. R9-2010-0016 for the Riverside County Copermittees listed in Table 1c and its amendments through Order No. R9-2015-0100 became effective January 7, 2016.
- (2) *Expiration.* This Order and NPDES permit expires five years after June 27, 2013, its initial effective date. [40 CFR 122.46(a)]
- (3) *Continuation of expired order.* After this Order and NPDES permit expires, the terms and conditions of this Order and NPDES permit are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits (40 CFR 122.6) are complied with.

ATTACHMENT B: STANDARD PERMIT PROVISIONS AND GENERAL PROVISIONS

1. Standard Permit Provisions
2. General Provisions

c. AVAILABILITY

A copy of this Order must be kept at a readily accessible location and must be available to on-site personnel at all times.

d. CONFIDENTIALITY OF INFORMATION

Except as provided for in 40 CFR 122.7, no information or documents submitted in accordance with or in application for this Order will be considered confidential, and all such information and documents shall be available for review by the public at the San Diego Water Board office.

Claims of confidentiality for the following information will be denied:
[40 CFR 122.7(b)]

- (1) The name and address of any permit applicant or Copermittee;
[40 CFR 122.7(b)(1)] and
- (2) Permit applications and attachments, permits, and effluent data.
[40 CFR 122.7(b)(2)]

e. EFFLUENT LIMITATIONS

- (1) *Interim effluent limitations.* The Copermittee must comply with any interim effluent limitations as established by addendum, enforcement action, or revised waste discharge requirements which have been, or may be, adopted by the San Diego Water Board.
- (2) *Other effluent limitations and standards.* If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under Section 307(a) of the CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the San Diego Water Board shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. [40 CFR 122.44(b)(1)]

f. DUTY TO MINIMIZE OR CORRECT ADVERSE IMPACTS

The Copermittee must take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this Order, including such accelerated or additional monitoring as may be necessary to determine the nature and impact of the noncompliance.

g. PERMIT ACTIONS

The filing of a request by the Copermittee for modification, revocation and reissuance, or termination of this Order, or a notification of planned change in or anticipated noncompliance with this Order does not stay any condition of this Order. (See 40 CFR 122.41(f)) In addition, the following provisions apply to this Order:

- (1) Upon application by any affected person, or on its own motion, the San Diego Water Board may review and revise the requirements in this Order. All requirements must be reviewed periodically. [CWC Section 13263(e)]
- (2) This Order may be terminated or modified for cause, including, but not limited to, all of the following: [CWC Section 13381]
 - (a) Violation of any condition contained in the requirements of this Order. [CWC Section 13381(a)]
 - (b) Obtaining the requirements in this Order by misrepresentation, or failure to disclose fully all relevant facts. [CWC Section 13381(b)]
 - (c) A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. [CWC Section 13381(c)]
- (3) When this Order is transferred to a new owner or operator, such requirements as may be necessary under the CWC may be incorporated into this Order.

h. NPDES PERMITTED NON-STORM WATER DISCHARGES

The San Diego Water Board has, in prior years, issued a limited number of individual NPDES permits for non-storm water discharges to MS4s. The San Diego Water Board or State Water Board may in the future, upon prior notice to the Copermittee(s), issue an NPDES permit for any non-storm water discharge (or class of non-storm water discharges) to an MS4.

i. MONITORING

In addition to the standard provisions required under 40 CFR 122.41(j) and (l)(4), the following general monitoring provisions apply to this Order:

- (1) Where procedures are not otherwise specified in Order, sampling, analysis and quality assurance/quality control must be conducted in accordance with the Quality Assurance Management Plan (QAMP) for the State of California's Surface Water Ambient Monitoring Program (SWAMP), adopted by the State Water Resources Control Board (State Water Board).
- (2) Pursuant to 40 CFR 122.41(j)(2) and CWC Section 13383(a), each Copermittee must retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least five (5) years from the date of the sample, measurement, report or application. This period may be extended by request of the San Diego Water Board at any time.
- (3) All chemical, bacteriological, and toxicity analyses must be conducted at a laboratory certified for such analyses by the California Department of Public Health or a laboratory approved by the San Diego Water Board.

- (4) For priority toxic pollutants that are identified in the California Toxics Rule (CTR) (65 Fed. Reg. 31682), the Copermittees must instruct their laboratories to establish calibration standards that are equivalent to or lower than the Minimum Levels (MLs) published in Appendix 4 of the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP). If a Copermittee can demonstrate that a particular ML is not attainable, in accordance with procedures set forth in 40 CFR Part 136, the lowest quantifiable concentration of the lowest calibration standard analyzed by a specific analytical procedure (assuming that all the method specified sample weights, volumes, and processing steps have been followed) may be used instead of the ML listed in Appendix 4 of the SIP. The Copermittee must submit documentation from the laboratory to the San Diego Water Board for approval prior to raising the ML for any priority toxic pollutant.

j. ENFORCEMENT

- (1) The San Diego Water Board is authorized to enforce the terms of this Order under several provisions of the CWC, including, but not limited to, CWC Sections 13385, 13386, and 13387.
- (2) Nothing in this Order shall be construed to protect the Copermittee from its liabilities under federal, state, or local laws.
- (3) The CWC provides for civil and criminal penalties comparable to, and in some cases greater than, those provided for under the CWA.
- (4) Except as provided in the standard conditions required under 40 CFR 122.41(m) and (n), nothing in this Order shall be construed to relieve the Copermittee from civil or criminal penalties for noncompliance.
- (5) Nothing in this Order shall be construed to preclude the institution of any legal action or relieve the Copermittee from any responsibilities, liabilities, or penalties to which the Copermittee is or may be subject to under Section 311 of the CWA.
- (6) Nothing in this Order shall be construed to preclude institution of any legal action or relieve the Copermittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or regulation under authoring preserved by Section 510 of the CWA.

k. SEVERABILITY

The provisions of this Order are severable, and if any provision of this Order, or the application of any provisions of this Order to any circumstance, is held invalid, the application of such provision to other circumstances and the remainder of this Order shall not be affected thereby.

l. APPLICATIONS

Any application submitted by a Copermittee for reissuance or modification of this Order must satisfy all applicable requirements specified in federal regulations as well as any additional requirements for submittal of a Report of Waste Discharge specified in the CWC and the California Code of Regulations.

m. IMPLEMENTATION

All plans, reports and subsequent amendments submitted in compliance with this Order must be implemented immediately (or as otherwise specified). All submittals by Copermittees must be adequate to implement the requirements of this Order.

n. REPORT SUBMITTALS

- (1) All report submittals must include an executive summary, introduction, conclusion, recommendations, and signed certified statement.
- (2) Each Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal.
- (3) The Principal Watershed Copermittee(s) must submit a signed certified statement covering its responsibilities for each applicable submittal and the sections of the submittals for which it is responsible.
- (4) Unless otherwise directed, the Copermittees must submit one electronic copy of each report required under this Order to the San Diego Water Board at SanDiego@waterboards.ca.gov.
- (5) When hard copies are requested or required, the Copermittees must submit reports and provide notifications as required by this Order to:

EXECUTIVE OFFICER
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
2375 NORTHSIDE DRIVE, SUITE 100
SAN DIEGO CA 92108
Telephone: (619) 516-1990 Fax: (619) 516-1994

ATTACHMENT C

ACRONYMS AND ABBREVIATIONS

AMAL	Average Monthly Action Level
ASBS	Area(s) of Special Biological Significance
BMP	Best Management Practice
Basin Plan	Water Quality Control Plan for the San Diego Basin
CEQA	California Environmental Quality Act
CCR	California Code of Regulations
CFR	Code of Federal Regulations
CWA	Clean Water Act
CWC	California Water Code
CZARA	Coastal Zone Act Reauthorization Amendments of 1990
ESAs	Environmentally Sensitive Areas
GIS	Geographic Information System
IBI	Index of Biological Integrity
LID	Low Impact Development
MDAL	Maximum Daily Action Level
MEP	Maximum Extent Practicable
MS4	Municipal Separate Storm Sewer System
NAL	Non-Storm Water Action Level
NAICS	North American Industry Classification System
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
ROWD	Report of Waste Discharge (application for NPDES reissuance)
SAL	Storm Water Action Level
San Diego Water Board	California Regional Water Quality Control Board, San Diego Region
SIC	Standard Industrial Classification Code
State Water Board	State Water Resources Control Board
TMDL	Total Maximum Daily Load
USEPA	United States Environmental Protection Agency
WDID	Waste Discharge Identification Number
WLA	Waste Load Allocation
WQBEL	Water Quality Based Effluent Limitation

DEFINITIONS

Active/Passive Sediment Treatment - Using mechanical, electrical or chemical means to flocculate or coagulate suspended sediment for removal from runoff from construction sites prior to discharge.

Anthropogenic Litter – Trash generated from human activities, not including sediment.

Average Monthly Action Level – The highest allowable average of daily discharges over a calendar month.

Beneficial Uses - The uses of water necessary for the survival or wellbeing of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. “Beneficial Uses” of the waters of the State that may be protected include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves. Existing beneficial uses are uses that were attained in the surface or ground water on or after November 28, 1975; and potential beneficial uses are uses that would probably develop in future years through the implementation of various control measures. “Beneficial Uses” are equivalent to “Designated Uses” under federal law. [California Water Code Section 13050(f)].

Best Management Practices (BMPs) - Defined in 40 CFR 122.2 as schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

Bioassessment - The use of biological community information to evaluate the biological integrity of a water body and its watershed. With respect to aquatic ecosystems, bioassessment is the collection and analysis of samples of the benthic macroinvertebrate community together with physical/habitat quality measurements associated with the sampling site and the watershed to evaluate the biological condition (i.e. biotic integrity) of a water body.

Biofiltration - Practices that use vegetation and amended soils to detain and treat runoff from impervious areas. Treatment is through filtration, infiltration, adsorption, ion exchange, and biological uptake of pollutants.

Biological Integrity - Defined in Karr J.R. and D.R. Dudley. 1981. Ecological perspective on water quality goals. *Environmental Management* 5:55-68 as: “A balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of natural habitat of the region.” Also referred to as ecosystem health.

BMP Design Manual – A plan developed to eliminate, reduce, or mitigate the impacts of runoff from development projects, including Priority Development Projects.

Chronic Toxicity – A measurement of sublethal effect (e.g. reduced growth, reproduction) to experimental test organisms exposed to an effluent or receiving waters compared to that of the control organisms.

Clean Water Act Section 303(d) Water Body - An impaired water body in which water quality does not meet applicable water quality standards and/or is not expected to meet water quality standards, even after the application of technology based pollution controls required by the CWA. The discharge of runoff to these water bodies by the Copermittees is significant because these discharges can cause or contribute to violations of applicable water quality standards.

Construction Activities – Actions implemented during construction of development or redevelopment projects during the Preliminary Task (including rough grading and/or disking, clearing and grubbing operations, or any soil disturbance prior to mass grading), Grading or Land Development (including topography and slope reconfiguration, alluvium removals, canyon cleanouts, rock undercuts, keyway excavations, land form grading, and stockpiling of select material for capping operations), Streets and Utility Installation (including excavation and street paving, lot grading, curbs, gutters and sidewalks, public utilities, public water facilities including fire hydrants, public sanitary sewer systems, storm sewer systems and/or other drainage improvements), or Vertical Construction (including the build out of structures from foundations to roofing, including rough landscaping).

Construction Site – Any project, including projects requiring coverage under the Construction General Permit, that involves soil disturbing activities including, but not limited to, clearing, grading, disturbances to ground such as stockpiling, and excavation.

Contamination - As defined in the Porter-Cologne Water Quality Control Act, contamination is “an impairment of the quality of waters of the State by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. ‘Contamination’ includes any equivalent effect resulting from the disposal of waste whether or not waters of the State are affected.”

Copermittee – A permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator [40 CFR 122.26(b)(1)]. For the purposes of this Order, a Copermittee is one of the individual permittees identified in Tables 1a-1c of this Order.

Copermittees – All of the individual Copermittees, collectively.

Critical Channel Flow (Qc) – The channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Qc, it should be based on the weakest boundary material – either bed or bank.

Daily Discharge – Defined as either: (1) the total mass of the constituent discharged over the calendar day or any 24 hour period that reasonably represents a calendar day for purposes of sampling (as specified in the permit), for a constituent with limitations expressed in units of mass or; (2) the unweighted arithmetic mean measurement of the constituent over the day for a constituent with limitations expressed in other units of measurement (e.g. concentration.)

The Daily Discharge may be determined by the analytical results of a composite sample taken over the course of one day (a calendar day, or other 24 hour period other than a day), or by the arithmetic mean of analytical results from one or more grab samples taken over the course of a day.

Development Projects - Construction, rehabilitation, redevelopment, or reconstruction of any public or private projects.

Dry Season – May 1 to September 30.

Dry Weather – Weather is considered dry if the preceding 72 hours has been without measurable precipitation (>0.1 inch).

Enclosed Bays – Enclosed bays are indentations along the coast that enclose an area of oceanic water within distinct headlands or harbor works. Enclosed bays include all bays where the narrowest distance between the headlands or outermost bay works is less than 75 percent of the greatest dimension of the enclosed portion of the bay. Enclosed bays do not include inland surface waters or ocean waters.

Erosion – When land is diminished or worn away due to wind, water, or glacial ice. Often the eroded debris (silt or sediment) becomes a pollutant via storm water runoff. Erosion occurs naturally but can be intensified by land clearing activities such as farming, development, road building, and timber harvesting.

Environmentally Sensitive Areas (ESAs) - Areas that include but are not limited to all Clean Water Act Section 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the State Water Board and San Diego Water Board; State Water Quality Protected Areas; water bodies designated with the RARE beneficial use by the State Water Board and San Diego Water Board; areas designated as preserves or their equivalent under the Natural Communities Conservation Program within the Cities and County of Orange; and any other equivalent environmentally sensitive areas which have been identified by the Copermitttees.

Estuaries – Waters, including coastal lagoons, located at the mouth of streams that serve as areas of mixing fresh and ocean waters. Coastal lagoons and mouths of streams that are temporarily separated from the ocean by sandbars shall be considered estuaries. Estuarine waters shall be considered to extend from a bay or the open ocean to a point upstream where there is no significant mixing of fresh water and ocean water. Estuaries do not include inland surface waters or ocean waters.

Existing Development – Any area that has been developed and exists for municipal, commercial, industrial, or residential purposes, uses, or activities. May include areas that are not actively used for its originally developed purpose, but may be re-purposed or redeveloped for another use or activity.

Flow Duration – The long-term period of time that flows occur above a threshold that causes significant sediment transport and may cause excessive erosion damage to creeks and streams (not a single storm event duration). The simplest way to visualize this is to consider a histogram of pre- and post-project flows using long-term records of hourly data. To maintain pre-development flow duration means that the total number of hours (counts) within each range of flows in a flow-duration histogram cannot increase between the pre- and post-development condition. Flow duration within the range of geomorphologically significant flows is important for managing erosion.

Grading - The cutting and/or filling of the land surface to a desired slope or elevation.

Groundwater – Subsurface water that occurs beneath the water table in soils and geologic formations that are fully saturated.

Hazardous Material – Any substance that poses a threat to human health or the environment due to its toxicity, corrosiveness, ignitability, explosive nature or chemical reactivity. These also include materials named by the USEPA in 40 CFR 116 to be reported if a designated quantity of the material is spilled into the waters of the U.S. or emitted into the environment.

Hazardous Waste - Hazardous waste is defined as “any waste which, under Section 600 of Title 22 of this code, is required to be managed according to Chapter 30 of Division 4.5 of Title 22 of this code” [CCR Title 22, Division 4.5, Chapter 11, Article 1].

Household Hazardous Waste – Paints, cleaning products, and other hazardous wastes generated during home improvement or maintenance activities.

Hydromodification – The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, such as stream channelization, concrete lining, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes.

Illicit Connection – Any man-made conveyance or drainage system through which a non-storm water discharge to the storm water drainage system occurs or may occur. Any connection to the MS4 that conveys an illicit discharge.

Illicit Discharge - Any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 CFR 122.26(b)(2)].

Inactive Areas – Areas of construction activity that are not active and those that have been active and are not scheduled to be re-disturbed for at least 14 days.

Infiltration – In the context of low impact development, infiltration is defined as the percolation of water into the ground. Infiltration is often expressed as a rate (inches per hour), which is determined through an infiltration test. In the context of non-storm water, infiltration is water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow [40 CFR 35.2005(20)].

Inland Surface Waters – Includes all surface waters of the State that do not include the ocean, enclosed bays, or estuaries.

Jurisdictional Runoff Management Program Document – A written description of the specific jurisdictional runoff management measures and programs that each Copermittee will implement to comply with this Order and ensure that storm water pollutant discharges in runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards.

Low Impact Development (LID) – A storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions.

Low Impact Development Best Management Practices (LID BMPs) – LID BMPs include schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States through storm water management and land development strategies that emphasize conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions. LID BMPs include retention practices that do not allow runoff, such as infiltration, rain water harvesting and reuse, and evapotranspiration. LID BMPs also include flow-through practices such as biofiltration that may have some discharge of storm water following pollutant reduction.

Major Outfall – As defined in the Code of Federal Regulations, a major outfall is a MS4 outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (i.e. discharge from a single conveyance other than a circular pipe which is associated with a drainage area of more than 50 acres); or, for MS4s that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or equivalent), a MS4 outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (i.e. discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

Maximum Daily Action Level (MDAL) –The highest allowable daily discharge of a pollutant, over a calendar day (or 24 hour period). For pollutants with action levels expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with action levels expressed in other units of measurement, the daily discharge is calculated as the arithmetic mean measurement of the pollutant over the day.

Maximum Extent Practicable (MEP) – The technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) for storm water that operators of MS4s must meet. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of source control and treatment control BMPs. MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) in combination with treatment methods serving as a backup (additional line of defense). MEP considers economics and is generally, but not necessarily, less stringent than BAT. A definition for MEP is not provided either in the statute or in the regulations. Instead the definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their runoff management programs. Their total collective and individual activities conducted pursuant to the runoff management programs becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for MS4 maintenance). In the absence of a proposal acceptable to the San Diego Water Board, the San Diego Water Board defines MEP.

In a memo dated February 11, 1993, entitled "Definition of Maximum Extent Practicable," Elizabeth Jennings, Senior Staff Counsel, SWRCB addressed the achievement of the MEP standard as follows:

“To achieve the MEP standard, municipalities must employ whatever Best Management Practices (BMPs) are technically feasible (i.e., are likely to be effective) and are not cost prohibitive. The major emphasis is on technical feasibility. Reducing pollutants to the MEP means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, or the BMPs would not be technically feasible, or the cost would be prohibitive. In selecting BMPs to achieve the MEP standard, the following factors may be useful to consider:

- a. Effectiveness: Will the BMPs address a pollutant (or pollutant source) of concern?*
- b. Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?*
- c. Public Acceptance: Does the BMP have public support?*
- d. Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?*
- e. Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?*

The final determination regarding whether a municipality has reduced pollutants to the maximum extent practicable can only be made by the Regional or State Water Boards, and not by the municipal discharger. If a municipality reviews a lengthy menu of BMPs and chooses to select only a few of the least expensive, it is likely that MEP has not been met. On the other hand, if a municipal discharger employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit derived, it would have met the standard. Where a choice may be made between two BMPs that should provide generally comparable effectiveness, the discharger may choose the least expensive alternative and exclude the more expensive BMP. However, it would not be acceptable either to reject all BMPs that would address a pollutant source, or to pick a BMP based solely on cost, which would be clearly less effective. In selecting BMPs the municipality must make a serious attempt to comply and practical solutions may not be lightly rejected. In any case, the burden would be on the municipal discharger to show compliance with its permit. After selecting a menu of BMPs, it is the responsibility of the discharger to ensure that all BMPs are implemented.”

Monitoring Year – October 1 to September 30

Municipal Separate Storm Sewer System (MS4) – A conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designated or used for collecting or conveying storm water; (iii) Which is not a combined sewer; (iv) Which is not part of the Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.26.

National Pollutant Discharge Elimination System (NPDES) - The national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 318, 402, and 405 of the CWA.

Non-Storm Water - All discharges to and from a MS4 that do not originate from precipitation events (i.e., all discharges from a MS4 other than storm water). Non-storm water includes illicit discharges and NPDES permitted discharges.

Nuisance - As defined in the Porter-Cologne Water Quality Control Act, a nuisance is “anything which meets all of the following requirements: 1) Is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. 2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. 3) Occurs during, or as a result of, the treatment or disposal of wastes.”

Ocean Waters – The territorial marine waters of the State as defined by California law to the extent these waters are outside of enclosed bays, estuaries, and coastal lagoons. Discharges to ocean waters are regulated in accordance with the State Board’s California Ocean Plan.

Order – Unless otherwise specified, refers to this Order, Order No. R9-2013-0001 (NPDES No. CAS0109266)

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

Persistent Flow - Persistent flow is defined as the presence of flowing, pooled, or ponded water more than 72 hours after a measureable rainfall event of 0.1 inch or greater during three consecutive monitoring and/or inspection events. All other flowing, pooled, or ponded water is considered transient.

Person - A person is defined as an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof [40 CFR 122.2].

Point Source - Any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operations, landfill leachate collection systems, vessel, or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

Pollutant - Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated.

Pollution - As defined in the Porter-Cologne Water Quality Control Act, pollution is “the alteration of the quality of the waters of the State by waste, to a degree which unreasonably affects either of the following: 1) The waters for beneficial uses; or 2) Facilities that serve these beneficial uses.” Pollution may include contamination.

Pollution Prevention - Pollution prevention is defined as practices and processes that reduce or eliminate the generation of pollutants, in contrast to source control BMPs, treatment control BMPs, or disposal.

Pre-Development Runoff Conditions – Approximate flow rates and durations that exist or existed onsite before land development occurs. For new development projects, this equates to runoff conditions immediately before project construction. For redevelopment projects, this equates to runoff conditions from the project footprint assuming infiltration characteristics of the underlying soil, and existing grade. Runoff coefficients of concrete or asphalt must not be used. A redevelopment Priority Development Project must use available information pertaining to existing underlying soil type and onsite existing grade to estimate pre-development runoff conditions.

Priority Development Projects - New development and redevelopment projects defined under Provision E.3.b of Order No. R9-2013-0001, as amended by Order Nos. R9-2015-0001 and R9-2015-0100.

Rainy Season (aka Wet Season) –October 1 to April 30

Receiving Waters – Waters of the United States.

Receiving Water Limitations - Waste discharge requirements issued by the San Diego Water Board typically include both: (1) “Effluent Limitations” (or “Discharge Limitations”) that specify the technology-based or water-quality-based effluent limitations; and (2) “Receiving Water Limitations” that specify the water quality objectives in the Basin Plan as well as any other limitations necessary to attain those objectives. In summary, the “Receiving Water Limitations” provision is the provision used to implement the requirements of CWA section 402(p)(3)(B).

Redevelopment - The creation and/or replacement of impervious surface on an already developed site. Examples include the expansion of a building footprint, road widening, the addition to or replacement of a structure. Replacement of impervious surfaces includes any activity where impervious material(s) are removed, exposing underlying soil during construction. Redevelopment does not include routine maintenance activities, such as trenching and resurfacing associated with utility work; pavement grinding; resurfacing existing roadways, sidewalks, pedestrian ramps, or bike lanes on existing roads; and routine replacement of damaged pavement, such as pothole repair.

Regional Clearinghouse – A central location for the collection and distribution of information developed and maintained by the Copermittees including, but not limited to, plans, reports, manuals, data, contact information, and/or links to such documents and information.

Rehabilitation - Remedial measures or activities for the purpose of improving or restoring the beneficial uses of streams, channels or river systems. Techniques may vary from in-stream restoration techniques to off-line storm water management practices installed in the system corridor or upland areas, or a combination of in-stream and out of stream techniques. Rehabilitation techniques may include, but are not limited to the following: riparian zone restoration, constructed wetlands, channel modifications that improve habitat and stability, and daylighting of drainage systems.

Reporting Period – The period of information that is reported in the Water Quality Improvement Plan Annual Report. The reporting period consists of two components: 1) July 1 to June 30, consistent with the fiscal year, for the implementation of the jurisdictional runoff management programs, and 2) October 1 to September 30, consistent with the monitoring year for the monitoring and assessment programs. Together, these two time periods constitute the reporting year for the Water Quality Improvement Plan Annual Report due January 31 following the end of the monitoring year.

Retain – Keep or hold in a particular place, condition, or position without discharge to surface waters.

Retrofitting – Storm water management practice put into place after development has occurred in watersheds where the practices previously did not exist or are ineffective. Retrofitting of developed areas is intended to improve water quality, protect downstream channels, reduce flooding, or meet other specific objectives. Retrofitting developed areas may include, but is not limited to replacing roofs with green roofs, disconnecting downspouts or impervious surfaces to drain to pervious surfaces, replacing impervious surfaces with pervious surfaces, installing rain barrels, installing rain gardens, and trash area enclosures.

Runoff - All flows in a storm water conveyance system that consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water including dry weather flows.

San Diego Water Board – As used in this document the term "San Diego Water Board" is synonymous with the term "Regional Board" as defined in Water Code section 13050(b) and is intended to refer to the California Regional Water Quality Control Board for the San Diego Region as specified in Water Code Section 13200.

Sediment - Soil, sand, and minerals washed from land into water. Sediment resulting from anthropogenic sources (i.e. human induced land disturbance activities) is considered a pollutant. This Order regulates only the discharges of sediment from anthropogenic sources and does not regulate naturally occurring sources of sediment. Sediment can destroy fish-nesting areas, clog animal habitats, and cloud waters so that sunlight does not reach aquatic plants.

Source Control BMP – Land use or site planning practices, or structural or nonstructural measures that aim to prevent runoff pollution by reducing the potential for contamination at the source of pollution. Source control BMPs minimize the contact between pollutants and runoff.

Storm Water – Per 40 CFR 122.26(b)(13), means storm water runoff, snowmelt runoff and surface runoff and drainage. Surface runoff and drainage pertains to runoff and drainage resulting from precipitation events.

Structural BMPs - A subset of BMPs which detains, retains, filters, removes, or prevents the release of pollutants to surface waters from development projects in perpetuity, after construction of a project is completed.

Test of Significant Toxicity (TST) - A statistical approach used to analyze toxicity test data. The TST incorporates a restated null hypothesis, Welch's t-test, and biological effect thresholds for chronic and acute toxicity.

Total Maximum Daily Load (TMDL) - The maximum amount of a pollutant that can be discharged into a water body from all sources (point and non-point) and still maintain water quality standards. Under CWA section 303(d), TMDLs must be developed for all water bodies that do not meet water quality standards after application of technology-based controls.

Toxicity - Adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies. The water quality objectives for toxicity provided in the Basin Plan, state in part...“All waters shall be

free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life....The survival of aquatic life in surface waters subjected to a waste discharge or other controllable water quality factors, shall not be less than that for the same water body in areas unaffected by the waste discharge.”

Toxicity Identification Evaluation (TIE) - A set of procedures for identifying the specific chemical(s) responsible for toxicity. These procedures are performed in three phases (characterization, identification, and confirmation) using aquatic organism toxicity tests.

Toxicity Reduction Evaluation (TRE) - A study conducted in a step-wise process designed to identify the causative agents of effluent or ambient toxicity, isolate the sources of toxicity, evaluate the effectiveness of toxicity control options, and then confirm the reduction in toxicity. The first steps of the TRE consist of the collection of data relevant to the toxicity, including additional toxicity testing, and an evaluation of facility operations and maintenance practices, and best management practices. A Toxicity Identification Evaluation (TIE) may be required as part of the TRE, if appropriate.

Treatment Control BMP – Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants, filtration, biological uptake, media absorption or any other physical, biological, or chemical process.

Unpaved Road – Any long, narrow stretch without pavement used for traveling by motor passenger vehicles between two or more points. Unpaved roads are generally constructed of dirt, gravel, aggregate or macadam and may be improved or unimproved.

Waste - As defined in CWC Section 13050(d), “waste includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.”

Article 2 of CCR Title 23, Chapter 15 (Chapter 15) contains a waste classification system that applies to solid and semi-solid waste, which cannot be discharged directly or indirectly to water of the state and which therefore must be discharged to land for treatment, storage, or disposal in accordance with Chapter 15. There are four classifications of waste (listed in order of highest to lowest threat to water quality): hazardous waste, designated waste, non-hazardous solid waste, and inert waste.

Water Quality Objective - Numerical or narrative limits on constituents or characteristics of water designated to protect designated beneficial uses of the water. [California Water Code Section 13050 (h)]. California’s water quality objectives are established by the State and Regional Water Boards in the Water Quality Control Plans. Numeric or narrative limits for pollutants or characteristics of water designed to protect the beneficial uses of the water. In other words, a water quality objective is the maximum concentration of a pollutant that can exist in a receiving water and still generally ensure that the beneficial uses of the receiving water remain protected (i.e., not impaired). Since water quality objectives are designed specifically to protect the beneficial uses, when the objectives are violated the beneficial uses are, by definition, no longer protected and become impaired. This is a fundamental concept under the Porter Cologne Act. Equally fundamental is Porter Cologne’s definition of pollution. A condition of pollution exists when the water quality needed to support designated beneficial uses has

become unreasonably affected or impaired; in other words, when the water quality objectives have been violated. These underlying definitions (regarding beneficial use protection) are the reason why all waste discharge requirements implementing the federal NPDES regulations require compliance with water quality objectives. (Water quality objectives are also called water quality criteria in the CWA.)

Water Quality Standards - Water quality standards, as defined in Clean Water Act section 303(c) consist of the beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.) of a water body and criteria (referred to as water quality objectives in the California Water Code) necessary to protect those uses. Under the Water Code, the water boards establish beneficial uses and water quality objectives in water quality control or basin plans. Together with an anti-degradation policy, these beneficial uses and water quality objectives serve as water quality standards under the Clean Water Act. In Clean Water Act parlance, state beneficial uses are called “designated uses” and state water quality objectives are called “criteria.” Throughout this Order, the relevant term is used depending on the statutory scheme.

Waters of the State - Any water, surface or underground, including saline waters within the boundaries of the State [CWC section 13050 (e)]. The definition of the Waters of the State is broader than that for the Waters of the United States in that all water in the State is considered to be a Waters of the State regardless of circumstances or condition.

Waters of the United States - As defined in the 40 CFR 122.2, the Waters of the U.S. are defined as: “(a) All waters, which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (b) All interstate waters, including interstate “wetlands;” (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition; (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition; (f) The territorial seas; and (g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA.”

Watershed - That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as drainage area, catchment, or river basin).

Wet Season (aka Rainy Season) – October 1 to April 30

Wet Weather – Weather is considered wet up to 72 hours after a storm event of 0.1 inches and greater, unless otherwise defined by another regulatory mechanism (e.g. a TMDL).

Order No. R9-2013-0001
As amended by Order No. R9-2015-0001
and Order No. R9-2015-0100

D-1

Amended February 11, 2015
Amended November 18, 2015

ATTACHMENT D

JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM
ANNUAL REPORT FORM

Order No. R9-2013-0001
As amended by Order No. R9-2015-0001
and Order No. R9-2015-0100

D-2

Amended February 11, 2015
Amended November 18, 2015

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**JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM
 ANNUAL REPORT FORM
 FY _____**

I. COPERMITTEE INFORMATION	
Copermittee Name:	
Copermittee Primary Contact Name:	
Copermittee Primary Contact Information:	
Address:	
City:	County:
Telephone:	Fax:
State:	Zip:
Email:	
II. LEGAL AUTHORITY	
Has the Copermittee established adequate legal authority within its jurisdiction to control pollutant discharges into and from its MS4 that complies with Order No. R9-2013-0001?	YES <input type="checkbox"/> NO <input type="checkbox"/>
A Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative has certified that the Copermittee obtained and maintains adequate legal authority?	YES <input type="checkbox"/> NO <input type="checkbox"/>
III. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM DOCUMENT UPDATE	
Was an update of the jurisdictional runoff management program document required or recommended by the San Diego Water Board?	YES <input type="checkbox"/> NO <input type="checkbox"/>
If YES to the question above, did the Copermittee update its jurisdictional runoff management program document and make it available on the Regional Clearinghouse?	YES <input type="checkbox"/> NO <input type="checkbox"/>
IV. ILLICIT DISCHARGE DETECTION AND ELIMINATION PROGRAM	
Has the Copermittee implemented a program to actively detect and eliminate illicit discharges and connections to its MS4 that complies with Order No. R9-2013-0001?	YES <input type="checkbox"/> NO <input type="checkbox"/>
Number of non-storm water discharges reported by the public	
Number of non-storm water discharges detected by Copermittee staff or contractors	
Number of non-storm water discharges investigated by the Copermittee	
Number of sources of non-storm water discharges identified	
Number of non-storm water discharges eliminated	
Number of sources of illicit discharges or connections identified	
Number of illicit discharges or connections eliminated	
Number of enforcement actions issued	
Number of escalated enforcement actions issued	
V. DEVELOPMENT PLANNING PROGRAM	
Has the Copermittee implemented a development planning program that complies with Order No. R9-2013-0001?	YES <input type="checkbox"/> NO <input type="checkbox"/>
Was an update to the BMP Design Manual required or recommended by the San Diego Water Board?	YES <input type="checkbox"/> NO <input type="checkbox"/>
If YES to the question above, did the Copermittee update its BMP Design Manual and make it available on the Regional Clearinghouse?	YES <input type="checkbox"/> NO <input type="checkbox"/>
Number of proposed development projects in review	
Number of Priority Development Projects in review	
Number of Priority Development Projects approved	
Number of approved Priority Development Projects exempt from any BMP requirements	
Number of approved Priority Development Projects allowed alternative compliance	
Number of Priority Development Projects granted occupancy	
Number of completed Priority Development Projects in inventory	
Number of high priority Priority Development Project structural BMP inspections	
Number of Priority Development Project structural BMP violations	
Number of enforcement actions issued	
Number of escalated enforcement actions issued	

**JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM
 ANNUAL REPORT FORM**

FY _____

VI. CONSTRUCTION MANAGEMENT PROGRAM

Has the Copermittee implemented a construction management program that complies with Order No. R9-2013-0001?	YES	<input type="checkbox"/>
	NO	<input type="checkbox"/>
Number of construction sites in inventory		
Number of active construction sites in inventory		
Number of inactive construction sites in inventory		
Number of construction sites closed/completed during reporting period		
Number of construction site inspections		
Number of construction site violations		
Number of enforcement actions issued		
Number of escalated enforcement actions issued		

VII. EXISTING DEVELOPMENT MANAGEMENT PROGRAM

Has the Copermittee implemented an existing development management program that complies with Order No. R9-2013-0001?	YES	<input type="checkbox"/>		
	NO	<input type="checkbox"/>		
	Municipal	Commercial	Industrial	Residential
Number of facilities or areas in inventory				
Number of existing development inspections				
Number of follow-up inspections				
Number of violations				
Number of enforcement actions issued				
Number of escalated enforcement actions issued				

VIII. PUBLIC EDUCATION AND PARTICIPATION

Has the Copermittee implemented a public education program component that complies with Order No. R9-2013-0001?	YES	<input type="checkbox"/>
	NO	<input type="checkbox"/>
Has the Copermittee implemented a public participation program component that complies with Order No. R9-2013-0001?	YES	<input type="checkbox"/>
	NO	<input type="checkbox"/>

IX. FISCAL ANALYSIS

Has the Copermittee attached to this form a summary of its fiscal analysis that complies with Order No. R9-2013-0001?	YES	<input type="checkbox"/>
	NO	<input type="checkbox"/>

X. CERTIFICATION

I [Principal Executive Officer Ranking Elected Official Duly Authorized Representative] certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

Signature	Date
Print Name	Title
Telephone Number	Email

ATTACHMENT E

SPECIFIC PROVISIONS FOR TOTAL MAXIMUM DAILY LOADS APPLICABLE TO ORDER NO. R9-2013-0001, AS AMENDED BY ORDER NOS. R9-2015-0001 AND R9-2015-0100

These provisions implement load allocations (LAs) and wasteload allocations (WLAs) of the Total Maximum Daily Loads (TMDLs) established by the San Diego Water Board or USEPA under Clean Water Act section 303(c), applicable to discharges regulated under this Order. The provisions and schedules for implementation of the TMDLs described below must be incorporated into the Water Quality Improvement Plans, required pursuant to Provision B of this Order, for the specified Watershed Management Areas.

1. Total Maximum Daily Load for Diazinon in Chollas Creek Watershed
2. Total Maximum Daily Loads for Dissolved Copper in Shelter Island Yacht Basin
3. Total Maximum Daily Loads for Total Nitrogen and Total Phosphorus in Rainbow Creek Watershed
4. Total Maximum Daily Loads for Dissolved Copper, Lead, and Zinc in Chollas Creek
5. Total Maximum Daily Loads for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay
6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)
7. Total Maximum Daily Load for Sediment in Los Peñasquitos Lagoon

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1. Total Maximum Daily Load for Diazinon in Chollas Creek Watershed

a. APPLICABILITY

- (1) TMDL Basin Plan Amendment: Resolution No. R9-2002-0123
- (2) TMDL Adoption and Approval Dates:
San Diego Water Board Adoption Date: August 14, 2002
State Water Board Approval Date: July 16, 2003
Office of Administrative Law Approval Date: September 11, 2003
US EPA Approval Date: November 3, 2003
- (3) TMDL Effective Date: September 11, 2003
- (4) Watershed Management Area: San Diego Bay
- (5) Water Body: Chollas Creek
- (6) Responsible Copermittees: City of La Mesa, City of Lemon Grove, City of San Diego, County of San Diego, San Diego Unified Port District

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final diazinon TMDL compliance requirements for Chollas Creek consist of the following:

- (1) Final TMDL Compliance Date

The Responsible Copermittees must be in compliance with the final TMDL compliance requirements as of December 31, 2010.

- (2) Final Water Quality Based Effluent Limitations

- (a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations:

Table 1.1

Final Receiving Water Limitations Expressed as Concentrations in Chollas Creek

Constituent	Exposure Duration	Receiving Water Limitation	Averaging Period
Diazinon	Acute	0.08 µg/L	1 hour
	Chronic	0.05 µg/L	4 days

(b) Final Effluent Limitations

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

Table 1.2

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

Constituent	Exposure Duration	Effluent Limitation	Averaging Period
Diazinon	Acute	0.072 µg/L	1 hour
	Chronic	0.045 µg/L	4 days

(c) Best Management Practices

The following BMPs for Chollas Creek must be incorporated into the Water Quality Improvement Plan for the San Diego Bay Watershed Management Area and implemented by the Responsible Copermittees:

- (i) The Responsible Copermittees must implement BMPs to achieve the receiving water limitations under Specific Provision 1.b.(2)(a) and/or the effluent limitations under Specific Provision 1.b.(2)(b) for Chollas Creek.
- (ii) The Responsible Copermittees must implement the Diazinon Toxicity Control Plan and Diazinon Public Outreach/Education Program as described in the report titled, *Technical Report for Total Maximum Daily Load for Diazinon in Chollas Creek Watershed, San Diego County*, dated August 14, 2002, including subsequent modifications, in order to achieve the receiving water limitations under Specific Provision 1.b.(2)(a) and/or the effluent limitations under Specific Provision 1.b.(2)(b).
- (iii) The Responsible Copermittees should coordinate any BMPs implemented to address this TMDL with Caltrans as possible.

(3) Final TMDL Compliance Determination

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

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision 1.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

- (c) There are no exceedances of the final effluent limitations under Specific Provision 1.b.(2)(b) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:
 - (i) Incorporate the BMPs required under Specific Provision 1.b.(2)(c) as part of the Water Quality Improvement Plan,
 - (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 1.b.(2)(c) achieves compliance with Specific Provisions 1.b.(3)(a), 1.b.(3)(b) and/or 1.b.(3)(c),
 - (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
 - (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 1.b.(2)(c), AND
 - (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 1.d, to demonstrate compliance with Specific Provisions 1.b.(3)(a), 1.b.(3)(b) and/or 1.b.(3)(c).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The Responsible Copermittees must be in compliance with the final diazinon TMDL compliance requirements as of December 31, 2010.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

- (1) The Responsible Copermittees must implement the monitoring and assessment requirements issued under Investigation Order No. R9-2004-0277, *California Department of Transportation and San Diego Municipal Separate Storm Sewer System Copermittees Responsible for the Discharge of Diazinon into the Chollas Creek Watershed*. The monitoring reports required under Investigation Order No. R9-2004-0277 must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.
- (2) The Responsible Copermittees must monitor the effluent of the MS4 outfalls for diazinon within the Chollas Creek watershed, and calculate or estimate the annual diazinon loads, in accordance with the requirements of Provisions D.2, D.4.b.(1), and D.4.b.(2) of this Order. The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment

Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

- (3) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 1.b.(2)(b), dry and wet weather discharge concentrations may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

2. Total Maximum Daily Loads for Dissolved Copper in Shelter Island Yacht Basin

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2005-0019

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	February 9, 2005
State Water Board Approval Date:	September 22, 2005
Office of Administrative Law Approval Date:	December 2, 2005
US EPA Approval Date:	February 8, 2006

(3) TMDL Effective Date: December 2, 2005

(4) Watershed Management Area: San Diego Bay

(5) Water Body: Shelter Island Yacht Basin

(6) Responsible Copermittee: City of San Diego

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final dissolved copper TMDL compliance requirements for Shelter Island Yacht Basin consist of the following:

(1) Final TMDL Compliance Date

The Responsible Copermittee must be in compliance with the final TMDL compliance requirements as of December 2, 2005.

(2) Final Water Quality Based Effluent Water Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations:

Table 2.1

Final Receiving Water Limitations Expressed as Concentrations in Shelter Island Yacht Basin

Constituent	Exposure Duration	Receiving Water Limitation	Averaging Period
Dissolved Copper	Acute	4.8 µg/L x WER*	1 hour
	Chronic	3.1 µg/L x WER*	4 days

Notes:

* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.

(b) Final Effluent Limitations

Discharges from the MS4s containing pollutant loads that do not exceed the following effluent limitations will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 2.b.(2)(a):

Table 2.2

Final Effluent Limitations as Expressed as Annual Loads in MS4 Discharges to Shelter Island Yacht Basin

Constituent	Effluent Limitation
Dissolved Copper	30 kg/yr*

* If the water quality objectives for dissolved copper in Shelter Island Yacht Basin are changed in the future, then the margin of safety (MOS), TMDL and allocations will be recalculated using the *Method for Recalculation of the Total Maximum Daily Load for Dissolved Copper in the Shelter Island Yacht Basin, San Diego Bay* in the Basin Plan (p. 7-14).

(c) Best Management Practices

The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision 2.b.(2)(a) and/or the effluent limitations under Specific Provision 2.b.(2)(b) for Shelter Island Yacht Basin. The BMPs must be incorporated into the Water Quality Improvement Plan for the San Diego Bay Watershed Management Area.

(3) Final TMDL Compliance Determination

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

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision 2.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision 2.b.(2)(b) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The Responsible Copermittee develops and implements the Water Quality Improvement Plan as follows:
 - (i) Incorporate the BMPs required under Specific Provision 2.b.(2)(c) as part of the Water Quality Improvement Plan,

- (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 2.b.(2)(c) achieves compliance with Specific Provisions 2.b.(3)(a), 2.b.(3)(b) and/or 2.b.(3)(c),
- (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
- (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 2.b.(2)(c), AND
- (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 2.d, to demonstrate compliance with Specific Provisions 2.b.(3)(a), 2.b.(3)(b) and/or 2.b.(3)(c).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The Responsible Copermittees must be in compliance with the final dissolved copper TMDL compliance requirements as of December 2, 2005.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

The Responsible Copermittee must monitor the effluent of its MS4 outfalls for dissolved copper, and calculate or estimate the monthly and annual dissolved copper loads, in accordance with the requirements of Provisions D.2, D.4.b.(1), and D.4.(b)(2) of this Order. The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

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

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2005-0036

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	February 9, 2005
State Water Board Approval Date:	November 16, 2005
Office of Administrative Law Approval Date:	February 1, 2006
US EPA Approval Date:	March 22, 2006

(3) TMDL Effective Date: February 1, 2006

(4) Watershed Management Area: Santa Margarita River

(5) Water Body: Rainbow Creek

(6) Responsible Copermittee: County of San Diego

b. FINAL TMDL COMPLIANCE REQUIREMENTS

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

(1) Final TMDL Compliance Date

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

(2) Final Water Quality Based Effluent Water Limitations

(a) Final Receiving Water Limitations

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

Table 3.1

Final Receiving Water Limitations Expressed as Concentrations in Rainbow Creek

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

(b) Final Effluent Limitations

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

Table 3.2
Final Effluent Limitations Expressed as Concentrations in MS4 Discharges to Rainbow Creek

Constituent	Effluent Limitation
Nitrate (as N)	10 mg/L
Total Nitrogen	1 mg/L
Total Phosphorus	0.1 mg/L

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

Table 3.3
Final Effluent Limitations Expressed as Annual Loads in MS4 Discharges to Rainbow Creek

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

(c) Best Management Practices

- (i) The Responsible Copermitttee must implement BMPs to achieve the receiving water limitations under Specific Provision 3.b.(2)(a) and/or the effluent limitations under Specific Provision 3.b.(2)(b) for Rainbow Creek.
- (ii) The Responsible Copermitttee should coordinate any BMPs implemented to address this TMDL with Caltrans and other sources as possible.

(3) Final TMDL Compliance Determination

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

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

- (b) There are no exceedances of the final receiving water limitations under Specific Provision 3.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision 3.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The annual pollutant loads from given land uses discharging to and from the MS4s do not exceed the final effluent limitations under Specific Provision 3.b.(2)(b)(ii); OR
- (e) The Responsible Copermittee develops and implements the Water Quality Improvement Plan as follows:
 - (i) Incorporate the BMPs required under Specific Provision 3.b.(2)(c) as part of the Water Quality Improvement Plan,
 - (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Specific Provision 3.b.(2)(c) achieves compliance with Specific Provisions 3.b.(3)(a), 3.b.(3)(b), 3.b.(3)(c) and/or 3.b.(3)(d),
 - (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
 - (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 3.b.(2)(c), AND
 - (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 3.d, to demonstrate compliance with Specific Provisions 3.b.(3)(a), 3.b.(3)(b), 3.b.(3)(c) and/or 3.b.(3)(d).

C. INTERIM TMDL COMPLIANCE REQUIREMENTS

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

(1) Interim Compliance Dates and WQBELs

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

Table 3.4
Interim Water Quality Based Effluent Limitations Expressed as Annual Loads in MS4 Discharges from Specific Land Uses to Rainbow Creek

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

(2) Interim TMDL Compliance Determination

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

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

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

- (1) The Responsible Copermittee must incorporate into the Water Quality Improvement Plan and implement the Sampling and Analysis Plan for Rainbow Creek Nutrient Reduction TMDL Implementation Water Quality Monitoring, dated January 2010.

- (2) The results of any monitoring conducted during the reporting period, and assessment of whether the interim and final TMDL compliance requirements have been achieved must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.
- (3) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 3.b.(2)(b)(i), dry and wet weather discharge concentrations may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

4. Total Maximum Daily Loads for Dissolved Copper, Lead, and Zinc in Chollas Creek

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2007-0043

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	June 13, 2007
State Water Board Approval Date:	July 15, 2008
Office of Administrative Law Approval Date:	October 22, 2008
US EPA Approval Date:	December 18, 2008

(3) TMDL Effective Date: October 22, 2008

(4) Watershed Management Area: San Diego Bay

(5) Water Body: Chollas Creek

(6) Responsible Copermittees: City of La Mesa, City of Lemon Grove, City of San Diego, County of San Diego, San Diego Unified Port District

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final dissolved copper, lead, and zinc TMDL compliance requirements for Chollas Creek consist of the following:

(1) Final TMDL Compliance Date

The Responsible Copermittees must comply with the final TMDL compliance requirements by October 22, 2028.

(2) Final Water Quality Based Effluent Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance date under Specific Provision 4.b.(1):

Table 4.1
Final Receiving Water Limitations Expressed as Concentrations in Chollas Creek

Constituent	Exposure Duration	Receiving Water Limitation (µg/L)	Averaging Period
Dissolved Copper	Acute	$(0.96) \times e^{[0.9422 \times \ln(\text{hardness}) - 1.700]} \times \text{WER}^*$	1 hour
	Chronic	$(0.96) \times e^{[0.8545 \times \ln(\text{hardness}) - 1.702]} \times \text{WER}^*$	4 days
Dissolved Lead	Acute	$[1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 1.460]} \times \text{WER}^*$	1 hour
	Chronic	$[1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 4.705]} \times \text{WER}^*$	4 days
Dissolved Zinc	Acute	$(0.978) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	1 hour
	Chronic	$(0.986) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	4 days

Notes:

* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.

(b) Final Effluent Limitations

Discharges from the MS4s containing pollutant loads that do not exceed the following effluent limitations by the compliance date under Specific Provision 4.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 4.b.(2)(a):

Table 4.2
Final Effluent Limitations as Expressed Concentrations in MS4 Discharges to Chollas Creek

Constituent	Exposure Duration	Effluent Limitation (µg/L)	Averaging Period
Dissolved Copper	Acute	$90\% \times (0.96) \times e^{[0.9422 \times \ln(\text{hardness}) - 1.700]} \times \text{WER}^*$	1 hour
	Chronic	$90\% \times (0.96) \times e^{[0.8545 \times \ln(\text{hardness}) - 1.702]} \times \text{WER}^*$	4 days
Dissolved Lead	Acute	$90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 1.460]} \times \text{WER}^*$	1 hour
	Chronic	$90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 4.705]} \times \text{WER}^*$	4 days
Dissolved Zinc	Acute	$90\% \times (0.978) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	1 hour
	Chronic	$90\% \times (0.986) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	4 days

Notes:

* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.

(c) Best Management Practices

- (i) The Responsible Copermittees must implement BMPs to achieve the receiving water limitations under Specific Provision 4.b.(2)(a) and/or the effluent limitations under Specific Provision 4.b.(2)(b) for Chollas Creek.
- (ii) The Responsible Copermittees should coordinate any BMPs implemented to address this TMDL with Caltrans and the U.S. Navy as possible.

(3) Final TMDL Compliance Determination

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

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision 4.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision 4.b.(2)(b) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:
 - (i) Incorporate the BMPs required under Specific Provision 4.b.(2)(c) as part of the Water Quality Improvement Plan,
 - (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 4.b.(2)(c) achieves compliance with Specific Provisions 4.b.(3)(a), 4.b.(3)(b) and/or 4.b.(3)(c),
 - (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
 - (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 4.b.(2)(c), AND
 - (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 4.d, to demonstrate compliance with Specific Provisions 4.b.(3)(a), 4.b.(3)(b) and/or 4.b.(3)(c).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The interim dissolved copper, lead, and zinc TMDL compliance requirements for Chollas Creek consist of the following:

(1) Interim Compliance Date and WQBELs

The Responsible Copermittee must comply with the interim WQBELs, expressed as concentrations, by the interim compliance date given in Table 4.3:

Table 4.3

Interim Water Quality Based Effluent Limitations Expressed as Concentrations in MS4 Discharges to Chollas Creek

Interim Compliance Date	Constituent	Exposure Duration	Effluent Limitation (µg/L)	Averaging Period
October 22, 2018	Dissolved Copper	Acute	$1.2 \times 90\% \times (0.96) \times e^{[0.9422 \times \ln(\text{hardness}) - 1.700]} \times \text{WER}^*$	1 hour
		Chronic	$1.2 \times 90\% \times (0.96) \times e^{[0.8545 \times \ln(\text{hardness}) - 1.702]} \times \text{WER}^*$	4 days
	Dissolved Lead	Acute	$1.2 \times 90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 1.460]} \times \text{WER}^*$	1 hour
		Chronic	$1.2 \times 90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 4.705]} \times \text{WER}^*$	4 days
	Dissolved Zinc	Acute	$1.2 \times 90\% \times (0.978) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	1 hour
		Chronic	$1.2 \times 90\% \times (0.986) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	4 days

Notes:

* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.

(2) Interim TMDL Compliance Determination

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

- (a) There is no direct or indirect discharge from the Responsible Copermittee’s MS4s to the receiving water; OR
- (b) There are no exceedances of the applicable receiving water limitations under Specific Provision 4.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee’s MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision 4.b.(2)(b) at the Responsible Copermittee’s MS4 outfalls; OR
- (d) There are no exceedances of the interim effluent limitations under Specific Provision 4.c.(1) at the Responsible Copermittee’s MS4 outfalls; OR

- (e) The Responsible Copermittees have submitted and is fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance date.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

- (1) The Responsible Copermittees must implement the monitoring and assessment requirements issued under Investigation Order No. R9-2004-0277, *California Department of Transportation and San Diego Municipal Separate Storm Sewer System Copermittees Responsible for the Discharge of Diazinon into the Chollas Creek Watershed*, when it is amended to include monitoring requirements for the Total Maximum Daily Loads for Dissolved Copper, Lead, and Zinc in Chollas Creek. The monitoring reports required under Investigation Order No. R9-2004-0277 must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.
- (2) The Responsible Copermittees must monitor the effluent of the MS4 outfalls discharging to Chollas Creek for dissolved copper, lead, and zinc, and calculate or estimate the monthly and annual dissolved copper, lead, and zinc loads, in accordance with the requirements of Provisions D.2, D.4.b.(1), and D.4.b.(2) of this Order. The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.
- (3) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 4.b.(2)(b) or 4.c.(1), dry and wet weather discharge concentrations may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

5. Total Maximum Daily Loads for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2008-0027

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	June 11, 2008
State Water Board Approval Date:	June 16, 2009
Office of Administrative Law Approval Date:	September 15, 2009
US EPA Approval Date:	October 26, 2009

(3) TMDL Effective Date: September 15, 2009

(4) Watershed Management Areas: See Table 5.0

(5) Water Bodies: See Table 5.0

(6) Responsible Copermittees: See Table 5.0

Table 5.0

*Applicability of Total Maximum Daily Loads for Indicator Bacteria
 Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay*

Watershed Management Area	Water Body	Segment or Area	Responsible Copermittees
South Orange County	Dana Point Harbor	Baby Beach	-City of Dana Point -County of Orange
San Diego Bay	San Diego Bay	Shelter Island Shoreline Park	- San Diego Unified Port District

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final indicator bacteria TMDL compliance requirements for segments or areas of the water bodies listed in Table 5.0 consist of the following:

(1) Final TMDL Compliance Dates

(a) Baby Beach in Dana Point Harbor

The Responsible Copermittees for MS4 discharges to Baby Beach must be in compliance with the final TMDL compliance requirements according to the following compliance dates:

Table 5.1
*Compliance Dates to Achieve Final TMDL Compliance Requirements
 For Baby Beach in Dana Point Harbor*

Constituent	Dry Weather WLA Compliance Date	Wet Weather WLA Compliance Date
Total Coliform	September 15, 2014	September 15, 2009
Fecal Coliform		September 15, 2009
<i>Enterococcus</i>		September 15, 2019

(b) Shelter Island Shoreline Park in San Diego Bay

The Responsible Copermittee for MS4 discharges to Shelter Island Shoreline Park must be in compliance with the final TMDL compliance requirements as of December 31, 2012.

(2) Final Water Quality Based Effluent Water Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance dates under Specific Provision 5.b.(1):

Table 5.2
*Final Receiving Water Limitations Expressed as Bacteria Densities in
 the Water Body*

Constituent	Receiving Water Limitations	
	Single Sample Maximum ^{1,2}	30-Day Geometric Mean ²
Total Coliform	10,000 MPN/100mL	1,000 MPN/100mL
Fecal Coliform	400 MPN/100mL	200 MPN/100mL
<i>Enterococcus</i>	104 MPN/100mL	35 MPN/100mL

Notes:

1. During wet weather days, only the single sample maximum receiving water limitations are required to be achieved.
2. During dry weather days, the single sample maximum and 30-day geometric mean receiving water limitations are required to be achieved.

(b) Final Effluent Limitations

- (i) Discharges from the MS4s containing indicator bacteria densities that do not exceed the following effluent limitations by the compliance dates under Specific Provision 5.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 5.b.(2)(a):

Table 5.3a

Final Effluent Limitations as Expressed as Bacteria Densities in MS4 Discharges to the Water Body

Effluent Limitations		
Constituent	Single Sample Maximum ^{1,2}	30-Day Geometric Mean ²
Total Coliform	10,000 MPN/100mL	1,000 MPN/100mL
Fecal Coliform	400 MPN/100mL	200 MPN/100mL
<i>Enterococcus</i>	104 MPN/100mL	35 MPN/100mL

Notes:

1. During wet weather days, only the single sample maximum effluent limitations are required to be achieved.
2. During dry weather days, the single sample maximum and 30-day geometric mean effluent limitations are required to be achieved.

- (ii) Discharges from the MS4s containing indicator bacteria loads that do not exceed the following effluent limitations by the compliance dates under Specific Provision 5.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 5.b.(2)(a):

Table 5.4a

Final Effluent Limitations Expressed as Bacteria Loads in MS4 Discharges to the Baby Beach in Dana Point Harbor

Constituent	Dry Weather	Wet Weather
	Final Effluent Limitation	Final Effluent Limitation
Total Coliform	0.86x10 ⁹ MPN/day	3,254x10 ⁹ MPN/30days
Fecal Coliform	0.17x10 ⁹ MPN/day	112x10 ⁹ MPN/30days
<i>Enterococcus</i>	0.03x10 ⁹ MPN/day	114x10 ⁹ MPN/30days

Table 5.4b

Final Effluent Limitations Expressed as Bacteria Loads in MS4 Discharges to the Shelter Island Shoreline Park in San Diego Bay

Constituent	Dry Weather	Wet Weather
	Final Effluent Limitation	Final Effluent Limitation
Total Coliform	0 MPN/day	198x10 ⁹ MPN/30days
Fecal Coliform	0 MPN/day	8x10 ⁹ MPN/30days
<i>Enterococcus</i>	0 MPN/day	26x10 ⁹ MPN/30days

- (iii) Indicator bacteria percent load reductions from the Responsible Copermitees' MS4s that are greater than or equal to the following effluent limitations by the compliance dates under Specific Provision 5.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 5.b.(2)(a):

Table 5.5a

Final Effluent Limitations Expressed as Percent Load Reductions in MS4 Discharges to Baby Beach in Dana Point Harbor*

Constituent	Dry Weather	Wet Weather
	Final Effluent Limitation	Final Effluent Limitation
Total Coliform	90.4%	0%
Fecal Coliform	82.7%	0%
<i>Enterococcus</i>	96.2%	62.2%

Notes:

* The percent load reductions are relative to data collected between 1996-2002. For pollutant load reductions of 0%, pollutant loads discharged from the Responsible Copermitees' MS4s must not exceed the loads in Table 5.4a, unless an updated model or analysis, accepted by the San Diego Water Board, identifies a different allowable pollutant load that can be discharged from the Responsible Copermitee's MS4s to the water body.

Table 5.5b

*Final Effluent Limitations Expressed as Percent Load Reductions** in MS4 Discharges to Shelter Island Shoreline Park in San Diego Bay*

Constituent	Dry Weather	Wet Weather
	Final Effluent Limitation	Final Effluent Limitation
Total Coliform	0%	0%
Fecal Coliform	0%	0%
<i>Enterococcus</i>	0%	0%

Notes:

* The percent load reductions are relative to data collected between 1999-2004. For pollutant load reductions of 0%, pollutant loads discharged from the Responsible Copermitee's MS4s must not exceed the loads in Table 5.4b, unless an updated model or analysis, accepted by the San Diego Water Board, identifies a different allowable pollutant load that can be discharged from the Responsible Copermitee's MS4s to the water body.

(c) Best Management Practices

- (i) The Water Quality Improvement Plans for the applicable Watershed Management Areas in Table 5.0 must incorporate the Bacteria Load Reduction Plan (BLRP) required to be developed pursuant to Resolution No. R9-2008-0027.
- (ii) The Responsible Copermitee must implement BMPs to achieve the receiving water limitations under Specific Provision 5.b.(2)(a) and/or the effluent limitations under Specific Provision 5.b.(2)(b) for the segments or areas of the water bodies listed in Table 5.0

(3) Final TMDL Compliance Determination

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

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision 5.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision 5.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The pollutant loads discharging from the Responsible Copermittees' MS4 outfalls do not exceed the final effluent limitations under Specific Provision 5.b.(2)(b)(ii); OR
- (e) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the final effluent limitations under Specific Provision 5.b.(2)(b)(iii); OR
- (f) The Responsible Copermittees can demonstrate that exceedances of the final receiving water limitations under Specific Provision 5.b.(2)(a) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermittees' MS4s are not causing or contributing to the exceedances; OR
- (g) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:
 - (i) Incorporate the BMPs required under Specific Provision 5.b.(2)(c) as part of the Water Quality Improvement Plan,
 - (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 5.b.(2)(c) achieves compliance with Specific Provisions 5.b.(3)(a), 5.b.(3)(b), 5.b.(3)(c), 5.b.(3)(d), 5.b.(3)(e) and/or 5.b.(3)(f),
 - (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
 - (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 5.b.(2)(c), AND

- (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 5.d, to demonstrate compliance with Specific Provisions 5.b.(3)(a), 5.b.(3)(b), 5.b.(3)(c), 5.b.(3)(d), 5.b.(3)(e) and/or 5.b.(3)(f).

C. INTERIM TMDL COMPLIANCE REQUIREMENTS

The interim indicator bacteria TMDL compliance requirements for segments or areas of the water bodies listed in Table 5.0 consist of the following:

(1) Baby Beach in Dana Point Harbor

(a) Interim TMDL Compliance Dates and WQBELS

The Responsible Copermittees for MS4 discharges to Baby Beach must comply with the following interim WQBELS by the interim compliance dates given in Tables 5.6a and/or 5.6b:

Table 5.6a

Interim Water Quality Based Effluent Limitations Expressed as Bacteria Loads in MS4 Discharges to Baby Beach in Dana Point Harbor

Constituent	Interim Compliance Dates	Dry Weather	Wet Weather
		Interim Effluent Limitation	Interim Effluent Limitation
Total Coliform	September 15, 2012	4.93x10 ⁹ MPN/day	3,254x10 ⁹ MPN/30days*
Fecal Coliform	September 15, 2012	0.59x10 ⁹ MPN/day	112x10 ⁹ MPN/30days*
Enterococcus	September 15, 2012	0.42x10 ⁹ MPN/day	301x10 ⁹ MPN/30days
	September 15, 2016	0.03x10 ⁹ MPN/day *	207x10 ⁹ MPN/30days

Notes:

* Same as the final effluent limitations in Table 5.4a.

Table 5.6b

Interim Water Quality Based Effluent Limitations Expressed as Percent Load Reductions in MS4 Discharges to Baby Beach in Dana Point Harbor*

Constituent	Interim Compliance Dates	Dry Weather	Wet Weather
		Interim Effluent Limitation	Interim Effluent Limitation
Total Coliform	September 15, 2012	45.2%	0%**
Fecal Coliform	September 15, 2012	41.4%	0%**
Enterococcus	September 15, 2012	48.1%	0%
	September 15, 2016	96.2%**	31.1%

Notes:

* The percent load reductions are relative to data collected between 1996-2002. For pollutant load reductions of 0%, pollutant loads discharged from the Responsible Copermittees' MS4s must not exceed the loads in Table 5.6a, unless an updated model or analysis, accepted by the San Diego Water Board, identifies a different allowable pollutant load that can be discharged from the Responsible Copermittee's MS4s to the waterbody.

** Same as the final effluent limitations in Table 5.5a.

(b) Interim Compliance Determination

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

- (i) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (ii) There are no exceedances of the final receiving water limitations under Specific Provision 5.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (iii) There are no exceedances of the final effluent limitations under Specific Provision 5.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR
- (iv) The pollutant loads discharging from the Responsible Copermittees' MS4 outfalls do not exceed the final effluent limitations under Specific Provision 5.b(2)(b)(ii); OR
- (v) The Responsible Copermittees can demonstrate that exceedances of the applicable receiving water limitations under Specific Provision 5.b.(2)(a) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermittees' MS4s are not causing or contributing to the exceedances; OR
- (vi) The pollutant loads discharging from the Responsible Copermittees' MS4 outfalls do not exceed the interim effluent limitations under Table 5.6a of Specific Provision 5.c.(1)(a); OR
- (vii) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the interim effluent limitations under Table 5.6b of Specific Provision 5.c.(1)(a); OR
- (viii) The Responsible Copermittees have submitted and are fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance dates.

(2) Shelter Island Shoreline Park in San Diego Bay

The Responsible Copermittee for MS4 discharges to Shelter Island Shoreline Park must be in compliance with the final indicator bacteria TMDL requirements as of December 31, 2012.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

(1) Monitoring Stations

Monitoring locations should consist of, at a minimum, the same locations used to collect data required pursuant to Order Nos. R9-2007-0001 and R9-2009-0002, and beach monitoring for Health and Safety Code section 115880.³⁸ If discharges of bacteria from the MS4 exceed the applicable interim or final WQBELs, additional monitoring locations and/or other source identification methods must be implemented to identify the sources causing the exceedances. The additional monitoring locations must also be used to demonstrate that the bacteria loads from the identified anthropogenic sources have been addressed and are no longer causing exceedances in the receiving waters.

(2) Monitoring Procedures

- (a) The Responsible Copermittees must collect dry weather monitoring samples from the receiving water monitoring stations at least monthly. Dry weather samples collected from additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified anthropogenic sources have been addressed and are no longer causing exceedances in the receiving waters.
- (b) The Responsible Copermittees must collect wet weather monitoring samples within the first 24 hours of a storm event³⁹ of the rainy season (i.e. October 1 through April 30). Wet weather samples collected from receiving water stations and any additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified sources have been addressed and are no longer causing exceedances in the receiving waters.
- (c) Samples must be analyzed for total coliform, fecal coliform, and *Enterococcus* indicator bacteria.

³⁸ Commonly referred to as AB 411 monitoring

³⁹ Wet weather days are defined by the TMDL as storm events of 0.2 inches or greater and the following 72 hours. The Responsible Copermittees may choose to limit their wet weather sampling requirements to storm events of 0.2 inches or greater, or also include storm events of 0.1 inches or greater as defined by the federal regulations [40CFR122.26(d)(2)(iii)(A)(2)].

(3) Assessment and Reporting Requirements

- (a) The Responsible Copermittees must analyze the dry weather and wet weather monitoring data to assess whether the interim and final WQBELs have been achieved.
- (b) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 5.b.(2)(b)(i), dry and wet weather discharge bacteria densities may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.
- (c) The Responsible Copermittees must analyze the dry weather and wet weather monitoring data to correlate elevated bacteria levels with known or suspected sewage spills from wastewater collection systems and treatment plants or boats.
- (d) The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

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

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2010-0001

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	February 10, 2010
State Water Board Approval Date:	December 14, 2010
Office of Administrative Law Approval Date:	April 4, 2011
US EPA Approval Date:	June 22, 2011

(3) TMDL Effective Date: April 4, 2011

(4) Watershed Management Areas: See Table 6.0

(5) Water Bodies: See Table 6.0

(6) Responsible Copermittees: See Table 6.0

Table 6.0

Applicability of Total Maximum Daily Loads for Indicator Bacteria

Project I - Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)

Watershed Management Area and Watershed	Water Body	Segment or Area	Responsible Copermittees
South Orange County San Joaquin Hills HSA (901.11) and Laguna Beach HSA (901.12)	Pacific Ocean Shoreline	Cameo Cove at Irvine Cove Drive – Riviera Way at Heisler Park - North	-City of Laguna Beach -County of Orange -Orange County Flood Control District
		at Main Laguna Beach	
	Pacific Ocean Shoreline	Laguna Beach at Ocean Avenue	-City of Aliso Viejo -City of Laguna Beach -City of Laguna Woods -County of Orange -Orange County Flood Control District
		Laguna Beach at Cleo Street	
		Arch Cove at Bluebird Canyon Road Laguna Beach at Dumond Drive	
South Orange County Aliso HSA (901.13)	Pacific Ocean Shoreline	Laguna Beach at Lagunita Place / Blue Lagoon Place at Aliso Beach	-City of Aliso Viejo -City of Laguna Beach -City of Laguna Hills -City of Laguna Niguel -City of Laguna Woods -City of Lake Forest -City of Mission Viejo -County of Orange -Orange County Flood Control District
	Aliso Creek	Entire reach (7.2 miles) and associated tributaries: - Aliso Hills Channel - English Canyon Creek - Dairy Fork Creek - Sulfur Creek - Wood Canyon Creek	
	Aliso Creek Mouth	at mouth	

Table 6.0 (Cont'd)
*Applicability of Total Maximum Daily Loads for Indicator Bacteria
 Project I - Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)*

Watershed Management Area and Watershed	Water Body	Segment or Area	Responsible Copermittees
South Orange County Dana Point HSA (901.14)	Pacific Ocean Shoreline	Aliso Beach at West Street	-City of Dana Point -City of Laguna Beach -City of Laguna Niguel -County of Orange -Orange County Flood Control District
		Aliso Beach at Table Rock Drive	
		100 Steps Beach at Pacific Coast Hwy at hospital (9 th Avenue)	
		at Salt Creek (large outlet)	
		Salt Creek Beach at Salt Creek service road	
		Salt Creek Beach at Strand Road	
South Orange County Lower San Juan HSA (901.27)	Pacific Ocean Shoreline	at San Juan Creek	-City of Dana Point -City of Laguna Hills -City of Laguna Niguel -City of Mission Viejo -City of Rancho Santa Margarita -City of San Juan Capistrano -County of Orange -Orange County Flood Control District
	San Juan Creek	lower 1 mile	
	San Juan Creek Mouth	at mouth	
South Orange County San Clemente HA (901.30)	Pacific Ocean Shoreline	at Poche Beach	-City of Dana Point -City of San Clemente -County of Orange -Orange County Flood Control District
		Ole Hanson Beach Club Beach at Pico Drain	
		San Clemente City Beach at El Portal Street Stairs	
		San Clemente City Beach at Mariposa Street	
		San Clemente City Beach at Linda Lane	
		San Clemente City Beach at South Linda Lane	
		San Clemente City Beach at Lifeguard Headquarters	
		under San Clemente Municipal Pier	
		San Clemente City Beach at Trafalgar Canyon (Trafalgar Lane)	
		San Clemente State Beach at Riviera Beach	
		San Clemente State Beach at Cypress Shores	

Table 6.0 (Cont'd)
*Applicability of Total Maximum Daily Loads for Indicator Bacteria
 Project I - Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)*

Watershed Management Area and Watershed	Water Body	Segment or Area	Responsible Copermittees
San Luis Rey River San Luis Rey HU (903.00)	Pacific Ocean Shoreline	at San Luis Rey River mouth	-City of Oceanside -City of Vista -County of San Diego
Carlsbad San Marcos HA (904.50)	Pacific Ocean Shoreline	at Moonlight State Beach	-City of Carlsbad -City of Encinitas -City of Escondido -City of San Marcos -County of San Diego
San Dieguito River San Dieguito HU (905.00)	Pacific Ocean Shoreline	at San Dieguito Lagoon mouth	-City of Del Mar -City of Escondido -City of Poway -City of San Diego -City of Solana Beach -County of San Diego
Penasquitos Miramar Reservoir HA (906.10)	Pacific Ocean Shoreline	Torrey Pines State Beach at Del Mar (Anderson Canyon)	-City of Del Mar -City of Poway -City of San Diego -County of San Diego
Mission Bay Scripps HA (906.30)	Pacific Ocean Shoreline	La Jolla Shores Beach at El Paseo Grande	-City of San Diego
		La Jolla Shores Beach at Caminito del Oro	
		La Jolla Shores Beach at Vallecitos	
		La Jolla Shores Beach at Avenida de la Playa	
		at Casa Beach, Children's Pool	
		South Casa Beach at Coast Boulevard	
		Whispering Sands Beach at Ravina Street	
		Windansea Beach at Vista de la Playa	
		Windansea Beach at Bonair Street	
		Windansea Beach at Playa del Norte	
		Windansea Beach at Palomar Avenue	
		at Tourmaline Surf Park	
Pacific Beach at Grand Avenue			
Mission Bay Tecolote HA (906.50)	Tecolote Creek	Entire reach and tributaries	

Table 6.0 (Cont'd)
Applicability of Total Maximum Daily Loads for Indicator Bacteria
Project I- Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)

Watershed Management Area and Watershed	Water Body	Segment or Area	Responsible Copermittees
San Diego River Mission San Diego HSA (907.11) and Santee HSA (907.12)	Forrester Creek	lower 1 mile	-City of El Cajon -City of Santee -County of San Diego
	San Diego River	lower 6 miles	-City of El Cajon -City of La Mesa
	Pacific Ocean Shoreline	at San Diego River mouth at Dog Beach	-City of San Diego -City of Santee -County of San Diego
San Diego Bay Chollas HSA (908.22)	Chollas Creek	lower 1.2 miles	-City of La Mesa -City of Lemon Grove -City of San Diego -County of San Diego - San Diego Unified Port District

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final indicator bacteria TMDL compliance requirements for the water bodies listed in Table 6.0 consist of the following:

(1) Final TMDL Compliance Dates

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

Table 6.1
Compliance Dates to Achieve Final TMDL Compliance Requirements

Constituent	Dry Weather TMDL Compliance Date	Wet Weather TMDL Compliance Date*
Total Coliform	April 4, 2021	April 4, 2031 (April 4, 2021)
Fecal Coliform		
<i>Enterococcus</i>		

* The Wet Weather TMDL Compliance Date in parenthesis applies if the applicable Water Quality Improvement Plan does not include load reduction programs for other constituents (e.g. metals, pesticides, trash, nutrients, sediment, etc.) together with bacteria load reduction requirements of these TMDLs.

(2) Final Water Quality Based Effluent Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance dates under Specific Provision 6.b.(1):

Table 6.2a

Final Receiving Water Limitations Expressed as Bacteria Densities and Allowable Exceedance Frequencies for Beaches

Constituent	Wet Weather Days		Dry Weather Days	
	Single Sample Maximum ^{a,b} (MPN/100mL)	Single Sample Maximum Allowable Exceedance Frequency ^c	30-Day Geometric Mean ^b (MPN/100mL)	30-Day Geometric Mean Allowable Exceedance Frequency
Total Coliform	10,000	22%	1,000	0%
Fecal Coliform	400	22%	200	0%
<i>Enterococcus</i>	104	22%	35	0%

Notes:

- During wet weather days, only the single sample maximum receiving water limitations are required to be achieved.
- During dry weather days, the single sample maximum and 30-day geometric mean receiving water limitations are required to be achieved.
- The 22% single sample maximum allowable exceedance frequency only applies to wet weather days. For dry weather days, the dry weather bacteria densities must be consistent with the single sample maximum REC-1 water quality objectives in the Ocean Plan.

Table 6.2b

Final Receiving Water Limitations Expressed as Bacteria Densities and Allowable Exceedance Frequencies for Creeks

Constituent	Wet Weather Days		Dry Weather Days	
	Single Sample Maximum ^{a,b} (MPN/100mL)	Single Sample Maximum Allowable Exceedance Frequency ^c	30-Day Geometric Mean ^b (MPN/100mL)	30-Day Geometric Mean Allowable Exceedance Frequency
Fecal Coliform	400	22%	200	0%
<i>Enterococcus</i>	61 (104)	22%	33	0%

Notes:

- During wet weather days, only the single sample maximum receiving water limitations are required to be achieved.
- During dry weather days, the single sample maximum and 30-day geometric mean receiving water limitations are required to be achieved.
- The 22% single sample maximum allowable exceedance frequency only applies to wet weather days. For dry weather days, the dry weather bacteria densities must be consistent with the single sample maximum REC-1 water quality objectives in the Basin Plan.
- A single sample maximum of 104 MPN/100ml for *Enterococcus* may be applied as a receiving water limitation for creeks, instead of 61 MPN/100mL, if one or more of the creeks addressed by these TMDLs (San Juan Creek, Aliso Creek, Tecolote Creek, Forrester Creek, San Diego River, and/or Chollas Creek) is designated with a "moderately to lightly used area" or less frequent usage frequency in the Basin Plan. Otherwise, the single sample maximum of 61 MPN/100mL for *Enterococcus* must be used to assess compliance with the allowable exceedance frequency.

(b) Final Effluent Limitations

- (i) Discharges from the MS4s containing indicator bacteria densities that do not exceed the following effluent limitations by the compliance dates under Specific Provision 6.c.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 6.b.(2)(a):

Table 6.2c

Final Effluent Limitations Expressed as Bacteria Densities and Allowable Exceedance Frequencies in MS4 Discharges to the Water Body

Constituent	Concentration-Based Effluent Limitations			
	Single Sample Maximum ^{a,b} (MPN/100mL)	Single Sample Maximum Allowable Exceedance Frequency ^c	30-Day Geometric Mean ^b (MPN/100mL)	30-Day Geometric Mean Allowable Exceedance Frequency
Total Coliform ^d	10,000	22%	1,000	0%
Fecal Coliform	400	22%	200	0%
<i>Enterococcus</i>	104 ^e / 61 ^f	22%	35 ^e / 33 ^f	0%

Notes:

- During wet weather days, only the single sample maximum effluent limitations are required to be achieved.
- During dry weather days, the single sample maximum and 30-day geometric mean effluent limitations are required to be achieved.
- The 22% single sample maximum allowable exceedance frequency only applies to wet weather days. For dry weather days, the dry weather bacteria densities must be consistent with the single sample maximum REC-1 water quality objectives in the Ocean Plan for discharges to beaches, and the Basin Plan for discharges to creeks and creek mouths.
- Total coliform effluent limitations only apply to MS4 outfalls that discharge to the Pacific Ocean Shorelines and creek mouths listed in Table 6.0.
- This *Enterococcus* effluent limitation applies to MS4 discharges to segments of areas of Pacific Ocean Shoreline listed in Table 6.0.
- This *Enterococcus* effluent limitation applies to MS4 discharges to segments or areas of creeks or creek mouths listed in Table 6.0.

- (ii) Indicator bacteria percent load reductions from the Responsible Copermittees' MS4s that are greater than or equal to the following effluent limitations by the compliance dates under Specific Provision 6.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 6.b.(2)(a):

Table 6.3
Final Effluent Limitations Expressed as Percent Load Reductions in MS4 Discharges to the Water Body*

Watershed Management Areas	Watershed and Water Bodies	Load-Based Effluent Limitations					
		Dry Weather			Wet Weather		
		Total Coliform	Fecal Coliform	Enterococcus	Total Coliform	Fecal Coliform	Enterococcus
South Orange County	San Joaquin Hills HSA (901.11) and Laguna Hills HSA (901.12) - Pacific Ocean Shoreline	91.78%	91.72%	98.28%	46.85%	52.07%	51.26%
	Aliso HSA (901.13) - Pacific Ocean Shoreline - Aliso Creek - Aliso Creek mouth	95.47%	95.58%	99.13%	25.29%	26.62%	27.52% (27.37%)**
	Dana Point HSA (901.14) - Pacific Ocean Shoreline	95.04%	95.03%	98.98%	13.15%	14.86%	15.16%
	Lower San Juan HSA (901.27) - Pacific Ocean Shoreline - San Juan Creek - San Juan Creek mouth	72.96%	74.21%	94.94%	19.21%	12.82%	27.12% (26.90%)**
	San Clemente HA (901.30) - Pacific Ocean Shoreline	94.28%	94.23%	98.83%	23.85%	24.58%	25.26%
San Luis Rey River	San Luis Rey HU (903.00) - Pacific Ocean Shoreline	38.13%	39.09%	87.38%	5.62%	3.12%	11.69%

Table 6.3 (Cont'd)
Final Effluent Limitations Expressed as Percent Load Reductions in
 MS4 Discharges to the Water Body*

Watershed Management Areas	Watershed and Water Bodies	Load-Based Effluent Limitations					
		Dry Weather			Wet Weather		
		Total Coliform	Fecal Coliform	Enterococcus	Total Coliform	Fecal Coliform	Enterococcus
Carlsbad	San Marcos HA (904.50)	82.82%	82.55%	96.03%	18.47%	18.98%	20.19%
	- Pacific Ocean Shoreline						
San Dieguito River	San Dieguito HU (905.00)	14.39%	20.72%	83.48%	4.29%	1.46%	7.72%
	- Pacific Ocean Shoreline						
Penasquitos	Miramar Reservoir HA (906.10)	96.50%	96.59%	99.42%	1.61%	1.99%	1.93%
	- Pacific Ocean Shoreline						
Mission Bay	Scripps HA (906.30)	96.44%	96.42%	99.25%	16.32%	21.14%	18.82%
	- Pacific Ocean Shoreline						
	Tecolote HA (906.50)	94.51%	94.59%	98.94%	16.51%	20.47%	18.15% (18.08%)**
	- Tecolote Creek						
	Mission San Diego HSA (907.11) and Santee HSA (907.12)	74.03%	69.44%	93.96%	38.14%	53.22%	42.74% (42.47%)**
San Diego River	- Pacific Ocean Shoreline						
	- Forrester Creek (lower 1 mile) - San Diego River (lower 6 miles)						
San Diego Bay	Chollas HSA (908.22)	92.06%	92.15%	98.46%	17.82%	24.84%	21.46% (21.36%)**
	- Chollas Creek						

Notes:

* The percent load reductions are based on reducing loads compared to pollutant loads from 2001 to 2002.

** The alternative *Enterococcus* percent load reduction was calculated based on a numeric target of 104 MPN/100mL instead of 61 MPN/100mL, protective of the REC-1 "moderately to lightly used area" usage frequency that is protective of freshwater creeks and downstream beaches. Acceptable evidence that impaired freshwater creeks can be considered "moderately to lightly used areas" must be provided before these alternative pollutant load reductions can be utilized.

(c) Best Management Practices

- (i) The Water Quality Improvement Plans for the applicable Watershed Management Areas in Table 6.0 must incorporate the Bacteria Load Reduction Plans (BLRPs) or Comprehensive Load Reduction Plans (CLRPs) required to be developed pursuant to Resolution No. R9-2010-0001.
- (ii) The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision 6.b.(2)(a) and/or the effluent limitations under Specific Provision 6.b.(2)(b) for the segments or areas of the water bodies listed in Table 6.0.
- (iii) The Responsible Copermittees should coordinate any BMPs implemented to address this TMDL with Caltrans, owners/operators of small MS4s, and agricultural dischargers as possible.

(3) Final TMDL Compliance Determination

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

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) There are no exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision 6.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR
- (d) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the final effluent limitations under Specific Provision 6.b.(2)(b)(ii); OR
- (e) The Responsible Copermittees can demonstrate that exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermittees' MS4s are not causing or contributing to the exceedances; OR
- (f) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:
 - (i) Incorporate the BMPs required under Specific Provision 6.b.(2)(c) as part of the Water Quality Improvement Plan,

- (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 6.b.(2)(c) achieves compliance with Specific Provisions 6.b.(3)(a), 6.b.(3)(b), 6.b.(3)(c), 6.b.(3)(d), and/or 6.b.(3)(e),
- (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,
- (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 6.b.(2)(c), AND
- (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 6.d, to demonstrate compliance with Specific Provisions 6.b.(3)(a), 6.b.(3)(b), 6.b.(3)(c), 6.b.(3)(d), 6.b.(3)(e) and/or 6.b.(3)(f).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The interim indicator bacteria TMDL compliance requirements for the water bodies listed in Table 6.0 consist of the following:

(1) Interim TMDL Compliance Dates

The Responsible Copermittees must achieve compliance with the interim TMDL compliance requirements, as determined in accordance with Specific Provision 6.c.(3), by the interim compliance dates given in Table 6.4, unless alternative interim compliance dates are accepted by the San Diego Water Board Executive Officer as part of the Water Quality Improvement Plan.

Table 6.4
Interim Compliance Dates to Achieve Interim TMDL Compliance Requirements

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Compliance Dates	
			Interim Dry Weather WQBELs	Interim Wet Weather WQBELs*
South Orange County San Joaquin Hills HSA (901.11) and Laguna Beach HSA (901.12)	Pacific Ocean Shoreline	Cameo Cove at Irvine Cove Drive – Riviera Way	April 4, 2016	April 4, 2021 (April 4, 2016)
		at Heisler Park - North		
	Pacific Ocean Shoreline	at Main Laguna Beach	April 4, 2016	April 4, 2021 (April 4, 2016)
		Laguna Beach at Ocean Avenue		
		Laguna Beach at Cleo Street		
Arch Cove at Bluebird Canyon Road				
Laguna Beach at Dumond Drive				
South Orange County Aliso HSA (901.13)	Pacific Ocean Shoreline	Laguna Beach at Laguna Place / Blue Lagoon Place at Aliso Beach	April 4, 2016	April 4, 2021 (April 4, 2016)
	Aliso Creek	Entire reach (7.2 miles) and associated tributaries: - Aliso Hills Channel - English Canyon Creek - Dairy Fork Creek - Sulfur Creek - Wood Canyon Creek	April 4, 2018	April 4, 2021 (April 4, 2018)
		Aliso Creek Mouth		
South Orange County Dana Point HSA (901.14)	Pacific Ocean Shoreline	Aliso Beach at West Street	April 4, 2016	April 4, 2021 (April 4, 2016)
		Aliso Beach at Table Rock Drive		
		100 Steps Beach at Pacific Coast Hwy at hospital (9 th Avenue)		
		at Salt Creek (large outlet)		
		Salt Creek Beach at Salt Creek service road	April 4, 2017	April 4, 2021 (April 4, 2017)
		Salt Creek Beach at Strand Road	April 4, 2017	April 4, 2021 (April 4, 2017)

Table 6.4 (Cont'd)
Interim Compliance Dates to Achieve Interim WQBELs

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Compliance Dates	
			Interim Dry Weather WQBELs	Interim Wet Weather WQBELs*
South Orange County Lower San Juan HSA (901.27)	Pacific Ocean Shoreline	at San Juan Creek	April 4, 2016	April 4, 2021 (April 4, 2016)
	San Juan Creek	lower 1 mile	April 4, 2018	April 4, 2021 (April 4, 2018)
	San Juan Creek Mouth	at mouth	April 4, 2016	April 4, 2021 (April 4, 2016)
South Orange County San Clemente HA (901.30)	Pacific Ocean Shoreline	at Poche Beach	April 4, 2016	April 4, 2021 (April 4, 2016)
		Ole Hanson Beach Club Beach at Pico Drain	April 4, 2016	April 4, 2021 (April 4, 2016)
		San Clemente City Beach at El Portal Street Stairs	April 4, 2017	April 4, 2021 (April 4, 2017)
		San Clemente City Beach at Mariposa Street		
		San Clemente City Beach at Linda Lane	April 4, 2016	April 4, 2021 (April 4, 2016)
		San Clemente City Beach at South Linda Lane	April 4, 2018	April 4, 2021 (April 4, 2018)
		San Clemente City Beach at Lifeguard Headquarters	April 4, 2017	April 4, 2021 (April 4, 2017)
		under San Clemente Municipal Pier		
		San Clemente City Beach at Trafalgar Canyon (Trafalgar Lane)	April 4, 2018	April 4, 2021 (April 4, 2018)
		San Clemente State Beach at Riviera Beach	April 4, 2016	April 4, 2021 (April 4, 2016)
		San Clemente State Beach at Cypress Shores	April 4, 2017	April 4, 2021 (April 4, 2017)
San Luis Rey River San Luis Rey HU (903.00)	Pacific Ocean Shoreline	at San Luis Rey River mouth	April 4, 2017	April 4, 2021 (April 4, 2017)
Carlsbad San Marcos HA (904.50)	Pacific Ocean Shoreline	at Moonlight State Beach	April 4, 2016	April 4, 2021 (April 4, 2016)
San Dieguito River San Dieguito HU (905.00)	Pacific Ocean Shoreline	at San Dieguito Lagoon mouth	April 4, 2016	April 4, 2021 (April 4, 2016)

Table 6.4 (Cont'd)
Interim Compliance Dates to Achieve Interim WQBELs

Watershed Management Area and Watershed			Interim Compliance Dates	
Water Body	Segment or Area	Interim Dry Weather WQBELs	Interim Wet Weather WQBELs*	
Penasquitos Miramar Reservoir HA (906.10)	Pacific Ocean Shoreline Torrey Pines State Beach at Del Mar (Anderson Canyon)	April 4, 2016	April 4, 2021 (April 4, 2016)	
Mission Bay Scripps HA (906.30)	La Jolla Shores Beach at El Paseo Grande	April 4, 2016	April 4, 2021 (April 4, 2016)	
	La Jolla Shores Beach at Caminito del Oro			
	La Jolla Shores Beach at Vallecitos			
	La Jolla Shores Beach at Avenida de la Playa			
	at Casa Beach, Children's Pool			
	South Casa Beach at Coast Boulevard			
	Whispering Sands Beach at Ravina Street			
	Windansea Beach at Vista de la Playa			
	Windansea Beach at Bonair Street			
	Windansea Beach at Playa del Norte			
	Windansea Beach at Palomar Avenue			
	at Tourmaline Surf Park			
at Pacific Beach at Grand Avenue				
Mission Bay Tecolote HA (906.50)	Tecolote Creek Entire reach and tributaries			
San Diego River Mission San Diego HSA (907.11) and Santee HSA (907.12)	Forrester Creek lower 1 mile	April 4, 2018	April 4, 2021 (April 4, 2018)	
	San Diego River lower 6 miles			
	Pacific Ocean Shoreline at San Diego River mouth at Dog Beach			
San Diego Bay Chollas HSA (908.22)	Chollas Creek lower 1.2 miles	April 4, 2018	April 4, 2021 (April 4, 2018)	

* The Interim Compliance Dates to achieve the Interim Wet Weather WQBELs in parenthesis apply if the applicable Water Quality Improvement Plan does not include load reduction programs for other constituents (e.g. metals, pesticides, trash, nutrients, sediment, etc.) together with bacteria load reduction requirements of these TMDLs.

(2) Interim Water Quality Based Effluent Limitations

The Responsible Copermittees for discharges to the water bodies in Table 6.0 must comply with the following interim WQBELs by the interim compliance dates given in Specific Provision 6.c.(1):

(a) Interim Receiving Water Limitations

(i) *Interim Dry Weather Receiving Water Limitations*

The Responsible Copermittee must calculate the “existing” exceedance frequencies of the 30-day geometric mean water quality objectives for each of the indicator bacteria by analyzing the available monitoring data collected between January 1, 1996 and December 31, 2002. “Existing” exceedance frequencies may be calculated by water body and/or by Watershed Management Area listed in Table 6.0. Separate “existing” exceedance frequencies must be calculated for beaches and creeks/creek mouths.

The Responsible Copermittees must achieve a 50 percent reduction in the “existing” exceedance frequency of the 30-day geometric mean WQBELs for the water bodies listed in Table 6.0 by the interim compliance dates given in Table 6.4. A 50 percent reduction in the “existing” exceedance frequency is equivalent to half of the “existing” exceedance frequency of the 30-day geometric mean WQBELs.

The “existing” exceedance frequencies and the interim dry weather allowable exceedance frequencies (i.e. interim dry weather receiving water limitations) calculated by the Responsible Copermittees must be included in the Water Quality Improvement Plans for the applicable Watershed Management Areas.

(ii) *Interim Wet Weather Receiving Water Limitations*

The Responsible Copermitees must achieve the interim wet weather receiving water limitations in Table 6.5, expressed as interim wet weather allowable exceedance frequencies, by the interim compliance dates given in Table 6.4.

Table 6.5
Interim Wet Weather Receiving Water Limitations Expressed as Interim Wet Weather Allowable Exceedance Frequencies

Watershed Management Area and Watershed		Water Body	Segment or Area	Interim Wet Weather Allowable Exceedance Frequencies		
				Total Coliform	Fecal Coliform	Enterococcus
South Orange County	Pacific Ocean Shoreline	Cameo Cove at Irvine Cove Drive – Riviera Way	38%	37%	39%	
						Pacific Ocean Shoreline
	at Main Laguna Beach					
	Laguna Beach at Ocean Avenue					
	Laguna Beach at Cleo Street					
	San Joaquin Hills HSA (901.11) and Laguna Beach HSA (901.12)	Arch Cove at Bluebird Canyon Road				
Laguna Beach at Dumond Drive						
South Orange County	Pacific Ocean Shoreline	Laguna Beach at Lagunita Place / Blue Lagoon Place at Aliso Beach	41%	41%	42%	
	Aliso HSA (901.13)	Aliso Creek	Entire reach (7.2 miles) and associated tributaries: - Aliso Hills Channel - English Canyon Creek - Dairy Fork Creek - Sulfur Creek - Wood Canyon Creek	41%	41%	42%
South Orange County	Pacific Ocean Shoreline	Aliso Beach at West Street	36%	36%	36%	
		Aliso Beach at Table Rock Drive				
		100 Steps Beach at Pacific Coast Hwy at hospital (9 th Avenue)				
		at Salt Creek (large outlet)				
		Salt Creek Beach at Salt Creek service road				
		Salt Creek Beach at Strand Road				

Table 6.5 (Cont'd)
*Interim Wet Weather Receiving Water Limitations Expressed as
 Interim Wet Weather Allowable Exceedance Frequencies*

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Wet Weather Allowable Exceedance Frequencies		
			Total Coliform	Fecal Coliform	Enterococcus
South Orange County Lower San Juan HSA (901.27)	Pacific Ocean Shoreline	at San Juan Creek	44%	44%	48%
	San Juan Creek	lower 1 mile	44%	44%	47%
	San Juan Creek Mouth	at mouth	44%	44%	47%
South Orange County San Clemente HA (901.30)	Pacific Ocean Shoreline	at Poche Beach	35%	35%	36%
		Ole Hanson Beach Club Beach at Pico Drain			
		San Clemente City Beach at El Portal Street Stairs			
		San Clemente City Beach at Mariposa Street			
		San Clemente City Beach at Linda Lane			
		San Clemente City Beach at South Linda Lane			
		San Clemente City Beach at Lifeguard Headquarters			
		under San Clemente Municipal Pier			
		San Clemente City Beach at Trafalgar Canyon (Trafalgar Lane)			
		San Clemente State Beach at Riviera Beach			
		San Clemente State Beach at Cypress Shores			
San Luis Rey River San Luis Rey HU (903.00)	Pacific Ocean Shoreline	at San Luis Rey River mouth	45%	44%	47%
Carlsbad San Marcos HA (904.50)	Pacific Ocean Shoreline	at Moonlight State Beach	40%	40%	41%
San Dieguito River San Dieguito HU (905.00)	Pacific Ocean Shoreline	at San Dieguito Lagoon mouth	33%	33%	36%

Table 6.5 (Cont'd)
*Interim Wet Weather Receiving Water Limitations Expressed as
 Interim Wet Weather Allowable Exceedance Frequencies*

Watershed Management Area and Watershed		Water Body	Segment or Area	Interim Wet Weather Allowable Exceedance Frequencies		
				Total Coliform	Fecal Coliform	Enterococcus
Penasquitos						
Miramar Reservoir HA (906.10)	Pacific Ocean Shoreline	Torrey Pines State Beach at Del Mar (Anderson Canyon)		26%	26%	26%
Mission Bay Scripps HA (906.30)	Pacific Ocean Shoreline	La Jolla Shores Beach at El Paseo Grande	37%	37%	37%	
		La Jolla Shores Beach at Caminito del Oro				
		La Jolla Shores Beach at Vallecitos				
		La Jolla Shores Beach at Avenida de la Playa				
		at Casa Beach, Children's Pool				
		South Casa Beach at Coast Boulevard				
		Whispering Sands Beach at Ravina Street				
		Windansea Beach at Vista de la Playa				
		Windansea Beach at Bonair Street				
		Windansea Beach at Playa del Norte				
		Windansea Beach at Palomar Avenue				
		at Tourmaline Surf Park				
Pacific Beach at Grand Avenue						
Mission Bay Tecolote HA (906.50)	Tecolote Creek	Entire reach and tributaries	49%	49%	51%	
San Diego River	Forrester Creek	lower 1 mile	46%	43%	49%	
	San Diego River	lower 6 miles	46%	43%	49%	
Mission San Diego HSA (907.11) and Santee HSA (907.12)	Pacific Ocean Shoreline	at San Diego River mouth at Dog Beach	46%	43%	51%	
San Diego Bay Chollas HSA (908.22)	Chollas Creek	lower 1.2 miles	41%	41%	43%	

(b) Interim Effluent Limitations

Indicator bacteria percent load reductions from the Responsible Copermittees' MS4s that are greater than or equal to the following effluent limitations by the interim compliance dates under Specific Provision 6.c.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 6.c.(2)(a):

Table 6.6
Interim Effluent Limitations Expressed as Percent Load Reductions in MS4 Discharges to the Water Body*

Watershed Management Areas	Watersheds and Water Bodies	Load-Based Effluent Limitations					
		Dry Weather			Wet Weather		
		Total Coliform	Fecal Coliform	Enterococcus	Total Coliform	Fecal Coliform	Enterococcus
South Orange County	San Joaquin Hills HSA (901.11) and Laguna Hills HSA (901.12) - Pacific Ocean Shoreline	45.89%	45.86%	49.14%	23.43%	26.04%	25.63%
	Aliso HSA (901.13) - Pacific Ocean Shoreline - Aliso Creek - Aliso Creek mouth	47.74%	47.79%	49.57%	12.65%	13.31%	13.76% (13.69%)**
	Dana Point HSA (901.14) - Pacific Ocean Shoreline	47.52%	47.52%	49.49%	6.58%	7.43%	7.58%
	Lower San Juan HSA (901.27) - Pacific Ocean Shoreline - San Juan Creek - San Juan Creek mouth	36.48%	37.11%	47.47%	9.61%	6.41%	13.56% (13.45%)**
	San Clemente HA (901.30) - Pacific Ocean Shoreline	47.14%	47.12%	49.42%	11.93%	12.29%	12.63%
San Luis Rey River	San Luis Rey HU (903.00) - Pacific Ocean Shoreline	19.07%	19.55%	43.69%	2.81%	1.56%	5.85%
Carlsbad	San Marcos HA (904.50) - Pacific Ocean Shoreline	41.41%	41.28%	48.02%	9.24%	9.49%	10.10%

Table 6.6 (Cont'd)
Interim Effluent Limitations Expressed as Percent Load Reductions in
 MS4 Discharges to the Water Body*

Watershed Management Areas	Watersheds and Water Bodies	Load-Based Effluent Limitations					
		Dry Weather			Wet Weather		
		Total Coliform	Fecal Coliform	Enterococcus	Total Coliform	Fecal Coliform	Enterococcus
San Dieguito River	San Dieguito HU (905.00) - Pacific Ocean Shoreline	7.20%	10.36%	41.74%	2.15%	0.73%	3.86%
	Miramar Reservoir HA (906.10) - Pacific Ocean Shoreline	48.25%	48.30%	49.71%	0.81%	1.00%	0.97%
Mission Bay	Scripps HA (906.30) - Pacific Ocean Shoreline	48.22%	48.21%	49.63%	8.16%	10.57%	9.41%
	Tecolote HA (906.50) - Tecolote Creek	47.26%	47.30%	49.47%	8.26%	10.24%	9.08% (9.04%)**
San Diego River	Mission San Diego HSA (907.11) and Santee HSA (907.12) - Pacific Ocean Shoreline - Forrester Creek (lower 1 mile) - San Diego River (lower 6 miles)	37.02%	34.72%	46.98%	19.07%	26.61%	21.37% (21.24%)**
San Diego Bay	Chollas HSA (908.22) - Chollas Creek	46.03%	46.08%	49.23%	8.91%	12.42%	10.73% (10.68%)**

Notes:

* The percent load reductions are based on reducing loads compared to pollutant loads from 2001 to 2002.

** The alternative *Enterococcus* percent load reduction was calculated based on a numeric target of 104 MPN/100mL instead of 61 MPN/100mL, protective of the REC-1 "moderately to lightly used area" usage frequency that is protective of freshwater creeks and downstream beaches. Acceptable evidence that impaired freshwater creeks can be considered "moderately to lightly used areas" must be provided before these alternative pollutant load reductions can be utilized.

(3) Interim TMDL Compliance Determination

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

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

- (b) There are no exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermitttee's MS4 outfalls; OR
- (c) There are no exceedances of the final effluent limitations under Specific Provision 6.b.(2)(b)(i) at the Responsible Copermitttee's MS4 outfalls; OR
- (d) The pollutant load reductions for discharges from the Responsible Copermitttees' MS4 outfalls are greater than or equal to the final effluent limitations under Specific Provision 6.b.(2)(b)(ii); OR
- (e) The Responsible Copermitttees can demonstrate that exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermitttees' MS4s are not causing or contributing to the exceedances; OR
- (f) There are no exceedances of the interim receiving water limitations under Specific Provision 6.c.(2)(a) in the receiving water at, or downstream of the Responsible Copermitttees' MS4 outfalls; OR
- (g) The pollutant load reductions for discharges from the Responsible Copermitttees' MS4 outfalls are greater than or equal to the interim effluent limitations under Specific Provision 6.c.(2)(b); OR
- (h) The Responsible Copermitttees have submitted and are fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance dates.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

(1) Monitoring and Assessment Requirements for Beaches

(a) Monitoring Stations

For beaches addressed by the TMDL, monitoring locations should consist of, at a minimum, the same locations used to collect data required pursuant to Order Nos. R9-2007-0001 and R9-2009-0002, and beach monitoring for Health and Safety Code section 115880.⁴⁰ If exceedances of the applicable interim or final receiving water limitations are observed in the monitoring data, additional monitoring locations and/or other source

⁴⁰ Commonly referred to as AB 411 monitoring

identification methods must be implemented to identify the sources causing the exceedances. The additional monitoring locations must also be used to demonstrate that the bacteria loads from the identified anthropogenic sources have been addressed and are no longer causing exceedances in the receiving waters.

(b) Monitoring Procedures

- (i) The Responsible Copermittees must collect dry weather monitoring samples from the receiving water monitoring stations at least monthly. Dry weather samples collected from additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified sources have been addressed and are no longer causing exceedances in the receiving waters.
- (ii) The Responsible Copermittees must collect wet weather monitoring samples from the receiving water monitoring stations at least once within the first 24 hours of the end of a storm event⁴¹ during the rainy season (i.e. October 1 through April 30). Wet weather samples collected from receiving water stations and any additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified sources have been addressed and are no longer in exceedance of the allowable exceedance frequencies in the receiving waters.
- (iii) Samples must be analyzed for total coliform, fecal coliform, and *Enterococcus* indicator bacteria.
- (iv) For Pacific Ocean Shoreline segments or areas listed in Table 6.0 that have been de-listed from the Clean Water Act Section 303(d) List, the Responsible Copermittees may propose alternative monitoring procedures to demonstrate that the water bodies continue to remain in compliance with water quality standards under wet weather and dry weather conditions. The alternative monitoring procedures must be submitted as a part of the Water Quality Improvement Plans or any updates required under Provisions F.1 and F.2.c of the Order.

⁴¹ Wet weather days are defined by the TMDL as storm events of 0.2 inches or greater and the following 72 hours. The Responsible Copermittees may choose to limit their wet weather sampling requirements to storm events of 0.2 inches or greater, or also include storm events of 0.1 inches or greater as defined by the federal regulations [40CFR122.26(d)(2)(iii)(A)(2)].

(c) Assessment and Reporting Requirements

- (i) The Responsible Copermittees must analyze the dry weather and wet weather monitoring data to assess whether the interim and final WQBELs for the Pacific Ocean Shoreline segments or areas listed in Table 6.0 have been achieved.
- (ii) Dry weather exceedance frequencies must be calculated as follows:
 - [a] 30-day geometric means must be calculated from the results of any dry weather samples collected from the segments or areas for each water body listed in Table 6.0;
 - [b] The method and number of samples need for calculating the 30-day geometric means must be consistent with the number of samples required by the Ocean Plan;
 - [c] Where there are multiple segments or areas associated with a water body listed in Table 6.0, the Copermittees may calculate geometric means for each segment or area, or combine the dry weather monitoring data from all the segments or areas to calculate geometric means for the water body;
 - [d] The exceedance frequency must be calculated by dividing the number of geometric means that exceed the geometric mean receiving water limitations in Table 6.2 by the total number of geometric means calculated from samples collected during the dry season.
- (iii) Wet weather exceedance frequencies must be calculated as follows:
 - [a] If only one sample is collected for a storm event, the bacteria density for every wet weather day associated with that storm event must be assumed to be equal to the results from the one sample collected;
 - [b] If more than one sample is collected for a storm event, but not on a daily basis, the bacteria density for all wet weather days of the storm event not sampled must be assumed to be equal to the highest bacteria density result reported from the samples collected;
 - [c] If there are any storm events not sampled, the bacteria density for every wet weather day of those storm events must be assumed to be equal to the average of the highest bacteria densities reported from each storm event sampled; and
 - [d] The single sample maximum exceedance frequency must be calculated by dividing the number of wet weather days that exceed the single sample maximum receiving water limitations in Table 6.2 by the total number of wet weather days during the rainy season.
 - [e] The data collected for dry weather must be used in addition to the data collected for wet weather to calculate the wet weather 30-

day geometric means. The exceedance frequency of the wet weather 30-day geometric means must be calculated by dividing the number of geometric means that exceed the geometric mean receiving water limitations in Table 6.2 by the total number of geometric means calculated from samples collected during the wet season.

- (iv) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 6.b.(2)(b)(i), dry and wet weather discharge bacteria densities may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.
- (v) The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

(2) Monitoring and Assessment Requirements for Creeks and Creek Mouths

(a) Monitoring Stations

For creeks addressed by the TMDL, monitoring locations should consist of, at a minimum, a location at or near the mouth of the creek (e.g. Mass Loading Station or Mass Emission Station) and one or more locations upstream of the mouth (e.g. Watershed Assessment Station). If exceedances of the applicable interim or final receiving water limitations are observed in the monitoring data, additional monitoring locations and/or other source identification methods must be implemented to identify the sources causing the exceedances. The additional monitoring locations must also be used to demonstrate that the bacteria loads from the identified sources have been addressed and are no longer causing exceedances in the receiving waters.

(b) Monitoring Procedures

- (i) The Responsible Copermittees must collect dry weather monitoring samples from the receiving water monitoring stations in accordance with the requirements of Provision D.
- (ii) The Responsible Copermittees must collect wet weather monitoring samples from the receiving water monitoring stations within the first 24 hours of the end of a storm event⁴² during the rainy season (i.e. October 1 through April 30).

⁴² Wet weather days are defined by the TMDL as storm events of 0.2 inches or greater and the following 72 hours. The Responsible Copermittees may choose to limit their wet weather sampling requirements to

- (iii) Samples collected from receiving water monitoring stations must be analyzed for fecal coliform and *Enterococcus* indicator bacteria.
- (iv) For creeks or creek mouths listed in Table 6.0 that have been de-listed from the Clean Water Act Section 303(d) List, the Responsible Copermittees may propose alternative monitoring procedures to demonstrate that the water bodies continue to remain in compliance with water quality standards under wet weather and dry weather conditions. The alternative monitoring procedures must be submitted as a part of the Water Quality Improvement Plans or any updates required under Provisions F.1 and F.2.c of the Order.

(c) Assessment and Reporting Requirements

- (i) The Responsible Copermittees must analyze the receiving water monitoring data to assess whether the interim and final receiving water WQBELs for the creeks and creek mouths listed in Table 6.0 have been achieved.
- (ii) Dry weather exceedance frequencies must be calculated as follows:
 - [a] 30-day geometric means must be calculated from the results of any dry weather samples collected from the segment or area for each water body listed in Table 6.0;
 - [b] The method and number of samples need for calculating the 30-day geometric means must be consistent with the number of samples required by the Basin Plan;
 - [c] The exceedance frequency must be calculated by dividing the number of 30-day geometric means that exceed the 30-day geometric mean receiving water limitations in Table 6.2 by the total number of 30-day geometric means calculated from samples collected during the dry season.
- (iii) Wet weather exceedance frequencies must be calculated as follows:
 - [a] If only one sample is collected for a storm event, the bacteria density for every wet weather day associated with that storm event must be assumed to be equal to the results from the one sample collected;
 - [b] If more than one sample is collected for a storm event, but not on a daily basis, the bacteria density for all wet weather days of the storm event not sampled must be assumed to be equal to the highest bacteria density result reported from the samples collected;

storm events of 0.2 inches or greater, or also include storm events of 0.1 inches or greater as defined by the federal regulations [40CFR122.26(d)(2)(iii)(A)(2)].

- [c] If there are any storm events not sampled, the bacteria density for every wet weather day of those storm events must be assumed to be equal to the average of the highest bacteria densities reported from each of the storm events sampled; and
 - [d] The exceedance frequency must be calculated by dividing the number of wet weather days that exceed the single sample maximum receiving water limitations in Table 6.2 by the total number of wet weather days during the rainy season.
 - [e] The data collected for dry weather must be used in addition to the data collected for wet weather to calculate the wet weather 30-day geometric means. The exceedance frequency of the wet weather 30-day geometric means must be calculated by dividing the number of geometric means that exceed the geometric mean receiving water limitations in Table 6.2 by the total number of geometric means calculated from samples collected during the wet season.
- (iv) The Responsible Copermittee must identify and incorporate additional MS4 outfall and receiving water monitoring stations and/or adjust monitoring frequencies to identify sources causing exceedances of the receiving water WQBELs.
 - (v) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 6.b.(2)(b)(i), dry and wet weather discharge bacteria densities may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.
 - (vi) The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

7. Total Maximum Daily Loads for Sediment in Los Peñasquitos Lagoon

a. APPLICABILITY

- (1) TMDL Basin Plan Amendment: Resolution No. R9-2012-0033
- (2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	June 13, 2012
State Water Board Approval Date:	January 21, 2014
Office of Administrative Law Approval Date:	July 14, 2014
US EPA Approval Date:	October 30, 2014
- (3) TMDL Effective Date: July 14, 2014
- (4) Watershed Management Area: Peñasquitos
- (5) Water Body: Los Peñasquitos Lagoon
- (6) Responsible Copermittees: County of San Diego, City of San Diego, City of Del Mar, and City of Poway

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final sediment TMDL compliance requirements for Los Peñasquitos Lagoon consist of the following:

- (1) Final TMDL Compliance Date

The Responsible Copermittees must be in compliance with the final TMDL compliance requirements by December 31, 2034.

- (2) Final Water Quality Based Effluent Limitations

- (a) Final Receiving Water Limitations

Discharges from the MS4s must not prohibit the sustainable restoration of tidal and non-tidal saltmarsh vegetation of at least 346 acres.

- (b) Final Effluent Limitations

Discharges from the MS4s containing pollutant loads that do not exceed the following effluent limitations by the compliance date under Provision 7.b(1) will not cause or contribute to a failure of the receiving water condition specified under Specific Provision 7.b.(2)(a):

Table 7.1
*Final Effluent Limitations as Expressed as Wet Season Loads in MS4 Discharges to Los Peñasquitos Lagoon**

Constituent	Effluent Limitation
Sediment	2,580 tons/wet season

* Final effluent limitations are to be achieved by the following Responsible Parties: County of San Diego, City of San Diego, City of Del Mar, City of Poway, Phase II MS4 permittees, Caltrans, general construction storm water NPDES permittees, and general industrial storm water NPDES permittees.

(c) **Best Management Practices**

- (i) The Water Quality Improvement Plan for the Los Peñasquitos Watershed Management Area must incorporate the Sediment Load Reduction Plan required to be developed pursuant to Resolution No. R9-2012-0033.
- (ii) The Responsible Copermittees must implement BMPs to achieve the receiving water limitations under Specific Provision 7.b.(2)(a) and/or the Copermittee's portion of the effluent limitations under Specific Provision 7.b.(2)(b) for Los Peñasquitos Lagoon.

(3) Final TMDL Compliance Determination

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

- (a) Successful restoration of 80 percent of the 1973 acreage of tidal and non-tidal lagoon salt marsh (346 acres) as described in Attachment A of Resolution No. R9-2010-0033; OR
- (b) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:
 - (i) Incorporate the BMPs required under Specific Provision 7.b.(2)(c)(ii) and/or other implementation actions to achieve compliance with Specific Provision 7.b.(3)(a) as part of the Water Quality Improvement Plan,
 - (ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 7.b.(2)(c)(ii) or other implementation actions to achieve compliance with Specific Provision 7.b.(3)(a),
 - (iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,

- (iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 7.b.(2)(c)(ii) or other implementation actions, AND
- (v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 7.d to demonstrate compliance with Specific Provision 7.b.(3)(a).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The interim sediment TMDL compliance requirements for Los Peñasquitos Lagoon consist of the following:

(1) Interim Compliance Dates and WQBELs

The Responsible Copermittees must comply with the interim WQBELs, expressed as wet season loads, by December 31 of the interim compliance year set forth in Table 7.2.

Table 7.2
*Interim Water Quality Based Effluent Limitations Expressed as Wet Season Loads in MS4 Discharges**

Interim Compliance Date	Interim Effluent Limitations (tons/wet season)
December 31, 2019	6,691
December 31, 2023	5,663
December 31, 2027	4,636
December 31, 2029	3,608

* Interim effluent limitations are to be achieved by the following Responsible Parties: County of San Diego, City of San Diego, City of Del Mar, City of Poway, Phase II MS4 permittees, Caltrans, general construction storm water NPDES permittees, and general industrial storm water NPDES permittees.

(2) Interim TMDL Compliance Determination

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

- (a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR
- (b) The final receiving water limitation under Specific Provision 7.b.(2)(a) is met; OR
- (c) There are no exceedances of the Copermittee's portion of interim effluent limitations under Table 7.2 at the Responsible Copermittee's MS4 outfalls; OR

- (d) The Responsible Copermittees have submitted and is fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the Copermittee's portion of the interim TMDL compliance requirements described in Attachment A of Resolution No. R9-2010-0033 will be achieved by the interim compliance date.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

(1) Watershed Monitoring

The Responsible Copermittees must conduct suspended sediment, bed load, and flow monitoring to calculate total sediment loading to the Los Peñasquitos Lagoon for each wet season (October 1 thru April 30) as set forth below:

- (a) The Responsible Copermittees must monitor enough storm events throughout the season to quantify sediment loading over each wet season, and
- (b) The Responsible Copermittees must monitor at least 3 stations to quantify cumulative sediment loading into Los Peñasquitos Lagoon. Stations must be located within the Los Peñasquitos, Carroll Canyon, and Carmel Creek tributaries prior to discharging into Los Peñasquitos Lagoon.

(2) Lagoon Monitoring

The Responsible Copermittees must monitor Los Peñasquitos Lagoon each Fall for changes in the extent of the vegetation types as set forth below:

- (a) The Responsible Copermittees must acquire aerial photos of Los Peñasquitos Lagoon and digitize them at an approximate scale of 1:2,500,
- (b) The Responsible Copermittees must appropriately interpret the vegetation and classify the various types as saltmarsh, non-tidal saltmarsh, freshwater marsh, non-tidal saltmarsh –*Lolium perrene* infested, southern willow scrub/mulefat scrub, herbaceous wetland, or upland land cover.

(3) Assessment and Reporting Requirements

- (a) The Responsible Copermittees must analyze the monitoring data collected under Specific Provision 7.d(1) and 7.d(2) to assess whether the interim and final WQBELs have been achieved.
- (b) For assessing and determining compliance with the final receiving water limitations under Specific Provision 7.b.(2)(a), the Responsible Copermittees must use the data acquired under Specific Provision 7.d.(2) to estimate the acreage of tidal and non-tidal saltmarsh actually restored.

- (c) For assessing and determining compliance with the final effluent limitations under Specific Provision 7.b.(2)(b), the Responsible Copermittees must use the data acquired under Specific Provision 7.d.(1) to estimate sediment loading into Los Peñasquitos Lagoon. Sediment loading must be evaluated using a 3-year, weighted rolling average. The first reported average shall be calculated using data collected in the year, 2015-2016, 2016-2017, and 2017-2018 wet seasons.
- (d) The monitoring and assessment results must be submitted as part of the Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

VOLUME I

TAB 2

ATTACHMENT F

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

FACT SHEET / TECHNICAL REPORT

FOR

**ORDER NO. R9-2013-0001
AS AMENDED BY ORDER NOS. R9-2015-0001 AND R9-2015-0100
NPDES NO. CAS0109266**

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

**May 8, 2013
Amended February 11, 2015
and November 18, 2015**

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I. FACT SHEET FORMAT

This Fact Sheet briefly sets forth the principal facts and the significant factual, legal, methodological, and policy questions that the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) considered in preparing Order No. R9-2013-0001 (Order), as amended by Order Nos. R9-2015-0001 and R9-2015-0100. In accordance with the Code of Federal Regulations (CFR) Title 40 Parts 124.8 and 124.56 (40 CFR 124.8 and 40 CFR 124.56), this Fact Sheet includes, but is not limited to, the following information:

1. Contact information
2. Public process and notification procedures
3. Background of municipal storm water permits
4. Regional MS4 Permit approach
5. Economic considerations
6. Applicable statutes, regulations, plans and policies
7. Discussion of the provisions in the Order

Tentative Order No. R9-2013-0001 was distributed for public review on October 31, 2012. The San Diego Water Board accepted written comments on Tentative Order No. R9-2013-0001 until January 11, 2013. A public hearing was subsequently held on April 10 and 11, 2013, that was continued to May 8, 2013 to receive oral comments from interested persons. The San Diego Water Board adopted Order No. R9-2013-0001 on May 8, 2013.

Tentative Order No. R9-2015-0001, an Order amending Order No. R9-2013-0001, was distributed for public review on September 19, 2014. The San Diego Water Board accepted written comments on Tentative Order No. R9-2015-0001 until November 19, 2014. A public hearing was held on February 11, 2015, to receive oral comments from Copermittees and interested persons. The San Diego Water Board adopted Order No. R9-2015-0001 amending Order No. R9-2013-0001 on February 11, 2015. Order No. R9-2015-0001 amended the findings and provisions of Order No. R9-2013-0001 to:

- a. Enroll the County of Orange, the Orange County Flood Control District and the south Orange County Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano as Copermittees responsible for compliance with the terms and conditions of Order No. R9-2013-0001, as amended by Order No. R9-2015-0001;
- b. Designate the San Diego Water Board to regulate all Phase I MS4 discharges within the jurisdiction of the Cities of Laguna Woods and Laguna Hills and agree to the designation of the Santa Ana Water Board to regulate all Phase I MS4 discharges within the jurisdiction of the City of Lake Forest, subject to the

terms of the February 10, 2015 agreement between San Diego Water Board and the Santa Ana Water Board described in Finding 29 of this Order, upon the later effective date of Order No. R9-2015-0001 or Order No. R8-2015-0001 (superseding Order No. R8-2009-0030);

- c. Establish interim exceptions to land development requirements for those priority development projects that discharge to engineered channels and large river reaches as described in Provision E.3.c.(2)(e) of this Order;
- d. Incorporate the amended requirements of the State Water Resources Control Board's (State Water Board) General Exception to require that pollutant reductions be achieved within 6 years for storm water and nonpoint source discharges to ASBS within the Region;
- e. Incorporate applicable requirements of the Los Peñasquitos Lagoon Sediment TMDL; and
- f. Require the Orange County Copermittees to implement the "*Workgroup Recommendation for a Unified Beach Water Quality Monitoring and Assessment Program in South Orange County*," dated October 2014, made effective in the Monitoring and Reporting Program/Order issued pursuant to California Water Code section 13383 in the December 5, 2014 San Diego Water Board Letter Directive and subject to future revisions by the Executive Officer after appropriate public input.

Tentative Order No. R9-2015-0100, an Order amending Order No. R9-2013-0001 as amended by Order No. R9-2015-0001, was distributed for public review on July 31, 2015. The San Diego Water Board accepted written comments on Tentative Order No. R9-2015-0100 until September 14, 2015. A public hearing was held on November 18, 2015, to receive oral comments from Copermittees and interested persons. The San Diego Water Board adopted Order No. R9-2015-0100 amending Order No. R9-2013-0001 as amended by Order No. R9-2015-0001, on November 18, 2015. Order No. R9-2015-0100 amended the findings and provisions of Order No. R9-2013-0001 as amended by Order No. R9-2015-0001 to:

- a. Enroll the County of Riverside, the Cities of Murrieta, Temecula, and Wildomar, and the Riverside County Flood Control and Water Conservation District as Copermittees responsible for compliance with the terms and conditions of Order No. R9-2013-0001, as amended by Order Nos. R9-2015-0001 and R9-2015-0100;
- b. Continue designation of the San Diego Water Board to regulate Phase I MS4 discharges within the jurisdictions of the Cities of Murrieta and Wildomar, including areas within the Santa Ana Region; and, agree to continue designation of the Santa Ana Water Board to regulate all Phase I MS4 discharges within the jurisdiction of the City of Menifee, including areas within

the San Diego Region, subject to the terms of the October 26, 2015 agreement between San Diego Water Board and the Santa Ana Water Board described in Finding 29 of this Order;

- d. Incorporate Provision B.3.c, which provides an option that allows a Copermittee to utilize the watershed-based Water Quality Improvement Plan to be deemed in compliance with the prohibitions and limitations of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b;
- e. Incorporate minor revisions to Provisions E.2.a.(1) and E.2.a.(2) to include San Diego Water Board Order No. R9-2015-0013 and State Water Board Order 2014-0194-DWQ into the requirements for addressing non-storm water discharges to a Copermittee's MS4;
- e. Incorporate minor revisions to Provision E.3.b.(1) to correct inconsistencies in the definition of a Priority Development Project as compared to the definitions in Order No. R9-2009-0002 (Fourth Term Orange County MS4 Permit) and Order No. R9-2010-0016 (Fourth Term Riverside County MS4 Permit), and requirements for incorporating the corrected definitions into the BMP Design Manual;
- f. Incorporate revisions to Provision E.3.e.(1)(a) to provide additional clarity on when the structural BMP performance requirements of Provision E.3.c are applicable to Priority Development Projects;
- e. Incorporate minor revisions to the Revised TMDLs for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region and the TMDLs for Sediment in Los Peñasquitos Lagoon in Attachment E to the Order to make the requirements consistent with the Basin Plan amendments adopted by the San Diego Water Board; and
- f. Remove provisions related to allowing the Riverside County Copermittees to apply for early coverage under the Regional MS4 Permit.

The San Diego Water Board files applicable to the issuance of Order No. R9-2013-0001 and amendments thereto are incorporated into the administrative record in support of the findings and requirements of the Order.

II. CONTACT INFORMATION

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The Order and other related documents can be downloaded from the San Diego Water Board website at

http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/index.shtml

The documents referenced in this Fact Sheet and in Order No. R9-2013-0001 and amendments thereto are available for public review at the San Diego Water Board office, located at the address listed above. Public records are available for inspection during regular business hours, from 8:00 am to 5:00 pm Monday through Friday. To schedule an appointment to inspect public records, contact the San Diego Water Board Records Management Officer at 619-516-1990.

COPERMITTEES

Orange County Copermittees

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

* While not listed in the above table, the City of Lake Forest remains a Copermittee under this Order until the later effective date of this Order or Santa Ana Water Board Tentative Order No. R8-2015-0001. Thereafter, the City of Lake Forest will no longer be considered a Copermittee under this Order because its Phase I MS4 discharges will be regulated by the Santa Ana Water Board pursuant to Water Code section 13328 designation. The requirements of this Order that apply to the City of Lake Forest for the duration of this Order, consistent with the Water Code section 13228 agreement dated February 10, 2015, are described in Finding 29 and Footnote 2 to Table B-1.

Riverside County Copermittees

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

** The City of Menifee is not regulated as a Copermittee under this Order because its Phase I MS4 discharges are regulated by Santa Ana Water Board Order No. R8-2010-0033 as it may be amended or issued pursuant to Water Code section 13228 designation. The requirements of this Order that apply to the City of Menifee for the duration of this Order, consistent with the Water Code section 13228 written agreement dated October 26, 2015, are described in Finding 29 and Footnote 3 to Table B-1.

San Diego County Copermittees

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

III. PUBLIC PROCESS AND NOTIFICATION PROCEDURES

The San Diego Water Board followed the schedule listed below for the preparation of Order No. R9-2013-0001 and amendments thereto:

San Diego County Copermittee Permit Reissuance Process

1. On February 8, 2011, the San Diego Water Board met with the San Diego County Copermittees to discuss the Report of Waste Discharge required pursuant to Order No. R9-2007-0001.
2. Between February and May 2011, the San Diego Water Board met with select San Diego County, Orange County, and Riverside County Copermittees, as well as representatives of the environmental community to discuss concepts and receive recommendations for elements to be incorporated in a Regional Municipal Separate Storm Sewer System Permit (Regional MS4 Permit).
3. On June 27, 2011 the San Diego Water Board received the Report of Waste Discharge from the San Diego County Copermittees for the renewal of their NPDES permit, Order No. R9-2007-0001.
4. On April 9, 2012, the San Diego Water Board released an administrative draft of Tentative Order No. R9-2013-0001 for preliminary informal comments and feedback.
5. On April 25, 2012, the San Diego Water Board held an informal public workshop to present the administrative draft of Tentative Order No. R9-2013-0001 and receive verbal comments.
6. Between June and August 2012, the San Diego Water Board held four (4) focused meetings with representatives of the principal stakeholders (the Copermittees, the environmental community, the development/business community, and USEPA) to discuss and receive preliminary comments and feedback about specific elements in the administrative draft of Tentative Order No. R9-2013-0001.
7. On September 5, 2012, the San Diego Water Board held an informal public workshop to present the modifications that were expected to be incorporated into the Tentative Order based on the preliminary comments and feedback received during the focused meetings held between June and August 2012.
8. Informal written comments on the administrative draft of Tentative Order No. R9-2013-0001 were accepted until September 14, 2012.
9. On October 12, 2012, the San Diego Water Board released a revised administrative draft of Tentative Order No. R9-2013-0001.

10. On October 24, 2012, the San Diego Water Board held a focused meeting with representatives of the principal stakeholders (the Copermittees, the environmental community, the development/business community, and USEPA) to discuss modifications incorporated into the administrative draft of Tentative Order No. R9-2013-0001.
11. On October 31, 2012, the San Diego Water Board released Tentative Order No. R9-2013-0001 for formal public review and comment.
12. On November 13, 2012 and December 12, 2012, the San Diego Water Board held a formal public Board workshop to present the public draft of Tentative Order No. R9-2013-0001 and receive verbal comments.
13. Formal written comments on the public draft of Tentative Order No. R9-2013-0001 were accepted until January 11, 2013.
14. A public hearing of Tentative Order No. R9-2013-0001 was conducted on April 10 and 11, 2013, that was continued to May 8, 2013.

Orange County Copermittee Permit Reissuance Process

15. On May 20, 2014 the San Diego Water Board received the Report of Waste Discharge from the Orange County Copermittees for the renewal of their MS4 NPDES permit, Order No. R9-2009-0002.
16. On June 24, 2014, the San Diego Water Board met with the Orange County Copermittees to discuss the Report of Waste Discharge required pursuant to Order No. R9-2009-0002 and the process for enrollment as Copermittees under Regional MS4 Permit Order No. R9-2013-0001.
17. On July 1, 2014, the San Diego Water Board held a public meeting to discuss the Orange County Report of Waste Discharge and receive comments on potential modifications to Order No. R9-2013-0001. Based on comments received from the Orange County Copermittees and other interested persons at this meeting, the San Diego Water Board determined that additional public meetings were not needed prior to release of Tentative Order No. R9-2015-0001, amending Order No. R9-2013-0001 in redlined – strikeout format for public review and comment.
18. On September 19, 2014, the San Diego Water Board released Tentative Order No. R9-2015-0001 for a 60 day public review and comment period.
19. On October 8, 2014, the San Diego Water Board held a formal public workshop at a regular board meeting to receive information and discuss the proposed amendments to Order No. R9-2013-0001 described in Tentative Order No. R9-2015-0001.

20. In accordance with State and federal laws and regulations, the San Diego Water Board notified San Diego County, Orange County and Riverside County Copermittees, and all known interested agencies and persons of its intent to adopt Tentative Order No. R9-2015-0001 and provided them with an opportunity to submit their written comments and recommendations. Written comments and recommendations on Tentative Order No. R9-2015-0001 were accepted until November 19, 2014.
21. The San Diego Water Board held a public workshop on October 8, 2014, and a public hearing on February 11, 2015, and heard and considered all comments pertaining to the adoption of Tentative Order No. R9-2015-0001 on February 11, 2015.

Riverside County Copermittee Permit Reissuance Process

22. Between April and June 2015, the San Diego Water Board held three (3) public workshops with representatives of the principal stakeholders (the Copermittees, the environmental community, the development/business community) to discuss and receive comments and feedback about amending Order No. R9-2013-0001 to incorporate a definition of prior lawful approval for Priority Development Projects, and an alternative compliance pathway for prohibitions and limitations in Provision A of the Order. A San Diego Water Board member attended the April and May 2015 public workshops, but no actions or voting took place.
23. On April 15, 2015, the San Diego Water Board met with the Riverside County Copermittees to discuss the Report of Waste Discharge required pursuant to Order No. R9-2010-0016 and the process for enrollment as Copermittees under Order No. R9-2013-0001 (Regional MS4 Permit).
24. On May 8, 2015 the San Diego Water Board received a Report of Waste Discharge from the Riverside County Copermittees for the renewal of their MS4 NPDES permit, Order No. R9-2010-0016.
25. On July 31, 2015, the San Diego Water Board released Tentative Order No. R9-2015-0100 for a formal public review and comment period.
26. Formal written comments on the public draft of Tentative Order No. R9-2015-0100 were accepted until September 14, 2015, a formal public written comment period of 46 days.
27. A public hearing to receive oral comments on Tentative Order No. R9-2015-0100 was conducted on November 18, 2015.

IV. BACKGROUND OF THE SAN DIEGO REGION MUNICIPAL STORM WATER PERMITS

In developed and developing areas, storm water runoff is commonly transported through municipal separate storm sewer systems (MS4s) and discharged into local receiving water bodies. As the storm water runs off and flows over the land or impervious surfaces (e.g., paved streets, parking lots, and building rooftops), it accumulates debris, chemicals, sediment, and other pollutants that can adversely affect receiving water quality if discharged untreated. The United States Environmental Protection Agency (USEPA) recognizes wet weather flows from urban areas as the number one source of estuarine pollution in coastal communities,¹ such as those within the San Diego Region.

The federal Clean Water Act (CWA) was amended in 1987 to address and regulate discharges of storm water associated with industrial activities and from municipal storm sewers. With the amendments, many municipalities throughout the United States were obligated for the first time to obtain National Pollutant Discharge Elimination System (NPDES) permits for discharges of storm water from their MS4s.

In response to the CWA 1987 amendment, as well as the pending federal NPDES regulations which would implement the amendment, the San Diego Water Board issued “early” MS4 permits. The San Diego Water Board adopted and issued Order Nos. 90-38, 90-42, and 90-46 to regulate storm water discharges from the MS4s in Orange County, San Diego County, and Riverside County, respectively, within the San Diego Region on July 16, 1990.

The “early” MS4 permits, or First Term Permits, were issued prior to the November 1990 promulgation of the final federal NPDES storm water regulations. By issuing these First Term Permits before the federal regulations took effect, the San Diego Water Board was able to provide the Copermittees additional flexibility in addressing and managing storm water discharges. The First Term Permits contained the essentials of the 1990 regulations, and required the Copermittees to develop and implement runoff management programs, but provided little specificity about what was required to be included in or actually achieved by those programs.

The flexibility provided in the First Term Permits was generally continued through the Second Term Permits. The combination of the lack of specificity in the First and Second Term Permits, a general lack of meaningful action by the Copermittees and a general lack of corresponding reaction (i.e. enforcement) by the San Diego Water Board during the first ten years of the storm water program, resulted in few substantive steps towards achieving improvements in the quality of receiving waters or storm water discharges from the MS4s.

¹ US EPA. 1999. 40 CFR Parts 9, 122, 123, and 124. National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule. 64 FR 68727.

From 2001, the regulatory approach incorporated into Third Term Permits was a significant departure from the regulatory approach of the First and Second Term Permits. The Third Term Permits issued by the San Diego Water Board included more detailed requirements that outlined the minimum level of implementation required for the Copermittees' programs to meet the maximum extent practicable (MEP) standard for storm water. The Third Term Permits included more detail to emphasize and enhance the jurisdictional runoff management programs developed by the Copermittees and introduced requirements for developing and implementing watershed-based programs.

The Third Term Permits also incorporated two precedent setting decisions by the State Water Board. In Order WQ 99-05, the State Water Board established receiving water limitation language to be included in all MS4 permits. The State Water Board's precedential language clarified that municipal storm water permits must include provisions requiring discharges to be controlled to attain water quality standards in receiving waters. Unlike previously adopted versions of the receiving water limitation language in the First and Second Term Permits, the language no longer stated that "*violations of water quality standards are not violations of the municipal storm water permit under certain conditions.*" In addition, the receiving water limitation language no longer indicated that the "*implementation of best management practices is the 'functional equivalent' of meeting water quality standards.*" State Water Board Order WQ 99-05 specifically requires language in MS4 permits for the Copermittees to comply with water quality standards based discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions to reduce pollutants in discharges. (See State Water Board Order WQ 99-05 (*Environmental Health Coalition*)).

In Order WQ 2000-11, also a precedential decision, the State Water Board addressed design standards for structural post-construction best management practices (BMPs) for new development and significant redevelopment. The State Water Board found that the design standards, which require that runoff generated by 85 percent of storm events from specific development categories be infiltrated or treated, reflect the MEP standard. State Water Board Order WQ 2000-11 also found that the post-construction BMP provisions, or Standard Storm Water Mitigation Plan (SSMP) provisions, constitute MEP for addressing storm water pollutant discharges resulting from specific development categories.

The Third Term San Diego County and Orange County Permits (Order Nos. 2001-01 and R9-2002-0001, respectively) were appealed to the State Water Board. Minor modifications were made by the State Water Board, but the requirements were largely upheld. In State Water Board Order WQ 2001-15, the State Water Board upheld the Third Term San Diego County Permit requirements with certain modifications. The State Water Board removed the prohibition of storm water discharges *into* the MS4 that cause or contribute to exceedances of water quality objectives. The revision allows for treatment of pollutants in storm water runoff after the pollutants have entered the MS4.

State Water Board Order WQ 2001-15 otherwise upheld all the other requirements of the permit.

In addition to the modification to the discharge prohibition in Order WQ 2001-15, the State Water Board refined Order WQ 99-05 by making clear that the Copermitees may use an iterative approach to achieving compliance with water quality standards that involves ongoing assessments and revisions. Thus, the language for the discharge prohibitions and receiving water limitations was revised to explicitly require the Copermitees to implement an iterative process of assessments and revisions to comply with the discharge prohibitions and receiving water limitations. The San Diego Water Board retained the authority to enforce receiving water limitations and discharge prohibitions even if the Copermitee is engaged in the iterative process.

The Third Term San Diego County Permit was subsequently challenged in the Superior Court of the State of California and the Court of Appeal, Fourth Appellate District. The Court of Appeal, Fourth Appellate District, found that the approach of the Third Term San Diego County Permit to regulating discharges into the MS4 was appropriate (*Building Industry Ass'n. v. State Water Resources Control Bd., et al.*, 124 Cal.App.4th 866 (2004)). The State of California Supreme Court denied review sought by the Building Industry Association in March 2005.

The Fourth Term Permits began with the adoption of Order No. R9-2007-0001 issued to the Copermitees of San Diego County in January 2007. Order Nos. R9-2009-0002 and R9-2010-0016 were subsequently issued to the Copermitees of Orange County and Riverside County. The Fourth Term Permits continued to include more detailed requirements to be implemented by each Copermitee's jurisdictional runoff management program. The Fourth Term Permits also included requirements to further emphasize a watershed management approach and for more coordination among jurisdictional runoff management programs. In addition, the Fourth Term Permits included more requirements for assessing the effectiveness of the runoff management programs being implemented by the Copermitees. The intent of the inclusion of additional requirements was to enhance and better define elements of the permit that were expected to be incorporated into the iterative process for managing runoff from each Copermitee's jurisdiction and within the watersheds of the San Diego Region.

The Fourth Term Permits included several new and emerging approaches for managing storm water runoff and discharges. Low impact development (LID) requirements are included for development and significant redevelopment to reduce pollutants in storm water runoff from sites through more natural processes such as infiltration and biofiltration closer to the source, rather than utilizing conventional mechanical end-of-pipe treatment systems. Hydrograph modification (hydromodification) management requirements also are included to mitigate the potential for increased erosion in receiving waters due to increased runoff rates and durations often caused by development and increased impervious surfaces. The Fourth Term Orange County and Riverside County Permits introduced requirements to identify areas of existing

development where retrofitting with LID projects would be feasible and could be implemented to reduce storm water runoff and pollutants in storm water discharges.

The Fourth Term Orange County and Riverside County Permits included a clearer distinction between storm water and non-storm water discharges. The term “urban runoff” was completely removed, and a distinction between storm water (wet weather) runoff and non-storm water (dry weather) runoff was emphasized. This clarification was made to prevent any potential misunderstanding that regulation under the MS4 permits is limited only to urbanized areas, and to prevent non-storm water runoff from being managed in the same manner as storm water runoff. The term “urban runoff” is not defined in the Code of Federal Regulations (CFR) or Federal Register (FR) in the regulation of MS4 discharges. According to the CWA 402(p)(3)(B)(ii), MS4 permits must include a requirement to effectively prohibit non-storm water discharges into the MS4s.

Finally, for the Fourth Term Orange County and Riverside County Permits the San Diego Water Board found that non-storm water discharges to the MS4 from over application of irrigation water are sources of pollutants. The San Diego Water Board found that non-storm water discharges resulting from over-irrigation must be prohibited from entering the MS4 in accordance with the requirements of the CWA and pursuant to 40 CFR 122.26(d)(2)(iv)(B)(1).

The requirements of the Fourth Term Permits issued to the Copermittees in each county within the San Diego Region now have substantively the same core requirements such as discharge prohibitions, receiving water limitations, jurisdictional runoff management program components, and monitoring program requirements. There are, however, several inconsistencies that exist among the three Fourth Term Permits which complicate oversight and implementation of the permits by the San Diego Water Board.

The Fourth Term San Diego County Permit expired in January 2012. The Fourth Term Orange County permit expired in December 2014 and the Fourth Term Riverside County Permit expired in November 2015. Issuing the Fifth Term Permits within five years for three counties under three different permits would have required the San Diego Water Board to expend significant time and resources for the issuance of the permits through three separate public proceedings, thereby greatly reducing the time and resources available to oversee implementation and compliance. Multiple permits also create confusion for determining compliance among regulated entities, especially for the land development community.

The San Diego Water Board acknowledged that issuing a single MS4 permit for all the Copermittees in the San Diego Region can and is expected to result in more consistent implementation, improve communication among agencies within watersheds crossing multiple jurisdictions, and minimize resources spent with each permit renewal process. Within the findings of the Fourth Term Riverside County Permit issued in November 2010, the San Diego Water Board notified the public of its intent to develop and issue a single Regional MS4 Permit.

V. REGIONAL MS4 PERMIT APPROACH

The Fifth Term Permit, or Regional MS4 Permit, shifts the focus of the permit requirements from a minimum level of actions to be implemented by the Copermitees to identifying outcomes to be achieved by those actions. Order No. R9-2013-0001 represents an important paradigm shift in the approach for MS4 permits within the San Diego Region.

Historical Permitting Approach

The First and Second Term Permits were very broad and provided little specificity about what was required to be developed and implemented by the Copermitees. The Third Term Permits began to become more specific about the minimum level of implementation required by the Copermitees. The Fourth Term Permits subsequently increased in specificity. The MS4 permits have progressively become more detailed and focused on specifying the minimum level of actions expected to be implemented by the Copermitees. As detailed and specific as the MS4 permits have become, however, they include very little detail about what the desired outcomes of the required actions are expected to achieve. Compliance with the permit requirements has essentially been tracking numbers of actions and reporting, not tracking progress or actual improvements in the quality of receiving waters or discharges from the MS4s. The result has been an increase in actions being implemented by the Copermitees with little or no ability or expectations to determine whether or not improvements in water quality are being achieved.

The Fourth Term Permits result in significant resource expenditure by the Copermitees to report permit compliance information to the San Diego Water Board in the form of annual jurisdictional runoff management program, watershed program, and monitoring program reports. The San Diego Water Board was required to expend much of its limited resources on reviewing more than 50 voluminous reports submitted annually by the Copermitees. The information reported by the Copermitees was of limited value when trying to measure progress toward achieving improvements in the quality of receiving waters or discharges from the MS4s. Oversight of the MS4 permits was further complicated by the inconsistencies among the requirements issued to the Orange County, San Diego County, and Riverside County Copermitees under three separate MS4 permits.

Under the Fourth Term Permits, the Copermitees were required to expend a significant portion of their limited resources collecting data of limited value, and putting together reports to submit that information to the San Diego Water Board. Likewise, the San Diego Water Board was required to expend most of its limited resources reviewing reports, and developing permits instead of working directly with the Copermitees to identify solutions to problems causing impacts to water quality. This was an unsustainable course that would have continued to demand more resources

from the Copermittees and the San Diego Water Board, and would have continued to result in unknown water quality benefits.

New Permitting Approach

The goal of the Regional MS4 Permit is twofold: 1) bring a consistent set of MS4 permit requirements to all of the Copermittees within the San Diego Region; and, 2) provide an MS4 permit with requirements that will allow the Copermittees to focus their efforts and resources on achieving goals and desired outcomes toward the improvement of water quality rather than completing specific actions.

The overall approach included in the Regional MS4 Permit with respect to the jurisdictional runoff management programs will not differ significantly from the current permits. The general requirements for the jurisdictional runoff management program components and compliance with those requirements will remain and be applied consistently throughout the San Diego Region under the Regional MS4 Permit.

The most significant difference in the new permitting approach is the specific manner of implementation for those jurisdictional runoff management programs. Implementation will be based on decisions made by the Copermittees in accordance with what they have identified as their highest priority water quality conditions. In other words, the Copermittees will have significant control in how to implement the jurisdictional runoff management programs to best utilize their available resources in addressing a specific set of priorities effectively, instead of trying to address all the water quality priorities ineffectively.

The Copermittees are given the responsibility of identifying their highest priority water quality conditions that they intend to address. The Copermittees will develop goals that can be used to measure and demonstrate progress or improvements toward addressing those priorities. In addition to the goals, the Copermittees will provide a schedule for achieving the goals for those highest priorities. The measurement of progress toward achieving the goals for those highest priorities requires a better defined and more focused program of monitoring and assessment than under the Fourth Term Permits.

The monitoring and assessment program must be designed to inform the Copermittees of their progress, and the need for modifications in their jurisdictional runoff management programs and schedules to achieve their goals to improve water quality. The monitoring and assessment program requirements will have a more central role in the Regional MS4 Permit than in earlier permits. The monitoring and assessment requirements must also be designed to enable the Copermittees to focus and direct their efforts in implementing their jurisdictional runoff management programs toward their stated desired outcomes to improve the quality of receiving waters and/or discharges from the MS4s.

By providing an MS4 permit that allows the Copermittees to make more decisions about how to utilize and focus their resources, along with a better defined monitoring and assessment program to inform their water quality management decisions, the Copermittees have the opportunity to:

- 1) *Plan strategically.* The Copermittees must have the ability to identify their available resources and develop and implement long term plans that can organize, collect, and use those resources in the most strategically advantageous and efficient manner possible. This ability to develop long term plans will allow the Copermittees to focus and utilize their resources in a more concerted way over the short term and long term to address specific water quality priorities through stated desired outcomes.
- 2) *Manage adaptively.* The Copermittees must be given the ability to modify their plans as additional information and data are collected from the monitoring and assessment programs. The Copermittees' plans may require modifications to the programs, priorities, goals, strategies, and/or schedules in order for the Copermittees to achieve a stated desired outcome.
- 3) *Identify synergies.* The Copermittees must be given more flexibility to identify efficiencies within and among their jurisdictional runoff management programs as the strategies are developed and implemented to increase the Copermittees' collective effectiveness. The Copermittees must also be able to identify and utilize resources available from other agencies and entities to further augment and enhance their jurisdictional runoff management programs and/or to collectively work with those other agencies and entities toward achieving a stated desired outcome.

The Regional MS4 Permit requirements provide the Copermittees the flexibility and responsibility to decide what actions will be necessary to achieve an outcome that is tailored and designed by the Copermittees to improve specific prioritized water quality conditions. The San Diego Water Board expects the approach of the Regional MS4 Permit to give the Copermittees a greater sense of ownership for restoring the quality of receiving waters in the San Diego Region by becoming an integral part of the decision making process in identifying water quality conditions to be addressed, as well as determining the best use of their resources.

VI. ECONOMIC CONSIDERATIONS

Statutory Considerations

California Water Code (CWC) section 13241 requires the San Diego Water Board to consider certain factors, including economic considerations, in the adoption of water quality objectives. CWC section 13263 requires the San Diego Water Board to take into consideration the provisions of CWC section 13241 in adopting waste discharge requirements.

In *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, the California Supreme Court considered whether Regional Water Boards must comply with CWC section 13241 when issuing waste discharge requirements under CWC section 13263(a) by taking into account the costs a permittee will incur in complying with the permit requirements. The Court concluded that whether it is necessary to consider such cost information “*depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act.*” (*Id.* at p. 627.) The Court ruled that Regional Water Boards may not consider the factors in CWC section 13241, including economics, to justify imposing pollutant restrictions that are less stringent than applicable federal law requires. (*Id.* At pp. 618, 626-627 [“*[Water Code section 13377 specifies that [] discharge permits issued by California’s regional boards must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board’s consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act...Because CWC section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a [] discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards.*”]). However, when pollutant restrictions in an NPDES permit are more stringent than federal law requires, CWC section 13263 requires that the Regional Water Boards consider the factors described in CWC section 13241 as they apply to those specific restrictions.

As discussed in Section VII.F, Unfunded State Mandates, the San Diego Water Board finds that the requirements in this Order are not more stringent than the minimum federal requirements. Among other requirements, federal law requires MS4 permits to include requirements to effectively prohibit non-storm water discharges into the MS4s, in addition to requiring controls to reduce the discharge of pollutants in storm water to the MEP, and other provisions as USEPA or the State determines are appropriate for the control of pollutants in MS4 discharges.

The requirements in this Order may be more specific or detailed than those enumerated in federal regulations under 40 CFR 122.26 or in the USEPA guidance. However, the requirements have been designed to be consistent with and within the federal statutory mandates described in CWA section 402(p)(3)(B)(ii) and (iii) and the related federal regulations and guidance. Consistent with federal law, all of the

conditions in this Order could have been included in a permit adopted by USEPA in the absence of the in lieu authority of California to issue NPDES permits.

Moreover, the inclusion of numeric WQBELs in this Order does not cause this Order to be more stringent than federal law. Federal law authorizes both narrative and numeric effluent limitations to meet state water quality standards. The inclusion of WQBELs as discharge specifications in an NPDES permit in order to achieve compliance with water quality standards is not a more stringent requirement than the inclusion of BMP based permit limitations to achieve water quality standards (State Water Board Order No. WQ 2006-0012 (*Boeing*)). Therefore, consideration of the factors set forth in CWC section 13241 is not required for permit requirements to implement the effective prohibition on the discharge of non-storm water discharges into the MS4 or for controls to reduce the discharge of pollutants in storm water to the MEP, or other provisions that the San Diego Water Board has determine appropriate to control such pollutants, as those requirements are mandated by federal law.

Included in the provisions of the Order are monitoring and reporting requirements that are designed to demonstrate that the Copermittees are implementing programs to comply with the CWA municipal storm water requirements. CWA section 308(a) and 40 CFR 122.41(h), (j)-(l), 122.44(i) and 122.48 require that all NPDES permits specify monitoring and reporting requirements. Federal regulations applicable to large and medium MS4s (40 CFR 122.26(d)(1)(iv)(D), 122.26(d)(1)(v)(B), 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)(D), 122.26(d)(2)(iv)(B)(2) and 122.42(c)) also specify additional monitoring and reporting requirements. In addition to the federal requirements of the CWA, the San Diego Water Board also has the authority in CWC 13383 to establish monitoring, reporting, and recordkeeping requirements that implement federal and state laws and regulations through NPDES permits.

The monitoring and assessment information that will be reported to the San Diego Water Board is necessary to determine if the Copermittees are making progress toward achieving compliance with the discharge prohibitions, receiving water limitations, and effluent limitations under Provision A of the Order. The monitoring and assessment information that will be reported is also expected to be key to the iterative approach and adaptive management process that is required to be implemented by the Copermittees if they cannot meet the discharge prohibitions and receiving water limitations under the present conditions, which is also part of the requirements under Provision A of the Order.

Notwithstanding the above, the San Diego Water Board has considered cost information in issuing this Order, as discussed below. The San Diego Water Board has also considered all of the evidence that has been presented to the San Diego Water Board regarding the CWC section 13241 factors in adopting this Order. The San Diego Water Board finds that the requirements in this Order are reasonably necessary to protect beneficial uses identified in the Basin Plan and the economic information related to costs of compliance and other CWC section 13241 factors are not sufficient to justify failing to protect those beneficial uses. Where appropriate, the

San Diego Water Board has provided or will consider providing the Copermittees with additional time to implement control measures to achieve final WQBELs and/or water quality standards.

Cost Information

Discussions of the financial and economic ramifications of municipal storm water management programs tend to focus on the significant costs incurred by municipalities in developing and implementing the programs. When considering the cost of implementing the programs, however, it is also important to consider the alternative costs that are incurred when programs are not fully implemented, as well as the economic benefits which result from effective program implementation.

The recent financial and economic conditions have amplified the concerns about the costs incurred by the municipalities in developing and implementing their programs. The reduction in resources resulting from the recent financial and economic conditions has been cited by many of the Copermittees as a justification for reducing the requirements that must be met by their programs. While the recent conditions are a cause for concern in the short term, these programs also have an opportunity to identify and implement improvements and efficiencies before the next period of growth and development, resulting in more effective and sustainable programs over the long term.

In addition, it is very difficult to ascertain the true cost of implementation of the Copermittees' management programs because of inconsistencies in reporting by the Copermittees. Reported costs of compliance for the same program element can vary widely from city to city, often by a very wide margin that is not easily explained.² Despite these problems, efforts have been made to identify management program costs, which can be helpful in understanding the costs of program implementation.

The San Diego Water Board recognizes that the Copermittees will incur costs in implementing this Order, potentially above and beyond the costs from the Copermittees' prior permits. The San Diego Water Board also recognizes that, due to California's current economic condition, many Copermittees currently have limited staff and resources to implement actions to address its MS4 discharges. Based on the economic considerations below, the San Diego Water Board has provided the Copermittees a significant amount of flexibility to choose how to implement the requirements of the Order.

The Order also allows the Copermittees to customize their plans, programs, and monitoring requirements. In the end, it is up to the Copermittees to determine the effective BMPs and measures necessary to comply with this Order. The Copermittees can choose to implement the least expensive measures that are effective in meeting

² Los Angeles Water Board, 2003. Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003. P. 2.

the requirements of this Order. This Order also does not require the Copermittees to fully implement all requirements within a single permit term. Where appropriate, the Board has provided the Copermittees with additional time outside of the permit term to implement control measures to achieve final WQBELs and/or water quality standards.

The San Diego Water Board has considered available cost information associated with compliance with this Order. It is not possible to predict accurately the cost impact of the requirements that involve an unknown level of implementation or that depend on environmental variables that are as yet undefined. Only general conclusions can be drawn from this information.

Estimated Municipal Storm Water Program Implementation Costs

The USEPA, the State Water Board, and the California Regional Water Quality Control Boards (Regional Water Boards) have attempted to evaluate the costs of implementing municipal storm water programs. The assessments have demonstrated that the true costs are difficult to ascertain and reported costs vary widely. In addition, reported fiscal analyses tend to neglect the costs incurred to municipalities when storm water and non-storm water runoff is not effectively managed, which are incurred as a result of pollution, contamination, nuisance, and damage to ecosystems, property, and human health. Nonetheless, they provide a useful context for considering the costs of requirements within Order No. R9-2013-0001.

In 1999, the USEPA reported on multiple studies it conducted to determine the cost of management programs. A study of Phase II municipalities determined that the annual cost of the Phase II program was expected to be \$9.16 per household. The USEPA also studied 35 Phase I municipalities, finding costs to be \$9.08 per household annually, similar to those anticipated for Phase II municipalities.³

The State Water Board commissioned a study by the California State University, Sacramento to assess costs of the Phase I MS4 program. This study includes an assessment of costs incurred by Phase I MS4s throughout the state to implement their programs. Annual cost per household in the study ranged from \$18 to \$46, with the Fresno-Clovis Metropolitan Area representing the lower end of the range, and the City of Encinitas (in San Diego County) representing the upper end of the range.⁴

A study on Phase I MS4 program costs was also conducted by the California Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board), where program costs reported in the municipalities' annual reports were assessed. The Los

³ Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68791-68792.

⁴ State Water Board, 2005. NPDES Stormwater Cost Survey. P. ii.

Angeles Water Board estimated that average per household cost to implement the MS4 program in Los Angeles County was \$12.50.⁵

It is important to note that reported program costs are not all attributable to solely complying with MS4 permits. Many program components, and their associated costs, existed before any MS4 permits were ever issued. For example, street sweeping and trash collection costs cannot be solely or even principally attributable to MS4 permit compliance, since these practices have long been expected from and implemented by municipalities.

Therefore, true program cost resulting from MS4 permit requirements is some fraction of reported costs. The California State University, Sacramento study found that only 38 percent of program costs are new costs fully attributable to MS4 permits. The remainder of the program costs was either pre-existing or resulted from enhancement of pre-existing programs.⁶ In 2000, the County of Orange found that even lower amounts of program costs are solely attributable to MS4 permit compliance, reporting that the amount attributable to implement the County of Orange Drainage Area Management Plan (DAMP), was less than 20 percent of the total budget. The remaining 80 percent was attributable to pre-existing programs.⁷ More current data from the County of Orange is not used in this discussion because the County of Orange no longer reports such information.

Estimated Value of Healthy Water Quality

Economic considerations of municipal storm water management programs cannot be limited only to program costs. Evaluation of programs must also consider information on the benefits derived from environmental protection and improvement.⁸ Attention is often focused on municipal storm water management program costs, but the programs must also be viewed in terms of their value to the public.

Placing a value on healthy receiving waters is very difficult. Often the value of receiving waters with good water quality manifests in other forms, such as tourism, recreational opportunities, and/or increased property values. When surface water bodies are degraded, thereby degrading the habitat within and adjacent to the water bodies, the public loses the value and benefits associated with being able to use the area in and around the water bodies. Surface waters that are able to support the beneficial uses designated in the Basin Plan can sustain plants and wildlife that can attract visitors and residents, providing aesthetic, recreational, as well as monetary value to the public. At this time, however, there have been no studies for the San

⁵ Los Angeles Water Board, 2003. Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003. P. 2.

⁶ State Water Board, 2005. NPDES Stormwater Cost Survey. P. 58.

⁷ County of Orange, 2000. A NPDES Annual Progress Report. P. 60.

⁸ Ribaudo M.O. and D. Heelerstein. 1992, *Estimating Water Quality Benefits: Theoretical and Methodological Issues*. U.S. Department of Agriculture. Technical Bulletin No. 1808.

Diego Region to quantify the added value that surface waters with healthy water quality can provide.

USEPA has estimated that household willingness to pay for improvements in fresh water quality for fishing and boating is approximately \$158-\$210.⁹ This estimate can be considered conservative, since it does not include important considerations such as marine waters benefits, wildlife benefits, or flood control benefits. Another study conducted by California State University, Sacramento reported that the annual household willingness to pay for statewide clean water is approximately \$180.¹⁰

A study conducted by the University of Southern California and University of California, Los Angeles assessed the costs and benefits of implementing various approaches for achieving compliance with the MS4 permits in the Los Angeles region. The study found that non-structural systems would cost \$2.8 billion but provide \$5.6 billion in benefit. If structural systems were determined to be needed, the study found that total costs would be \$5.7 to \$7.4 billion, while benefits could reach \$18 billion.¹¹ Costs are anticipated to be borne over many years, probably at least ten years.

As can be seen, the benefits of the municipal storm water management programs are expected to considerably exceed their costs. Such findings are corroborated by USEPA, which found that the benefits of implementation of its Phase II storm water rule would also outweigh the costs.¹²

⁹ Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68793.

¹⁰ State Water Board, 2005. NPDES Stormwater Cost Survey. P. iv.

¹¹ Los Angeles Water Board, 2004. Alternative Approaches to Stormwater Control.

¹² Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68791.

VII. APPLICABLE STATUTES, REGULATIONS, PLANS AND POLICIES

A. Legal Authorities – Federal Clean Water Act and California Water Code

This Order is issued pursuant to section 402 of the CWA and implementing regulations adopted by the USEPA and chapter 5.5, division 7 of the CWC (commencing with section 13370). This Order serves as an NPDES permit for point source discharges to surface waters. This Order also serves as waste discharge requirements pursuant to article 4, chapter 4, division 7 of the CWC (commencing with section 13260).

The objective of the CWA is “*to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.*” To carry out this objective, the CWA requires the implementation of permit programs to regulate the discharge of pollutants and dredged or fill material to the navigable waters of the U.S. and to regulate the use and disposal of sewage sludge. CWA section 402 provides the legal authority to issue a permit for the discharge of pollutants to waters of the U.S. under the NPDES. The CWA provides that NPDES permits may be issued by states which are authorized to implement the provisions of that act. California became authorized to implement the NPDES permit program on May 14, 1973.

The Porter-Cologne Water Quality Control Act (Division 7, commencing with CWC section 13000) established the State Water Resources Control Board (State Water Board) and nine Regional Water Quality Control Boards (Regional Water Boards) as the principal state agencies with primary responsibility for the coordination and control of water quality. CWC section 13200(f) established the San Diego Water Board, which has the primary responsibility for the coordination and control of water quality in the San Diego Region, which includes all the basins draining into the Pacific Ocean between the southern boundary of the Santa Ana Region and the California-Mexico boundary. The San Diego Water Board implements the CWA through Chapter 5.5 of the CWC, commencing with section 13370. CWC section 13377 provides the San Diego Water Board the legal authority to issue waste discharge requirements to ensure compliance with all applicable provisions of the CWA and acts amendatory thereof or supplementary, thereto, to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

CWA section 402(p) requires the USEPA or authorized state to issue NPDES permits for storm water discharges from MS4s to waters of the U.S. CWA section 402(p)(3)(B)(ii) requires that NPDES permits for storm water discharges from MS4s “*effectively prohibit non-storm water discharges*” into the MS4s. CWA section 402(p)(3)(B)(iii) requires that NPDES permits for storm water discharges from MS4s to “*require controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable [MEP], including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.*”

The USEPA published implementing regulations (Code of Federal Regulations [CFR] Title 40, Part 122 [40 CFR 122]), which prescribe permit application requirements for storm water discharges from MS4s pursuant to CWA 402(p), on November 16, 1990. The USEPA published an Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems, which provided guidance on permit application requirements for regulated MS4s, on May 17, 1996. The federal regulations in 40 CFR 122 and guidance issued by USEPA serve as the foundation for the provisions of Order No. R9-2013-0001. The legal authorities provided by the above statutes and regulations are included as part of the discussions in Section VIII of this Fact Sheet.

B. Legal Authority for the Permit Issued on a Region-wide Basis

CWA section 402(p)(3)(B) provides the San Diego Water Board the legal authority to issue an NPDES permit for the San Diego Region as compared to separate MS4 permits based upon County- and partial County-wide boundaries as they existed within the San Diego Region. CWA section 402(p)(3)(B) states that “*Permits for discharges from municipal storm sewers- (i) may be issued on a system- or jurisdiction-wide basis ...*” The federal regulations in 40 CFR 122.26(a)(1)(v) also state that the San Diego Water Board “*may designate dischargers from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination, the [San Diego Water Board] may consider the following factors: (A) the location of the discharge with respect to waters of the United States; (B) the size of the discharge; (C) the quantity and nature of the pollutants discharged to waters of the United States; and (D) other relevant factors.*”

More specifically, the federal regulations provide that for large and medium MS4 systems, the San Diego Water Board may issue a regional permit. Specifically, the federal regulation in 40 CFR 122.26(a)(3) provide:

- "(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.*
- (iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either: (A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operator of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system; (B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for*

which the operator is responsible; or (C) A regional authority may be responsible for submitting a permit application under the following guidelines...

- (iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one systemwide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.*
- (v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system."*

Based on these regulations, the San Diego Water Board may issue a region-wide MS4 permit. The regulations also clarify that the permit may include different conditions for separate discharges covered by the permit. This allows the San Diego Water Board to ensure that suitable water quality conditions and provisions are identified for each watershed.

The USEPA's responses to comments in the Final Rule for the above-mentioned regulations also make it clear that the permitting authority, in this case the San Diego Water Board, has the flexibility to establish system- or region-wide, permits. In the Final Rule published in the Federal Register and containing the responses to comments, USEPA notes that 40 CFR 122.26(a)(3)(iv) would allow an entire system in a geographical region under the purview of a State agency to be designated under a permit.¹³ USEPA also states that many commenters wanted to allow the permitting authority broad discretion to establish system-wide permits, and that EPA believes that paragraphs 40 CFR 122.26 (a)(1)(v) and (a)(3)(ii) allow for such broad discretion.¹⁴

This Order creates watershed requirements that apply to multiple counties. The regional nature of this Order will ensure consistency of regulation within watersheds and is expected to result in overall cost savings for the Copermittees. Managing storm water on a regional and watershed basis is expected to result in improved water quality, as the Order focuses on monitoring and management practices necessary to improve each watershed rather than political boundaries. A single permit also allows the San Diego Water Board staff to expend fewer resources developing successive multiple permits and allows more resources to be devoted to working cooperatively with all three current groups of Copermittees to ensure implementation of this Order results in improved water quality.

¹³ 55 Federal Register 47990-01, 48042.

¹⁴ Ibid.

C. Federal and California Endangered Species Acts

This Order does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2115.5) or the Federal Endangered Species Act (16 United States Code [USC] sections 1531 to 1544). This Order requires compliance with requirements to protect the beneficial uses of waters of the U.S. The Copermittees are responsible for meeting all requirements of the applicable Endangered Species Act.

D. California Environmental Quality Act

The action to adopt an NPDES Permit is exempt from the provisions of Chapter 3 of the California Environmental Quality Act (CEQA) (Public Resources Code section 21100, et seq.) pursuant to CWC section 13389. (*County of Los Angeles v. Cal. Water Boards* (2006) 143 Cal.App.4th 985.)

E. State and Federal Regulations, Plans and Policies

The legal authority provided by the following regulations, plans, and policies are also included as part of the discussions in Section VIII of this Fact Sheet.

Water Quality Control Plan for the San Diego Basin

The CWA requires the San Diego Water Board to establish water quality standards for each water body in its region. Water quality standards include beneficial uses, water quality objectives and criteria that are established at levels sufficient to protect beneficial uses, and an antidegradation policy to prevent degrading of waters. On September 8, 1994, the San Diego Water Board adopted the *Water Quality Control Plan for the San Diego Basin* (Basin Plan). The Basin Plan designates beneficial uses, establishes water quality objectives, and contains implementation programs and policies to achieve those objectives for all waters in the San Diego Region. The San Diego Water Board has amended the Basin Plan on multiple occasions since 1994. In addition, the Basin Plan implements State Water Board Resolution No. 88-63, which established state policy that all waters, with certain exceptions, should be considered suitable or potentially suitable for municipal or domestic supply. Beneficial uses applicable to the surface water bodies that receive discharges from the MS4s within the San Diego Region generally include those listed below:

The Basin Plan identifies the following existing and potential beneficial uses for inland surface waters in the San Diego Region:

- Municipal and Domestic Supply (MUN)
- Agricultural Supply (AGR)
- Industrial Process Supply (PROC)

- Industrial Service Supply (IND)
- Ground Water Recharge (GWR)
- Contact Water Recreation (REC1)
- Non-contact Water Recreation (REC2)
- Warm Freshwater Habitat (WARM)
- Cold Freshwater Habitat (COLD)
- Wildlife Habitat (WILD)
- Rare, Threatened, or Endangered Species (RARE)
- Freshwater Replenishment (FRSH)
- Hydropower Generation (POW)
- Preservation of Biological Habitats of Special Significance (BIOL)

The following additional existing and potential beneficial uses are identified for coastal waters of the San Diego Region:

- Navigation (NAV)
- Commercial and Sport Fishing (COMM)
- Estuarine Habitat (EST)
- Marine Habitat (MAR)
- Aquaculture (AQUA)
- Migration of Aquatic Organisms (MIGR)
- Spawning, Reproduction, and/or Early Development (SPWN)
- Shellfish Harvesting (SHELL)

Pursuant to Water Code sections 13263 and 13377, the requirements of this Order implement the Basin Plan.

Water Quality Control Plan for Ocean Waters of California, California Ocean Plan

In 1972, the State Water Board adopted the Water Quality Control Plan for Ocean Waters of California, California Ocean Plan (Ocean Plan). The State Water Board adopted the most recent amended Ocean Plan on October 16, 2012. The Office of Administrative Law approved it on July 3, 2013. The amended Ocean Plan became effective on August 19, 2013. The Ocean Plan is applicable, in its entirety, to ocean waters of the State. In order to protect beneficial uses, the Ocean Plan establishes water quality objectives and a program of implementation. Pursuant to Water Code sections 13263 and 13377, the requirements of this Order implement the Ocean Plan. The Ocean Plan identifies the beneficial uses of ocean waters of the State to be protected as summarized below:

- Industrial water supply
- Water contact and non-contact recreation, including aesthetic enjoyment; navigation
- Commercial and sport fishing

- Mariculture
- Preservation and enhancement of designated Areas of Special Biological Significance
- Rare and endangered species
- Marine habitat
- Fish spawning and shellfish harvesting

On March 20, 2012, the State Water Board approved Resolution No. 2012-0012 approving an exception to the Ocean Plan prohibition against discharges to Areas of Special Biological Significance (ASBS) for certain nonpoint source discharges and NPDES permitted municipal storm water discharges. On June 19, 2012, the State Water Board adopted Order No. 2012-0031, amending Order No. 2012-0012 to require pollutant load reductions to be achieved within six years for the ASBS Compliance Plans, section A.2.d(2) and ASBS Pollution Prevention Plans, section B.2.b(2). The State Water Board Resolution No. 2012-0012, as amended requires monitoring and testing of marine aquatic life and water quality in several ASBS to protect California's coastline during storms when rain water overflows into coastal waters. Specific terms, prohibitions, and special conditions were adopted to provide special protections for marine aquatic life and natural water quality in ASBS. The City of San Diego's municipal storm water discharges to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach's municipal storm water discharges to the Heisler Park ASBS are subject terms and conditions of State Water Board Resolution No. 2012-0012, as amended. The Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012, as amended, applicable to these discharges, are incorporated in Attachment A of this Order. Requirements of this Order implement the Ocean Plan.

Water Quality Control Plan for Enclosed Bays and Estuaries – Part 1 Sediment Quality

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

Antidegradation Policy

Federal regulations (40 CFR 131.12) require that the state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). State Water Board Resolution No. 68-16 incorporates the

federal antidegradation policy where the federal policy applies under federal law.

The San Diego Water Board's Basin Plan implements and incorporates by reference both the State and federal antidegradation policies. State Water Board Resolution No. 68-16 and 40 CFR 131.12 require the San Diego Water Board to maintain high quality waters of the State unless degradation is justified based on specific findings. First, the Board must ensure that "existing instream uses and the level of water quality necessary to protect the existing uses" are maintained and protected. Second, if the baseline quality of a water body for a given constituent exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected through the requirements of the Order unless the Board makes findings that (1) any lowering of the water quality is necessary to accommodate important economic or social development in the area in which the waters are located; (2) water quality adequate to protect existing uses fully is assured; and (3) the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control are achieved. The San Diego Water Board must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy. In particular, the Board must find that not only present, but also anticipated future uses of water are protected, and must ensure best practicable treatment or control of the discharges. The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.

The discharges permitted in this Order are consistent with the antidegradation provisions of 40 CFR 131.12 and State Water Board Resolution No. 68-16 as set forth below:

1. Many of the waters within the area covered by this Order are impaired for multiple pollutants discharged through MS4s and are not high quality waters with regard to these pollutants. In most cases, there is insufficient data to determine whether these water bodies were impaired as early as 1968, but the limited available data shows impairment dating back for more than two decades. Many such water bodies are listed on the State's CWA Section 303(d) List and the San Diego Water Board has established TMDLs to address the impairments. This Order ensures that existing instream (beneficial) water uses and the level of water quality necessary to protect the existing uses is maintained and protected. This Order requires the Copermitttees to comply with permit provisions to implement the WLAs set forth in the TMDLs in order to restore the beneficial uses of the impaired water bodies consistent with the assumptions and requirements of the TMDLs. This Order further requires compliance with receiving water limitations to meet water quality standards in the receiving water either by demonstrating compliance pursuant to Provision A and the Copermitttees' monitoring and assessment program pursuant to Provision D of this Order, or by implementing Provision B.3.c with a schedule to achieve compliance

with receiving water limitations. This Order includes requirements to develop and implement storm water management programs, achieve WQBELs, and effectively prohibit non-storm water discharges into the MS4. The issuance of this Order does not authorize an increase in the amount of discharge of waste.

2. To the extent that water bodies within the area covered by this Order are high quality waters with regard to some constituents, this Order finds as follows:
 - a. Allowing limited degradation of high quality water bodies through MS4 discharges is necessary to accommodate important economic or social development in the area and is consistent with the maximum benefit to the people of the state. The discharge of storm water in certain circumstances is to the maximum benefit to the people of the state because it can assist with maintaining instream flows that support beneficial uses, may spur the development of multiple-benefit projects, and may be necessary for flood control, and public safety as well as to accommodate development in the area. The alternative – capturing all storm water from all storm events – would be an enormous opportunity cost that would preclude MS4 permittees from spending substantial funds on other important social needs. The Order ensures that any limited degradation does not affect existing and anticipated future uses of the water and does not result in water quality less than established standards. The Order requires compliance with receiving water limitations that act as a floor to any limited degradation.
 - b. The Order requires the highest statutory and regulatory requirements and requires that the Copermitees meet best practicable treatment or control. The Order prohibits all non-storm water discharges, with a few enumerated exceptions, through the MS4 to the receiving waters. As required by 40 CFR section 122.44(a), the Copermitees must comply with the “maximum extent practicable” technology-based standard set forth in CWA section 402(p), and implement extensive minimum control measures in a storm water management program. Recognizing that best practicable treatment or control may evolve over time, the Order includes new and more specific requirements as compared to the prior Phase I MS4 permits for the San Diego County, Orange County and Riverside County Copermitees. The Order incorporates options to implement Water Quality Improvement Plans that must specify detailed structural and non-structural storm water controls that must be implemented in accordance with an accepted proposed time schedule. The Order contains provisions to encourage, wherever feasible, retention of the storm water from the 85th percentile 24-hour storm event.

Anti-Backsliding Requirements

CWA sections 402(o) and 303(d)(4) and federal regulations at 40 CFR 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations or conditions may be relaxed. While this Order

allows implementation of an alternative compliance pathway option in Provision B.3.c to constitute compliance with receiving water limitations under certain circumstances, the availability of that alternative and the corresponding availability of additional time to come into compliance with receiving water limitations does not violate the anti-backsliding provisions. The receiving water limitations provisions of this Order are imposed under section 402(p)(3)(B) of the Clean Water Act rather than based on best professional judgment, or based on section 301(b)(1)(C) or sections 303(d) or (e), and are accordingly not subject to the anti-backsliding requirements of section 402(o). Although the non-applicability is less clear with respect to the regulatory anti-backsliding provisions in 40 CFR 122.44(l), the regulatory history suggests that USEPA's intent was to establish the anti-backsliding regulations with respect to evolving technology standards for traditional point sources. (See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979)). It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because the alternative compliance pathway option in Provision B.3.c qualifies for an exception to backsliding as based on new information.

The alternative compliance pathway option in Provision B.3.c of this Order was informed by new information available to the Board from experience and knowledge gained through storm water permitting at the Regional Water Boards in the last ten years. There has been a statewide paradigm shift in storm water management. State Water Board Order WQ 2015-0075 directed all of the Regional Water Boards to consider the Los Angeles Water Board's alternative compliance path to receiving water limitations in all Phase I MS4 permits going forward (State Water Board Order WQ 2015-0075 at page 51), and the Los Angeles Water Board's process of developing over 30 watershed-based TMDLs and implementing several TMDLs since the adoption of the previous permits. In particular, the Los Angeles Water Board recognized the significance of allowing time to plan, design, fund, operate and maintain watershed-based BMPs necessary to attain water quality improvements and additionally recognized the potential for municipal storm water to benefit water supply. Similarly, the San Diego Water Board's experience developing and implementing the Fourth Term MS4 Permits and TMDLs that apply on a region-wide scale (e.g. TMDLs for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region) has resulted in a similar recognition of the need for a watershed-based approach that allows time to plan, design, fund, operate and maintain BMPs to address impaired waters that have been impacted by MS4 discharges. Thus, even if the receiving water limitations are subject to anti-backsliding requirements, they were revised based on new information that would support an exception to the anti-backsliding provisions. (33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(1); 40 C.F.R. §122.44(l)(2)(i)(B)(1)).

Clean Water Act Section 303(d) List

CWA section 303(d)(1) requires each State to identify specific water bodies within its boundaries where water quality standards are not being met or are not expected to be met after implementation of technology-based effluent limitations on point sources. Water bodies that do not meet water quality standards are considered impaired and are placed on the state's "303(d) List." Periodically, USEPA approves the State's 303(d) List.

Most recently, USEPA approved the State's 2010 303(d) List of impaired water bodies on October 11, 2011, which includes certain receiving waters in the San Diego Region. For each listed water body, the state or USEPA is required to establish a TMDL of each pollutant impairing the water quality standards in that water body. A TMDL is a tool for implementing water quality standards and is based on the relationship between pollution sources and in-stream water quality conditions. The TMDL establishes the allowable pollutant loadings for a water body and thereby provides the basis to establish water quality-based controls. These controls should provide the pollution reduction necessary for a water body to meet water quality standards.

A TMDL is the sum of the allowable pollutant loads of a single pollutant from all contributing point sources (the waste load allocations or WLAs) and non-point sources (load allocations of LAs) plus the contribution from background sources and a margin of safety (40 CFR 130.2(i)). MS4 discharges are considered point source discharges. For 303(d)-listed water bodies and pollutants in the San Diego Region, the San Diego Water Board or USEPA develops and adopts TMDLs that specify these requirements.

Since 2002, the San Diego Water Board has established seven (7) TMDLs to remedy water quality impairments in various water bodies within the San Diego Region (see Attachment E to the Order). These TMDLs identify MS4 discharges as a source of pollutants to these water bodies, and, as required, establish WLAs for MS4 discharges to reduce the amount of pollutant discharged to receiving waters. CWA section 402(p)(3)(B)(iii) requires the San Diego Water Board to impose permit conditions, including: "management practices, control techniques and system, design and engineering methods, and *such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.*" (Emphasis added.) CWA section 402(a)(1) also requires states to issue permits with conditions necessary to carry out the provisions of the CWA. Federal regulations also require that NPDES permits contain WQBELs consistent with the assumptions and requirements of all available WLAs (40 CFR 122.44(d)(1)(vii)(B)). CWC section 13377 also requires that NPDES permits include limitations necessary to implement water quality control plans. Therefore, this Order includes WQBELs and other provisions to implement the TMDL WLAs assigned to Copermitttees regulated by this Order.

Other Regulations, Plans and Policies

This Order implements all other applicable federal regulations and State regulations, plans and policies, including the California Toxics Rule at 40 CFR 131.38 (Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California Rule [California Toxics Rule or CTR]), and State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP).

F. Unfunded State Mandates

Article XIII B, Section 6(a) of the California Constitution provides that whenever “*any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service.*” The requirements of this Order do not constitute state mandates that are subject to a subvention of funds for several reasons, including, but not limited to, the following.

First, the requirements of this Order do not constitute a new program or a higher level of service as compared to the requirements contained in the previous Fourth Term Permits. The overarching requirement to impose controls to reduce the pollutants in discharges from MS4s is dictated by the CWA and is not new to this permit cycle (33 USC section 1342(p)(3)(B)). The inclusion of new and advanced measures as the MS4 programs evolve and mature over time is anticipated under the CWA (55 FR 47990, 48052 (Nov. 16, 1990)), and to the extent requirements in this Order are interpreted as new advanced measures, they do not constitute a new program or higher level of service.

Second, and more broadly, mandates imposed by federal law, rather than by a state agency, are exempt from the requirement that the local agency’s expenditures be reimbursed (Cal. Const., art. XIII B, section 9, subd. (b)). This Order implements federally mandated requirements under the CWA and its requirements are therefore not subject to subvention of funds. This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants in storm water to the MEP, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants (33 USC section 1342(p)(3)(B)). Federal cases have held these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (*Natural Resources Defense Council, Inc., v. USEPA* (9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.)

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

The MEP standard is a flexible standard that balances a number of considerations, including technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. (*Building Ind. Ass’n., supra*, 124 Cal.App.4th at pp. 873-874, 889.) Such considerations change over time with advances in technology and with experience

gained in storm water management (55 FR 47990, 48052 (Nov. 16, 1990)). Accordingly, a determination of whether the conditions contained in this Order exceed the requirements of federal law cannot be based on a point by point comparison of the permit conditions and the minimum control measures that are required “at a minimum” to reduce pollutants to the maximum extent practicable and to protect water quality (40 CFR 122.34). Rather, the appropriate focus is whether the permit conditions, as a whole, exceed the MEP standard.

In recent months, the County of Los Angeles and County of Sacramento Superior Courts have granted writs setting aside decisions of the Commission on State Mandates that held certain requirements in Phase I permits constituted unfunded mandates. In both cases, the courts have found that the correct analysis in determining whether an MS4 permit constituted a state mandate was to evaluate whether the permit as a whole exceeds the MEP standard. (*State of Cal. v. Comm. on State Mandates* (Super. Ct. Sacramento County, 2012, No. 34-2010-80000604), *State of California v. County of Los Angeles* (Super. Ct. Los Angeles County, 2011, No. BS130730.) Both cases are currently pending appeal.

The requirements of the Order, taken as a whole rather than individually, are necessary to reduce the discharge of pollutants to the MEP and to protect water quality. The San Diego Water Board finds that the requirements of the Order are practicable, do not exceed federal law, and thus do not constitute an unfunded mandate. These findings are the expert conclusions of the principal state agency charged with implementing the NPDES program in California (CWC sections 13001, 13370).

It should also be noted that the provisions in this Order to effectively prohibit non-storm water discharges are also mandated by the CWA (33 USC section 1342(p)(3)(B)(ii)). Likewise, the provisions of this Order to implement TMDLs are federal mandates. The CWA requires TMDLs to be developed for water bodies that do not meet federal water quality standards (33 USC section 1313(d)). Once the USEPA or a state establishes or adopts a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions and requirements of any applicable waste load allocation in a TMDL (40 CFR 122.44(d)(1)(vii)(B)).

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

The CWA and the Porter-Cologne Act largely regulate storm water with an even hand, but to the extent there is any relaxation of this even-handed regulation, it is in favor of the local agencies. Generally, the CWA requires point source dischargers, including dischargers of storm water associated with industrial or construction activity, to comply strictly with water quality standards (33 USC section 1311(b)(1)(C); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1164-1165 [noting that industrial discharges must strictly comply with water quality standards]). As discussed in prior State Water Board decisions, certain provisions of this Order do not require strict compliance with water quality standards (State Water Board Order No. WQ 2001-0015, p. 7). Those provisions of this Order regulate the discharge of waste in municipal storm water under the CWA's MEP standard, not the BAT/BCT standard that applies to other types of discharges. These provisions, therefore, regulate the discharge of waste in municipal storm water more leniently than the discharge of waste from non-governmental sources.

Fourth, the Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA section 301(a) (33 USC section 1311(a)). To the extent that the local agency Copermittees have voluntarily availed themselves of the permit, the program is not a state mandate. (Accord, *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 107-108.)

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

Finally, even if any of the permit provisions could be considered unfunded mandates, under Government Code section 17556, subdivision (d), a state mandate is not subject to reimbursement if the local agency has the authority to charge a fee. The local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order, subject to certain voting requirements contained in the California Constitution. (See Cal. Const., Art. XIII D, section 6, subd. (c); see also *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.) The Fact Sheet demonstrates that numerous activities contribute to the pollutant loading in the MS4. Local agencies can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., *Apartment Ass'n of Los Angeles County, Inc., v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The authority and ability of a local agency to defray the cost of a program without raising taxes indicates that a program does not entail a cost subject to subvention. (*Clovis Unified School Dist. V. Chiang* (2010) 188 Cal.App.4th 794, 812, citing *Connell v. Sup. Ct.* (1997) 59 Cal.App.4th 382, 401; *County of Fresno v. State of California* (1991) 53 Cal. 3d. 482, 487-488.)

VIII. PROVISIONS

The provisions (i.e. NPDES permit requirements) of the Order are discussed below.

A. Prohibitions and Limitations

Purpose: Provision A includes the prohibitions and limitations requirements that are the foundation of all the subsequent requirements included in the Order. Compliance with the prohibitions and limitations will restore and protect receiving waters from impacts that may be caused by discharges into and from the Copermittees' MS4s and ultimately achieve the objective of the CWA.

In meeting the requirements set forth in the Order, the Copermittees must be cognizant that the prohibitions and limitations exist and will be the standard by which the San Diego Water Board will be measuring the progress and success of their implementation of the NPDES permit requirements.

Discussion: The objective of the CWA is to “*restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.*” The CWA requires the implementation of NPDES permit programs to regulate discharges of pollutants and dredged or fill material to the navigable waters of the U.S. For discharges into and from MS4s, the CWA requires the NPDES permits to “*effectively prohibit non-stormwater discharges into the storm sewers*” and “*require controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable.*”

Provision A includes limitations, consistent with the requirements of the CWA for discharges from MS4s. Provision A expresses these limitations as discharge prohibitions, receiving water limitations, and effluent limitations. Compliance with the discharge prohibitions and receiving water limitations is also explicitly described, in conformance with precedential State Water Board Orders.

More specific and detailed discussions of the requirements of Provision A are provided below.

Provision A.1 (Discharge Prohibitions) prohibits the discharge of specific types of waste into and/or from the Copermittees' MS4s.

Provision A.1.a restates and reiterates Basin Plan Waste Discharge Prohibition 1, by prohibiting discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters of the

state. The terms pollution,¹⁵ contamination,¹⁶ and nuisance¹⁷ are defined under CWC 13050. Provision A.1.c incorporates all the waste discharge prohibitions of the Basin Plan into the requirements of the Order. The waste discharge prohibitions from the Basin Plan have been reproduced and provided in Attachment A to the Order.

Provision A.1.b requires non-storm water discharges into the MS4s to be effectively prohibited, consistent with the requirements of the CWA for MS4 permits to “*effectively prohibit non-stormwater discharges into the storm sewers.*” The effective prohibition is required to be implemented by each Copermittee within its jurisdiction through the illicit discharge detection and elimination requirements under Provision E.2. The prohibition does not apply to NPDES permitted discharges into the Copermittees’ MS4s.

The CWA employs the strategy of prohibiting the discharge of any pollutant from a point source into waters of the United States unless the discharger of the pollutant(s) obtains an NPDES permit pursuant to CWA Section 402. The 1987 amendment to the CWA includes provision 402(p) that specifically addresses NPDES permitting requirements for storm water discharges from MS4s. CWA section 402(p) prohibits the discharge of pollutants from specified MS4s to waters of the U.S. except as authorized by an NPDES permit and identifies two substantive standards for MS4 storm water permits. MS4 permits (1) “*shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers*” and (2) “*shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants.*” (CWA section 402(p)(3)(B)(ii)-(iii).)

In November 1990, the USEPA published regulations addressing storm water discharges from MS4s (55 FR 47990 and following (Nov. 16, 1990) (Phase I Final Rule)). The regulations establish minimum requirements for MS4 permits, and generally focus on the requirement that MS4s implement programs to reduce the amount of pollutants found in storm water discharges to the MEP. The CWA’s municipal storm water MEP standard does not require storm water discharges to strictly meet water quality standards, as is required for other NPDES permitted

¹⁵ CWC 13050(l): “(1) ‘Pollution’ means an alteration of the quality of waters of the state by waste to a degree which unreasonably affects either of the following: (A) The water for beneficial uses. (B) Facilities which serve beneficial uses. (2) ‘Pollution’ may include ‘contamination.’”

¹⁶ CWC 13050(k): “Contamination’ means an impairment of the quality of waters of the state by waste to a degree which creates a hazard to public health through poisoning or through the spread of disease. ‘Contamination’ includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.”

¹⁷ CWC 13050(m): ‘Nuisance’ means anything which meets all of the following requirements: (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. (3) Occurs during, or as a result of, the treatment or disposal of wastes.”

discharges. Compliance is achieved through an iterative approach of continuous implementation of improved BMPs. This distinction reflects Congress's recognition that variability in flow and intensity of storm events render difficult strict compliance with water quality standards by MS4 permittees. In describing the controls that permits must include to reduce pollutants in storm water discharges to the MEP, the statute (CWA section 402(p)(3)(B)(iii)) states that the controls shall include: "*management practices, control techniques and system, design and engineering methods, and such other provisions as the [permit writer] determines appropriate for the control of such pollutants.*"

In contrast, non-storm water discharges from the MS4 that are not authorized by separate NPDES permits are subject to requirements under the NPDES program, including discharge prohibitions, technology based effluent limitations and water quality-based effluent limitations (40 CFR 122.44). The regulations also require the Copermitee's program to include an element to detect and remove illicit discharges and improper disposal into the storm sewer (40 CFR 122.26(d)(2)(iv)(B)).

While "non-storm water" is not defined in the CWA or federal regulations, the federal regulations (at 40 CFR 122.26(b)(2)) define "*illicit discharge*" as "*any discharge to a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer and discharges resulting from fire fighting activities).*" This definition is the most closely applicable definition of "non-storm water" contained in federal law. As stated in the Phase I Final Rule, USEPA added the illicit discharge program requirement to begin implementation of the 'effective prohibition' requirement to detect and control non-storm water discharges to their municipal system.

Thus, federal law mandates that permits issued to MS4s must require management practices that will result in reducing storm water pollutants to the MEP yet at the same time requires that non-storm water discharges be effectively prohibited from entering the MS4. "Effectively" prohibit does not mean that non-storm water discharges are authorized to be discharged into and from the Copermitees' MS4s. The Phase I Final Rule clarifies what "effectively prohibit" means (55 FR 47995):

"Section 402(p)(3)(B) requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer...Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit (other than the permit for the discharge from the municipal separate storm sewer)" [Emphasis added].

Consistent with federal law, unless non-storm water discharges to the MS4 are authorized by a separate NPDES permit, non-storm water discharges are

appropriately subject to the effective prohibition requirement in the CWA and Regional Water Boards are not limited by the iterative MEP approach to storm water regulation in crafting appropriate regulations for non-storm water discharges.

The federal regulations (40CFR122.26(d)(2)(i)(B)) require the Copermitees to establish the legal authority which authorizes or enables the Copermitees to prohibit illicit discharges to the MS4s. The federal regulations (40 CFR 122.26(d)(2)(vi)(B)(1)) require the Copermitees to “*implement and enforce an ordinance, order or similar means*” to prevent non-storm water discharges to their MS4s. Thus, the Copermitees are required to “*effectively*” prohibit non-storm water discharges to their MS4s through enforcing their legal authority established under “*ordinance, order or similar means*” and either remove those discharges to their MS4s, or require those discharges to obtain coverage under a separate NPDES permit. More detail about the program that must be implemented to “*effectively*” prohibit non-storm water discharges to the Copermitees’ MS4s is provided under the discussion for Provision E.2.

Provision A.1.d was included to be consistent with Resolution No. 2012-0012, adopted by the State Water Board on March 20, 2012. Provision A.1.d prohibits discharges from MS4s to Areas of Special Biological Significance (ASBS), except for storm water discharges from the City of San Diego’s MS4 to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach to the Heisler Park ASBS subject to the Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012. The pertinent Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012 are provided in Attachment A to the Order.

Provision A.2 (Receiving Water Limitations) specifies the condition of the receiving waters that must be achieved when there are discharges from the Copermitees’ MS4s. Receiving water limitations are included in all NPDES permits issued pursuant to the CWA section 402. CWA section 402(p)(3)(B)(iii) authorizes the inclusion of “*such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.*” This requirement gives USEPA or the State permitting authority, in this case the San Diego Water Board, discretion to determine what permit conditions are necessary to control pollutants.

In its Phase I Final Rule (see 55 FR 47990, 47994 (Nov. 16, 1990)), USEPA elaborated on these requirements, stating that, “*permits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls.*” USEPA reiterated in its Phase II Final Rule (64 FR 68722, 68737), that MS4 “*permit conditions must provide for attainment of applicable water quality standards (including designated uses), allocations of pollutant loads established by a TMDL, and timing requirements for implementation of a TMDL.*” CWC section 13377 also requires that NPDES permits include limitations necessary to implement water quality control plans. Both the State Water Board and the San Diego Water Board have previously concluded that discharges from the MS4 contain pollutants that have

the reasonable potential to cause or contribute to excursions above water quality standards. As such, inclusion of receiving water limitations is appropriate to control MS4 discharges.

The inclusion of receiving water limitations is also consistent with the Ninth Circuit Court of Appeals' ruling in *Defenders of Wildlife v. Browner* (191 F.3d 1159, 1166 (1999)) that the permitting authority has discretion regarding the nature and timing of requirements that it includes as MS4 permit conditions to attain water quality standards. The Ninth Circuit Court of Appeals recently explained that, "[w]ater quality standards are used as a supplementary basis for effluent limitations [guidelines] so that numerous dischargers, despite their individual compliance with technology based effluent limitations, can be regulated to prevent water quality from falling below acceptable levels." (*Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d 880, 886 (revd. On other grounds and remanded by *Los Angeles County Flood Control District v. Natural Resources Defense Council* (133 S.Ct. 710 (2013)))

The receiving water limitations included in this Order consist of all applicable numeric or narrative water quality objectives or criteria, or limitations to implement the applicable water quality objectives or criteria, for receiving waters as contained in the Basin Plan or in water quality control plans or policies adopted by the State Water Board, including State Water Board Resolution No. 68-16, or in federal regulations, including but not limited to 40 CFR 131.12 and 131.38. The water quality objectives in the Basin Plan and other State Water Board plans and policies have been approved by USEPA and combined with designated beneficial uses constitute the water quality standards required under federal law.

Provision A.2.a requires that discharges from the Copermittees' MS4s must not cause or contribute to the violation of water quality standards in receiving waters. The water quality standards of the receiving waters must be protected from the impacts that may be caused by the Copermittees' MS4 discharges. Water quality standards applicable to the surface waters in the San Diego Region must be achieved through meeting the technology based standard of MEP through an iterative process of improved management actions. Provision A.2.a is also consistent with State Water Board Order WQ 99-05 precedent-setting language requiring discharges from MS4s to attain receiving water quality standards. The water quality control plans and policies with water quality standards applicable to the waters in the San Diego Region are included under Provision A.2.a.

Provisions A.2.b was included to be consistent with the requirements of State Water Board Resolution No. 2012-0012, adopted on March 20, 2012.

Provision A.3 (Effluent Limitations) specifies the condition of the discharges from the Copermittees' MS4s that must be achieved if and when there are discharges.

Consistent with CWA section 301(b)(1)(A) and 40 CFR 122.44(a), Provision A.3.a includes the technology-based effluent limitations that must be included in the Order. The technology-based effluent limits, representing the minimum level of control that must be imposed in a permit under CWA section 402, requires that pollutants in discharges of storm water from the Copermittees' MS4s be reduced to the MEP. This provision applies specifically to storm water discharges. Non-storm water discharges must be effectively prohibited, as required under Provision A.1.b. Non-storm water (dry weather) discharges from the MS4 are not considered storm water (wet weather) discharges and therefore are not subject to the MEP standard.

The technology-based MEP standard is an ever-evolving, flexible, and advancing concept. Neither Congress nor USEPA has specifically defined the term "maximum extent practicable." Congress established this flexible MEP standard so that the administrative bodies would have "*the tools to meet the fundamental goals of the Clean Water Act in the context of storm water pollution.*" (*Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 884.) As knowledge about controlling storm water runoff and discharges continues to evolve, so does the knowledge which constitutes MEP. Reducing the discharge of pollutants in storm water from the MS4 to the MEP requires the Copermittees to assess each program component and revise activities, control measures, BMPs, and measurable goals, as necessary to meet MEP.

The San Diego Water Board or the State Water Board ultimately define MEP, and may include requirements that provide specific guidance on what is expected to demonstrate MEP. It is the responsibility of the Copermittees to propose actions that implement BMPs to reduce storm water pollution to the MEP. In other words, the Copermittees' runoff management programs developed and implemented under the Order are the Copermittees' proposals for achieving MEP. Their total collective and individual activities conducted pursuant to their runoff management programs become their proposal for achieving MEP as it applies both to their overall effort, as well as to specific activities. Provisions B through E of the Order provides a minimum framework to guide the Copermittees in achieving the MEP standard for discharges of pollutants in storm water.

Provision A.3.b incorporates any water quality based effluent limitations (WQBELs) applicable to the MS4s established for TMDLs adopted and approved for the San Diego Region and requires the Copermittees to comply with those WQBELs. This is consistent with 40 CFR 122.44(d)(1)(vii)(B), which requires that NPDES permits to incorporate WQBELs "*developed to protect a narrative water quality criterion, a numeric water quality criterion, or both...consistent with the assumptions and requirements of any available wasteload allocation for the discharge...*"

Pursuant to CWA section 303(d), for surface water bodies identified as impaired by one or more pollutants, the San Diego Water Board is required to establish TMDLs "*at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge*

concerning the relationship between effluent limitations and water quality.” The TMDLs identify sources of the pollutants causing the impairments and assign portions of the TMDL as WLAs to point sources, which include MS4s.

WLAs must be expressed in NPDES permits as WQBELs, which may include one or more numeric components such as numeric effluent limits, and/or receiving water limitations, and/or BMP requirements. Because numeric targets for TMDLs typically include a component that will be protective of water quality standards, a TMDL will likely include one or more numeric receiving water limitations and/or effluent limitations as part of the assumptions or requirements of the TMDL. Any numeric receiving water limitations and/or effluent limitations developed as part of the assumptions or requirements of a TMDL must be incorporated and included as part of WQBELs for the MS4s.

Because the development and approval of new TMDLs, or modification of existing TMDLs, may occur during the term of this Order, the specific provisions of those TMDLs, including effluent limitations applicable to MS4s are provided within Attachment E to the Order. Attachment E will be updated with new TMDLs and modifications to existing TMDLs in a timely manner as they occur.

Provision A.4 (Compliance with Discharge Prohibitions and Receiving Water Limitations) describes the process required to be implemented by the Copermittees if compliance with the discharge prohibitions of Provisions A.1.a and A.1.c and receiving water limitations of Provision A.2.a are not being achieved under current conditions.

In its Phase II Stormwater Regulations, Final Rule, USEPA states that MS4 *“permit conditions must provide for attainment of applicable water quality standards (including designated uses), allocations of pollutant loads established by a TMDL, and timing requirements for implementation of a TMDL.”*¹⁸ In a series of comment letters on MS4 permits issued by various Regional Water Boards, USEPA has also reiterated that MS4 discharges must meet water quality standards.¹⁹ In addition, the Ninth Circuit Court of Appeals explained in a recent ruling that, *“[w]ater quality standards are used as a supplementary basis for effluent limitations [guidelines] so that numerous dischargers, despite their individual compliance with technology based effluent limitations, can be regulated to prevent water quality from falling below acceptable levels.”*²⁰

¹⁸ Phase II Stormwater Regulations, Final Rule, 64 Fed. Reg. 68722, 68737.

¹⁹ Letter from Alexis Strauss, Acting Director, Water Division, USEPA Region IX, to Walt Pettit, Executive Director, State Water Board, re: SWRCB/OCC File A-1041 for Orange County, dated January 21, 1998.

²⁰ NRDC v. County of Los Angeles (9th Cir. 2011), 673 F.3d 880, 886 (revd. on other grounds and remanded by *Los Angeles County Flood Control District v. Natural Resources Defense Council* (133 S.Ct. 710 (2013))). See also, *Building Industry Ass’n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 884-886, citing *Defenders of Wildlife v. Browning*, (9th Cir. 1999) 191 F.3d 1159.)

Water quality standards for the San Diego Region are established in the Basin Plan. The water quality standards of the Basin Plan are incorporated into this Order as the discharge prohibitions under Provisions A.1.a and A.1.c and receiving water limitations under Provision A.2.a. The discharge prohibitions and receiving water limitations in this Order consist of all applicable numeric or narrative water quality objectives or criteria, or limitations or prohibitions to implement the applicable water quality objectives or criteria, for receiving waters as contained in the Basin Plan, water quality control plans or policies adopted by the State Water Board, including Resolution No. 68-16, or federal regulations, including but not limited to, 40 CFR 131.12 and 131.38. The waste discharge prohibitions and water quality objectives in the Basin Plan have been approved by USEPA and combined with the designated beneficial uses constitute the water quality standards required under federal law.

Under federal law (CWA section 402(p)(3)(B)(iii)), an MS4 permit must include “*controls to reduce the discharge of pollutants to the maximum extent practicable...and such other provision as...the State determines appropriate for control of such pollutants.*” The State Water Board has previously determined that limitations necessary to meet water quality standards are appropriate for the control of pollutants discharged by MS4s and must be included in MS4 permits. (State Water Board Orders WQ 91-03, 98-01, 99-05, 2001-15; see also *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) This Order prohibits discharges that cause or contribute to violations of water quality standards.

The discharge prohibitions under Provisions A.1.a and A.1.c and receiving water limitations under Provision A.2.a are included in this Order to ensure that discharges from the MS4s do not cause or contribute to exceedances of water quality objectives necessary to protect the beneficial uses of the receiving waters.

Provision A.4 is consistent with the precedent-setting language in State Water Board Order WQ 99-05 required to be included in municipal storm water permits. State Water Board Order WQ 2001-15 refined Order WQ 99-05 by requiring an iterative approach to compliance with water quality standards involving ongoing assessments and revisions, referred to as the “iterative process.” The “iterative process” is a fundamental NPDES requirement for municipal storm water permits to achieve the objectives of the CWA.

The State Water Board and Regional Water Boards have stated that the provisions under Provisions A.1.a, A.1.c, A.2.a, and A.4 are independently applicable, meaning that compliance with one provision does not provide a “safe harbor” where there is non-compliance with another provision (i.e., compliance with the Provision A.4 does not shield a Copermitttee who may have violated Provision A.1.a, A.1.c, or A.2.a from an enforcement action). The intent of Provision A.4 is to ensure that the Copermitttees have the necessary storm water management programs and controls in place, and that they are modified by the Copermitttees in a timely fashion when necessary, so that compliance with Provisions A.1.a, A.1.c, and/or A.2.a is achieved as soon as possible. USEPA expressed the importance of this independent applicability in a series of

comment letters on MS4 permits proposed by various Regional Water Boards. At that time, USEPA expressly objected to certain MS4 permits that included language stating, “*permittees will not be in violation of this [receiving water limitation] provision ... [if certain steps are taken to evaluate and improve the effectiveness of the jurisdictional runoff management programs],*” concluding that this phrase would not comply with the CWA.²¹

The Ninth Circuit held in *Natural Resources Defense Council v. County of Los Angeles* (2011) 673 F3d. 880, 886 (revd. on other grounds and remanded by *Los Angeles County Flood Control District v. Natural Resources Defense Council* (133 S.Ct. 710 (2013))) that engagement in the iterative process does not provide a safe harbor from liability for violations of permit terms prohibiting exceedances of water quality standards. The Ninth Circuit holding is consistent with the position of the State and Regional Water Boards that exceedances of water quality standards in an MS4 permit constitute violations of permit terms subject to enforcement by the Water Boards or through a citizen suit. While the Water Boards have generally directed dischargers to achieve compliance by improving control measures through the iterative process, the San Diego Water Board retains the discretion to take other appropriate enforcement and the iterative process does not shield dischargers from citizen suits under the CWA.

The requirements of Provision A.4, therefore, are required to be implemented until the water quality standards expressed under Provisions A.1.a, A.1.c, and A.2.a are achieved. The CWA requires MS4 permits to “*require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.*” The requirements of this Order have been deemed or determined to be “appropriate” to achieve water quality standards in receiving waters.

Part of the “controls” required by the Order is the process described in Provision A.4. Provision A.4 includes the process that is ultimately expected to achieve compliance with the requirement that discharges from the MS4 do not cause or contribute to violations of water quality standards in the receiving waters. The implementation of Provision A.4 is required when the Copermitees or the San Diego Water Board have determined that discharges from the MS4 are causing or contributing to violations of water quality standards in the receiving waters.

The Copermitees must effectively prohibit non-storm water discharges into the MS4s, reduce the discharge of pollutants in storm water from the MS4s to the MEP, and ensure that their MS4 discharges do not cause or contribute to violations of water quality standards. If the Copermitees have effectively prohibited non-storm water

²¹ Letter from Alexis Strauss, Acting Director, Water Division, USEPA Region IX, to Walt Pettit, Executive Director, State Water Board, re: SWRCB/OCC File A-1041 for Orange County, dated January 21, 1998.

discharges and reduced storm water pollutant discharges to the MEP, but their discharges are still causing or contributing to violations of water quality standards, Provision A.4 provides a clear “iterative process” for the Copermittees to follow.

Provision A.4 essentially requires the Copermittees to implement additional BMPs until MS4 discharges no longer cause or contribute to a violation of water quality standards.

In assessing compliance and potential enforcement actions, the San Diego Water Board looks at the Copermittees’ efforts in total to meet the requirements of Provisions A.1.a, A.1.c, A.2.a and Provision A.4. The Copermittees need to demonstrate that they are making improvements to their programs and making progress toward achieving the discharge prohibitions and receiving water limitations in Provisions A.1.a, A.1.c, and A.2.a by implementing the requirements of Provision A.4. The San Diego Water Board would consider these efforts prior to strictly enforcing the requirements of Provisions A.1.a, A.1.c, and A.2.a. Causes of exceedances of the receiving water limitations can often be more difficult to identify and attribute solely to the Copermittees’ MS4s. The intent of the Order is to provide the Copermittees more clarity and flexibility in addressing these exceedances through the iterative approach and adaptive management process until the requirements under Provisions A.1.a, A.1.c, and A.2.a are fully achieved.

An exception to the iterative approach and adaptive management process would be in receiving waters subject to adopted and approved TMDLs. For TMDLs that are incorporated into the Order, there is a specific date for compliance to be achieved, after which the iterative approach and adaptive management process required under Provision A.4 no longer provides the flexibility to achieve compliance. Where compliance dates for a TMDL have passed, compliance with the WQBELs incorporated into the Order established by a TMDL in Attachment E to protect water quality standards is required. Thus, after the interim or final compliance dates for a TMDL have passed, if the discharges from the Copermittees’ MS4s are causing or contributing to a violation of WQBELs, exceedances of WQBELs must be strictly enforced by the San Diego Water Board. In the meantime, however, the Copermittees are in compliance with the interim or final TMDL requirements in Attachment E as long as the interim or final WQBELs are being achieved in accordance with the interim or final compliance dates.

In addition, this Order includes an optional pathway that incorporates the requirements of Provision A.4 and would allow a Copermittee to be deemed in compliance with the requirements under Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b during implementation of a Water Quality Improvement Plan that incorporates specific additional requirements. This alternative compliance pathway and the additional specific requirements are described below under the discussion for Provision B.3.c.

B. Water Quality Improvement Plans

Purpose: Since 1990, the Copermitees have been developing and implementing programs and BMPs intended to effectively prohibit non-storm water discharges to the MS4s and control pollutants in storm water discharges from the MS4s to receiving waters. As a result, several water body / pollutant combinations have been de-listed from the CWA Section 303(d) List, beach closures have been significantly reduced, and public awareness of water quality issues has increased. The Copermitees have been able to achieve improvements in water quality in some respects, but significant improvements to the quality of receiving waters and discharges from the MS4s are still necessary to meet the requirements and objectives of the Clean Water Act.

Provision B includes requirements for the Copermitees to develop and implement Water Quality Improvement Plans to ultimately comply with the prohibitions and limitations under Provision A. The Water Quality Improvement Plans will provide the Copermitees a comprehensive program that can achieve the requirements and further the objectives of the CWA. Implementation of the Water Quality Improvement Plans will also improve the quality of the receiving waters in the San Diego Region.

The Water Quality Improvement Plan is the backbone of the Regional MS4 Permit requirements. Provision B provides the guidance, criteria, and minimum expectations and requirements for the elements of the Water Quality Improvement Plan to be developed and implemented by the Copermitees. The Water Quality Improvement Plans will be implemented in the Watershed Management Area by the Copermitees within their jurisdictions through their jurisdictional runoff management programs.

The Water Quality Improvement Plan also incorporates a program to monitor and assess the progress of the Copermitees' jurisdictional runoff management programs toward improving the quality of discharges from the MS4s, as well as tracking improvements to the quality of receiving waters. A process to adapt and improve the effectiveness of the Water Quality Improvement Plans has also been incorporated into the requirements of Provision B to be consistent with the "iterative approach" required to achieve compliance with discharge prohibitions of Provisions A.1.a and A.1.c and receiving water limitations of Provision A.2.a, pursuant to the requirements of Provision A.4.

The Water Quality Improvement Plans have also been structured to incorporate the requirements of any TMDLs that have been adopted for the San Diego Region. Incorporating the requirements of the TMDLs into the requirements of Provision B allows the Copermitees to develop a single plan, instead of separate plans, to coordinate their non-storm water and storm water runoff management programs. The Water Quality Improvement Plans allow the Copermitees to meet the requirements of this Order, as well as fulfill the requirements of the TMDLs.

As an added benefit, if the Copermittees demonstrate that impaired water bodies within the Watershed Management Area listed on the 303(d) List will be addressed with their Water Quality Improvement Plans in a reasonable period of time, the San Diego Water Board may be able to remove the water bodies from the 303(d) List, which would greatly reduce the need for the San Diego Water Board to develop additional TMDLs that would have to be incorporated into the Order and implemented by the Copermittees.

Discussion: The federal NPDES regulations require the Copermittees to develop a proposed management program (40 CFR 122.26(d)(2)(iv)). The proposed management program must include “a *comprehensive planning process*” and “*where necessary intergovernmental coordination*” for the “*duration of the permit.*” The Water Quality Improvement Plan is the Copermittees’ “*comprehensive planning process*” document for the proposed management program that will be implemented within a Watershed Management Area. Implementation of the Water Quality Improvement Plan requires “*intergovernmental coordination*” among the Copermittees for at least the “*duration of the permit,*” and likely into and beyond the next iteration of the permit.

Developing Water Quality Improvement Plans based upon watersheds is consistent with federal regulations that support the development of permit conditions, as well as implementation of storm water management programs, at a watershed scale (40 CFR 122.26(a)(3)(ii), 122.26(a)(3)(v), and 122.26(d)(2)(iv)). In 2003, USEPA issued a Watershed-Based NPDES Permitting Policy Statement (USEPA, 2003) that defines watershed-based permitting as an approach that produces NPDES permits that are issued to point sources on a geographic or watershed basis. In this policy statement, USEPA explains that “[t]he utility of this tool relies heavily on a detailed, integrated, and inclusive watershed planning process.” USEPA identifies a number of important benefits of watershed permitting, including more environmentally effective results, the ability to emphasize measuring the effectiveness of targeted actions on improvements in water quality, reduced cost of improving the quality of the nation’s waters and more effective implementation of watershed plans, including TMDLs, among others.

An emphasis on watersheds is appropriate at this stage in the San Diego Region’s MS4 program to shift the focus to more targeted, water quality driven planning and implementation. Addressing discharges on a watershed scale focuses on water quality results by emphasizing the receiving waters in the watershed. The conditions of the receiving waters drive management actions, which in turn focus measures to address pollutant contributions from MS4 discharges.

The Water Quality Improvement Plan gives the Copermittees the responsibility of developing a comprehensive plan to coordinate the efforts of their jurisdictional runoff management programs for addressing the problems related to MS4 discharges causing impacts to water quality in the Watershed Management Area. The development of the plan provides the Copermittees the opportunity to provide

significant input on how to implement their jurisdictional runoff management programs, and how to best utilize their available resources in addressing a focused set of priorities that they believe will result in measureable improvements to water quality within the Watershed Management Area.

The Copermittees are encouraged to separate the Watershed Management Area into subwatersheds, as appropriate. This allows the Copermittees to identify priorities applicable to a subset of the Copermittees or specific water bodies or areas within the Watershed Management Area.

Included in the requirements for the elements to be included in the Water Quality Improvement Plan are monitoring and assessment requirements that are necessary to implement, as well as ensure the Copermittees are in compliance with, the requirements of the Order. In addition to the federal requirements of the CWA section 308(a) and 40 CFR 122.26(d), the San Diego Water Board has the authority to establish monitoring, reporting, and recordkeeping requirements for NPDES permits under CWC 13383.

More specific and detailed discussions of the requirements of Provision B are provided below.

Provision B.1 (Watershed Management Areas) requires the Copermittees to develop a Water Quality Improvement Plan for each of the Watershed Management Areas defined by the San Diego Water Board.

Pursuant to 40 CFR 122.26(d)(2)(iv), proposed management programs “*may impose controls on a...watershed basis...*” The Water Quality Improvement Plan is the Copermittees’ proposed management program. A Water Quality Improvement Plan must be developed for each Watershed Management Area identified in the Order.

The Watershed Management Areas are identified in Table B-1. Table B-1 establishes ten (10) Watershed Management Areas, and identifies the Copermittees that are responsible for developing and implementing the Water Quality Improvement Plan for each Watershed Management Area.

The Copermittees from each of the three counties within the San Diego Region were phased in as their respective NPDES municipal storm water permits expired. Order No. R9-2007-0001 expired in January 2012, and the San Diego County Copermittees became covered under the Regional MS4 Permit on June 27, 2013, the effective date of the Order. Order No. R9-2009-0002 expired in December 2014, and the Orange County Copermittees became covered under the Regional MS4 Permit on April 1, 2015, the effective date of Order No. R9-2013-0001 as amended by Order No. R9-2015-0001. Order No. R9-2010-0016 expired in November 2015, and the Riverside County Copermittees became covered under the Regional MS4 Permit on January 7, 2016, the effective date of Order No. R9-2013-0001 as amended by Order No. R9-2015-0100.

The Cities of Laguna Woods, Laguna Hills, Murrieta, and Wildomar are located partially within the jurisdictions of both the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board) and the San Diego Water Board. Written requests for designation of a single Regional Water Board to regulate matters pertaining to permitting of Phase I MS4 discharges were submitted to the San Diego Water Board and the Santa Ana Water Board by the City of Laguna Woods by letter dated September 8, 2014, the City of Laguna Hills by letter dated March 12, 2014, the City of Murrieta by letter dated June 22, 2015, and the City of Wildomar by letter dated June 23, 2015. The Cities of Laguna Woods, Laguna Hills, Murrieta, and Wildomar requested designation of the San Diego Water Board pursuant to CWC section 13228.

The Cities of Laguna Woods, Laguna Hills, Murrieta, and Wildomar reported that management and implementation of municipal programs to comply with two different Phase I MS4 permits creates a significant administrative and financial burden and inhibits their ability to contribute to greater overall water quality improvements in either Region. In an effort to address these concerns, the San Diego Water Board and the Santa Ana Water Board have entered into written agreements, whereby the San Diego Water Board is designated to regulate Phase I MS4 discharges within the jurisdictions of the Cities of Laguna Woods, Laguna Hills, Murrieta, and Wildomar including the portions of the jurisdictions within the Santa Ana Region. The San Diego Water Board and the Santa Ana Water Board entered into an agreement dated February 10, 2015 to designate the San Diego Water Board to regulate Phase I MS4 discharges within the jurisdictions of the Cities of Laguna Woods and Laguna Hills, including the portions of the jurisdictions within the Santa Ana Region, upon the later effective date of Order No. R9-2015-0001 or Santa Ana Water Board Tentative Order No. R8-2015-0001. The San Diego Water Board and the Santa Ana Water Board entered into an agreement dated October 26, 2015 to designate the San Diego Water Board to regulate Phase I MS4 discharges within the jurisdictions of the Cities of Murrieta and Wildomar, including the portions of the jurisdictions within the Santa Ana Region upon the effective date of Order R9-2015-0100.

Under the terms of the agreements, each Regional Water Board retains the authority to enforce provisions of the Phase I MS4 permits issued to each city but compliance will be determined based upon the Phase I MS4 permit in which a particular city is regulated as a Copermittee (Water Code section 13228 (b)). Also under the terms of the agreements, any TMDL and associated MS4 permit requirements issued by the San Diego Water Board or the Santa Ana Water Board which include the Cities of Laguna Woods, Laguna Hills, Murrieta, or Wildomar as a responsible party, will be incorporated into the appropriate Phase I MS4 permit by reference. Enforcement of the applicable TMDL would remain with the Regional Water Board which has jurisdiction over the targeted impaired water body. Applicable TMDLs subject to the terms of the agreement include, but are not limited to, the Santa Ana Water Board's San Diego Creek/Newport Bay TMDL and Lake Elsinore/Canyon Lake Nutrient TMDLs, and the San Diego Water Board's Indicator Bacteria Project I Beaches and Creeks TMDL.

In conformance with the agreements, footnotes to Table B-1 are included to specify coverage under Order No. R9-2013-0001 for those Phase I MS4 discharges within the jurisdictional boundaries of the Cities of Laguna Woods, Laguna Hills, Murrieta, and Wildomar within the Santa Ana Region. Footnote 1 to Table B-1 specifies that the Cities of Laguna Woods and Laguna Hills are identified as responsible Copermitttees in the San Diego Creek/Newport Bay TMDL in the Santa Ana Region and remain obligated to comply with the San Diego Creek/Newport Bay TMDL pursuant to section XVIII of Tentative Order No. R8-2015-0001 (NPDES No. CAS618030) and any reissuance thereof. Footnote 4 to Table B-1 specifies that the Cities of Murrieta and Wildomar are identified as responsible Copermitttees in the Lake Elsinore/Canyon Lake Nutrient TMDLs in the Santa Ana Region and remain obligated to comply with the Lake Elsinore/Canyon Lake Nutrient TMDLs pursuant to section VI.D.2 of Order No. R8-2010-0033 (NPDES No. CAS618030) or corresponding section as it may be amended or reissued.

The Cities of Lake Forest and Menifee are located partially within the jurisdictions of both the Santa Ana Water Board and the San Diego Water Board. Written requests for designation of a single Regional Water Board to regulate matters pertaining to permitting of Phase I MS4 discharges were submitted to the San Diego Water Board and the Santa Ana Water Board by the City of Lake Forest by letters dated January 14, 2013 and April 4, 2014, and the City of Menifee by letter dated June 25, 2015. The Cities of Lake Forest and Menifee requested designation of the San Ana Water Board pursuant to CWC section 13228.

The Cities of Lake Forest and Menifee reported that management and implementation of municipal programs to comply with two different Phase I MS4 permits creates a significant administrative and financial burden and inhibits their ability to contribute to greater overall water quality improvements in either Region. In an effort to address these concerns, the San Diego Water Board and the Santa Ana Water Board have entered into written agreements, whereby the Santa Ana Water Board is designated to regulate Phase I MS4 discharges within the jurisdictions of the Cities of Lake Forest and Menifee including the portions of the jurisdictions within the San Diego Region. The San Diego Water Board and the Santa Ana Water Board entered into an agreement dated February 10, 2015 to designate the San Ana Water Board to regulate Phase I MS4 discharges within the jurisdiction of the City of Lake Forest, including portions of the jurisdiction within the Santa Diego Region, upon the later date of Order No. R9-2015-0001 or Santa Ana Water Board Tentative Order No. R8-2015-0001. The San Diego Water Board and the Santa Ana Water Board entered into an agreement dated October 26, 2015 to designate the San Ana Water Board to regulate Phase I MS4 discharges within the jurisdiction of the City of Menifee, including portions of the jurisdiction within the San Diego Region, under Order No. R8-2010-0033 (NPDES No. CAS618030) as it may be amended or reissued upon the effective date of Order No. R9-2015-0100.

Under the terms of the agreements, each Regional Water Board retains the authority to enforce provisions of the Phase I MS4 permits issued to each city but compliance will be determined based upon the Phase I MS4 permit in which a particular city is regulated as a Copermittee (Water Code section 13228 (b)). Also under the terms of the agreements, any TMDL and associated Phase I MS4 permit requirements issued by the San Diego Water Board or the Santa Ana Water Board which include the Cities of Lake Forest or Menifee as a responsible party, will be incorporated into the appropriate Phase I MS4 permit by reference. Enforcement authority for the applicable TMDL would remain with the Regional Water Board which has the jurisdiction over the targeted impaired water body. Applicable TMDLs subject to the terms of the agreement include, but are not limited to, the Santa Ana Water Board's San Diego Creek/Newport Bay TMDL and Lake Elsinore/Canyon Lake Nutrient TMDLs, and the San Diego Water Board's Indicator Bacteria Project I Beaches and Creeks TMDL.

In conformance with the agreements, Footnote 2 to Table B-1 has been included to specify that Phase I MS4 discharges within the jurisdictional boundaries of the City of Lake Forest located within the San Diego Region will be regulated under Santa Ana Water Board Order No. R8-2015-0001 (NPDES No. CAS618030) and any reissuance thereof. The footnote specifies that the City of Lake Forest is an identified responsible Copermittee in the Indicator Bacteria Project I Beaches and Creeks TMDL (Bacteria TMDL) in the San Diego Region and remains obligated to comply with the Bacteria TMDL pursuant to Attachment E of Order No. R9-2013-0001 and any reissuance thereto. The City of Lake Forest is also identified as a responsible Copermittee in the San Diego Creek/Newport Bay TMDL established by the Santa Ana Water Board. The City remains obligated to comply with the San Diego Creek/New Port Bay TMDL pursuant to the Santa Ana Water Board's Phase I MS4 Permit (Tentative Order No. R8-2015-0001 (NPDES No. CAS618030), as it may be amended or reissued). Under the terms of the agreement, the City of Lake Forest must retain and continue implementation of the over irrigation prohibition in Title 15, Chapter 15, Section 14.030, List (b) of the City Municipal Code throughout its jurisdiction. Also under the terms of the agreement, the City of Lake Forest must actively participate in the development and implementation of the South Orange County Watershed Management Area Water Quality Improvement Plan required pursuant to Order No. R9-2013-0001, and any reissuance thereof.

Footnote 3 to Table B-1 has been included to specify that Phase I MS4 discharges within the jurisdictional boundaries of the City of Menifee located within the San Diego Region will be regulated under Santa Ana Water Board Order No. R8-2010-0033 (NPDES No. CAS618033) and any reissuance thereof. At this time, the City of Menifee is not identified as a responsible Copermittee for any TMDLs established by the San Diego Water Board. Under the terms of the agreement, the City of Menifee must actively participate in the development and implementation of the Santa Margarita River Watershed Management Area Water Quality Improvement Plan required pursuant to Order No. R9-2013-0001, and any reissuance thereof.

The basis supporting the Cities of Laguna Woods, Laguna Hills, Lake Forest, Menifee, Murrieta, and Wildomar requests to designate a specific Regional Water Board for regulatory oversight of Phase I MS4 discharges may change under future conditions and circumstances, therefore the San Diego Water Board will periodically review the effectiveness of the agreements during each MS4 permit reissuance. Based on this periodic review the San Diego Water Board may terminate one or both of the agreements with the Santa Ana Water Board or otherwise modify the agreements subject to the approval of the Santa Ana Water Board.

Provision B.2 (Priority Water Quality Conditions) requires the Copermittees in each Watershed Management Area to identify the highest priority water quality conditions which will be the focus of the Water Quality Improvement Plan implementation.

Provisions B.2.a and B.2.b provide the criteria that must be assessed when characterizing the receiving water quality and potential impacts from MS4 discharges of the receiving waters within the Watershed Management Area. The criteria are based primarily on the requirements in 40 CFR 122.26(d)(1)(iv)(C) and (C)(1)-(9). Characterizing the receiving water quality and identifying the potential impacts caused by MS4 discharges to receiving waters in the Watershed Management Area is necessary to identify the impacts to receiving waters associated with MS4 discharges that are of the most concern to the Copermittees.

Based on the information required to be considered under Provisions B.2.a and B.2.b, Provision B.2.c requires to Copermittees to identify the highest priority water quality conditions related to discharges from the MS4s that will be the primary focus of the Water Quality Improvement Plan in the Watershed Management Area. Addressing and improving these highest priority water quality conditions will become the focus of each Copermittee's jurisdictional runoff management program as the Water Quality Improvement Plan is implemented in the Watershed Management Area. The highest priority water quality conditions are expected to include sources of pollutants and/or stressors, and/or receiving water conditions, that the Copermittees consider the highest threats or most likely to have adverse impacts on the physical, chemical, and biological integrity of receiving waters. Addressing these threats and/or adverse impacts should restore the physical, chemical, and biological integrity of receiving waters, and result in the restoration and protection of the beneficial uses of the receiving waters in the Watershed Management Area.

Provision B.2.d requires the Copermittees to identify known and suspected sources of pollutants and/or stressors contributing to the highest priority water quality conditions. The requirements of Provision B.2.d are based primarily on the requirements in 40 CFR 122.26(d)(1)(iii)(B)(1)-(6). The Copermittees are required to evaluate several factors in the identification of those sources. The Copermittees must consider and evaluate the following: (1) the land uses that may contribute toward impacts to receiving waters, (2) the locations of the Copermittees' MS4s that can convey and discharge runoff and pollutants to receiving waters, (3) other sources that discharge

into the Copermittees' MS4s and receiving waters, and (4) other information and data that can help the Copermittees to evaluate the relative importance of or contribution from those sources toward the highest priority water quality conditions. Identifying the known and suspected sources, and their relative contribution toward the highest priority water quality conditions, will help the Copermittees to focus, direct, and prioritize their resources and implementation efforts within their jurisdictions.

Provision B.2.e requires the Copermittees to identify potential strategies that can result in improvements to water quality in MS4 discharges and/or receiving waters within the Watershed Management Area. Potential water quality improvement strategies will not necessarily be implemented by the Copermittees, but provide a "menu" of options that the Copermittees will consider for implementation. The public participation process that will be implemented during the development of the Water Quality Improvement Plan is where the potential water quality improvement strategies will be identified.

Provision B.3 (Water Quality Improvement Goals, Strategies and Schedules) requires the Copermittees in each Watershed Management Area to identify the goals that the Copermittees' jurisdictional runoff management programs will work toward achieving to address and improve the highest priority water quality conditions identified under Provision B.2.c; the strategies that will be implemented by the Copermittees within their jurisdictions and the Watershed Management Area to achieve the goals; and, the schedules for implementing the strategies and achieving the goals. The element of the Water Quality Improvement Plan required under Provision B.3 is where the "*comprehensive planning*" and "*intergovernmental coordination*" [40 CFR 122.26(d)(2)(iv)] of the Copermittees' actions for the proposed management programs within the Watershed Management Area is required to be described.

Provision B.3.a requires the Copermittees to identify interim and final numeric goals, and schedules to achieve those goals as part of the Water Quality Improvement Plans. Provision B.3.a.(1) requires the Copermittees to identify two types of numeric goals to be achieved:

- (1) Final numeric goals in the receiving waters and/or MS4 discharges that will result in the protection of the water quality standards of the receiving waters for the highest priority water quality conditions identified by the Copermittees for Provision B.2.c. These final numeric goals are the ultimate goals for the Water Quality Improvement Plan, and the achievement and maintenance of these final numeric goals will indicate that one or more beneficial uses have been successfully restored and/or protected from MS4 discharges.
- (2) Interim numeric goals that can be used by the Copermittees to demonstrate progress toward achieving the final numeric goals in the receiving waters and/or MS4 discharges for the highest priority water quality conditions in the Watershed Management Area. Achievement of the interim numeric goals will demonstrate to the San Diego Water Board that the Copermittees' implementation efforts are progressing toward achieving the final numeric goals.

Provision B.3.a.(1) does not specify what the interim and final numeric goals must be based on, but they essentially must be designed to achieve compliance with water quality standards in the receiving waters. To that end, the interim goals must be based on measureable criteria or indicators capable of demonstrating progress toward achieving the numeric goals.

The interim and final numeric goals can be based on the water quality objectives in the Basin Plan. The water quality objectives in the Basin Plan, however, consist of numeric and narrative water quality objectives. Numeric water quality objectives can be directly used as numeric goals. Narrative water quality objectives, on the other hand, will require some interpretation to identify numeric goals. The achievement of multiple numeric goals based on the water quality objectives, used in combination, may be necessary to demonstrate that beneficial uses have been restored and/or protected.

The Copermittees could also propose other numeric goals that are not necessarily water quality objectives from the Basin Plan. For example, the Copermittees could propose a numeric goal that consists of achieving some percent improvement of a measureable indicator, such as acreage of a specific habitat or increase in a specific plant or animal species population. Other examples may include pollutant load reductions, number of impaired waterbodies delisted from the List of Water Quality Impaired Segments, Index of Biological Integrity (IBI) scores, etc.

The Copermittees may choose to develop interim numeric goals based on the final numeric goals they develop, such as incremental steps toward ultimately achieving the final numeric goals. The Copermittees may also choose to develop interim numeric goals that are based on other measureable indicators that can indirectly indicate improvements and progress toward the final numeric goals.

There are no limits to the types of interim numeric goals that could be proposed by the Copermittees, other than the goals must be based on measureable criteria or indicators capable of demonstrating progress toward achieving the numeric goals. Likewise, there are no limits to the types of final numeric goals that could be proposed by the Copermittees, other than the goals must “*restore and protect the water quality standards of the receiving waters.*”

Finally, Provision B.3.a.(2) also requires the Copermittees to develop schedules for measuring progress and achieving the interim and final numeric goals. Several criteria are included for the development of the schedules, but the Copermittees are required to achieve the numeric goals as soon as possible, consistent with federal NPDES regulations (40 CFR 122.47(a)(1)).

The Copermittees are also required to incorporate any compliance schedules for applicable ASBS or TMDL requirements. Applicable ASBS and TMDL compliance schedules are set forth in Attachment A and Attachment E to the Order, respectively.

The information provided by the Copermittees under Provision B.3.a.(2) will be used by the Copermittees and the San Diego Water Board to gauge and track the progress of the Copermittees' efforts in addressing the highest priority water quality conditions identified in the Water Quality Improvement Plan.

Provision B.3.b requires the Copermittees to identify the strategies and schedules to implement those strategies as part of the Water Quality Improvement Plans. Provision B.3.b requires the Copermittees to identify the water quality improvement strategies that will be and may be implemented within the Watershed Management Area to 1) reduce pollutants in storm water discharged from the MS4 to the MEP, 2) effectively prohibit non-storm water discharges from entering the MS4, 3) protect water quality standards in receiving waters by controlling MS4 discharges so that they do not cause or contribute to exceedances of receiving water limitations, and 4) achieve applicable WQBELs that implement TMDLs. The Copermittees will select the strategies to be implemented based on the likely effectiveness and efficiency of the potential water quality improvement strategies identified under Provision B.2.e to effectively prohibit non-storm water discharges to the MS4, reduce pollutants in storm water discharges from the MS4 to the MEP, and/or achieve the interim and final numeric goals identified under Provision B.3.a.

Provision B.3.b.(1) requires each Copermittee to identify the strategies that will be or may be implemented within its jurisdiction. Each Copermittee is required to describe the strategies it is committed to implementing as part of its jurisdictional runoff management requirements under Provisions E.2 through E.7, and the optional jurisdictional strategies that the Copermittee will implement, as necessary, to achieve the numeric goals.

Each Copermittee is expected to implement the optional jurisdictional strategies identified under Provisions B.3.b.(1)(b) when the jurisdictional strategies it has committed to implement under Provision B.3.b.(1)(a) are not making adequate progress toward the interim and final numeric goals in accordance with the schedules established under Provision B.3.a. Provision B.3.b.(1)(b)(v) requires each Copermittee to describe the circumstances necessary to trigger implementation of the optional jurisdictional strategies, in addition to the requirements of Provisions B.3.b.(1)(a).

The San Diego Water Board recognizes that there may be optional jurisdictional strategies that will likely require funding and/or resources for planning, permitting, procurement of labor and materials, and implementation. Thus, Provision B.3.b.(1)(b)(iv) requires each Copermittee to describe the funding and/or resources that are necessary to implement these optional jurisdictional strategies. This information may provide interested groups and members of the public an understanding of the resources that they could provide or assist in obtaining to implement these optional jurisdictional strategies.

Provision B.3.b.(2) requires the Copermittees in the Watershed Management Area to identify the regional or multi-jurisdictional strategies that may be implemented, as necessary, to achieve the numeric goals. Similar to the requirements of Provision B.3.b.(1)(b), these regional or multi-jurisdictional strategies will likely require funding and/or resources for planning, permitting, procurement of labor and materials, and implementation, and San Diego Water Board recognizes that these strategies may be difficult to implement with only Copermittee resources. Thus, Provision B.3.b.(2)(d) requires the Copermittees to describe the funding and/or resources necessary to implement these optional regional or multi-jurisdictional strategies. This information may provide interested groups and members of the public an understanding of the resources that they could provide or assist in obtaining to implement these optional regional or multi-jurisdictional strategies.

Provision B.3.b.(3) requires the Copermittees to develop and include schedules in the Water Quality Improvement Plan for implementing the water quality improvement strategies identified under Provisions B.3.b.(1) and B.3.b.(2). The schedule for implementing the water quality improvement strategies will be used by the Copermittees and San Diego Water Board to measure and demonstrate the progress of the Copermittees' implementation efforts toward reducing pollutants in storm water discharged from the MS4 to the MEP, and eliminating illicit non-storm water discharges from entering the MS4.

Provision B.3.b.(4) provides the Copermittees in each Watershed Management Area the option of implementing watershed-specific structural BMP requirements for Priority Development Projects. Historically, storm water permits have included very specific performance standards for permanent, structural BMPs. These standards describe the expectation for the capture or treatment of pollutants and control of excessive flow before storm water is discharged from a site. The Copermittees were also allowed to develop waiver programs for Priority Development Projects to avoid implementing the structural BMPs; however, the waiver programs were not necessarily tied into any sort of holistic watershed strategy. The result is that implementation of BMP requirements is largely done on a site-by-site basis. This requires proper design on the part of the Priority Development Project and strict oversight on the part of the Copermittee.

Provision B.3.b.(4) promotes the evaluation of multiple strategies for water quality improvement, in addition to the implementation of permanent structural BMPs, on a watershed-scale versus the site-by-site approach. In a report issued by the Southern California Coastal Water Research Project (SCCWRP) and several other research institutions, the report emphasized that a successful hydromodification management program will involve watershed analysis as a first step, and that integrating multiple watershed-based strategies is preferable over a site-by-site approach. Indeed, the report states that the watershed analysis "*...should lead to identification of existing opportunities and constraints that can be used to help prioritize areas of greater concern, areas of restoration potential, infrastructure constraints, and pathways for*

*potential cumulative effects.*²² Provision B.3.b.(4) promotes the findings and recommendations of the report by providing a pathway for Copermittees to develop an integrated approach to their land development programs.

Under Provision B.3.b.(4), the Copermittees in a Watershed Management Area must first perform an analysis by gathering as much information pertaining to the physical characteristics of the Watershed Management Area as possible. This includes, for example, identifying potential areas of coarse sediment supply, present and anticipated future land uses, and locations of physical structures within receiving streams and upland areas that affect the watershed hydrology (such as bridges, culverts, and flood management basins). Once this information is collected, the Copermittees must produce GIS layers (maps) that include this information.

From there, the Copermittees must use the results of the Watershed Management Area Analysis to identify and compile a list of candidate projects that could potentially be used as alternative compliance options for Priority Development Projects. Such projects include, for example, opportunities for stream or riparian area rehabilitation, opportunities for retrofitting existing infrastructure to incorporate storm water retention or treatment, and opportunities for regional BMPs, among others. Once these candidate projects are identified, Copermittees may allow Priority Development Projects to fund, partially fund, or completely implement these candidate projects. The Copermittees must first find that implementing such a candidate project would provide greater overall benefit to the watershed than requiring implementation of the structural BMPs onsite, and also enter into a voluntary agreement with the Priority Development Project that authorizes this arrangement. The Copermittees may use Provision B.3.b.(4) as both 1) a mechanism to reach their stated goals of the Water Quality Improvement Plan by using Priority Development Projects to either fund or implement projects that will provide water quality benefit, and 2) an alternative to requiring strict adherence to the structural BMP design standards.

Additionally, Provision B.3.b.(4) allows the Copermittees to use the results of the Watershed Management Area Analysis to identify areas within the Watershed Management Area where it is appropriate to allow Priority Development Projects to be exempt from the hydromodification management BMP performance requirements. Provision E.3.c.(2) already allows exemptions for Priority Development Projects that discharge to a conveyance channel whose bed and bank are concrete lined from the point of discharge to an enclosed embayment or the Pacific Ocean. However, there may be cases where further exemptions are warranted. The Copermittees may identify such cases on a watershed basis and include them in the Watershed Management Area Analysis; however, they must provide the supporting rationale to support all claims for exemptions.

²² 2012. ED Stein, F Federico, DB Booth, BP Bledsoe, C Bowles, Z Rubin, GM Kondolf, A Sengupta. Technical Report 667. Southern California Coastal Water Research Project. Costa Mesa, CA.

Provision B.3.b.(4) provides an innovative pathway for Copermittees to regulate their land development programs by allowing alternative compliance in lieu of implementing structural BMPs on each and every Priority Development Project. This approach facilitates the integration of watershed-scale solutions for improving overall water quality and assisting Copermittees to achieve their stated goals of the Water Quality Improvement Plan. The San Diego Water Board understands, however, that undertaking this approach, which involves extensive planning, could be resource intensive for the Copermittees. Therefore, the Watershed Management Area Analysis is optional and not a requirement. The Copermittees can choose not to perform the watershed planning and mapping exercise described in Provision B.3.b.(4), and instead choose to require strict implementation of the structural BMPs onsite, pursuant to Provision E.3.c.

Provision B.3.c is included to provide the Copermittees an option that allows the Copermittees to be deemed in compliance with the prohibitions and limitations (receiving water limitations) of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b. One or more Copermittees within a Watershed Management Area can choose to implement this option. This option is only expected to be utilized by a Copermittee that wishes to be deemed in compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b.

The alternative compliance pathway option included in Provision B.3.c is consistent with the approach described in Order WQ 2015-0075, *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4*, adopted by the State Water Board on June 16, 2015. State Water Board Order WQ 2015-0075 directs the Regional Water Boards to consider a watershed-based planning and implementation approach to compliance with receiving water limitations when issuing Phase I MS4 permits going forward. Order WQ 2015-0075 included seven principles that the Regional Water Boards are expected to follow when incorporating an alternative compliance pathway into a MS4 permit. The San Diego Water Board incorporated the seven principles stipulated in State Water Board Order WQ 2015-0075 into the Regional MS4 Permit as follows:

1. Provision A of this Order continues to require compliance with water quality standards in the receiving water and does not deem good faith engagement in the iterative process to constitute compliance with receiving water limitations. Provision A of this Order continues to be consistent with the receiving water limitations provisions from State Water Board Order WQ 99-05.
2. Compliance with Provision B.3.c constitutes compliance with the requirements of the Provision A.3.b, which requires compliance with the WQBELs of the TMDLs in Attachment E to the Order, and is considered compliance with receiving water limitations for those TMDL water body-pollutant combinations.

3. Provision B.3.c is an ambitious, rigorous, and transparent alternative compliance pathway that allows a Copermittee appropriate time to come into compliance with receiving water limitations without being in violation of the receiving water limitations during implementation of the compliance alternative.
4. Provision B.3.c requirements are incorporated into a Water Quality Improvement Plan. Water Quality Improvement Plans are a watershed-based planning and implementation approach, which address multiple contaminants, and incorporate TMDL requirements.
5. The strategies required to be included in the Water Quality Improvement Plans promote and incentivize the use of green infrastructure and requires the implementation of low impact development principles.
6. The strategies required to be included in the Water Quality Improvement Plans encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.
7. The alternative compliance pathway of Provision B.3.c includes rigor and accountability. The Copermittee is required, through a transparent public process, to demonstrate that water quality issues in the watershed have been analyzed and prioritized, and that appropriate solutions are proposed. The Copermittee is also required, through a transparent process, to monitor the results and return to their analysis to verify assumptions and update the solutions. The Copermittee is required to conduct this type of adaptive management on its own initiative without waiting for direction from the San Diego Water Board.

In order for a Copermittee to utilize this option, the Copermittee is required to include three components in the Water Quality Improvement Plan. The first component is a comprehensive set of numeric goals and schedules that will demonstrate the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b will be achieved within a specified period of time. The criteria provided in the Order will require the Copermittee to demonstrate that the discharges from its MS4s will not cause or contribute to exceedances of water quality objectives in the receiving waters, and/or the receiving waters will be adequately protected from adverse impacts attributable to the Copermittee's MS4 discharges. The Copermittee is also required to specify annual milestones to be achieved each year, which adds rigor, accountability, and transparency to the process. The annual milestones may consist of water quality improvement strategy implementation phases, interim numeric goals, and other acceptable metrics, which are expected to build upon previous milestones and lead to the achievement of the final numeric goals.

The second component is an analysis to demonstrate that implementation of the water quality improvement strategies required under Provision B.3.b will achieve the numeric goals within the established schedules required under Provisions B.3.a and B.3.c.(1).

Because the development of the analysis may require significant resources, the Order allows the Copermittees in each Watershed Management Area that choose to implement this option to perform the analysis individually, or pool their resources for the analysis collectively.

The analysis must “reasonably” and “quantitatively” demonstrate that the implementation of the water quality improvement strategies can achieve the numeric goals within the established schedules. However, as more data and information are collected during implementation of the Water Quality Improvement Plan to demonstrate progress toward achieving the numeric goals, the numeric goals, water quality improvement strategies and schedules may need to be modified. If the data and information indicate that modification is needed, the Copermittee must also update the analysis. With the exception of numeric goals and schedules associated with TMDLs from Attachment E to the Order, the modification to the analysis would be allowed as part of the adaptive management process of the Water Quality Improvement Plan. For TMDLs, modification of numeric goals or schedules would likely require an amendment to the Basin Plan and Attachment E to the Order before the analysis and Water Quality Improvement Plan could include such modifications.

Thus, the third component is the key component that allows a Copermittee to demonstrate the implementation of the water quality improvement strategies within its jurisdiction is making progress toward achieving the final numeric goals. Each Copermittee must specify the monitoring and assessments that will be performed to confirm that implementation of the water quality improvement strategies are making progress toward achieving the numeric goals within the established schedules, and whether the interim and final numeric goals have been achieved.

These three components must then be reviewed by the Water Quality Improvement Consultation Panel. The Water Quality Improvement Consultation Panel is required to be formed as part of the public participation process for the development of the Water Quality Improvement Plans. The Water Quality Improvement Consultation Panel is described under Provision F.1.a.(1)(b). Review by the Water Quality Improvement Consultation Panel is included to provide an additional layer of input, support, and accountability for the implementation of this option.

Compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b begins when the Water Quality Improvement Plan, incorporating the requirements of Provision B.3.c.(1), is accepted by the San Diego Water Board. Each Copermittee that chooses to implement and continues to implement this option will be deemed in compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b as long as the Copermittee continues to implement the strategies, monitoring and assessments as incorporated in the Water Quality Improvement Plan in accordance with Provision B.3.c.(1), and the Copermittee reports the achievement of the annual milestones each year, or provides acceptable rationale and recommends appropriate modifications to the interim numeric goals, and/or water quality improvement

strategies, and/or schedules to improve the rate of progress toward achieving the final numeric goals. The Copermittee continues to be deemed in compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b during the time the San Diego Water Board reviews the rationale and recommended modifications to the interim numeric goals, and/or water quality improvement strategies, and/or schedules. If and when the San Diego Water Board determines that it does not accept the rationale or recommendations, the Copermittee will be notified they are no longer deemed in compliance with Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b.

Provision B.4 (Water Quality Improvement Monitoring and Assessment) requires the Copermittees to develop an integrated monitoring and assessment program to track the progress of the Water Quality Improvement Plan toward meeting the implementation goals and schedules, and improving the water quality of the Watershed Management Area. Provision B.4 is the part of the Water Quality Improvement Plan where the Copermittees describe the monitoring data that will be collected, which is not only necessary to implement the “iterative approach” required by Provision A.4, but inform the adaptive management and “*comprehensive planning process*” that allows the Copermittees to make adjustments and modifications to the Water Quality Improvement Plans and the jurisdictional runoff management programs.

Provision B.4 requires the Copermittees, at a minimum, to include the requirements of Provision D as part of the water quality improvement monitoring and assessment program for the Water Quality Improvement Plan. The Copermittees, however, are not limited to the requirements of Provision D and may include additional monitoring and assessment methods to track progress toward improving water quality in the Watershed Management Area.

In addition to incorporating the requirements of Provision D, the water quality improvement monitoring and assessment program must incorporate any monitoring and assessment requirements specified for any applicable TMDLs included in Attachment E to the Order, and the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012 for Watershed Management Areas with ASBS.

The monitoring and assessments required to be incorporated into the Water Quality Improvement Plan are necessary to implement, as well as ensure the Copermittees are in compliance with, the requirements of the Order.

Provision B.5 (Iterative Approach and Adaptive Management Process) requires the Copermittees to implement the iterative approach pursuant to Provision A.4 to adapt the Water Quality Improvement Plan, monitoring and assessment program, and jurisdictional runoff management programs to become more effective toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a.

Provision B.5 requires the Copermittees in each Watershed Management Area to re-evaluate the highest priority water quality conditions and potential water quality

improvement strategies, the water quality improvement goals, strategies and schedules, and the water quality improvement monitoring and assessment program and provide recommendations for modifying those elements to improve the effectiveness of the Water Quality Improvement Plan. The re-evaluation of the Water Quality Improvement Plan is part of the assessment requirements of Provision D.

Provision B.6 (Water Quality Improvement Plan Submittal, Updates, and Implementation) requires to Copermittees to submit, update, and implement the Water Quality Improvement Plans.

The requirements for the process to develop and submit the Water Quality Improvement Plans is described in more detail under the discussion for Provision F.1. The process will include several opportunities for the public to provide input during the development of the Water Quality Improvement Plans. The process for updating the Water Quality Improvement Plans is described in more detail under the discussion for Provision F.3.c. Upon acceptance of the Water Quality Improvement Plan and updates, the Copermittees are required to immediately begin implementing the Water Quality Improvement Plan and subsequent updates.

The Water Quality Improvement Plan is expected to be a dynamic document that will evolve over time. The Water Quality Improvement Plan is also expected to be a long term plan that focuses the Copermittees' efforts and resources on a limited set of priority water quality conditions, with the ultimate goal of protecting all the beneficial uses of the receiving waters within the Watershed Management Area from impacts that may be caused or contributed to by MS4 discharges. As the Copermittees collect data, implement their jurisdictional runoff management programs, and review the results from their water quality improvement monitoring and assessment program, the Water Quality Improvement Plan is expected to be continually reviewed and updated until compliance with Provisions A.1.a, A.1.b, and A.2.a is achieved.

However, in specific cases supported by robust analytical documentation the implementation of the Water Quality Improvement Plans may demonstrate that TMDLs are not necessary for identified impaired water bodies within the Watershed Management Area if the analytical record demonstrates that technology-based effluent limitations required by the CWA, more stringent effluent limitations required by state, local, or federal authority, and/or other pollution control requirements (e.g., best management practices) required by local, state or federal authority are stringent enough to implement applicable water quality standards within a reasonable period of time.²³

The San Diego Water Board submits an Integrated Report to USEPA to comply with the reporting requirements of CWA sections 303(d), 305(b) and 314, which lists the attainment status of water quality standards for water bodies in the San Diego Region.

²³ 40 CFR 130.7(b)(1)

According to USEPA guidance for the Integrated Report,²⁴ water bodies are placed in one of five categories. Water bodies included in Category 5 in the Integrated Report indicate at least one beneficial use is not being supported or is threatened, and a TMDL is required. Water bodies included in Category 5 are placed on the 303(d) List.

Category 4 in the Integrated Report is for water bodies where available data and/or information indicate that at least one beneficial use is not being supported or is threatened, but a TMDL is not needed.²⁵ Impaired surface water bodies may be included in Category 4 if a TMDL has been adopted and approved (Category 4a); if other pollution control requirements required by a local, state or federal authority are stringent enough to implement applicable water quality standards within a reasonable period of time (Category 4b); or, if the failure to meet an applicable water quality standard is not caused by a pollutant, but caused by other types of pollution (Category 4c).

Impaired water bodies can be included in Category 4a if a TMDL has been adopted and approved. The TMDLs in Attachment E to the Order implement the requirements of the TMDLs adopted by the San Diego Water Board, and approved by the State Water Board and USEPA. The water bodies in Attachment E will be included in Category 4a in the Integrated Report and removed from the 303(d) List.

Impaired water bodies can be included in Category 4b if there are *acceptable* “pollution control requirements” required by a local, state or federal authority stringent enough to implement applicable water quality standards within a reasonable period of time (e.g., a compliance date is set). When evaluating whether a particular set of pollution controls are “requirements,” the USEPA considers a number of factors, including: (1) the authority (local, state, federal) under which the controls are required and will be implemented with respect to sources contributing to the water quality impairment (examples may include: self-executing state or local regulations, permits, and contracts and grant/funding agreements that require implementation of necessary controls), (2) existing commitments made by the sources and completion or soon to be completed implementation of the controls (including an analysis of the amount of actual implementation that has already occurred), (3) the certainty of dedicated funding for the implementation of the controls, and (4) other relevant factors as determined by USEPA depending on case-specific circumstances.²⁶

Impaired water bodies can be included in Category 4c if the failure to meet an applicable water quality standard is not caused by a pollutant, but caused by other types of pollution. Pollution, as defined by the CWA is “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.”²⁷ In

²⁴ USEPA, 2005. Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act

²⁵ Ibid

²⁶ Ibid

²⁷ CWA section 502(19)

other cases, pollution does not result from a pollutant and a TMDL is not required. Examples of circumstances where an impaired segment may be placed in Category 4c include segments impaired solely due to lack of adequate flow, stream channelization, or hydromodification. In these situations, there may be water quality management actions that can address the cause(s) of the impairment, but a TMDL may not be required to implement the actions.

The Water Quality Improvement Plans will require the implementation of pollution controls and water quality management actions (i.e. water quality improvement strategies) which can result in the attainment of water quality standards in water bodies impaired by discharges from the Copermittees' MS4s. The Water Quality Improvement Plans also include requirements that are expected to attain water quality standards in a reasonable period of time. The San Diego Water Board considers the Water Quality Improvement Plans to be a commitment by the Copermittees to develop, plan, budget for, and implement pollution controls that will attain water quality standards in receiving waters in a reasonable period of time, or as soon as possible. The results of the Copermittees' efforts in implementing the Water Quality Improvement Plans can be used to re-evaluate the condition of the impaired water bodies during the next update to the 303(d) List.

After the Copermittees submit the Water Quality Improvement Plans and demonstrate that water quality standards are being attained or will be attained in a reasonable period of time, the San Diego Water Board may re-evaluate the water bodies on the 303(d) List. These water bodies on the 303(d) List may be re-evaluated and placed into Category 4b or Category 4c in the Integrated Report. The water bodies placed in Category 4b or Category 4c in the Integrated Report must show a record that the water bodies are attaining water quality standards or supporting the identified beneficial uses, or will attain water quality standards or support identified beneficial uses in a reasonable period of time, in order for the water bodies to be appropriately removed from the 303(d) List.

C. Action Levels

Purpose: Provision C includes requirements for the Copermittees to identify and include numeric action levels in the Water Quality Improvement Plan to direct and focus the Copermittees' jurisdictional runoff management program implementation efforts for controlling MS4 discharges to receiving waters.

Discussion: Under Provision C, the numeric action levels required are for non-storm water discharges and storm water discharges. The non-storm water action levels (NALs) are applicable to non-storm water discharges from the Copermittees' MS4s, which can occur year-round. The storm water action levels (SALs) are applicable to storm water discharges from the Copermittees' MS4s, which occur during the rainy season defined as the period between October 1 and April 30.

The action levels required by Provision C are based on the action level requirements that were developed and incorporated into Order Nos. R9-2009-0002 and R9-2010-0016, the Orange County and Riverside County MS4 Permits, respectively. The Fact Sheets for these Orders provide detailed discussions about the development of the numeric NALs and SALs included in this Order.

Order Nos. R9-2009-0002 and R9-2010-0016 required the Copermittees to perform prescribed actions if the NALs or SALs are exceeded. The actions required under Order Nos. R9-2009-0002 and R9-2010-0016 generally included conducting additional monitoring and source investigations when a discharge from the MS4 is observed to exceed one or more NALs and/or SALs.

For this Order, however, the action levels of Provision C are to be used by the Copermittees to prioritize the actions to be implemented as part of the Water Quality Improvement Plan. Monitoring data collected by the Copermittees from MS4 outfalls will be compared with the NALs and SALs. Exceedances of the NALs and SALs will not require the Copermittees to immediately identify sources causing exceedances, but will provide some numeric indicator levels that can give the Copermittees a way to measure the relative severity of a pollutant contributing to receiving water quality impacts.

NALs and SALs must be included in the Water Quality Improvement Plans to be used by the Copermittees in directing and focusing their water quality improvement strategies. The Copermittees are expected to utilize the NALs and SALs to help focus their implementation efforts on addressing pollutants that have the most significant potential or observed impacts to receiving waters. The NALs and SALs will be used as part of the MS4 discharges assessments required under Provision D.4.b. The NALs and SALs may also be used by the Copermittees as the numeric goals to be achieved in MS4 discharges and/or receiving waters as the Water Quality Improvement Plans are implemented.

More specific and detailed discussions of the requirements of Provision C are provided below.

Provision C.1 (Non-storm Water Action Levels) requires the Copermittees to incorporate NALs into the Water Quality Improvement Plan for pollutants and/or constituents that are causing or contributing, or may be causing or contributing, to the highest priority water quality conditions identified in the Water Quality Improvement Plan related to non-storm water discharges from the MS4s. NALs generally must be consistent with the water quality objectives found within the Basin Plan.

The NALs have been included to ensure that the Copermittees are implementing and complying with several requirements of the MS4 permit. The federal CWA requires permits for municipal storm sewer systems to “*effectively prohibit non-storm water discharges into the storm sewers.*” The federal NPDES regulations, which were promulgated to implement the CWA requirements for discharges from municipal storm sewers, require a program to address illicit discharges, which are non-storm water discharges. Provision A.1.b prohibits “[*n*]on-storm water discharges into MS4s” unless the non-storm water discharge authorized by a separate NPDES permit. The NALs will be used as part of the illicit discharge detection and elimination program required pursuant to Provision E.2, as well as part of the MS4 discharges assessments required pursuant to Provision D.4.b.

Provision A.1.a prohibits non-storm water discharges from the MS4 from “*causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state.*” In addition, pursuant to Provision A.2.a, non-storm water discharges “*must not cause or contribute to the violation of water quality standards in any receiving waters.*”

Ideally, the Copermittees’ jurisdictional runoff management programs will eliminate all non-storm water discharges entering the MS4s within their jurisdictions. The complete elimination of non-storm water discharges to the Copermittees’ MS4s would be in compliance with the CWA requirements for non-storm water discharges, as well as the prohibitions and limitations of Provisions A.1.a and A.2.a.

The federal regulations, however, also refer to several non-storm water discharge categories that must be addressed as illicit discharges if they are found to be a source of pollutants. The federal regulations thus identify some non-storm water discharges that are not required to be addressed as illicit discharges if they are not a source of pollutants (e.g. non-storm water discharges specified in Provisions E.2.a.(1)-(5)). Thus, these regulations imply that some non-storm water discharges into and from the MS4 may occur even if non-storm water discharges are “effectively” prohibited by the Copermittees.

If the source of a non-storm water discharge is identified as a category of non-storm water specified in Provisions E.2.a.(1)-(5), the NALs can be used to determine if the category of non-storm water discharges is a source of pollutants. For other non-storm water discharges not specified in Provisions E.2.a.(1)-(5), the CWA requires those discharges to be “*effectively*” prohibited by removing the discharge to the MS4 through enforcement of the Copermittees’ legal authority established under “*ordinance, order or similar means*” to prohibit illicit discharges to the MS4s.

If there are non-storm water discharges that are not required to be addressed as illicit discharges, those discharges must comply, at a minimum, with the discharge prohibitions and receiving water limitations of Provision A. Thus, the non-storm water discharges from the MS4 must be at levels that will not cause or contribute to a condition of pollution, contamination, or nuisance (Provision A.1.a), and must not cause or contribute to a violation of water quality standards in receiving waters (Provision A.2.a) to be consistent with the discharge prohibitions and receiving water limitations of Provisions A.1.a and A.2.a.

Furthermore, the San Diego Region has predominantly intermittent and ephemeral rivers and streams which vary in flow volume and duration at spatial and temporal scales. For most of these river and stream systems, non-storm water discharges from the MS4 are likely to be the most significant or the only source contributing to surface flows present within the receiving water, especially during the dry season.

Therefore, because of the prohibitions and limitations of Provision A.1.a and A.2.a, and the likelihood that non-storm water discharges from the MS4 are the most significant or only source contributing to surface flows present within the receiving water, NALs generally must be consistent with the water quality objectives found within the Basin Plan. Non-storm water discharges that are meeting the NALs would not be expected to cause or contribute to an exceedance of water quality objectives in receiving waters, which would be consistent with the discharge prohibitions and receiving water limitations of Provisions A.1.a and A.2.a.

Exceedances of the NALs would then provide an indication of the relative severity of a pollutant in non-storm water discharges from the MS4 contributing to potential or observed receiving water quality impacts. The relative severity or significance of a pollutant in non-storm water discharges from the MS4 will provide the Copermittees a valuable source of information that can be used to identify priority water quality conditions within a Watershed Management Area and within each Copermittee’s jurisdiction.

Tables C-1 through C-4 under Provision C.1.a specify numeric NALs for several parameters or pollutant constituents for non-storm water discharges from the MS4 to several water body types. The NALs for MS4 discharges given under Provision C.1.a are based on the water quality objectives for inland surface waters in the Basin Plan, and the water quality objectives for ocean waters in the Ocean Plan. The NALs for

most of the metals were calculated based on the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP). The NALs provided in Tables C-1 through C-4 must be included in the Water Quality Improvement Plans required to be developed pursuant to Provision B.

Provision C.1.b requires the Copermittees to identify NALs for pollutants and/or constituents, not specified in Provision C.1.a, which are causing or contributing, or may be causing or contributing, to the highest priority water quality conditions of the Watershed Management Area related to non-storm water discharges from the MS4s. The NALs must be based on the water quality objectives in the Basin Plan. The NALs identified under Provision C.1.b must be included in the Water Quality Improvement Plan.

The San Diego Water Board recognizes that some of the NALs required pursuant to Provisions C.1.a and C.1.b may be exceeded more frequently than not. Thus, Provision C.1.c has been included in the Order to provide the Copermittees the option to develop secondary NALs that are set at levels greater than the levels required pursuant to Provisions C.1.a and C.1.b to further refine the prioritization and assessment of water quality improvement strategies for addressing non-storm water discharges to and from the MS4s, as well as the detection and elimination of non-storm water and illicit discharges to and from the MS4.

Provision C.2 (Storm Water Action Levels) requires the Copermittees to incorporate SALs into the Water Quality Improvement Plan for pollutants and/or constituents causing or contributing, or may be causing or contributing, to the highest priority water quality conditions identified in the Water Quality Improvement Plan related to storm water discharges from the MS4s.

The SALs have been included to ensure that the Copermittees are implementing and complying with several requirements of the MS4 permit. Provision A.1.a prohibits storm water discharges from the MS4 from *“causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state.”* In addition, pursuant to Provision A.2.a, storm water discharges *“must not cause or contribute to the violation of water quality standards in any receiving waters.”*

Provision A.3.a, however, implicitly acknowledges that compliance with Provisions A.1.a and A.2.a cannot be achieved immediately for discharges of storm water from the MS4 by applying the MEP standard. Thus, Provision A.4 requires the Copermittees to implement an iterative approach to demonstrate that MEP is being achieved. This approach is supported by USEPA.

The federal CWA requires permits for municipal storm sewer systems to *“require controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable, including management practices, control techniques and system, design*

and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” MEP is an ever-evolving, flexible, and advancing concept. As knowledge about controlling storm water runoff and discharges evolves, so does the knowledge which constitutes MEP. Reducing the discharge of storm water pollutants from the MS4 to the MEP requires the Copermittees to assess their jurisdictional runoff management programs and revise activities, control measures, BMPs, and measurable goals, as necessary to meet MEP. The SALs provide the Copermittees measureable goals that may be used to demonstrate the achievement of MEP for reducing pollutants in storm water discharges from the MS4. The SALs will be used as part of the MS4 discharges assessments required under Provision D.4.a.

In June of 2006, the State Water Board’s Blue Ribbon Storm Water Panel released its report titled “*The Feasibility of Numerical Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities.*” In the recommendations, the Blue Ribbon panel proposed storm water effluent limitations which are computed using statistical based population approaches. The SALs specified in Table C-5 under Provision C.2.a were developed from a regional subset of nationwide Phase I MS4 data by using USEPA Rain Zone 6 (arid west) data.²⁸ Additionally, utilization of regional data is appropriate due to the addition of data into the nationwide Phase I MS4 monitoring dataset in February 2008. This additional data increased the number of USEPA Rain Zone 6 samples to more than 400, and included additional monitoring events within Southern California.

Utilizing data from USEPA Rain Zone 6 resulted in SALs which closely reflect the environmental conditions experienced in the San Diego Region. The localized subset of data includes sampling events from multiple Southern California locations including Orange, San Diego, Riverside, Los Angeles, and San Bernardino Counties. The dataset includes samples taken from highly built-out impervious areas and from storm events representative of Southern California conditions.

The SALs for cadmium, copper, lead and zinc require the measurement of hardness and to provide more specificity in the assessment of samples with SALs for total metal concentrations. While USEPA Rain Zone 6 data include a large sample size for concentrations of total metals, the impact the concentration will have on receiving waters will vary with receiving water hardness. Since it is the goal of the SALs, through the iterative process and MEP standard, to have MS4 storm water discharges meet all applicable water quality objectives, the hardness of the receiving water should be used when assessing the total metal concentration of a sample.

Thus, when there is an exceedance of a SAL for a metal, the Copermittee must determine if that exceedance is above the existing applicable water quality objectives based upon the hardness of the receiving water. The water quality objectives

²⁸ Data used to develop SAL were obtained from <http://rpitt.eng.ua.edu/Research/ms4/mainms4.shtml>

Copermittees must use to assess total metal SAL exceedances are the California Toxic Rule (CTR) and USEPA National Recommended Water Quality Criteria for Freshwater Aquatic Life 1 hour maximum concentrations. The 1-hour maximum concentration is to be used for comparison since it is expected to most replicate the impacts to waters of the State from the first flush following a precipitation event.

The statistically calculated SALs given in Table C-5 are at levels greater than the water quality objectives in the Basin Plan or Ocean Plan. Because the objective of the CWA is to *“to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”*, meaning eventually pollutants in storm water discharges must be reduced to a level that cannot cause or contribute to an exceedance of water quality objectives in receiving waters, over time the SALs are expected to be reduced to a level that is based on the water quality objectives rather than statistical calculations. The San Diego Water Board will review the SALs as more data for discharges of storm water from the MS4s are collected, and revise them as conditions improve and the MEP standard advances. For the Water Quality Improvement Plans required under this Order, the SALs identified under Provision C.2.a must be included.

Provision C.2.b requires the Copermittees to identify SALs for pollutants and/or constituents, not specified in Provision C.2.a, which are causing or contributing, or may be causing or contributing, to the highest priority water quality conditions of the Watershed Management Area related to storm water discharges from the MS4s. The SALs identified under Provision C.2.b must be included in the Water Quality Improvement Plan.

The San Diego Water Board recognizes that some of the SALs required pursuant to Provisions C.2.a and C.2.b may be exceeded more frequently than not. Thus, Provision C.2.c has been included in the Order to provide the Copermittees the option to develop secondary SALs that are set at levels greater than the levels required pursuant to Provisions C.2.a and C.2.b to further refine the prioritization and assessment of water quality improvement strategies for reducing pollutants in storm water discharges from the MS4s.

D. Monitoring and Assessment Program Requirements

Purpose: Provision D includes minimum monitoring and assessment requirements that must be developed and implemented by the Copermittees as part of the Water Quality Improvement Plans. Implementation of the monitoring and assessment requirements of Provision D will allow the Copermittees to demonstrate that the requirements of the CWA to effectively prohibit non-storm water discharges to the MS4 and reduce pollutants in storm water discharges from the MS4 to the MEP are being achieved. Implementation of the monitoring and assessment requirements of Provision D will also allow the Copermittees and the San Diego Water Board to track improvements to the water quality in the San Diego Region. The monitoring and assessment program requirements are necessary to implement, as well as ensure the Copermittees are in compliance with, the requirements of the Order.

Discussion: The San Diego Water Board recognized that changes to the monitoring and assessment requirements of the Fourth Term Permit were necessary to improve the usefulness and usability of monitoring data collected by the Copermittees to support their jurisdictional storm water programs more efficiently and with increased effectiveness. The data collected are needed to better inform the Copermittees' understanding of the physical, chemical, and biological condition of the receiving waters and the quality of the MS4 discharges. The monitoring program needs to provide opportunities for the Copermittees to integrate regional monitoring efforts into municipal storm water monitoring requirements to provide a cost-effective approach to monitoring and avoid duplication of efforts.

The requirements in Provision D were largely recommended by the Copermittees as an outcome of the San Diego Water Boards Focused Meeting process. The monitoring and assessment program requirements now require collection of more specific information necessary for each Copermittee to adapt its jurisdictional runoff management program in such a way that focuses resources on a watershed's highest priority water quality conditions. The monitoring and assessment program will require the Copermittees to collect data that can be utilized to answer both watershed level management questions (e.g. Are the chemical, physical, and biological conditions of a receiving water protective, or likely protective of beneficial uses?), and specific jurisdictional runoff management program activity questions (e.g. Are the water quality improvement strategies of the jurisdictional program effectively eliminating non-storm water discharges to the MS4?).

The monitoring data collected and assessment information that will be reported to the San Diego Water Board are necessary to determine if the Copermittees are complying with the prohibitions and limitations of Provision A. The required monitoring and assessments that must be reported to the San Diego Water Board will be utilized for three purposes:

- (1) Inform the Copermittees, San Diego Water Board, and the public on the progress of the Copermittees' efforts to effectively prohibit non-storm water discharges to the MS4 and reduce pollutants in storm water discharges from the MS4 to the MEP;
- (2) Inform the Copermittees, San Diego Water Board, and the public on the condition of water bodies receiving discharges from the Copermittees' MS4, and the progress of the Copermittees' water quality improvement implementation efforts toward improving the receiving water quality; and
- (3) Inform the Copermittees, the San Diego Water Board, and the public on the effectiveness of the Water Quality Improvement Plan toward achieving (1) and (2).

The monitoring and assessment information reported pursuant to Provision F is also expected to be key to the iterative approach and adaptive management process required under Provision A.4 and implemented through the Water Quality Improvement Plan required under Provision B. As required by Provision A.4, the iterative approach and adaptive management process is required if the Copermittees cannot meet the discharge prohibitions and receiving water limitations of Provisions A.1.a, A.1.c, and/or A.2.a under the present conditions.

Provision D provides the minimum monitoring and assessment requirements that must be included in each Water Quality Improvement Plan to be developed and implemented by the Copermittees. The Copermittees, however, are not limited to the requirements of Provision D and may include additional methods to track progress toward improving water quality in a Watershed Management Area.

More specific and detailed discussions of the requirements of Provision D are provided below.

Provision D.1 (Receiving Water Monitoring Requirements) specifies the minimum receiving water monitoring that the Copermittees must conduct within the Watershed Management Area and include as part of the Water Quality Improvement Plan.

Provision D.1 establishes minimum monitoring requirements that must be conducted by the Copermittees within each Watershed Management Area. Provision D.1 requires the Copermittees to collect and develop the data and information necessary to determine potential impacts to the beneficial uses in the receiving waters due to discharges from the MS4s. The monitoring required under Provision D.1 will also provide the data that will allow the Copermittees to gauge the effectiveness and progress of its Water Quality Improvement Plan implementation efforts toward improving the quality of receiving waters.

The receiving water monitoring requirements of Provision D.1 are focused primarily on monitoring the conditions and response of the receiving waters to the Copermittees'

collective implementation efforts to reduce receiving water impacts that may be caused by the discharges from the MS4s. The preference of the San Diego Water Board is for the Copermittees to spend their resources achieving tangible and observable improvements in receiving water conditions instead of collecting samples and analyzing data that has consistently indicated that receiving water conditions are degraded and require improvement. In general, the ability to measure potential improvements in receiving water conditions due to any actions implemented by the Copermittees as part of the Water Quality Improvement Plan may require several years before a response can be observed. Thus, the frequency of collecting receiving water monitoring data has been kept to a minimum.

During the transitional period between adoption of this Order and San Diego Water Board acceptance of a Water Quality Improvement Plan, the Copermittees must conduct receiving water monitoring in accordance with Provision D.1.a. This approach to collecting receiving water data is different from what was required in the Fourth Term Permits, but one that truly embraces the concept of an integrated, cost-effective, streamlined receiving water monitoring approach.

Provision D.1.a requires Copermittees to continue performing the receiving water monitoring programs required in Order Nos. R-2007-0001, R9-2009-002, and R9-2010-0016; plus participation in: hydromodification management plan monitoring approved by the San Diego Water Board, monitoring plans as part of load reduction plans (either Bacteria Load Reduction Plans or Comprehensive Load Reduction Plans) for TMDLs in Attachment E of the Order, Storm Water Monitoring Coalition Regional Monitoring, Southern California Bight Regional Monitoring, Sediment Quality Monitoring, and ASBS Monitoring as applicable to a Watershed Management Area.

Provision D.1.a also provides an opportunity for the Copermittees to use third party data to meet receiving water monitoring requirements where feasible. Allowing the Copermittees to use the data currently collected through its participation in existing regional receiving water programs and that of third parties provides an efficiency of resources in obtaining the data necessary to inform the Copermittees and the San Diego Water Board about the physical, chemical, and biological conditions of the receiving waters, which can also help to focus the receiving water monitoring during the implementation of the Water Quality Improvement Plan. Once a Water Quality Improvement Plan is developed for a Watershed Management Area in compliance with Provision B of this Order, the transitional period is over and Copermittees are required to conduct receiving water monitoring according to the requirements of Provisions D.1.b-e.

Provision D.1.b requires each Copermittee to identify at least one long term receiving water monitoring station to be representative of receiving water quality within each Watershed Management Area. Long term receiving water monitoring stations can be located at any existing mass loading stations, temporary watershed assessment stations, bioassessment stations, and stream assessment stations previously established by the Copermittees. The requirements under Provision D.1.b. are

consistent with 40 CFR 122.26(d)(2)(iii)(D), which specifies that a “*monitoring program for representative data collection for the term of the permit*” may include “*instream locations*.” For each Watershed Management Area, at least one long term watershed monitoring station is required to be established and monitored. The Copermittees may choose to establish additional long term monitoring stations where necessary to support the implementation and adaptation of the Water Quality Improvement Plan.

Provision D.1.b. requires the Copermittees to locate the long term receiving water monitoring station at one of these existing receiving water monitoring stations to provide the Copermittees an opportunity to experience monitoring cost savings while continuing to collect the necessary data to assess the status and trends of receiving water quality conditions in 1) coastal water, 2) enclosed bays, harbors, estuaries, and lagoons, and 3) streams under both dry weather and wet weather conditions. Ideally these stations will continue to be monitored as part of the receiving water monitoring for each Watershed Management Area to maintain a consistent set of locations and a period of data that can be built upon with the monitoring required under this Order.

The receiving water monitoring requirements are separated into monitoring required during dry weather conditions pursuant to Provision D.1.c, and wet weather conditions pursuant to Provision D.1.d.

At each long term monitoring station the Copermittees must conduct at least three dry weather monitoring events as required pursuant to Provision D.1.c and at least three wet weather monitoring events as required pursuant to Provision D.1.d per permit term. Provisions D.1.c and D.1.d require the Copermittees to monitor priority water quality conditions identified in the Water Quality Improvement Plan, constituents listed as causing impairment of receiving waters in the Watershed Management Area, applicable NALs, toxicity, constituents listed in Tables D-2 and D-3, and constituents for implementation plans (e.g. Bacteria Load Reduction Plans and Comprehensive Load Reduction Plans). Required toxicity monitoring was changed to reflect an updated understanding of the unique challenges associated with sampling storm water for toxicity. Copermittees are required to sample receiving water for toxicity during each dry weather and each wet weather event pursuant to Provision D.1.c.(4) and D.1.d.(4). Required toxicity monitoring is now consistent with the State Water Resources Control Board Policy for Toxicity Assessment and Control (Draft June 2012) and recently adopted MS4 permits for Caltrans and Los Angeles Water Board. Receiving water monitoring efforts in this Order have been streamlined to redirect resources to monitoring efforts that better support pollutant reduction solutions with an increasing emphasis on MS4 outfall monitoring, source identification, and source abatement activities.

In addition to the receiving water monitoring requirements under Provisions D.1.b-d, Provision D.1.e requires the Copermittees participate in and/or conduct other types of receiving water monitoring. As recommended and requested by the Copermittees, Provision D.1.e.(1) requires the Copermittees to participate in existing regional monitoring, as applicable to each Watershed Management Area. Existing regional

monitoring includes monitoring conducted by the Storm Water Monitoring Coalition and for the Southern California Bight. Participation in and use of monitoring data collected from these existing regional water quality monitoring programs provide the Copermittees a greater opportunity for efficiency in the use of their resources to manage their storm water programs and those controllable discharges under their authority.

Provision D.1.e.(1)(c) requires the south Orange County MS4 Copermittees to participate in “unified regional beach water quality monitoring.” This monitoring replaces requirements to conduct “core monitoring” of beach water quality, as provided for in Appendix III of the Ocean Plan.

Several different public agencies currently conduct routine, ongoing beach water quality monitoring in south Orange County in accordance with several different sets of requirements. The monitoring programs implemented to meet those requirements overlap temporally and spatially. These monitoring programs are partially but not fully integrated. In November 2010, the State Water Board adopted Resolution No. 2010-0053, which directed Regional Water Boards to work with dischargers to modify beach water quality monitoring programs required by Regional Water Board-issued permits in order to eliminate redundancies and incorporate beach water quality monitoring required by beach water quality statutes, where appropriate.

In April 2012, the San Diego Water Board requested that its staff review beach water quality monitoring conducted in south Orange County. To assist in responding to that request, staff of the Board convened a workgroup that included representatives of the three public agencies that currently conduct almost all of the routine, ongoing beach water quality monitoring in south Orange County, i.e., South Orange County Wastewater Authority (SOCWA), Orange County Public Works, and Orange County Health Care Agency (OCHCA). The workgroup also included other interested parties, including representatives of the Sierra Club and Surfrider Foundation. In December 2012, the San Diego Water Board adopted Resolution No. R9-2012-0069, which endorsed the San Diego Water Board staff report entitled “A Framework for Monitoring and Assessment in the San Diego Region,” dated November 2012.

The unified program is consistent with and will meet or exceed the minimum requirements for beach water quality monitoring and related public notification and reporting established by State law, including the Ocean Plan. The unified program is consistent with State Water Board Resolution No. 2010-0053. The unified program is also consistent with and will help implement, “A Framework for Monitoring and Assessment in the San Diego Region,” which emphasizes the need for question-driven, beneficial use-oriented monitoring and assessment. The primary purpose of the unified program will be to answer the question “Does beach water quality meet standards for the beneficial use of water contact recreation?”

The unified program is intended to be protective; it will help protect the health of swimmers, surfers, and others who use south Orange County beach waters for water

contact recreational activities. The unified program is also intended to be reasonable; it will eliminate duplicative monitoring and will include triggers for public notification and additional sampling at all sampling stations year-round. The unified program is intended to be equitable; responsibility for implementation of the unified program will be shared and the responsible agencies will jointly make arrangements to implement the program and will have the flexibility to jointly make short and/or long term changes in those arrangements.

The San Diego Water Board Executive Officer issued a written directive on December 5, 2014, pursuant to California Water Code section 13383, for SOCWA and the south Orange County MS4 Copermittees to implement the unified program in cooperation with OCHCA. The Executive Officer may make revisions to the unified program, provided that the unified program, as revised, continues to be consistent with and meet the requirements of State law, including the Ocean Plan, for beach water quality monitoring and related public notification and reporting. Following a thirty day public comment period, and subject to a request for a hearing before the San Diego Water Board, any such revision shall take effect as specified in a written directive issued by the Executive Officer pursuant to CWC section 13383. The program and any Executive Officer issued revisions to the program are subject to CWC section 13320 right of review from the date of issuance.

The unified program will supersede the existing routine, ongoing, beach water quality monitoring programs in south Orange County that are conducted in accordance with the existing requirements of the NPDES permits for discharges from the SOCWA ocean outfalls and the south Orange County MS4s. The requirement to participate in “regional monitoring” of beach water quality replaces requirements to conduct “core monitoring” of beach water quality, as provided for in Appendix III of the Ocean Plan.

The State Water Resources Control Board adopted the Water Quality Control Plan for Enclosed Bays and Estuaries of California – Part 1 Sediment Quality which became effective August 25, 2009 (Sediment Quality Monitoring Policy). Provision D.1.e.(2) requires any Copermittees with MS4 discharges to an enclosed bay or estuary to monitor the sediments in the enclosed bay or estuary receiving water in accordance with the sediment quality monitoring procedures as prescribed in the Sediment Quality Monitoring Policy.

The State Water Board adopted Resolution No. 2012-0012 which approved exceptions to the California Ocean Plan for selected discharges into Areas of Special Biological Significance (ASBS), including special protections for beneficial uses. State Board Resolution No. 2012-0012 became effective on March 20, 2012, and Attachment B to the Resolution established limitations on point source storm water discharges to ASBS. Copermittees with MS4s that discharge to an ASBS must monitor its discharge to assure compliance with State Board Resolution No. 2012-0012 as required pursuant to Provision D.1.e.(3).

The San Diego Water Board is developing a regional monitoring strategy to assess the conditions of receiving waters in the San Diego Region. The monitoring requirements of Provision D.1 are expected to be incorporated or serve as a foundation of this regional monitoring strategy, but may require some modifications. When the San Diego Water Board develops an alternative regional monitoring strategy, the Copermittees will be required to participate in the development and implementation of the alternative regional monitoring program pursuant to Provision D.1.f.

Provision D.2 (MS4 Outfall Discharge Monitoring Requirements) specifies the minimum MS4 outfall discharge monitoring requirements that the Copermittees must incorporate and implement as part of the Water Quality Improvement Plan.

The dry weather MS4 outfall discharge monitoring requirements are included under Provisions D.2.a.(2) and D.2.b. The dry weather MS4 outfall discharge monitoring requirements are part of the “*program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer*” required by 40 CFR 122.26(d)(2)(iv)(B), which is expected to achieve compliance with the CWA section 402(p)(3)(B)(ii) statutory requirement for municipal storm water permits to require the Copermittees to “*effectively prohibit non-storm water discharges into the storm sewers.*” The dry weather MS4 outfall discharge monitoring data collection requirements are based on requirements under 40 CFR 122.26(d)(1)(iv)(D) and 122.26(d)(2)(iv)(B)(3).

The dry weather MS4 outfall discharge monitoring requirements are designed to provide wide spatial and temporal coverage of each jurisdiction to better understand the extent and magnitude of non-storm water discharges to receiving waters, and make a distinction between persistent and transient non-storm water flows. This information is expected to allow each Copermittee to focus its resources on eliminating and controlling the highest priority threats to receiving water quality, as well as integrating other elements of the storm water programs (e.g. complaint call response) and third party data to efficiently and effectively assist in efforts to eliminate non-storm water discharges.

The dry weather MS4 outfall discharge monitoring requirements of Provision D.2.a.(2) and D.2.b are separated into monitoring required before and after the San Diego Water Board accepts the Copermittees’ Water Quality Improvement Plan. Outfall monitoring conducted prior to acceptance of the Water Quality Improvement Plan is referred to in the Order as Transitional MS4 Outfall Discharge Monitoring. Provision D.2.a.(2) includes the transitional dry weather MS4 outfall discharge monitoring requirements.

The requirements under Provision D.2.a.(2) are based on the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B), which include the requirements for a monitoring program to identify, detect, and eliminate illicit connections and illegal discharges to the MS4s. The federal regulations (40 CFR 122.26(d)(1)(iv)(D)) require

the monitoring program to include “a *field screening analysis for illicit connections and illegal dumping [that]...[a]t a minimum, include[s] a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods.*” The federal regulations (40 CFR 122.26(d)(1)(v)(B)) require the monitoring program to include “*inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.*” Furthermore, the monitoring program is required by federal regulations (40 CFR 122.26(d)(2)(iv)(B)) to include “a *schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer.*”

Dry weather transitional MS4 outfall discharge monitoring requires each Copermittee to field screen (inspect) its major MS4 outfalls to classify the MS4 outfall locations as having persistent dry weather flows, transient dry weather flows, or no dry weather flows. To account for the variance in size of the 39 jurisdictions covered under this Order, the Copermittees recommended a tiered approach to the number of major MS4 outfalls that must be inspected. Provision D.2.a.(2)(a) provides a tiered approach to the number of major MS4 outfalls that must be visually inspected per jurisdiction as well as a minimum frequency each Copermittee must inspect each major MS4 outfall per year. This tiered approach is based on the total number of major MS4 outfalls within a Copermittees jurisdiction within each Watershed Management Area.

Based on the field screening, each Copermittee is required to make a determination whether any observed flowing, pooled, or ponded waters are transient or persistent flows. Based on this field screening information, other jurisdictional program information, and third party information, each Copermittee is required to prioritize the MS4 outfalls within its jurisdiction for follow up investigation and elimination of the non-storm water discharge, as part of its illicit discharge detection and elimination program required pursuant to Provision E.2. In accordance with the requirements of Provision E.2, each Copermittee is required to immediately investigate obvious illicit discharges (e.g. outfall discharges with unusual color, unusual odor, or high flows).

This approach allows a Copermittee to use all of its resources, as well as leverage resources and information provided by third parties, to effectively eliminate non-storm water discharges from its MS4 outfalls. If the source of the non-storm water discharge cannot be immediately eliminated, the Copermittee uses the persistent flow or transient flow classification along with other programmatic implementation data to prioritize the MS4 outfalls for future investigation. In accordance with the adaptive management approach deployed throughout this Order, Provision D.2.a.(2)(c) requires each Copermittee to update its MS4 outfall discharge monitoring station inventory, compiled pursuant to Provision D.2.a.(1), with any new information on the classification of whether the MS4 outfall produces persistent flow, transient flow, or no dry weather flow. The requirement of Provision D.2.a.(2)(c) assures that each Copermittee is collecting data that can be used to demonstrate compliance with the CWA requirement that each Copermittee must implement a program to “*effectively*

prohibit non-storm water discharges into the [MS4]" and with the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B).

Provision D.2.b describes the dry weather MS4 outfall discharge monitoring required to be incorporated and implemented as part of the Water Quality Improvement Plan. Dry weather MS4 outfall discharge monitoring must be performed by each Copermittee to identify non-storm water and illicit discharges within its jurisdiction pursuant to Provision E.2.c, and to prioritize the dry weather MS4 discharges that will be investigated and eliminated pursuant to Provision E.2.d. The emphasis of the dry weather MS4 outfall discharge monitoring required pursuant to Provision D.2.b is consistent with the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B).

Provision D.2.b.(1) requires each Copermittee to continue field screening its major MS4 outfalls and identifying those with persistent flows and transient flows, as conducted during the transitional period (i.e. before the Water Quality Improvement Plan was developed). However, each Copermittee now has the flexibility to adjust the field screening monitoring frequencies and locations for the MS4 outfalls in its inventory, as needed, to identify and eliminate sources of non-storm water persistent flow discharges in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan. In order to ensure a minimum number of outfalls are inspected, Provision D.2.b.(1) requires the number of visual inspections be equal to the number of visual inspections required in the tiered inspection program pursuant to Provision D.2.a.(2)(a).

Provision D.2.b.(2)(b) requires each Copermittee to monitor a minimum of 5 major MS4 outfalls with persistent flows identified as the highest priorities within a Copermittee's jurisdiction, within each Watershed Management Area. In other words, Copermittees located in more than one Watershed Management Area must identify at least 5 major MS4 outfalls with persistent flows in its jurisdiction in each Watershed Management Area. If a Copermittee is located in more than one Watershed Management Area, and they have less than 5 major MS4 outfalls with persistent flows per jurisdictional area per Watershed Management Area, all of the major MS4 outfalls must be identified as high priority dry weather persistent flow MS4 outfalls. The Copermittees identified as Responsible Copermittees by a TMDL in Attachment E of the Order may need to monitor more than 5 dry weather major MS4 outfall locations to determine compliance with the requirements of the TMDL(s).

Monitoring must occur at the highest priority outfall locations at least semi-annually until the non-storm water discharges have been eliminated for three consecutive dry weather monitoring events; identified to be authorized by a separate NPDES Permit; or reprioritized to a lower priority. Persistent flow MS4 outfall monitoring stations that have been removed must be replaced with the next highest prioritized MS4 major outfall in the Copermittee's jurisdiction within the Watershed Management Area, unless there are no remaining qualifying major MS4 outfalls within the Copermittees jurisdiction. The Copermittees must continually update their dry weather persistent

flow MS4 outfall discharge monitoring locations with the next highest priority non-storm water flow that have yet to be eliminated until all persistent and transient flows are eliminated or its threat reduced.

Non-storm water persistent flow MS4 outfall discharge monitoring data collected during each semi-annual monitoring event, must be collected and analyzed according to the requirements of Provision D.2.b.(2)(b)-(e). These monitoring requirements are consistent with the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B).

The wet weather MS4 outfall discharge monitoring requirements are included under Provisions D.2.a.(3) and D.2.c. The wet weather MS4 outfall discharge monitoring requirements are necessary for the Copermittees to implement a *“management program...to reduce the discharge of pollutants to the maximum extent practicable, using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate”* required by 40CFR 122.26(d)(2)(iv), which is expected to achieve compliance with the CWA section 402(p)(3)(B)(iii) statutory requirement for municipal storm water permits to require *“controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable.”* The wet weather MS4 outfall discharge monitoring data collection requirements are based on requirements under 40 CFR 122.26(d)(2)(iii), 122.26(d)(2)(iii)(A) and 122.26(d)(2)(iii)(A)(1)-(4), and 40 CFR 122.21(g)(7)(i)-(ii).

The wet weather MS4 outfall discharge monitoring requirements of Provision D.2.a.(3) and D.2.c are separated into monitoring required before and after the San Diego Water Board accepts the Copermittees' Water Quality Improvement Plan. Outfall monitoring conducted prior to acceptance of the Water Quality Improvement Plan is referred to in the Order as Transitional MS4 Outfall Discharge Monitoring. Provision D.2.a.(3) includes the transitional wet weather MS4 outfall discharge monitoring requirements.

Until the wet weather MS4 outfall discharge monitoring requirements of Provision D.2.c are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board, the Copermittees must comply with the requirements of transitional wet weather MS4 outfall monitoring requirements pursuant to Provision D.2.a.(3). Provision D.2.a.(3) requires the Copermittees in each Watershed Management Area to sample, at least five of the major MS4 outfalls inventoried pursuant to Provision D.2.a.(1) once per wet season for the monitoring data required to be collected pursuant to Provision D.2.a.(3)(c)-(e). Provision D.2.a.(3) further requires at least one major MS4 outfall monitoring station be located in each Copermittee's jurisdiction within the Watershed Management Area.

At a minimum, the five sampling locations chosen must be representative of storm water discharges from residential, commercial, industrial, and typical mixed-use land uses present within a Watershed Management Area. The San Diego Water Board expects the Copermittees to extrapolate from these data to similar land uses

throughout the Watershed Management Area to better inform the Water Quality Improvement Plan development process by prioritizing drainages for implementation of storm water control efforts required pursuant to Provision E.

Provision D.2.c describes the wet weather MS4 outfall discharge monitoring required to be included and implemented as part of the Water Quality Improvement Plan. Provision D.2.c provides the Copermittees the flexibility to adjust the wet weather MS4 outfall discharge monitoring locations and frequencies in the Watershed Management Area, as needed, to identify sources of pollutants in storm water discharges from MS4s in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan.

Although Provision D.2.c.(1) allows the Copermittees to adaptively manage the wet weather MS4 outfall discharge monitoring locations and frequencies, the provision requires a minimum of at least five wet weather outfall stations to be monitored. Provision D.2.c.(2) further allows the Copermittees to modify the monitoring frequency at each wet weather MS4 outfall station to meet the goals of the Water Quality Improvement Plan as long as the monitoring frequency occurs at least once per year and is at an appropriate frequency to identify sources of pollutants in storm water discharges, guide pollutant source identification efforts, or determine compliance with the requirements of the applicable TMDLs in Attachment E to the Order.

The wet weather MS4 outfall discharge monitoring requirements of Provisions D.2.c.(3) and D.2.c.(4) are the same as the transitional wet weather MS4 outfall discharge monitoring. In contrast, the requirements of Provision D.2.c.(5) are focused on collecting analytical data specific to the highest priority water quality conditions in the Watershed Management Area identified in the Water Quality Improvement Plan. The wet weather MS4 outfall discharge monitoring data collection requirements are consistent with the requirements under 40 CFR 122.26(d)(2)(iii), 122.26(d)(2)(iii)(A) and 122.26(d)(2)(iii)(A)(1)-(4), and 40 CFR 122.21(g)(7)(i)-(ii).

Provision D.3 (Special Studies) requires the Copermittees to develop special studies that will be conducted for each Watershed Management Area and the entire San Diego Region. Data collected pursuant to Provision D.3 is to be used by the Copermittees to improve the effectiveness of the strategies implemented by the jurisdictional runoff management programs toward achieving the numeric goals identified in the Water Quality Improvement Plans and ultimately achieve compliance with the discharge prohibitions and receiving water limitations of Provisions A.1.a, A.1.c, and A.2.a, which is consistent with the requirements of Provision A.4.

Special studies are often necessary to fill data gaps or provide more refined information that allow the Copermittees to better manage the generation or elimination of pollutants and discharges to and from the MS4. In the Fourth Term Permits, the Copermittees have been required to implement special studies as directed by the San Diego Water Board. The special studies required by this Order provide the Copermittees more flexibility to identify and implement special studies that will be most

useful to improving the effectiveness of their jurisdictional runoff management programs.

Provision D.3.a.(1) requires the Copermittees to develop and conduct at least two special studies per Watershed Management Area, to be determined by the Copermittees. One of the two special studies may be accomplished through participation in a Regional Special Study required under Provision D.3.a.(2). The requirements provide the Copermittees great latitude in identifying and developing the special studies. Watershed Management Area special studies are required, at a minimum, to: (a) relate in some way to the highest water quality priorities identified by the Copermittees in the Water Quality Improvement Plan, (b) be conducted within the Watershed Management Area, and (c) include some form of participation (e.g. contribution of funds, personnel services, project management) by all the responsible Copermittees within the Watershed Management Area.

Examples of Watershed Management Area special studies might include, but are not limited to: (1) focused pollutant source identification studies, (2) BMP effectiveness and/or comparison studies, (3) pilot tests for new or emerging pollutant control methods, (4) receiving water pollutant or stressor source identification and/or mitigation studies, or (5) pollutant fate and transport studies. The Watershed Management Area special studies are expected to provide data that can be utilized by the Copermittees to improve the Water Quality Improvement Plan or implementation of the Copermittees' jurisdictional runoff management programs to address the highest priority water quality conditions.

Provision D.3.a.(2) requires the Copermittees to develop at least one special study that will be conducted for the entire San Diego region. The regional special study is expected to provide data that can be utilized by the Copermittees to improve the Water Quality Improvement Plan or implementation of the Copermittees' jurisdictional runoff management programs to identify or address regional water quality concerns and priorities.

An example of a regional special study would be to develop and establish allowable exceedance frequencies of the bacteria water quality objectives for several types of water bodies, during different wet and dry weather conditions the San Diego region. The special study would be related to bacteria, which is a priority for the San Diego region due to the adoption of "*Bacteria TMDL Project I – Beaches and Creeks in the San Diego Region*." The study results could be used to inform the Copermittees and the San Diego Water Board about the indicator bacteria water quality objective exceedance frequencies that occur in natural or reference watersheds.

Provision D.4 (Assessment Requirements) specifies the assessments that the Copermittees are required to perform, based on the monitoring data collected, and will be reported as part of the Annual Report for the Water Quality Improvement Plan implementation. Provision D.4 requires the Copermittees assess the progress of the

water quality improvement strategies in the Water Quality Improvement Plan toward achieving compliance with Provisions A.1.a, A.1.c, and A.2.a.

Provision D.4 specifies the assessments that Copermittees must perform for each Watershed Management Area to assess the effectiveness of each Copermittee's jurisdictional runoff management program and the Water Quality Improvement Plan. The effectiveness of each Copermittee's jurisdictional runoff management program and Water Quality Improvement Plan is measured through these types of assessments: (a) Receiving Waters Assessments (b) MS4 Outfall Discharges Assessments, (c) Special Studies Assessments, and (d) Integrated Assessment of Water Quality Improvement Plan.

Provision D.4.a requires the Copermittees to assess the status of receiving water conditions annually during the transitional monitoring period (during development of the Water Quality Improvement Plan) and after acceptance of the Water Quality Improvement Plan. The monitoring data collected pursuant to Provision D.1 will be evaluated, among other information, to assess the condition of a Watershed Management Area's streams, coastal waters, enclosed bays, harbors, estuaries, and lagoons. The focus of the receiving waters assessments is to measure progress toward the objective of the CWA to "*restore and maintain the chemical, physical, and biological integrity of the Nation's waters*" as the Water Quality Improvement Plan and each Copermittee's jurisdictional runoff management program are implemented within a Watershed Management Area. Provision D.4.a is consistent with 40 CFR 122.42(c)(7) which requires the Copermittees to annually report the "[i]dentification of water quality improvements or degradation."

Provision D.4.b includes the MS4 outfall discharges assessment requirements. The focus of MS4 outfall discharges assessments is to determine if the Copermittees' are implementing programs that comply with the requirements of the CWA for MS4 permits to "*effectively prohibit non-stormwater discharges into the storm sewers*" and "*require controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable.*" The monitoring data collected pursuant to Provisions D.2 will be evaluated, among other information, to assess the effectiveness of the transitional MS4 outfall field screening monitoring, the implementation of the Water Quality Improvement Plan and each Copermittee's jurisdictional runoff management program. The MS4 outfall discharge assessments consist of Non-Storm Water Discharges Reduction Assessments and Storm Water Pollutant Discharges Reduction Assessments.

The Non-Storm Water Discharges Reduction Assessments are how each Copermittee will demonstrate that its jurisdictional runoff management program implementation efforts are achieving the CWA requirement to "*effectively prohibit non-stormwater discharges into the storm sewers.*" Provision D.4.b.(1) requires each Copermittee to assess and report on its illicit discharge detection and elimination program required pursuant to Provision E.2 to reduce and effectively prohibit non-storm water and illicit discharges into the MS4 within its jurisdiction. The Non-Storm Water Discharges

Reduction Assessments include specific assessment requirements applicable to each Copermitttee.

As each Copermitttee collects and analyzes the data collected pursuant to dry weather MS4 outfall discharges monitoring requirements of Provisions D.2.a.(2) and D.2.b, Provision D.4.b.(1) requires each Copermitttee to assess the progress, assess the effectiveness of its current actions, and identify modifications necessary to increase the effectiveness of its actions toward reducing and eliminating non-storm water and illicit discharges to its MS4. The findings from these assessments are expected to be utilized by the Copermitttee as part of its procedures to prioritize the non-storm water discharges that will be addressed by its Illicit Discharge Detection and Elimination program required pursuant to Provision E.2.

The assessment requirements of Provision D.4.a.(1) are consistent with 40 CFR 122.26(d)(2)(iv)(B) and 122.26(d)(2)(iv)(B)(3) which require *“procedures...to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information [emphasis added], indicate a reasonable potential of contain illicit discharges or other sources of non-storm water”* as part of a *“program...to detect and remove...illicit discharges and improper disposal into the storm sewer.”* The assessment requirements of Provision D.4.a.(1) are also consistent with 40 CFR 122.42(c)(1) requires the Copermitttees to annually report the *“status of implementing the components of the storm water management program that are established as permit conditions.”*

The Storm Water Pollutant Discharges Reduction Assessment is how the Copermitttees in each Watershed Management Area will demonstrate that their jurisdictional runoff management program implementation efforts are achieving the CWA requirement to *“reduce the discharge of pollutants [in storm water] to the maximum extent practicable.”* Provision D.4.b.(2) requires the Copermitttees in each Watershed Management Area to assess and report the progress of the Copermitttees’ efforts to reduce pollutants in storm water discharges from the MS4s to the MEP. The Storm Water Pollutant Discharges Reduction Assessments include specific assessment requirements during both the transitional monitoring period and after acceptance of the Water Quality Improvement Plan applicable to the Watershed Management Area and each Copermitttee.

As the Copermitttees collect and analyze the data collected pursuant to wet weather MS4 outfall discharges monitoring requirements of Provisions D.2.a.(3) and D.2.c, Provision D.4.b.(2) requires the Copermitttees to assess runoff conditions during the transitional period, and the progress of the Water Quality Improvement Plan strategies toward reducing pollutants in storm water from the MS4 to the MEP. The findings from these assessments are expected to be utilized by the Copermitttees to identify any modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies necessary to identify sources of pollutants in storm water discharges from the MS4s, as well as focus, modify, and improve the water quality improvement

strategies implemented by each Copermittee within its jurisdiction to reduce pollutants in storm water discharges to the MEP.

The assessment requirements of Provision D.4.b.(2) are consistent with 40 CFR 122.26(d)(2)(iii)(B) which requires “[e]stimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls...during a storm event...accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modeling, data analysis, and calculation methods.” The assessment requirements of Provision D.4.a.(2) are consistent with 40 CFR 122.26(d)(2)(v) which requires that each Copermittee assesses the “estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program.” The assessment requirements of Provision D.4.b.(2) are also consistent with 40 CFR 122.42(c)(1) which requires the Copermittees to annually report the “status of implementing the components of the storm water management program that are established as permit conditions.”

Provision D.4.c includes the special studies assessment requirements. Performing special studies are how the Copermittees will address data gaps identified during the development of and updates to the Water Quality Improvement Plan. The relevant findings from the special studies assessments are expected to be incorporated as part of the applicable receiving water assessments, MS4 outfall discharge assessments, and integrated water quality improvement assessments required in Provision D.4.a, D.4.b, and D.4.d, respectively.

The assessment requirements in Provision D.4.d are part of the iterative approach and adaptive management process required by Provision A.4. The Copermittees are required to integrate the data collected pursuant to Provisions D.4.a-c, and information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision E to re-evaluate the Water Quality Improvement Plan.

The monitoring data collected pursuant to Provisions D.1 and D.2, and the results of the assessment required pursuant to Provisions D.4.a-c, will be used to determine whether the Water Quality Improvement Plan and each Copermittee’s jurisdictional runoff management program are effective, or require modifications or improvements to become more effective to achieve the requirements of the CWA. The assessments required by Provision D.4.d are consistent with 40 CFR 122.42(c)(1) which requires that the Copermittees to report the “[t]he status of implementing the components of the storm water management program that are established as permit conditions.”

E. Jurisdictional Runoff Management Programs

Purpose: Provision E includes the requirements for the jurisdictional runoff management programs to be implemented by each of the Copermittees. Compliance with the requirements for the jurisdictional runoff management programs will allow the Copermittees to demonstrate that they are implementing programs to effectively prohibit non-storm water discharges to the MS4 and reduce pollutants in storm water discharges from the MS4 to the MEP. The jurisdictional runoff management program document prepared by each Copermittee will also provide the details for implementing the water quality improvement strategies identified in the Water Quality Improvement Plan specifically within its jurisdiction.

Discussion: Implementation of the jurisdictional runoff management program requirements under Provision E is how the Copermittees “*effectively prohibit non-stormwater discharges into the storm sewer,*” and outlines the “*controls to reduce the discharge of pollutants to the maximum extent practicable*” consistent with the federal regulations under 40 CFR 122.26. The jurisdictional runoff management program is part of the “*comprehensive planning process*” that is required pursuant to 40 CFR 122.26(d)(2)(iv). Where the Water Quality Improvement Plan is the “*comprehensive planning process*” on a Watershed Management Area scale, requiring “*intergovernmental coordination,*” the jurisdictional runoff management program document is the “*comprehensive planning process*” on a jurisdictional scale that should be coordinated with the other Copermittees in the Watershed Management Area to achieve the goals of the Water Quality Improvement Plan.

The jurisdictional runoff management program requirements are included to provide each Copermittee criteria that can be used to demonstrate that its storm water management program is implementing the “*comprehensive planning process*” within its jurisdiction to “*effectively prohibit non-stormwater discharges into the storm sewers,*” and to identify and implement the most effective “*controls to reduce the discharge of pollutants to the maximum extent practicable*” in accordance with the performance standards given in the CWA.

Provision E includes the requirements for each of the components that must be included in the Copermittee’s jurisdictional runoff management program document that will be implemented by the Copermittee within its jurisdiction. Implementation of the components of each Copermittee’s jurisdictional runoff management program must incorporate the water quality improvement strategies identified by each Copermittee in the Water Quality Improvement Plans, described pursuant to Provision B.3.b.(1)(a).

More specific and detailed discussions of the requirements of Provision E are provided below.

Provision E.1 (Legal Authority Establishment and Enforcement) requires each Copermitttee to establish and enforce sufficient legal authority to control discharges to the MS4 within its jurisdiction.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermitttee must have sufficient *“legal authority to control discharges to the municipal separate storm sewer system”* and be able to demonstrate that it can *“operate pursuant to legal authority established by statute, ordinance or series of contracts.”* Provision E.1.a describes the minimum legal authorities each Copermitttee must establish for itself within its jurisdiction to control discharges to its MS4. The requirements of Provision E.1.a are consistent with the requirements set forth in 40 CFR 122.26(d)(2)(i)(A)-(F).

The certification statement required from each Copermitttee by Provision E.1.b is included to provide the San Diego Water Board additional documentation that each Copermitttee has established the legal authorities consistent with Provision E.1.a and 40 CFR 122.26(d)(2)(i)(A)-(F), and the Copermitttee can *“operate pursuant to legal authority established by statute, ordinance or series of contracts.”*

Provision E.2 (Illicit Discharge Detection and Elimination) requires each Copermitttee to implement an illicit discharge detection and elimination program to effectively prohibit non-storm water discharges to the MS4 by actively detecting and eliminating illicit discharges and disposal into its MS4. If the San Diego Water Board finds that a Copermitttee is fully implementing the requirements of Provision E.2, then the Copermitttee is deemed in compliance with the effective prohibition of non-storm water discharges to the MS4 required under Provision A.1.b.

Provision E.2 establishes the minimum requirements that each Copermitttee must implement within its jurisdiction to effectively prohibit non-storm water discharges from entering its MS4. The federal CWA requires permits for municipal storm sewer systems to *“effectively prohibit non-storm water discharges into the storm sewers.”* The federal regulations (40CFR122.26(d)(2)(i)(B)) require each Copermitttee to establish the legal authority to prohibit illicit discharges to its MS4s. Under 40 CFR 122.26(d)(2)(iv)(B), each Copermitttee must implement a *“program...to detect and remove...illicit discharges and improper disposal into the storm sewer.”* The federal NPDES regulations, under 40 CFR 122.26(b)(2), define illicit discharges as *“any discharge to a municipal separate storm sewer that is not composed entirely of storm water.”* Thus, non-storm water discharges are not authorized to enter the MS4 and are considered to be illicit discharges, unless authorized by a separate NPDES permit.

The Phase I Final Rule clarifies that non-storm water discharges through an MS4 are not authorized under the CWA (55 FR 47995):

“Today’s rule defines the term “illicit discharge” to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not

authorized under the Clean Water Act. Section 402(p)(3)(B) requires that permits for discharges from municipal separate storm sewers require the municipality to “effectively prohibit” non-storm water discharges from the municipal separate storm sewer...Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit.”

The federal NPDES requirements for the program to address illicit discharges must include “*inspections, to implement and enforce an ordinance, orders, or other similar means to prevent illicit discharges to the MS4.*” The federal NPDES regulations also reference several categories of “*non-storm water discharges or flows [which] shall be addressed where such discharges are identified...as sources of pollutants to waters of the United States.*” The Phase I Final Rule (55 FR 48037) further clarified the requirements of 40 CFR 122.26(d)(2)(iv)(B)(1) as follows:

“EPA is clarifying that section 402(p)(3)(B) of the CWA (which requires permits for municipal separate storm sewers to ‘effectively’ prohibit non-storm water discharges) does not require permits for municipalities to prohibit certain discharges or flows of nonstorm water to waters of the United States through municipal separate storm sewers in all cases.”

In previous iterations of the municipal storm water permits for the San Diego Region, these categories were simply listed and referred to as categories of non-storm water discharges “not prohibited” unless identified as a source of pollutants. The Copermittees have often referred to these categories as “exempt” discharges. In both cases, however, the language is inconsistent with the federal CWA and NPDES regulations. And, the clarification provided in the Phase I Final Rule does not specifically state that such discharges are “not prohibited” or “exempt” or in any way authorized. The federal NPDES regulations do, however, state that specific categories of non-storm water discharges must be “*addressed*” if identified as “*sources of pollutants to waters of the United States.*”

The language of Provision E.2.a has been revised to be fully consistent with the language of the CWA and the requirements of the federal regulations under 40 CFR 122.26(d)(2)(iv)(B)(1). Provision E.2.a requires each Copermittee to address all types of non-storm water discharges into its MS4 as illicit discharges, unless the discharge is authorized by a separate NPDES permit, or identified as a category of non-storm water discharges or flows that must be addressed pursuant to Provisions E.2.a.(1) through E.2.a.(5). Only non-NPDES-permitted non-storm water discharges identified as a category of non-storm water discharges under Provisions E.2.a.(1) through E.2.a.(5) and not identified as a source of pollutants do not have to be addressed as illicit discharges. Categories of non-storm water discharges that meet the requirements of Provisions E.2.a.(1) through E.2.a.(5) do not have to be addressed by the Copermittee as illicit discharges.

Several of the non-storm water categories listed in 40 CFR 122.26(d)(2)(iv)(B)(1) have not been included in Provisions E.2.a.(1) through E.2.a.(5), including: street wash water, landscape irrigation, irrigation water, and lawn watering. Because these are no longer included within the categories listed under Provisions E.2.a.(1) through E.2.a.(5), the Copermittees must prohibit these types of non-storm water discharges from entering the MS4. This is consistent with the clarification of 40 CFR 122.26(d)(2)(iv)(B)(1) in the Phase I Final Rule (55 FR 48037), which states:

“[T]he Director may include permit conditions that either require municipalities to prohibit or otherwise control any of these types of discharges where appropriate.”

Street wash water is a category of non-storm water discharges that was removed when the Third Term Permits were issued. Street wash water is a source of several pollutants (e.g., metals, oil and grease, petroleum hydrocarbons, chlorinated solvents, sediment) which are generated during the street washing process. The removal of this category requires the Copermittees to prohibit this type of non-storm water discharge from entering the MS4.

The landscape irrigation, irrigation water, and lawn watering categories, collectively referred to hereafter as “over-irrigation” discharges, were removed from the list of non-storm water discharge categories in the Fourth Term Orange County and Riverside County Permits. Non-storm water discharges resulting from over-irrigation have been found to be a source of several types of pollutants (e.g., nutrients, bacteria, pesticides, sediment) in receiving waters. The San Diego Water Board and the Copermittees have identified categories of non-storm water discharges associated with over-irrigation as a source of pollutants and conveyance of pollutants to the MS4 and waters of the United States in the following documents:

- **SmartTimer/EdgescapE Evaluation Program (SEEP) Grant Application**

The State Water Board allocated grant funding to the SEEP project grant application submitted in 2006, which targeted irrigation runoff by retrofitting areas of existing development and documenting the conservation and runoff improvements. The basis of this grant project is that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 is a source and conveyance of pollutants. In addition, the grant application indicated that this alteration of natural flows is impacting the beneficial uses of waters of the state and U.S. Results from the study indicate that that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 is a source and conveyance of pollutants. The results of this study can be applied broadly to any area where over-irrigation takes place. The grant application included the following statements:

“Irrigation runoff contributes flow & pollutant loads to creeks and beaches that are 303(d) listed for bacteria indicators.”

“Regional program managers agree that the reduction and/or elimination of irrigation-related urban flows and associated pollutant loads may be key to successful attainment of water quality and beneficial use goals as outlined in the San Diego Basin Plan and Bacteria TMDL over the long term.”

“Elevated dry-weather storm drain flows, composed primarily ... of landscape irrigation water wasted as runoff, carry pollutants that impair recreational use and aquatic habitats all along Southern California’s urbanized coastline. Storm drain systems carry the wasted water, along with landscape derived pollutants such as bacteria, nutrients and pesticides, to local creeks and the ocean. Given the local Mediterranean climate, excessive perennial dry season stream flows are an unnatural hydrologic pattern, causing species shifts in local riparian communities and warm, unseasonal contaminated freshwater plumes in the near-shore marine environment.”

- **2006-2007 Orange County Watershed Action Plan Annual Reports**

The Watershed Action Plan Annual Reports for the 2006-2007 reporting period were submitted by the County of Orange, Orange County Flood Control District and Copermittees within the San Juan Creek, Laguna Coastal Streams, Aliso Creek, and Dana Point Coastal Streams Watersheds. San Juan Creek, Laguna Coastal Streams, Aliso Creek and Dana Point Coastal Streams are all currently 303(d) listed as impaired for indicator bacteria within their watersheds and/or in the Pacific Ocean at the discharge points of their watersheds. The Orange County Copermittees, within their Watershed Action Strategy Table for fecal indicator bacteria included the following:

“Support programs to reduce or eliminate the discharge of anthropogenic dry weather nuisance flow throughout the ... watershed. Dry weather flow is the transport medium for bacteria and other 303(d) constituents of concern.”

Additionally, they state that “conditions in the MS4 contribute to high seasonal bacteria propagation in-pipe during warm weather. Landscape irrigation is a major contributor to dry weather flow, both as surface runoff due to over-irrigation and overspray onto pavements; and as subsurface seepage that finds its way into the MS4.”

- **Fiscal Year 2008 Carlsbad Watershed Urban Runoff Management Program Annual Report**

The Carlsbad Watershed Urban Runoff Management Program Annual Report for Fiscal Year 2008 was submitted by the Carlsbad Watershed Copermittees (Cities of Carlsbad, Encinitas, Escondido, Oceanside, San Marcos, Solana Beach, and Vista, and the County of San Diego). In the Annual Report, the Carlsbad Watershed Copermittees stated the following:

“The Carlsbad Watershed Management Area (WMA) collective watershed strategy identifies bacteria, sediment, and nutrients as high priority water quality pollutants in the Agua Hedionda (904.3 – bacteria and sediment), Buena Vista (904.2 – bacteria), and San Marcos Creek (904.5 – nutrients) Hydrologic Areas. Bacteria, sediment, and nutrients have been identified as potential discharges from over-irrigation.”

- **2007-2008 San Diego Bay Watershed Urban Runoff Management Program Annual Report**

The San Diego Bay Watershed Urban Runoff Management Program 2007-2008 Annual Report was submitted by the San Diego Bay Watershed Copermittees (Cities of Chula Vista, Coronado, Imperial Beach, La Mesa, Lemon Grove, National City, and San Diego, the County of San Diego, the Port of San Diego, and the San Diego County Airport Authority). In Appendix D of the Annual Report, titled “Likely Sources of Pollutants,” the San Diego Bay Watershed Copermittees identified over-irrigation of lawns as a pollutant generating activity from business and/or residential land uses for bacteria, pesticides, and sediment.

- **Copermittee Public Education Materials**

The Orange County Public Works *Tips for Landscape & Gardening* public education brochure states: *“Fertilizers, pesticides and other chemicals that are left on yards or driveways can be blown or washed into storm drains that flow to the ocean. Overwatering lawns can also send materials into storm drains.”*

The Riverside County Flood Control and Water Conservation District *Landscape and Garden* public education brochure states: *“Soil, yard wastes, over-watering and garden chemicals become part of the urban runoff mix that winds its way through streets, gutters and storm drains before entering lakes, rivers, streams, etc. Urban runoff pollution contaminates water and harms aquatic life!”*

- **Los Peñasquitos Lagoon Sedimentation/Siltation TMDL Technical Report**

The Los Peñasquitos Lagoon Sedimentation/Siltation TMDL technical report was prepared for the City of San Diego and USEPA in October 2010. The technical report was included as a technical supporting document attached to the Sediment TMDL for Los Peñasquitos Lagoon staff report prepared by the San Diego Water Board, dated June 13, 2012. Under the Source Assessment section, the technical report states the following:

“Dry weather loading is dominated by nuisance flows from urban land use activities such as car washing, sidewalk washing, and lawn over-irrigation, which pick up and transport sediment into receiving waters.”

These documents confirm that non-storm water discharges associated with over-irrigation are a source of pollutants and should be addressed as illicit discharges to the MS4. Prohibiting non-storm water discharges associated with over-irrigation, however, is not a new requirement for the Copermittees because it is also consistent with and required by the Water Conservation in Landscaping Act (AB 1881, Laird).

The Water Conservation in Landscaping Act required the Department of Water Resources (DWR) to prepare a Model Water Efficient Landscape Ordinance for use by local agencies (e.g. the Copermittees). All local agencies were required to adopt a water efficient landscape ordinance by January 1, 2010. Local agencies could adopt the Water Efficient Landscape Ordinance developed by DWR, or an ordinance considered at least as effective as the Model Ordinance. The Water Efficient Landscape Ordinance includes a requirement that local agencies prohibit runoff from irrigation (§ 493.2):

“Local agencies shall prevent water waste resulting from inefficient landscape irrigation by prohibiting runoff from leaving the target landscape [emphasis added] due to low head drainage, overspray, or other similar conditions where water flows onto adjacent property, non-irrigated areas, walks, roadways, parking lots, or structures. Penalties for violation of these prohibitions shall be established locally.”

Furthermore, non-storm water discharges from over-irrigation not only transport and discharge pollutants to receiving waters, but are also a likely source of the dry weather flows causing changes to habitat within and along the receiving water bodies. Examples of habitat changes from the dry weather flows include perennialization of ephemeral streams, and conversion of saltwater and brackish water marsh habitats to freshwater marsh habitats (e.g. Los Peñasquitos Lagoon). Both of these examples have resulted in the promotion of invasive species in several areas of the San Diego Region.

The removal of the over-irrigation discharges categories does not require the Copermittees to strictly prohibit lawn and landscape irrigation, but does require the prohibition of excessive irrigation water that results in non-storm water discharges to the MS4. Non-storm water discharges to the MS4 from over-irrigation must be addressed as illicit discharges by the Copermittees pursuant to the requirements of Provision E.2.

The remaining non-storm water categories listed in 40 CFR 122.26(d)(2)(iv)(B)(1) are listed under Provisions E.2.a.(1) through E.2.a.(5) and generally fall into four categories: (1) non-storm water discharges subject to existing San Diego Water Board waste discharge requirements and NPDES permits; (2) non-storm water discharges generally not expected to be a source of pollutants to receiving waters; (3) non-storm water discharges likely to contain pollutants requiring some form of control to address

the pollutants prior to discharging to the MS4; and (4) non-storm water discharges or flows associated with firefighting.

Provisions E.2.a.(1) and E.2.a.(2) include several categories of non-storm water discharges listed in 40 CFR 122.26(d)(2)(iv)(B)(1) for which the San Diego Water Board already has developed general waste discharge requirements and NPDES permits to address the discharges. The Copermittees are only required to address these types of non-storm water discharges as illicit discharges if the Copermittees or the San Diego Water Board identifies these non-storm water discharges not having coverage under the applicable NPDES permit.

Provision E.2.a.(3) includes several categories of non-storm water discharges listed in 40 CFR 122.26(d)(2)(iv)(B)(1) which are generally not expected to be a source of pollutants to receiving waters, many of which originate from what are typically natural, uncontrollable sources. The Copermittees are only required to address these types of non-storm water discharges as illicit discharges if the Copermittees or the San Diego Water Board identifies these non-storm water discharges as a source of pollutants to receiving waters. Because many of these sources are generally uncontrollable, enforcing a prohibition may not be a possibility for the Copermittees. The Copermittees would be able to address these non-storm water discharges by preventing these non-storm water discharges from entering the MS4. This could potentially be achieved by sealing their MS4 structures so the discharges cannot enter the MS4.

Provision E.2.a.(4) includes several categories of non-storm water discharges listed in 40 CFR 122.26(d)(2)(iv)(B)(1) that are likely to contain pollutants requiring some form of control to address the pollutants prior to discharging to the MS4. At this time, an outright prohibition of these types of non-storm water discharges does not yet appear to be warranted. Thus, Provision E.2.a.(4) includes several requirements for the Copermittees to control the pollutants from these types of non-storm water discharges. This is consistent with the clarification of the federal regulations in the Phase I Final Rule (55 FR 48037), which states the San Diego Water Board has the authority to require the Copermittees to “*control any of these types of discharges where appropriate.*”

Unlike non-storm water discharges from over-irrigation, these types of non-storm water discharges are not expected to occur in close proximity to each other or very frequently. Provided these types of non-storm water discharges are controlled as required in Provision E.2.a.(4), the Copermittees would only be required to address these types of non-storm water discharges as illicit discharges if the Copermittee or the San Diego Water Board identifies these non-storm water discharges as a source of pollutants to receiving waters.

Provision E.2.a.(5) includes specific requirements for fire fighting discharges and flows. The requirements for non-storm water discharges and flows associated with fire

fighting have been separated into requirements for: a) non-emergency fire fighting discharges and flows, and b) emergency fire fighting discharges and flows.

The San Diego Water Board has found that discharges from building fire suppression system maintenance (e.g. fire sprinklers) contain waste and potentially a significant source of pollutants to receiving waters. As such, the San Diego Water Board is requiring these discharges be addressed as illicit discharges by the Copermittees. Thus, the discharges to the MS4 are to be prohibited via ordinance, order or similar means. For other non-emergency firefighting discharges and flows (i.e. flows from controlled or practice blazes, firefighting training, and maintenance activities not associated with building fire suppression systems), the Copermittees are required to develop and implement a program to address pollutants in these non-storm water discharges and flows. This is consistent with the clarification of the federal regulations in the Phase I Final Rule (55 FR 48037), which states the San Diego Water Board has the authority to require the Copermittees to “*control any of these types of discharges where appropriate.*”

For emergency firefighting discharges and flows, the Phase I Final Rule (55 FR 48037) has clarified the requirements of 40 CFR 122.26(d)(2)(iv)(B)(1) pertaining to emergency firefighting flows and discharges, which states:

“In the case of firefighting it is not the intention of these rules to prohibit in any circumstances the protection of life and public or private property through the use of water or other fire retardants that flow into separate storm sewers.”

Thus, the requirements have been made to be consistent with the guidance provided by the Phase I Final Rule. The Order recommends that the Copermittees develop and encourage implementation of BMPs to reduce or eliminate the discharge of pollutants from emergency firefighting flows to the MS4s and receiving waters. The Order does not include any requirements that should be interpreted as requiring the implementation of BMPs for emergency firefighting flows to the MS4s and receiving waters.

The Copermittees are expected to review the dry weather MS4 outfall discharge monitoring data they collect to determine if and when there are non-storm water discharges to or from their MS4s that are a source of pollutants to receiving waters. If the Copermittees identify one of the types of non-storm water discharges listed in Provisions E.2.a.(1) through E.2.a.(4) as a source of pollutants to receiving waters based on the review and evaluation of monitoring data, Provision E.2.a.(6) requires the Copermittees to prohibit those categories of discharges from entering the MS4 through ordinance, order or similar means. In addition, Provision E.2.a.(6) clarifies that the San Diego Water Board may identify categories of non-storm water discharges or flows listed under Provisions E.2.a.(1) through E.2.a.(4) that must be prohibited.

Provision E.2.a.(6) also provides the Copermittees an option to propose controls to be implemented for the category of non-storm water discharges as part of the Water Quality Improvement Plan instead of prohibiting the category of non-storm water discharges. If the Water Quality Improvement Plan is accepted by the San Diego Water Board with the proposed controls, the Copermittees will not be required to prohibit the category of non-storm water discharges to their MS4s as long as the controls are implemented. This is consistent with the clarification of 40 CFR 122.26(d)(2)(iv)(B)(1) in the Phase I Final Rule (55 FR 48037), which states the San Diego Water Board may “*require municipalities to prohibit or otherwise control any of these types of discharges where appropriate.*”

Finally, Provision E.2.a.(7) has been included in the requirements for non-storm water discharges to clarify that any non-storm water discharges to the Copermittee’s MS4, even those identified pursuant to Provisions E.2.a.(1) through E.2.a.(4), must be reduced or eliminated, unless a non-storm water discharge is identified as a discharge authorized by a separate NPDES permit. Provision E.2.a.(7) is consistent with the requirements of CWA section 402(p)(3)(B)(ii) and 40 CFR 122.26(d)(1)(v)(B), as clarified in the Phase I Final Rule (55 FR 47995) that “[u]ltimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit.” However, the reduction or elimination of those non-storm water discharges are expected to be achieved as feasible, in accordance with the priorities in the Water Quality Improvement Plan and when the resources are available to the Copermittee.

Consistent with 40 CFR 122.26(d)(2)(iv)(B) and 122.26(d)(2)(iv)(B)(1), each Copermittee must implement a “*program...to prevent illicit discharges to the municipal storm sewer system*” and “*detect...illicit discharges and improper disposal into the storm sewer.*” Provision E.2.b requires each Copermittee to implement measures to prevent and detect illicit discharges and connections to its MS4 as part of its illicit discharge detection and elimination program.

As part of the program to prevent and detect illicit discharges to the MS4, 40 CFR 122.26(d)(2)(iv)(B)(2) requires “*procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens.*” As part of the procedures, each Copermittee is required to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction. Having knowledge about where inlets, access points, connections with other MS4s, and outfalls are located is necessary for each Copermittee to track, identify, and eliminate illicit discharges and connections. Thus, Provision E.2.b.(1) of the Order specifies that the map must include the segments of the storm sewer system owned, operated, and maintained by the Copermittee, and include locations of all known inlets, connections with other MS4s, and outfalls to the Copermittee’s MS4. The remaining requirements of Provision E.2.b are consistent with the requirements of 40 CFR 122.26(d)(2)(iv)(B)(3)-(7) related to implementing measures to prevent and detect illicit discharges and connections to the MS4.

Provision E.2.c requires each Copermittee to conduct field screening and monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect non-storm water and illicit discharges and connections to the MS4. Field screening is a required element of the program to detect and eliminate illicit discharges and connections to the MS4, pursuant to 40 CFR 122.26(d)(2)(iv)(B)(2). The field screening requirement will be implemented through the dry weather MS4 outfall discharge monitoring required under Provisions D.2.a.(2) and D.2.b.(1).

Provision E.2.d specifies the measures each Copermittee must implement to eliminate illicit discharges and connections to its MS4. Elimination of illicit discharges and connections to the MS4 is consistent with the requirement of 40 CFR 122.26(d)(2)(iv)(B) *“to detect and remove [emphasis added]...illicit discharges and improper disposal into the storm sewer”* and will achieve the CWA requirement for MS4 permits to *“effectively prohibit non-storm water discharges into the storm sewers.”*

Generally, each Copermittee is responsible for prioritizing its efforts to eliminate non-storm water and illicit discharges or connections to its MS4 based on field screening and monitoring data, NALs, illicit discharge investigation records, and the known or suspected sources. Sources of non-storm water and illicit discharges or connections must be eliminated by enforcing the legal authority established by each Copermittee pursuant to Provision E.1.

Provision E.3 (Development Planning) requires each Copermittee to use its land use and planning authority to implement a development planning program to control and reduce the discharge of pollutants in storm water from new development and significant redevelopment to the MEP. Proper implementation of the development planning program will also contribute toward effectively prohibiting non-storm water discharges from development projects to the MS4.

Pursuant to 40 CFR 122.26(d)(2)(iv), each Copermittee is required to implement a *“management program...to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and other such provisions where applicable.”* As part of the management program, 40 CFR 122.26(d)(2)(iv)(A)(2) requires *“planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal storm sewers which receive discharges from areas of new development and significant redevelopment.”*

Land development generally alters the natural conditions of the land by removing vegetative cover, compacting soil, and/or placement of concrete, asphalt, or other impervious surfaces. These impervious surfaces concentrate urban pollutants (such as pesticides, petroleum hydrocarbons, heavy metals, and pathogens) that are otherwise not found in high concentrations in the natural environment. Pollutants that

accumulate on impervious surfaces are not easily biodegraded nor subject to natural treatment processes.

Impervious surfaces greatly affect the natural hydrology of the land because they do not allow natural infiltration and treatment of storm water runoff to take place. Instead, storm water runoff from impervious surfaces is typically directed through pipes, curbs, gutters, and other hardscape into receiving waters, with little treatment, at significantly increased volumes and accelerated flow rates over what would occur naturally. The increased pollutant loads, storm water volume, discharge rates and velocities, and discharge durations from the MS4 adversely impact stream habitat by causing accelerated, unnatural erosion and scouring within creek bed and banks. Placement of impervious surfaces also encapsulates “good” sediment (such as sand, gravel, rocks and cobbles) that would normally replenish creek beds and banks to help stabilize them. Collectively, these changes to natural hydrologic processes are termed hydrograph modification, or hydromodification.

Hydromodification, which is caused by both altered storm water flow and altered sediment flow regimes, is largely responsible for degradation of creeks, streams, and associated habitats in the San Diego Region. In an ongoing study by the Stormwater Monitoring Coalition to assess the health of streams throughout Southern California, researchers found that three of the four highest risk stressors to creeks (percent sands and fines present, channel alteration, and riparian disturbance) were related to physical habitat.²⁹ Researchers studying flood frequencies in Riverside County have found that increases in watershed imperviousness of only 9-22 percent can result in increases in peak flow rates for the two-year storm event of up to 100 percent.³⁰ Such changes in runoff have significant impacts on channel morphology.

In addition, a technical report issued by the Southern California Coastal Water Research Project (SCCWRP) stated that “[r]ecent studies indicate that California’s intermittent and ephemeral streams are more susceptible to the effects of hydromodification than streams from other parts of the United States. Physical degradation of stream channels in the central and eastern United States can initially be detected when watershed impervious cover approaches 10 percent, although biological effects (which may be more difficult to detect) may occur at lower levels. In contrast, initial response of streams in the semi-arid portions of California appears to occur between 3 and 5 percent impervious cover.”³¹ These studies highlight the extent to which impacts originating from impervious surfaces created by land development are responsible for the degradation of creek and stream habitat.

²⁹ Assessing the Health of Southern California Streams, Stormwater Monitoring Coalition, Fact Sheet

³⁰ Schueler and Holland, 2000. Storm Water Strategies for Arid and Semi-Arid Watersheds (Article 66). The Practice of Watershed Protection.

³¹ Stein, E. and Zaleski, S., 2005. Technical Report 475, Managing Runoff to Protect Natural Streams: The Latest Development on Investigation and Management of Hydromodification in California. December 30, 2005.

This is consistent with what USEPA has noted, that “[m]ost stormwater runoff is the result of the man-made hydrologic modifications that normally accompany development. The addition of impervious surfaces, soil compaction, and tree and vegetation removal result in alterations to the movement of water through the environment. As interception, evapotranspiration, and infiltration are reduced and precipitation is converted to overland flow, these modifications affect not only the characteristics of the developed site but also the watershed in which the development is located. Stormwater has been identified as one of the leading sources of pollution for all waterbody types in the United States. Furthermore, the impacts of stormwater pollution are not static; they usually increase with more development and urbanization.”³²

Reducing the impact from the increased pollutant loads and flows generated by impervious surfaces within a watershed is essential to protecting and restoring the integrity of the receiving waters. Provision E.3 includes the minimum “*management practices, control techniques and system, design and engineering methods, and other such provisions where applicable*” to be included in the “*planning procedures...to reduce the discharge of pollutants...from areas of new development and significant redevelopment.*” The requirements of Provision E.3 will 1) minimize the generation and discharge of pollutants in storm water from the MS4, and 2) minimize the potential of storm water discharges from the MS4 from causing altered flow regimes and excessive downstream erosion in receiving waters.

The requirements of Provision E.3.a include the minimum “*management practices, control techniques and system, design and engineering methods, and other such provisions where applicable*” to be included in the “*planning procedures...to reduce the discharge of pollutants...from areas of new development and significant redevelopment*” applicable to all development projects, regardless of size or purpose of development. In general, all development projects must implement onsite BMPs to remove pollutants from runoff prior to its discharge to any receiving waters, as close to the pollutant generating source as possible, and structural BMPs must not be constructed within waters of the U.S.

Furthermore, the onsite BMPs must be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors (e.g. mosquitos, rodents, and flies). If not properly designed or maintained, certain BMPs implemented or required by municipalities may create a habitat for vectors. Monitoring studies conducted by the California Department of Public Health (CDPH) have documented that mosquitoes opportunistically breed in structural storm water BMPs, particularly those that hold standing water for over 96 hours. Certain site design features that hold standing water may similarly produce mosquitoes.

³² USEPA, 2007. Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices, December 2007.

Structural BMPs and site design features should incorporate design, construction, and maintenance principles to promote drainage within 96 hours to minimize standing water available to mosquitoes. Nuisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities and local vector control agencies and the CDPH during the development and implementation of storm water runoff management programs. The CDPH also has issued guidance for BMP implementation that will minimize potential nuisances and public health impacts resulting from vector breeding.³³

All development projects are required to implement source control BMPs that will minimize the generation of pollutants. Additionally, each development project must implement, where applicable and feasible, low impact development (LID) BMPs to mimic the natural hydrology of the site and retain and/or treat pollutants in storm water runoff prior to discharging to and from the MS4.

The LID Center defines LID as “a comprehensive land planning and engineering design approach with a goal of maintaining and enhancing the pre-development hydrologic regime of urban and developing watersheds.”³⁴ LID designs seek to control storm water at the source, using small-scale integrated site design and management practices to mimic the natural hydrology of a site, retain storm water runoff by minimizing soil compaction and impervious surfaces, and disconnect storm water runoff from conveyances to the storm drain system.

LID BMPs may utilize interception, storage, evaporation, evapotranspiration, infiltration, and filtration processes to retain and/or treat pollutants in storm water before it is discharged from a site. Because of these numerous options, the San Diego Water Board expects that every development project will be able to implement some form of LID BMPs. Examples of LID BMPs include using permeable pavements, rain gardens, rain barrels, grassy swales, soil amendments, and native plants.

Provision E.3.a also includes requirements for all development projects to, where feasible, landscape with native and/or low water use plants to minimize the discharge of non-storm water discharges associated with excessive irrigation, as well as harvest (i.e., storage) and use precipitation to promote the concept of utilizing storm water as a resource.

While all development projects are subject to the requirements of Provision E.3.a, Provision E.3.b identifies Priority Development Projects that exceed given size thresholds and/or fit under specific use categories. Priority Development Projects are required to incorporate specific performance criteria for structural BMPs into the

³³ California Department of Public Health, 2012. Best Management Practices for Mosquito Control in California. (<http://www.cdph.ca.gov/HealthInfo/discond/Documents/BMPforMosquitoControl07-12.pdf>)

³⁴ www.lowimpactdevelopment.org

project plan to reduce the generation of pollutants, and address potential impacts from hydromodification.

The Priority Development Project categories are based on the requirements of the Fourth Term Permits for Orange County and Riverside County (Order Nos. R9-2009-0002 and R9-2010-0016, respectively), and do not differ significantly from the Fourth Term Permit for San Diego County. Furthermore, the Priority Development Project categories are consistent with Santa Ana Water Board Order Nos. R8-2009-0030 and R8-2010-0033 (Orange County and Riverside County MS4 Permits, respectively), and Los Angeles Water Board Order No. R4-2010-0108 (Ventura County MS4 Permit).

Because of the impact of relatively small increases in watershed impervious surfaces to receiving waters, Provision E.3.b.(1)(c)(iv) has been updated to include large driveways that are 5,000 square feet or more. The San Diego Water Board finds that large driveways can exacerbate altered flow regimes if not properly controlled.

Provision E.3.b.(3) describes projects that are exempt from Priority Development Project status. These include new or retrofit paved sidewalks, bicycle lanes, or trails that are designed and constructed to direct runoff to vegetated areas or be hydraulically disconnected from paved areas. The exemptions have been provided to encourage these types of projects because they provide multiple environmental benefits, such as promoting walking rather than driving, which will in turn improve air quality. Additionally, retrofitting of existing alleys, streets, or roads are exempt from Priority Development Project status if they are constructed using USEPA Green Streets guidance.³⁵ By doing so, retrofitting of these types of projects is encouraged. The San Diego Water Board recognizes that there are spatial constraints associated with these projects, and implementation of structural BMPs are not always feasible.

For development projects identified as Priority Development Projects, the requirements of Provision E.3.c are the minimum "*management practices, control techniques and system, design and engineering methods, and other such provisions where applicable*" to be included in the "*planning procedures...to reduce the discharge of pollutants...from areas of new development and significant redevelopment.*" Provisions E.3.c.(1)-(3) describe the performance criteria for the structural BMPs that must be implemented for each Priority Development Project defined by Provision E.3.b.

Provision E.3.c.(1) describes the storm water pollutant control BMP requirements that must be implemented by all Priority Development Projects. The purpose of Provision E.3.c.(1) is to reduce pollutants in storm water runoff to the MEP from Priority Development Projects before it is discharged to the MS4. Of all the available treatment processes available, retention of storm water, and therefore capture of the

³⁵ "Managing Wet Weather with Green Infrastructure – Municipal Handbook: Green Streets" (USEPA, 2008).

pollutants in the storm water, will achieve 100 percent pollutant removal efficiency for the volume of storm water retained. No other method of treatment can achieve 100 percent pollutant removal efficiency. Thus, retention of as much storm water onsite is the most effective way to reduce pollutants in storm water discharges to, and consequently from the MS4, and controls pollutants in storm water discharges from a site to the MEP.

Under Provision E.3.c.(1)(a), retention of the pollutants in the runoff produced from the 85th percentile storm event (“design capture volume”) is the design standard to which Priority Development Projects must comply. Since the 85th percentile storm event has previously been used as the numeric design standard for treatment control BMPs, this same size storm event is used as the numeric design standard for storm water retention. This is the MEP standard recognized by the San Diego Water Board and is consistent with the Fourth Term Permits for Orange County and Riverside County (Order Nos. R9-2009-0002 and R9-2010-0016, respectively), as well as Santa Ana Water Board Order Nos. R8-2009-0030 and R8-2010-0033 (Orange County and Riverside County MS4 Permits, respectively), Los Angeles Water Board Order No. R4-2010-0108 (Ventura County MS4 Permit), and Los Angeles Water Board Order No. R4-2012-0175 (Los Angeles County MS4 Permit).

The 85th percentile storm event is the event that has a precipitation total greater than or equal to 85 percent of all storm events over a given period of record in a specific area or location. For example, to determine what the 85th percentile storm event is in a specific location, all 24 hour storms that have recorded values over a 30 year period would be tabulated and a 85th percentile storm would be determined from this record (i.e. 15 percent of the storms would be greater than the number determined to be the 85th percentile storm). Most jurisdictions in the San Diego Region have already developed isopluvial maps that can provide this type of information. The 85th percentile storm might be determined to be a number such as 1.0 inch, and this would be multiplied by the total area of the project footprint producing runoff to calculate the design capture volume. The Priority Development Project designer would then select a system of BMPs that would retain (i.e. intercept, store, infiltrate, evaporate, or evapotranspire) the pollutants contained in the design capture volume onsite.

Retention BMPs are necessary to capture and retain pollutants generated from a Priority Development Project. In a recent study performed by SCCWRP in the Los Angeles Region, they found *“that the magnitude of constituent load associated with storm water runoff depends, at least in part, on the amount of time available for pollutant build-up on land surfaces. The extended dry period that typically occurs in arid climates such as southern California maximizes the time for constituents to build-up on land surfaces, resulting in proportionally higher concentrations and loads during*

*initial storms of the season.*³⁶ This implies that the “first flush” of a rainy season and the first storm events after long antecedent dry periods tend to have the highest pollutant loads. Capturing and retaining the pollutant loads of the “first flush” of a rainy season and the first storm events after long antecedent dry periods will reduce a significant portion of the pollutants in storm water discharged to and from the MS4.

The San Diego Water Board, however, acknowledges that in some situations retention of the full design capture volume onsite may not be technically feasible. In this event, the Copermittee may allow the Priority Development Project to use biofiltration BMPs to treat 1.5 times the design capture volume not reliably retained onsite, or biofiltration BMPs with a flow-thru design that has a total volume, including pore spaces and pre-filter detention volume, sized to hold at least 0.75 times the portion of the design capture volume not reliably retained onsite.

The 1.5 multiplier is based on the finding in the Ventura County Technical Guidance Manual that biofiltration of 1.5 times the design capture volume not retained onsite will provide approximately the same pollutant removal as retention of the design capture volume on an annual basis.³⁷ This standard is consistent with the Los Angeles Water Board’s Los Angeles County and Ventura County municipal storm water permits (Order Nos. R4-2012-0175 and R4-2010-0108, respectively). The flow-thru design of 0.75 times the portion of the design capture volume not reliably retained onsite is consistent with the San Diego Water Board’s Fourth Term Permits for Orange County and Riverside County (Order Nos. R9-2009-0002 and R9-2010-0016, respectively). In either case, the biofiltration BMPs must be designed with an appropriate hydraulic loading rate to maximize storm water retention and pollutant removal, as well as to prevent erosion, scour, and channeling within the BMP. Each Copermittee is required to update its BMP Design Manual to provide guidance for hydraulic loading rates and other biofiltration design criteria necessary to maximize storm water retention and pollutant removal.

The San Diego Water Board further recognizes that, in addition to not being technically feasible, retention of the full design capture storm onsite may be cost prohibitive, or may not provide as much water quality benefit to the Watershed Management Area as would implementing BMPs elsewhere in the watershed. Thus, Provision E.3.c.(1)(b) allows for the use of a combination of onsite retention BMPs, and the implementation of an Alternative Compliance Program described in Provision E.3.c.(3). Provision E.3.c.(3) is discussed in more detail below.

If the full design capture volume is not retained onsite either because biofiltration is not technically feasible, or a Copermittee grants a Priority Development Project permission

³⁶ Stein, E.D., Tiefenthaler, L.L., and Schiff, K.C., 2007. Technical Report 510, Sources, Patterns and Mechanisms of Storm Water Pollutant Loading from Watershed and Land Uses of the Greater Los Angeles Area, California, USA. March 20, 2007.

³⁷ Ventura Countywide Stormwater Management Program. 2011. Ventura Technical Guidance Manual, Manual Update, 2011.

to utilize the Alternative Compliance Program, then the pollutants in the portion of the design capture volume that are not reliably retained onsite must still be reduced to the MEP. Thus, flow-thru treatment control BMPs are required to be implemented on Priority Development Projects in addition to the retention BMPs. The requirements of Provisions E.3.c.(1)(a)(ii)[a]-[c] include the performance standards for flow-thru treatment control BMPs, consistent with the Fourth Term Permits in the San Diego Region.

Whereas the purpose of the requirements under Provision E.3.c.(1) is to reduce pollutants in storm water runoff to the MEP, the purpose of the requirements under Provision E.3.c.(2) is to maintain or restore more natural hydrologic flow regimes to prevent accelerated, unnatural erosion in downstream receiving waters, also to the MEP standard. Provision E.3.c.(2) describes hydromodification management BMP requirements that must be implemented by all Priority Development Projects.

The performance criteria for the implementation of hydromodification management BMPs on Priority Development Projects are consistent with the requirements in the Fourth Term Permits for Orange and Riverside Counties (Order Nos. R9-2009-0002 and R9-2010-0016, respectively). Modifications to the Orange County and Riverside County Hydromodification Management Plans (HMPs) will likely be minor, or may not be necessary. The HMP for San Diego County will likely require some minor modifications to incorporate the requirements of Provision E.3.c.(2) and become consistent with the Orange County and Riverside County HMPs. The San Diego Water Board does not, however, expect that it will be necessary for the San Diego County Copermittees to develop a new approach or significantly re-write the San Diego County HMP. This is because the premise of the hydromodification management BMP requirements, which are to control storm water runoff conditions (flow rates and durations) for Copermittee-defined range of flows, is unchanged from all Fourth Term Permits in the San Diego Region.

Provision E.3.c.(2)(a) requires that post-project runoff conditions mimic the *pre-development* runoff conditions, and not the *pre-project* runoff conditions. Fundamentally, the San Diego Water Board believes that using a hydrology baseline that approximates that of an undeveloped, natural watershed is the only way to facilitate the return of more natural hydrological conditions to already built-out watersheds, and ultimately improved stream health. On the other hand, using the *pre-project* hydrology as a baseline for redevelopment projects results in propagating the unnatural hydrology of urbanized areas. Propagating the urbanized flow regime does not support conditions for restoring degraded or channelized stream segments, and would forever sentence such streams to the degraded state. Furthermore, reducing the volume of storm water runoff associated with the urbanized flow regime will also result in reducing the discharge of pollutants into receiving waters, since storm water runoff from impervious surfaces contains untreated pollutants.

The San Diego Water Board understands that approximating the pre-development runoff condition associated with a redevelopment site is not necessarily straightforward because factors such as natural grade and native vegetation for the site cannot be precisely known. Therefore, the San Diego Water Board does not expect project designers to estimate historical conditions associated with redevelopment sites. Rather, the San Diego Water Board expects project designers and the Copermittees to approximate pre-development runoff conditions using the parameters of a *pervious* area rather than an *impervious* area. This means that for redevelopment sites, approximating pre-development runoff conditions equates to using existing onsite grade and assuming the infiltration characteristics of the underlying soil. A redevelopment Priority Development Project must not use runoff coefficients of concrete or asphalt to estimate pre-development runoff conditions. Rather, redevelopment projects must use available information pertaining to existing underlying soil type (such as soil maps published by the National Resource Conservation Service), onsite existing grade, and any other readily available pertinent information to estimate pre-development runoff conditions.

The San Diego Water Board understands, indeed asserts, that the pre-development hydrology of an area in question can only be roughly estimated and cannot be precisely known. However, using the hydrology of a natural condition, even if not precisely known, will provide significant benefit to receiving waters over using the hydrology associated with impervious (developed) surfaces. Therefore in order to achieve the goals of the Clean Water Act, which are to “*restore and maintain the chemical, physical, and biological integrity of the nation’s waters* [emphasis added],” the most appropriate standard to use for hydromodification management is the standard associated with the pre-development condition.

Provision E.3.c.(2)(b) requires Priority Development Projects to avoid known critical sediment yield areas or implement measures that would allow coarse sediment to be discharged to receiving waters, such that the natural sediment supply is unaffected by the project. This is necessary because the availability of coarse sediment supply is as much an issue for causing erosive conditions to receiving streams as are accelerated flows.

The San Diego Water Board recognizes that in some situations implementing the hydromodification management BMP requirements for flow control fully onsite may not be technically feasible, may be cost prohibitive, or may not provide any overall water quality benefits to the Watershed Management Area. Thus, Provision E.3.c.(2)(c) allows for the use of a combination of onsite hydromodification management BMPs for flow control and alternative compliance options described in Provision E.3.c.(3).

Provision E.3.c.(3) allows for alternative compliance in instances where the Copermittee determines that offsite measures will have a greater overall water quality benefit for the Watershed Management Area than if the Priority Development Project were to implement structural BMPs onsite. Consequently, watershed-specific

structural BMP requirements are present in this Order in the form of allowable compliance offsite. The Alternative Compliance Program to Onsite Structural BMP Implementation Provision is intended to integrate with the Copermittees' planning efforts in the Water Quality Improvement Plans.

The Alternative Compliance Program is an option for Priority Development Projects where the governing Copermittee has participated in the development of a Watershed Management Area Analysis as part of the Water Quality Improvement Plan (described in Provision B.3.b.(4)). Such an approach is consistent with the latest findings in hydromodification management by the scientific community. In a Technical Report entitled *Hydromodification Assessment and Management in California*,³⁸ the report states:

“An effective [hydromodification] management program will likely include combinations of on-site measures (e.g., low-impact development techniques, flow-control basins), in-stream measures (e.g., stream habitat restoration), floodplain and riparian zone actions, and off-site measures. Off-site measures may include compensatory mitigation measures at upstream locations that are designed to help restore and manage flow and sediment yield in the watershed.”

Consistent with the ideas brought forth in the report, in the Watershed Management Area Analysis of Provision B.3.b.(4), which is optional, the Copermittees will develop watershed maps that include as much detail about factors that affect the hydrology of the watershed as is available. Such factors included identification of areas suitable for infiltration, coarse sediment supply areas, and locating stream channel structures and constrictions. Once these factors are mapped and studied, the Copermittees can identify areas in the watershed where candidate projects may be implemented that are expected to improve water quality in the watershed by providing more opportunity for infiltration, slowing down storm water flows, or attenuation of pollutants naturally via healthy stream habitat. These candidate projects may be in the form of retrofitting existing development, rehabilitating degraded stream segments, identifying regional BMPs, purchasing land to preserve valuable floodplain functions, and any other project(s) that the Copermittees identify.

Under the Alternative Compliance Program, Priority Development Projects may be allowed to fund, partially fund, or implement a candidate project, in lieu of implementing structural BMPs onsite, if they enter into a voluntary agreement with the governing Copermittee permitting this arrangement. Project proponents may also propose an alternative project not previously identified by the Copermittees. In either case, whether a project proponent implements a candidate project identified by the Copermittees or a separate alternative compliance project, the governing Copermittee must determine that implementation of the project will have a greater overall water

³⁸ 2012. ED Stein, F Federico, DB Booth, BP Bledsoe, C Bowles, Z Rubin, GM Kondolf, A Sengupta. Technical Report 667. Southern California Coastal Water Research Project. Costa Mesa, CA.

quality benefit for the Watershed Management Area than fully implementing structural BMPs onsite. Determination of greater overall water quality benefits associated with alternative compliance projects would be accomplished by utilizing Water Quality Equivalency calculations developed pursuant to Provision E.3.c.(3)(a). Water Quality Equivalency calculations are necessary to establish a regional and technical basis for determining water quality benefits associated with alternative compliance projects, which can be consistently used by all Copermittees in the San Diego Region. Finally, if alternative compliance involves funding or implementing a project that is outside the jurisdiction of the governing Copermittee, then that Copermittee may enter into an inter-agency agreement with the appropriate jurisdiction.

Finally, Provision E.3.c.(2)(d) allows Priority Development Projects to be exempt from the hydromodification management BMP requirements if there is no threat of erosion to downstream receiving waters (i.e. the receiving stream is concrete lined from the point of discharge all the way to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean). If the Copermittees believe that more exemptions are warranted, then they must perform the optional Watershed Management Area Analysis of Provision B.3.b.(4). Additional exemptions other than those specified in this Order may be established on a watershed basis, provided the Copermittees perform the analysis, provide supporting rationale for the exemptions, and complete the Water Quality Improvement Plan approval process pursuant to Provision F.1.

To facilitate the transition to this Order from the Fourth Term Permits for Orange and Riverside County Copermittees, Provision E.3.c.(2)(e) allows two additional temporary exemptions from hydromodification management BMP implementation. The first temporary exemption allows relief from hydromodification management BMP implementation for Priority Development Projects discharging directly to an engineered channel conveyance system with a capacity to convey peak flows generated by the 10-year storm event all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean. Similar to the exemption allowed for concrete-lined channels, this exemption is premised on the concept that there is little threat of erosion to these types of engineered channel systems.

The second temporary exemption allows relief from hydromodification management BMP implementation for Priority Development Projects discharging directly to large river reaches with drainage areas larger than 100 square miles and a 100-year flow capacity in excess of 20,000 cubic feet per second. If this exemption is claimed, then properly sized energy dissipation is required at all discharge points associated with the Priority Development Project. This exemption is premised on the concept that large river reaches can essentially assimilate the accelerated flow rates associated with individual Priority Development Projects because they are inconsequential compared

to the flow rate in the large river reach. Both of these exemptions are included in the Hydromodification Management Plan for San Diego County³⁹.

These temporary exemptions are allowed as a means to facilitate Orange and Riverside County Copermittees' transition to this Order from the Fourth Term Permits and are not meant to reside as permanent exemptions without additional rigorous technical analyses specific to each County. Therefore, these exemptions will no longer apply once the Copermittees' land development programs are fully updated to reflect the requirements of this Order, i.e., upon implementation of the BMP Design Manual pursuant to Provision F.2.b. If the Copermittees believe that these or other exemptions are warranted in the context of water quality improvement and stream restoration opportunities, then the Copermittees must perform the optional Watershed Management Area Analysis of Provision B.3.b.(4) and provide supporting rationale for the exemptions. The San Diego County Copermittees are also required to perform the optional Watershed Management Area Analysis to provide supporting rationale to justify use of these and other exemptions. Updated BMP Design Manuals including rationale to justify use of exemptions will be reviewed by the San Diego Water Board pursuant to Provision F.2.b.

Provisions E.3.c.(4) and E.3.c.(5) were included under the BMP requirements applicable to all development projects in the Fourth Term Permits for San Diego, Orange, and Riverside Counties (Order Nos. R9-2007-0001, R9-2009-0002, and R9-2010-0016, respectively). In this Order, the long-term BMP maintenance and infiltration and groundwater protection requirements apply to structural BMPs implemented by Priority Development Projects only.

Provision E.3.d requires the Copermittees to update their BMP Design Manual as needed to incorporate the requirements of Provision E.3. The BMP Design Manual is formerly known as the Standard Storm Water Mitigation Plan, or SSMP, and was renamed so that the title has a more accurate description of the document content. The contents of the BMP Design Manual are largely unchanged from the previous Standard Storm Water Mitigation Plans required under the Fourth Term Permits. The BMP Design Manual fulfills the 40 CFR 122.26(d)(2)(iv)(A)(2) requirement that the Copermittee's development planning program includes "*a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal storm sewers which receive discharges from areas of new development and significant redevelopment.*"

As part of the "*planning procedures,*" 40 CFR 122.26(d)(2)(iv)(A)(2) requires the procedures to "*address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.*" The requirements applicable to the implementation and oversight of structural BMPs at Priority Development Projects are provided under Provision E.3.e.

³⁹ Final Hydromodification Management Plan Prepared for County of San Diego, March 2011

Proper installation of the structural BMPs approved for a Priority Development Project is necessary to ensure that pollutants in storm water discharges will be reduced to the MEP after the project is completed. In addition to the proper installation of structural BMPs, the maintenance of structural BMPs on Priority Development Projects is necessary to ensure that pollutants in storm water discharges will continue to be reduced to the MEP. Provision E.3.e.(1) includes the minimum requirements that each Copermittee must implement to ensure structural BMPs are properly installed and will be properly maintained.

Provisions E.3.e.(1)(a)(i)-(ii) have been included to provide additional clarification regarding when a Copermittee may allow land development requirements from earlier MS4 permits to apply to a Priority Development Project. Since the MS4 permits issued from 2001 to the adoption of Order No. R9-2015-0001 amending Order No. R9-2013-0001 (Regional MS4 Permit), a Copermittee could allow development projects with “prior lawful approval” to be “grandfathered” into implementing BMP requirements from previous MS4 permits. The Copermittees were given the discretion to use their land use authority to determine when it was appropriate to allow a development project with prior lawful approval to implement BMP requirements from the previous MS4 permits, and when the most recent BMP requirements should be required to achieve the reduction of pollutants in storm water runoff from development projects to the MEP. However, the San Diego Water Board has found that the Copermittees and the development community frequently disagree about when a development project has prior lawful approval and what is necessary to reduce pollutants in storm water runoff from development projects to the MEP.

Therefore, Provisions E.3.e.(1)(a)(i)-(ii) were included to provide more clarity and certainty for the Copermittees, the land development community, and the general public about when the structural BMP performance standards of earlier MS4 permits may be allowed to be implemented. A Copermittee may allow a Priority Development Project to implement BMP requirements of the previous MS4 permit only if all requirements of Provisions E.3.e.(1)(a)(i)[a]-[d] have been met. Otherwise, the Copermittees must require all Priority Development Projects to incorporate the BMP requirements of Provision E.3 into the project to reduce pollutants in storm water runoff from development projects to the MEP.

Provisions E.3.e.(1)(a)(i)[a]-[d] are dependent upon the effective date of the BMP Design Manual. Unless otherwise directed by the San Diego Water Board, the effective date of the BMP Design Manual is December 24, 2015 for the San Diego County Copermittees, September 28, 2017 for the Orange County Copermittees, and July 5, 2018 for the Riverside County Copermittees.

Alternatively, if the Copermittee can demonstrate a lack of land use authority or legal authority to require a Priority Development Project to implement the requirements of Provision E.3, the Copermittee may allow land development requirements from the previous MS4 permits to apply. However, under these circumstances the San Diego

Water Board expects the Copermittee to utilize its available land use authority or legal authority to require the implementation of as much of Provision E.3 as possible to reduce the discharge of pollutants in storm water from development and redevelopment projects within its jurisdiction to the MEP.

In cases where BMP requirements from the earlier MS4 permits govern the structural BMP design requirements of a Priority Development Project, the San Diego Water Board expects the Copermittees to be able to demonstrate, in a programmatic audit or other means, that a Priority Development Project met all the requirements listed under Provisions E.3.e.(1)(a)(i)[a]-[d], or have evidence that the Copermittee did not have the land use or legal authority to require the implementation of Provision E.3 for a Priority Development Project.

The requirements under Provision E.3.e.(2)-(3) are necessary to demonstrate each Copermittee is implementing a program that complies with Provisions E.3.b-c and E.3.e.(1), and ensure structural BMPs at Priority Development Project will continue to be able to reduce pollutants in storm water discharges to the MEP.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient *“legal authority to control discharges to the municipal separate storm sewer system.”* Where enforcement is necessary for any development projects to compel compliance with the requirements of Provision E.3 and ensure the pollutants in storm water discharges from the MS4 are reduced and continue to be reduced to the MEP, Provision E.3.f requires each Copermittee to enforce its legal authority established pursuant to Provision E.1, and in accordance with its Enforcement Response Plan required to be developed pursuant to Provision E.6.

Provision E.4 (Construction Management) requires each Copermittee to implement a construction management program to control and reduce the discharge of pollutants in storm water from construction sites to the MEP. Proper implementation of the construction management program will also contribute toward effectively prohibiting non-storm water discharges from construction sites to the MS4.

Pursuant to 40 CFR 122.26(d)(2)(iv), each Copermittee is required to implement a *“management program...to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and other such provisions where applicable.”* As part of the management program, 40 CFR 122.26(d)(2)(iv)(D) requires *“a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system.”*

Construction sites can be significant sources of sediment, trash, and other pollutants to receiving waters. Although sediment is naturally occurring in the natural environment, the discharge of sediment under unnatural conditions is problematic to receiving waters. Fine sediment in creeks causes high turbidity that interferes with the

functionality of native flora and fauna in local creeks. For example, turbidity interferes with both photosynthesis of water-philic plants, as well as successful foraging and reproduction of benthic macroinvertebrates. Sediment can also make it difficult for fish to breathe because it clogs fish gills. Other pollutants such as heavy metals or pesticides can adhere to sediment and are transported to receiving waters during storm events, where they dissolve in the water column and become bioavailable to aquatic organisms. Sediment is recognized as a major stressor to surface waters and is responsible for the impairment of several lagoons and creeks in the San Diego Region.

Provision E.4 includes requirements that each Copermittee must implement to minimize the discharge of sediment and other pollutants from construction sites to the MS4 within its jurisdiction. The requirements under Provision E.4 are consistent with the Fourth Term Permits for San Diego, Orange, and Riverside Counties. Therefore, Copermittees are expected to implement the requirements seamlessly, with minimal changes to their existing construction management programs. The Copermittees, however, are given more flexibility to run their programs as needed to maximize efficiency, and also to be consistent with the Water Quality Improvement Plan for the Watershed Management Area.

As part of the construction management program, 40 CFR 122.26(d)(2)(iv)(D)(1) requires “*procedures for site planning which incorporate consideration of potential water quality impacts.*” Provision E.4.a describes the minimum elements each Copermittee is required to include as part of the construction site planning and project approval process. The construction site planning and approval process is based primarily on ensuring each project had an adequate site-specific pollution control, construction BMP, and/or erosion and sediment control plan that will be implemented to minimize the discharge of pollutants in storm water to the MEP, and minimize impacts to receiving waters.

The requirements under Provision E.4.b provide the data and information necessary to identify “*priorities for inspecting sites and enforcing control measures*” required pursuant to 40 CFR 122.26(d)(2)(iv)(D)(3). Under Provision E.4.b, each Copermittee must identify construction sites that are considered a high threat to downstream surface waters. Designation of “high threat to water quality” construction sites will necessitate the Copermittees to develop criteria to identify such sites. Provision E.4.b.(2) describes a list of factors that must be considered when the Copermittee considers threat to water quality. For example, a Copermittee must identify sites as “high threat to water quality” if it is located within a hydrologic subarea where sediment is known or suspected to contribute to the highest priority water quality conditions, according to the Water Quality Improvement Plan. This ensures that construction management program implementation is compatible with the Copermittee’s identified highest priority water quality conditions.

Pursuant to 40 CFR 122.26(d)(2)(iv)(D)(2) each Copermittee is required describe “*requirements for nonstructural and structural best management practices*” at

construction sites. Provision E.4.c includes the types of construction site BMPs that the Copermittees must implement, or require the implementation of, at each construction site to reduce pollutants in storm water discharges to the MEP.

Each Copermittee is expected to require the implementation of appropriate BMPs given specific site conditions, the season and likelihood of rain events, and construction phase (i.e. grading vs. vertical construction). This means that throughout the life of the project construction, the appropriate BMPs will vary, especially if the construction of the project spans multiple wet seasons. As opposed to describing specific minimum BMPs that must be implemented, the Order describes major BMP categories that should be considered for each site.

Each Copermittee is expected to use its 20 years of storm water experience and knowledge to require implementation of appropriate BMPs from the various categories at each construction site within its jurisdiction. For example, the San Diego Water Board expects that each site will be required to implement erosion control and sediment control. The San Diego Water Board also expects each Copermittee to require implementation of active/passive sediment treatment systems at sites where other BMPs have been tried and are known to be inadequate, and discharges of sediment are causing or contributing to water quality impairment downstream. Each Copermittee is granted flexibility in specifying the minimum level of BMP requirements at each site, but the San Diego Water Board expects each site to be capable of controlling pollutants in storm water discharges to the MEP and preventing illicit discharges.

The requirements under Provision E.4.d are necessary to demonstrate that each Copermittee is implementing a program that complies with Provisions E.4.a and E.4.c and ensure BMPs at construction sites will reduce pollutants in storm water discharges to the MEP.

Provision E.4.d does not include minimum required inspection frequencies for construction sites. Each Copermittee must use its experience and knowledge to specify an appropriate inspection frequency for both high priority and lower priority sites in their jurisdictional runoff management program documents, and in accordance with the Water Quality Improvement Plan. Appropriate inspection frequencies may vary by Copermittee, but the San Diego Water Board expects that the stated frequency will be adequate for each Copermittee to properly oversee the construction sites within its jurisdiction, confirm BMPs are implemented to reduce pollutants in storm water discharges from constructions sites to the MEP, and make needed changes to its program on an ongoing basis as necessary.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient *“legal authority to control discharges to the municipal separate storm sewer system.”* Where enforcement is necessary for any development projects to compel compliance with the requirements of Provision E.4 and ensure the pollutants in storm water discharges from the MS4 are reduced and continue to be reduced to

the MEP, Provision E.4.e requires each Copermittee to enforce its legal authority established pursuant to Provision E.1, and in accordance with its Enforcement Response Plan required to be developed pursuant to Provision E.6.

Provision E.5 (Existing Development Management) requires each Copermittee to implement an existing development management program to control and reduce the discharge of pollutants in storm water from areas of existing development to the MEP. Proper implementation of the existing development management program will also contribute toward effectively prohibiting non-storm water discharges from areas of existing development to the MS4.

Pursuant to 40 CFR 122.26(d)(2)(iv), each Copermittee is required to implement a *“management program...to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and other such provisions where applicable.”* Within 40 CFR 122.26(d)(2)(iv)(A) and (C), the management program is required to reduce impacts on receiving waters and reduce pollutants in storm water discharges to the MEP from commercial and residential areas, industrial facilities, and municipal facilities.

Commercial and residential areas, industrial facilities, and municipal facilities must be addressed by each Copermittee with the existing development management program required under Provision E.5. All other areas within each Copermittee’s jurisdiction should be either undeveloped open space, or areas that are being developed or under construction. Areas being developed or under construction will be addressed by the Copermittee under the requirements of Provision E.3 (Development Planning) or Provision E.4 (Construction Management).

Areas of existing development typically include impervious surfaces such as sidewalks, driveways, roads, and rooftops, which generate and concentrate pollutants (such as pesticides, petroleum hydrocarbons, heavy metals, and pathogens) that are otherwise not found in high concentrations in the natural environment. Pollutants that accumulate on impervious surfaces are not easily biodegraded or not subject to natural treatment processes. When it rains, these pollutants are transported in storm water runoff from these impervious surfaces into receiving waters, resulting in poor water quality and degradation of beneficial uses.

In addition to the generation of pollutants, areas of existing development have generally altered the natural conditions of the land and removed vegetative cover, reduced the perviousness of the surface, and reduced the capacity of storm water that can be intercepted, captured, stored, infiltrated, evaporated, and/or evapotranspired. The alteration of the natural conditions and the impervious surfaces associated with areas of existing development causes water quality problems due to the alteration of natural flow regimes within the watersheds; resulting in hydromodification of channels, streams, and habitats that exist within or adjacent to the areas of existing development.

Thus, storm water discharges from areas of existing development are responsible for poor water quality, degraded habitats, and hydromodified channels throughout the developed portions of the watersheds in the San Diego Region. To improve the health and functionality of the receiving waters in a Watershed Management Area, land use practices and the amount of impervious surfaces in areas of existing development must change to reduce the various impacts caused by hydromodification and pollutants from storm water runoff generated in developed areas. Each Copermittee must be aggressive to address pollutant sources and runoff from areas of existing development to be able to reduce pollutants in storm water discharges from the MS4 to the MEP.

There is some overlap in the requirements under Provision E.5 with the requirements under Provisions E.2 (Illicit Discharge Detection and Elimination), E.3 (Development Planning), and E.4 (Construction Management). Illicit discharges frequently originate from areas of existing development. New development projects, when completed will become some type of residential, commercial, industrial or municipal existing development. Redevelopment projects are, by definition, redeveloping areas of existing development. And, redevelopment projects become construction sites located in areas of existing development. Much of the data and information collected, inspections performed, and enforcement actions taken for the requirements under Provisions E.2 to E.4 may also be utilized by the existing development management program. The requirements under Provision E.5, however, are focused primarily on reducing pollutants generated in areas of existing development that can be transported in storm water runoff and discharged to and from the MS4.

The requirements under Provision E.5 build upon existing program elements being implemented by the Copermittees. Provision E.5 is generally consistent with the existing development requirements of the Fourth Term Permits for Orange and Riverside Counties (Order Nos. R9-2009-0002 and R9-2010-0016, respectively), but modified to provide more flexibility to implement the programs so resources can be better focused toward addressing the highest priority water quality conditions identified in the Water Quality Improvement Plans.

For a Copermittee to properly manage areas of existing development, having knowledge of what development exists within its jurisdiction is essential. Provision E.5.a requires each Copermittee to maintain a watershed-based inventory of all the existing development within its jurisdiction. This requirement is necessary for each Copermittee to implement the requirements of Provision E.5.b-e.

As opposed to just maintaining separate inventories based on the type of site, each Copermittee must maintain a watershed-based inventory that includes all types of existing development within its jurisdiction. By utilizing a watershed-based inventory, the Copermittees within a Watershed Management Area can combine their inventories and review the inventories by watershed in addition to by jurisdiction. Pollutant

sources and strategies for abatement can then be evaluated on a watershed level, as opposed to evaluating sources and strategies strictly by type of site.

Provision E.5.a includes the information that must be included in the inventory. Provision E.5.a.(1) specifies what facilities or areas must be included in the inventory. A commercial type of existing development may be identified in the inventory as a facility (e.g. individual building, individual business) or an area (e.g. shopping center, commercial zone). An industrial type of existing development must be identified in the inventory by facility (e.g. individual industrial entity). A municipal type of existing development must be identified in the inventory by facility, with a list of specific municipal facilities that must be included in the inventory. A residential type of existing development must be identified by areas to be designated by the Copermittee. For each of the facilities and areas identified in the Copermittee's inventory developed pursuant to Provision E.5.a.(1), Provision E.5.a.(2) specifies the information that must be included in the description for the facility or area.

Provision E.5.a.(3) requires each Copermittee to maintain an updated map showing the location of inventoried existing development, watershed boundaries, and water bodies. This requirement was included because this information is expected to help the Copermittees in a Watershed Management Area identify and prioritize sources of pollutants and/or stressors in areas of existing development that contribute toward the highest priority water quality conditions identified in the Water Quality Improvement Plans.

Knowledge of the existing development that are likely to be sources of pollutants contributing to the highest priority water quality conditions is expected to be a key element in the Copermittees' development of the water quality improvement strategies that will be included in the Water Quality Improvement Plans. The strategies described in the Water Quality Improvement Plans will direct efforts within the existing development management programs implemented by each Copermittee.

Pursuant to 40 CFR 122.26(d)(2)(iv)(A) each Copermittee is required describe "*structural and source control measures to reduce pollutants*" in storm water runoff discharged from areas of existing development. Provision E.5.b includes the BMP implementation and maintenance requirements that the each Copermittee must require at areas of existing development to reduce pollutants in storm water discharges to the MEP. The San Diego Water Board, however, recognizes that BMP implementation and maintenance for residential areas will require much more education and encouragement through less authoritative measures than for commercial, industrial and municipal facilities and areas. Thus, the BMP implementation and maintenance requirements have been separated between requirements under Provision E.5.b.(1) for commercial, industrial and municipal facilities and areas, and Provision E.5.b.(2) for residential areas.

Most of the requirements in Provision E.5.b are consistent with the related requirements in the Fourth Term Permits. The level of specificity, however, has been changed to allow each Copermittee the flexibility to implement its program to achieve maximum efficiency, and to perform functions that will address the highest priority water quality conditions identified in the Water Quality Improvement Plans.

Each Copermittee is expected to require the implementation of appropriate BMPs to address the expected pollutants from each facility or area. The Third and Fourth Term Permits described specific minimum BMPs that must be implemented at various sites. This Order, however, requires each Copermittee to designate minimum BMPs themselves and require implementation. Consistent with the Fourth Term Permits, each Copermittee is required to maintain, or require the maintenance of, all BMPs as needed.

The BMP implementation and maintenance requirements include a schedule of operation and maintenance activities for the MS4 and related structures (such as catch basins, storm drain inlets, and detention basins), as well as public streets and roads. Public streets and roads specifically include public unpaved roads. The San Diego Water Board identified, through investigations and complaints, sediment discharges from unpaved roads as a significant source of water quality problems in the San Diego Region. Inspection activities conducted by the San Diego Water Board since the Third Term Permits have found a lack of source control for many unpaved roads within the jurisdiction of the Copermittees.

Unpaved roads are a source of sediment that can be discharged in runoff to receiving waters, especially during storm events. Erosion of unpaved roadways occurs when soil particles are loosened and carried away from the roadway base, ditch, or road bank by water, wind, traffic, or other transport means. Exposed soils, high runoff velocities and volumes, sandy or silty soil types, and poor compaction increase the potential for erosion.

Road construction, culvert installation, and other maintenance activities can disturb the soil and drainage patterns to streams in undeveloped areas, causing excess runoff and thereby erosion and the release of sediment. Poorly designed unpaved roads can act as preferential drainage pathways that carry runoff and sediment into natural streams, impacting water quality. In addition, other public works activities along unpaved roads have the potential to significantly affect sediment discharge and transport within streams and other waterways, which can degrade the beneficial uses of those waterways.

USEPA also recognizes that discharges from unpaved roads pose a significant potential threat to water quality. USEPA guidance⁴⁰ emphasizes the threat of unpaved roads to water quality:

⁴⁰ USEPA, 2006. Environmentally Sensitive Maintenance for Dirt and Gravel Roads. Gesford and Anderson, USEPA-PA-2005.

“Dirt and gravel roads are a major potential source of these pollutants [sediment] and pollutants that bind to sediment such as oils, nutrients, pesticides, herbicides, and other toxic substances. Many roads have unstable surfaces and bases. Roads act like dams, concentrating flows that accelerate erosion of road materials and roadsides. Both unstable surfaces and accelerated erosion then lead to sediment and dust.”

There are several guidance documents, developed by the USEPA,⁴¹ the US Forest Service,⁴² the University of California,⁴³ and others, that include design and construction specifications and BMPs that are readily available for implementation by public entities. Implementing design and other source control BMPs for unpaved roads in the region is necessary to reduce and minimize the impacts of sediment discharged during storm events from unpaved roads to the MS4s and receiving waters.

Provision E.5.c describes existing development site inspection frequency, content, and tracking that each Copermittee must incorporate into their existing development management programs. The requirements under Provision E.5.c are necessary to demonstrate each Copermittee is implementing a program that complies with Provision E.5.b and ensure BMPs implemented in areas of existing development will reduce pollutants in storm water discharges to the MEP. Provision E.5.c has been modified to include a minimum of once every 5 years for all inventoried facilities and areas of existing development, utilizing one or more methods of inspection.

In addition to onsite inspections, the methods of inspection have been expanded to include drive-by inspections. Inspections may be performed by the Copermittee’s municipal and contract staff, or by volunteer monitoring or patrol programs. Volunteer monitoring or patrol programs are not expected to enforce the Copermittee’s ordinances, or to inspect areas or facilities where members of the public are not allowed access. Volunteer monitoring or patrol programs must be trained by the Copermittee, and are only expected to collect visual observations. By utilizing drive-by inspections and volunteer monitoring or patrol programs, the Copermittees will be able to maximize and efficiently use their resources to identify and address sources of pollutants in areas of existing development.

The municipal and contract staff of each Copermittee must annually perform onsite inspections of an equivalent of at least 20 percent of the commercial, industrial, and municipal facilities and areas in its inventoried existing development pursuant to Provision E.5.c.(1)(a)(iv). An “equivalent” of at least 20 percent means if any commercial, industrial, or municipal facilities or areas require multiple onsite

⁴¹ Ibid

⁴² US Forest Service, 1996. Forest Service Specifications for Construction of Roads & Bridges. EM-7720-100. Revised August 1996.

⁴³ University of California Division of Agriculture and Natural Resources, 2007. Rural Roads: A Construction and Maintenance Guide of California Landowners. Publication 8262.

inspections during any given year, those additional inspections may count toward the total annual inspection requirement. Linear municipal facilities (i.e. MS4 linear channels, sanitary sewer collection systems, streets, roads and highways) in the Copermittee's existing development inventory are not subject to the inspection frequency requirement of Provision E.5.c.(1)(a)(iv).

The inspection content specified in Provision E.5.c.(2)(a) includes the information required to be collected during an inspection by any method. The inspection content specified in Provision E.5.c.(2)(b) includes additional information that must be collected when a Copermittee's municipal or contract staff perform an onsite inspection. Provision E.5.c.(3) specifies the information that each Copermittee must maintain in its existing development inspection records.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient "*legal authority to control discharges to the municipal separate storm sewer system.*" Where enforcement is necessary to compel compliance with the requirements of Provision E.5 and ensure the pollutants in storm water discharges from the MS4 are reduced and continue to be reduced to the MEP, Provision E.5.d requires each Copermittee to enforce its legal authority established pursuant to Provision E.1, and in accordance with its Enforcement Response Plan required to be developed pursuant to Provision E.6.

Provisions E.5.e.(1)-(2) specifically require the Copermittee to identify areas of existing development as candidates for retrofitting, and streams, channels, and/or habitats as candidates for rehabilitation. Provisions E.5.e.(1)-(2) are based on the retrofitting requirements of the Fourth Term Permits for Orange and Riverside Counties, but modified to also include identifying projects to rehabilitate channels within areas of existing development. The requirements have also been modified to be more focused on utilizing these types of projects for addressing the highest priority water quality conditions identified in the Water Quality Improvement Plans.

Interest and opportunity to retrofit areas of existing development and rehabilitate channels located in areas of existing development has been observed in several programs the San Diego Water Board oversees (e.g., CWA Section 401 Water Quality Certification program, supplemental environmental projects, and grant programs). Each jurisdiction has miles and miles of streets that could be retrofitted to become green streets. Reshaping landscaped areas from convex to concave configurations can detain storm water instead of directing runoff as quickly as possible to the MS4. Retrofit projects could also include simply replacing impervious surfaces with permeable surfaces.

Retrofitting projects do not necessarily have to be expensive. Retrofitting projects could be as simple as redirecting downspouts from roofs to pervious or landscaped areas instead of to hardscaped areas discharging directly to the MS4, providing rain barrels to harvest storm water from downspouts for use at a later time, or planting more trees in areas with little vegetation to provide canopy that can intercept storm

water. The San Diego Water Board encourages the Copermittees to identify simple, low-cost retrofitting opportunities that can be easily implemented, in addition to other more expensive retrofitting and channel rehabilitation projects.

Rehabilitation of channels, streams, and/or habitat will require more significant planning and resources to implement. There are, however, also abundant opportunities to rehabilitate channels, streams and/or habitats in or adjacent to areas of existing development. Each Watershed Management Area likely has several creeks and stream reaches that have been undergrounded, artificially hardened, or hydromodified that could be rehabilitated to be more sustainably configured, which would slow down storm water flows and potentially have more assimilative capacity for pollutants while still being supportive of designated beneficial uses.

The San Diego Water Board recognizes that it may be infeasible to implement retrofitting or channel rehabilitation projects within certain areas of a Copermittee's jurisdictions. For such areas, the Copermittee must instead identify, develop, and implement regional retrofitting and channel rehabilitation projects (i.e. projects that can retain and/or treat storm water from one or more areas of existing development) adjacent to and/or downstream of the areas of existing development.

Provisions E.5.e.(1)-(2) do not require the implementation of retrofitting and rehabilitation projects, but do require the Copermittee to develop a program with strategies to facilitate the implementation of these types of projects in areas of existing development. The strategies are expected to include allowing and encouraging Priority Development Projects to implement retrofitting types of projects as a means of compliance with the structural BMP performance criteria requirements of Provisions E.3.c.(1) and E.3.c.(2).

Provision E.6 (Enforcement Response Plans) requires each Copermittee to develop an Enforcement Response Plan as part of its jurisdictional runoff management program document. Proper implementation of the Enforcement Response Plans is necessary to effectively prohibit non-storm water discharges to the MS4, and reduce the discharge of pollutants in storm water from the MS4 to the MEP.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient "*legal authority to control discharges to the municipal separate storm sewer system*" and be able to demonstrate that it can "*operate pursuant to legal authority established by statute, ordinance or series of contracts*" to control the discharge of non-storm water and pollutants in storm water to and from its MS4. Pursuant to 40 CFR 122.26(d)(2)(i)(E) each Copermittee is specifically required to have the legal authority to "*[r]equire compliance with conditions in ordinances, permits, contracts or orders.*"

The requirements under Provision E.6 are necessary to demonstrate that each Copermittee can enforce its legal authority to "*effectively prohibit non-stormwater discharges*" and "*reduce the discharge of pollutants to the maximum extent*

practicable” as well as “[r]equire compliance with conditions in ordinances, permits, contracts or order.”

The Enforcement Response Plan required under Provision E.6 will serve as a reference for the Copermittee and the San Diego Water Board to determine if consistent enforcement actions are being implemented to achieve timely and effective compliance from all public and private entities that are not in compliance with the Copermittee’s ordinances, permits, or other requirements. The Enforcement Response Plan must contain clear direction for the Copermittee to take immediate enforcement action, when appropriate and necessary, in their illicit discharge detection and elimination, development planning, construction management, and existing development management programs.

If the entities subject to the Copermittee’s legal authority do not implement appropriate corrective actions in a timely manner, or if violations repeat, the Copermittee must take progressively stricter responses to enforce its legal authority and achieve compliance with its ordinances, permits, or other requirements to “*effectively prohibit non-stormwater discharges*” and “*reduce the discharge of pollutants to the maximum extent practicable.*”

Provision E.7 (Public Education and Participation) requires each Copermittee to implement a public education and participation program. Proper implementation of the public education and participation program as part of its jurisdictional runoff management program will contribute toward effectively prohibiting non-storm water discharges to the MS4, and toward the reduction of pollutants in storm water from the MS4 to the MEP.

Provision E.7 establishes the minimum requirements that each Copermittee must implement to engage members of the public as part of its jurisdictional runoff management program. In the Fourth Term Permits, the public education program requirements and the public participation requirements were included as separate jurisdictional runoff management program components. In this Order, the public education requirements have been consolidated with the public participation requirements, as both sets of requirements are related to the engagement of the public by each Copermittee. Engagement of the public is critical for the success of each Copermittee’s jurisdictional runoff management program.

The Copermittees have been implementing public education programs for the last 20 years, which are now well established. The specificity of expected public education program elements of the Fourth Term Permits has been removed. For the most part, the public education program requirements in Provision E.7.a have been reduced to a set of requirements that are specifically included in the federal regulations under 40 CFR 122.26(d)(2)(iv)(A)(6), 122.26(d)(2)(B)(6) and 122.26(d)(2)(D)(4), which should already be incorporated into each Copermittee’s existing public education program. Each Copermittee is expected to utilize the information and data collected from the monitoring and assessments conducted within the Watershed Management Area, and

from its inventories and inspections to best direct its public education program resources toward addressing the highest priority water quality conditions identified within the Water Quality Improvement Plan.

According to 40 CFR 122.26(d)(2)(iv), public participation is required to be included as part of the “*comprehensive planning process*”, which includes the development and implementation of the Water Quality Improvement Plan and jurisdictional runoff management programs. The requirements under Provision E.7.b specify the opportunities that the public must be provided to be involved in the “*comprehensive planning process*”, as required by to 40 CFR 122.26(d)(2)(iv).

Provision E.8 (Fiscal Analysis) requires each Copermittee to secure the resources and provide an analysis of the resources that will be necessary to implement the requirements of the Order. Adequate fiscal resources are necessary for a jurisdictional runoff management program to effectively prohibit non-storm water discharges to the MS4, and reduce pollutants in storm water from the MS4 to the MEP.

According to 40 CFR 122.26(d)(2)(vi), each Copermittee is responsible for providing “a *fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities*” required by this Order, including “a *description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.*” The fiscal analysis requirements of Provision E.8 are consistent with 40 CFR 122.26(d)(2)(vi).

The San Diego Water Board has chosen not to require a description of fiscal benefits realized from implementation of the jurisdictional runoff management programs. This is a recommendation from the National Association of Flood and Stormwater Management Agencies.⁴⁴ For instance, the fiscal analysis requirements do not address city-wide fiscal benefits of protection (e.g., public health, tourism, property values, economic activity, beneficial uses, etc.), even though many costs currently reported to the San Diego Water Board are for related activities. This type of assessment may help Copermittees improve the allocation of resources and it may help the Copermittees secure adequate funding for the program. Qualitative assessments, however, could be overly subjective and most Copermittees likely lack the ability to provide accurate quantitative assessments. The San Diego Water Board encourages the Copermittees to consider means for conducting assessments of fiscal benefits derived from the programs. Such assessments could be conducted on a regional scale similar to studies of program costs conducted by the State Water Board.⁴⁵

⁴⁴ National Association of Flood and Stormwater Management Agencies. 2006. *Guidance for Municipal Stormwater Funding*. Prepared under a grant provided by the USEPA.

⁴⁵ State Water Board, 2005. NPDES Stormwater Cost Survey.

F. Reporting

Purpose: Provision F includes the requirements for the documents and reports that the Copermittees must prepare and provide to the San Diego Water Board. The documents prepared by the Copermittees and provided to the San Diego Water Board and made available to the public will provide the documentation that the Copermittees are complying with the requirements of the Order.

Discussion: Provision F requires the Copermittees to prepare several documents and reports that must be provided to the San Diego Water Board and made available to the public. The reporting requirements have been significantly reduced compared to the Fourth Term Permit reporting requirements. The reduction in reporting requirements was recommended by the San Diego County Copermittees in the Report of Water Discharge submitted in June 2011.

More specific and detailed discussions of the requirements of Provision F are provided below.

Provision F.1 (Water Quality Improvement Plans) requires the Copermittees in each Watershed Management Area to develop and submit a Water Quality Improvement Plan in accordance with the requirements of Provision B.

Of all the requirements of Provision F, the Water Quality Improvement Plans will likely be the documents requiring the most significant effort to develop. The content of the Water Quality Improvement Plans, however, is expected to include content that should already have been developed for the Watershed Plans and several elements that are included in the Monitoring and Reporting Programs required under the Fourth Term Permits.

Because the Water Quality Improvement Plan is part of the “*comprehensive planning process which involves public participation*,” Provision F.1 includes requirements to give multiple opportunities to the public to provide input on the content of the plans.

Provision F.1.a.(1) specifies the elements that the Copermittees must include in the public participation process for the development of the Water Quality Improvement Plans. In order for the public to be aware of the opportunities to provide input, Provision F.1.a.(1)(a) requires the Copermittees to develop a publicly available and noticed schedule of the opportunities for the public to participate and provide comments during the development of the Water Quality Improvement Plan. These opportunities are when the public can provide the data, information, and recommendations that the Copermittees can consider during the development of the Water Quality Improvement Plans.

The San Diego Water Board recognizes, however, that the Copermittees cannot be expected to incorporate all the data, information, and recommendations that the public may provide into the Water Quality Improvement Plans. The Copermittees will have to

review the data, information, and recommendations received and make some decisions on what to incorporate into the Water Quality Improvement Plans. Before the Copermittees finalize their decisions, members of the public should be allowed to review the Copermittees' decisions. Thus, Provision F.1.a.(1)(b) requires the Copermittees to form a Water Quality Improvement Consultation Panel (Panel).

The Panel will consist of a member from the environmental community and a member from the development community familiar with the Watershed Management Area. A representative from the San Diego Water Board staff will also be part of the Panel. The Copermittees may choose to include additional members, but the Panel is only required to include three panel members.

The Panel will serve as an additional public participation and input mechanism during the development of the Water Quality Improvement Plans. The knowledge and expertise from these Panel members are expected to provide the Copermittees valuable direction during their decision-making process. The Copermittees will review the content of their planned submittals with the Panel members to receive recommendations. If the Panel provides recommendations, the Copermittees must consider revisions to the Water Quality Improvement Plan submittals.

The San Diego Water Board recognizes that the development of multiple Water Quality Improvement Plans concurrently may limit the ability of the public to review and provide comments to the Copermittees. Thus, Provision F.1.a.(1)(c) requires the Copermittees to coordinate the schedules for the public participation process among the Watershed Management Areas to provide the public time and opportunity to participate during the development of the Water Quality Improvement Plans.

Provision F.1.a.(2) requires the Copermittees to develop and submit the first Water Quality Improvement Plan component, in accordance with the requirements of Provision B.2, which includes the identification of the priority water quality conditions and potential water quality improvement strategies. The public must be provided an opportunity to provide data, information and recommendations to be utilized in the development and identification of the priority water quality conditions and potential water quality improvement strategies for the Watershed Management Area. The Copermittees must consult with the Panel and consider making revisions. The Copermittees may submit the requirements of Provision B.2 as early as 6 months and no later than 12 months after the commencement of coverage under this Order. After the requirements of Provision B.2 are submitted to the San Diego Water Board, the public will be provided another opportunity to provide comments.

Provision F.1.a.(3) requires the Copermittees to develop and submit the second Water Quality Improvement Plan component, in accordance with the requirements of Provision B.3, which includes the identification of the numeric goals for the highest priority water quality conditions identified for the Watershed Management Area, and the strategies that will be implemented to achieve the potential numeric goals. The Copermittees may also develop the Optional Watershed Management Area Analysis, in accordance with the requirements of Provision B.3.b.(4), as part of this submittal.

The public must be provided an opportunity to provide data, information and recommendations to be utilized in the development and identification of the numeric goals and water quality improvement strategies for the Watershed Management Area. The Copermittees must consult with the Panel and consider making revisions. The Copermittees may submit the requirements of Provision B.3 as early as 9 months and no later than 18 months after the commencement of coverage under this Order. After the requirements of Provision B.3 are submitted to the San Diego Water Board, the public will be provided another opportunity to provide comments.

Finally, Provision F.1.b describes the process for the submittal and implementation of the Water Quality Improvement Plans. The complete Water Quality Improvement Plans are required to be submitted by the Copermittees within 24 months after the commencement of coverage under this Order. The San Diego Water Board will provide the public an opportunity to provide comments on each complete Water Quality Improvement Plan.

The San Diego Water Board will review each Water Quality Improvement Plan and the public comments received to determine if the Copermittees have submitted a Water Quality Improvement Plan that meets the requirements of Provision B. If a Water Quality Improvement Plan does not meet the requirements of Provision B, the Copermittees will be considered out of compliance and directed in writing by the San Diego Water Board Executive Officer to correct the deficiencies.

When a Water Quality Improvement Plan meets the requirements of Provision B, the San Diego Water Board will determine whether to hold a public hearing or to limit public input to submittal of written comments before accepting the Water Quality Improvement Plan. Implementation of the Water Quality Improvement Plan must begin within 30 days of acceptance.

The San Diego Water Board expects that any deficiencies in the Water Quality Improvement Plan will be identified either in the public comments or during the review by the San Diego Water Board before implementation begins. In the event any deficiencies are identified after the implementation of the Water Quality Improvement Plan, Provision F.1.b.(7) clarifies that the San Diego Water Board maintains the right to require the Copermittees to correct any deficiencies that may be identified.

Provision F.2 (Updates) requires the Copermittees to update specific documents that the Copermittees will utilize to implement the requirements of this Order.

Each Copermittee is required to continue implementing a jurisdictional runoff management program, as required under Provision E. Implementation of each Copermittee's jurisdictional runoff management program is directed by its jurisdictional runoff management program document. Provision F.2.a requires each Copermittee to update its jurisdictional runoff management program document to be consistent with the requirements of Provision E concurrent with the submittal of the Water Quality Improvement Plan.

Likewise, each Copermittee must continue to require new development and redevelopment projects to implement BMPs to control pollutants in storm water runoff. The control of pollutants in storm water runoff from development and redevelopment projects within each Copermittee's jurisdiction is guided and directed by its BMP Design Manual, formerly known as a Standard Storm Water Mitigation Plan (SSMP). Provision F.2.b requires each Copermittee to update its BMP Design Manual to be consistent with the requirements of Provision E.3 concurrent with the submittal of the Water Quality Improvement Plan.

For situations where the San Diego Water Board may amend the requirements of Provisions E.3.a-d after a Copermittee has updated its BMP Design Manual pursuant to Provision F.2.b.(1), Provision F.2.b.(4) gives the Copermittee up to 90 days to incorporate the amended requirements of Provision E.3.a-d into its BMP Design Manual. The San Diego Water Board Executive Officer has discretion to modify the 90-day time period depending on the complexity of the amendments or other information that warrants a change in the 90-day time period.

In general, the requirements of the Order should not necessitate a complete rewrite of each Copermittee's jurisdictional runoff management program document or BMP Design Manual, as was required by the Third Term Permits. The jurisdictional runoff management program and BMP Design Manual requirements of this Order are not significantly different than the requirements of the Fourth Term Permits. Thus, only sections of the Order which are new or have been significantly changed should warrant revisions to specific sections of the Copermittee's jurisdictional runoff management program document and BMP Design Manual.

Finally, the Water Quality Improvement Plans are expected to require updates as the iterative approach and adaptive management process included in the Water Quality Improvement Plan, as required under Provision B.5, is implemented by the Copermittees. Provision F.2.c.(1) requires the Copermittees to implement a public participation process for the proposed updates, review the proposed updates with the Panel, and submit the updates to the Water Quality Improvement Plan as part of the Annual Reports required under Provision F.3.b.

Also, because TMDLs are likely to be developed, adopted and approved during the term of the Order, Provision F.2.c.(2) has been included to expedite the incorporation of TMDLs into the Copermittees' Water Quality Improvement Plans as part of the update process, potentially before the Order is re-opened to incorporate the requirements of the new TMDLs.

Provision F.3 (Progress Reporting) requires the Copermittees to report on the progress of implementing the Water Quality Improvement Plans.

The requirements of Provision F.3 are to report the progress toward improving water quality that the Copermittees are achieving with the implementation of the Water Quality Improvement Plans and each Copermittee's jurisdictional runoff management program. The Progress Report Presentations required under Provision F.3.a are

included to provide the Copermittees an opportunity to communicate directly with the San Diego Water Board and the public. The Progress Report Presentations will also provide the members of the San Diego Water Board and members of the public an opportunity to become more acquainted with the Copermittees and their projects and programs to address non-storm water and storm water discharges into and from their MS4s.

The Annual Report requirements of Provision F.3.b are a consolidation of several reporting requirements from the Fourth Term Permits, including the Jurisdictional Runoff Management Program Annual Reports, the Watershed Annual Reports, and the Monitoring and Reporting Program Annual Reports. Furthermore, the Annual Report requirements are consistent with the requirements under 40 CFR 122.42(c).

Pursuant to 40 CFR 122.42(c), “[t]he operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director...must submit an annual report”, which must include the following:

- (1) *The status of implementing the components of the storm water management program that are established as permit conditions [40 CFR 122.42(c)(1)];*
- (2) *Proposed changes to the storm water management programs that are established as permit conditions [40 CFR 122.42(c)(2)];*
- (3) *Revisions, if necessary, to the assessment of controls and fiscal analysis [40 CFR 122.42(c)(3)];*
- (4) *A summary of data, including monitoring data, that is accumulated throughout the reporting year [40 CFR 122.42(c)(4)];*
- (5) *Annual expenditures and budget for year following each annual report [40 CFR 122.42(c)(5)];*
- (6) *A summary describing the number and nature of enforcement actions, inspections, and public education programs [40 CFR 122.42(c)(6)];*
- (7) *Identification of water quality improvements or degradation [40 CFR 122.42(c)(7)].*

Under the Fourth Term Permits, each Copermittee is responsible for submitting a Jurisdictional Runoff Management Program Annual Report; the Copermittees in each designated watershed are responsible for submitting a Watershed Annual Report; and the Copermittees from each county are responsible for submitting a Monitoring and Reporting Program Annual Report.

There are 39 Copermittees in the San Diego Region, each required to prepare and submit a Jurisdictional Runoff Management Program Annual Report. There are 9 designated watersheds in San Diego County, 6 designated watersheds in Orange County, and 1 designated watershed in Riverside County for a total of 16 designated watersheds, each requiring a Watershed Annual Report. There are 3 sets of

Copermittees in 3 counties in the San Diego Region, requiring Copermittees from each county to prepare and submit a Monitoring and Reporting Program Annual Report. Thus each Copermittee is currently required to prepare, or participate in the preparation of at least 3 annual reports. In addition, the San Diego County Copermittees are required to prepare and submit a Regional Urban Runoff Management Plan Annual Report.

In total, there are 59 annual reports that are prepared by the Copermittees and submitted to the San Diego Water Board for the Fourth Term Permits. The preparation of these annual reports requires significant time and resources from each Copermittee, which could otherwise be expended on actions that could improve water quality within its jurisdiction. In turn, significant time and resources are required from the San Diego Water Board staff to review these reports, which could otherwise be expended on working directly with the Copermittees to improve their implementation efforts toward restoring and protecting water quality.

Until the Water Quality Improvement Plans are developed, there will be a transitional period during which the Copermittees will continue to implement their existing jurisdictional runoff management programs. There will also be a transitional period during which the Copermittees will implement the transitional monitoring and assessment requirements of Provision D. During the transitional period, the Copermittees will submit annual reports pursuant to the requirements of Provisions F.3.b.(1) and F.3.b.(2).

Provision F.3.b.(1) includes the transitional annual reporting requirements for each Copermittee's jurisdictional runoff management program. The reporting of the jurisdictional runoff management program implementation efforts have been reduced to a single 2-page form. Each Copermittee is required to complete and submit a Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D or a revised form accepted by the San Diego Water Board) no later than October 31 of each year for each jurisdictional runoff management program reporting period (i.e. July 1 to June 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted. The Jurisdictional Runoff Management Program Annual Report Form will certify that each Copermittee has implemented its jurisdictional runoff management program in accordance with the requirements of Provision E. Each Copermittee may choose to continue to utilize and submit the jurisdictional runoff management program annual reporting format of its current Order until the first Water Quality Improvement Plan Annual Report is required to be submitted.

Provision F.3.b.(2) includes the transitional annual reporting requirements for the transitional monitoring and assessment program for each Watershed Management Area. The Copermittees in the Watershed Management Area are required to submit a Transitional Monitoring and Assessment Program Annual Report no later than January 31 for each complete transitional monitoring and assessment program reporting period (i.e. October 1 to September 30) during the transitional period, until the first Water

Quality Improvement Plan Annual Reports are required to be submitted. The Transitional Monitoring and Assessment Program Annual Report is required to include the transitional period monitoring data collected pursuant to Provisions D.1.a and D.2.a, and the findings from the transitional period findings from the assessments required pursuant to Provisions D.4.a.(1)(a), D.4.b.(1)(a)(i), D.4.b.(2)(a)(i).

Provision F.3.b.(3) includes the Water Quality Improvement Plan Annual Report requirements. Only one Water Quality Improvement Plan Annual Report is required for each of the ten (10) Watershed Management Areas designated under Provision B.1, which is a significant reduction in the number of annual reports required to be prepared and submitted by the Copermittees. The Water Quality Improvement Plan Annual Report will document the Copermittees' efforts to implement the Water Quality Improvement Plan. Each Water Quality Improvement Plan Annual Report will be focused primarily on reporting the analysis of the monitoring data collected pursuant to Provisions D.1-D.3 during the reporting period, and the assessments that are required pursuant to Provision D.4 based on the data. The monitoring data analyses and the assessments that are provided in the Water Quality Improvement Plan Annual Report will be the core of the report. The reporting of the jurisdictional runoff management program implementation efforts have been reduced to a single 2-page form, and will no longer be the primary focus of the reporting requirements as in the Third and Fourth Term Permits.

Each Copermittee will continue to prepare and submit a Jurisdictional Runoff Management Program Annual Report Form as part of the Water Quality Improvement Plan Annual Report to certify that each Copermittee has implemented its jurisdictional runoff management program in accordance with the requirements of Provision E. Instead of reviewing a voluminous report from each Copermittee, as was required under the Third and Fourth Term Permits, the San Diego Water Board will conduct audits of each Copermittee's jurisdictional runoff management program to investigate and confirm the information provided by each Copermittee on its Jurisdictional Runoff Management Program Annual Report Form. The audits will allow the San Diego Water Board to become more familiar with the each Copermittee's jurisdictional runoff management program, and each Copermittee will become more informed about the expectations of the San Diego Water Board.

The reduction in the number and content of the Water Quality Improvement Plan Annual Reports should result in significant time, cost and resource savings for the Copermittees, as well as the San Diego Water Board. Those savings should offset a significant portion of any additional costs that may be incurred to develop the Water Quality Improvement Plans and to implement the monitoring and assessment program requirements of Provision D.

The reporting period for the Water Quality Improvement Plan Annual Reports consists of two periods. Because the jurisdictional runoff management programs are typically budgeted and implemented during a fiscal year, the information provided on the

Jurisdictional Runoff Management Program Annual Report Forms will cover the period from July 1 to June 30 of the following year.

The Water Quality Improvement Plan Annual Reports, however, are focused primarily on the monitoring data and the assessments based on the monitoring data. The monitoring data is collected during the monitoring year, which begins October 1 and ends September 30 of the following year. The monitoring year begins after the beginning of the fiscal year and ends after the end of the fiscal year. Therefore, to accommodate and capture the information collected during the fiscal year and the monitoring year, the Annual Report reporting period incorporates both periods.

Finally, Provision F.3.c requires the Copermittees to develop and submit a Regional Monitoring and Assessment Report. The Regional Monitoring and Assessment Report is similar to the Long Term Effectiveness Assessment required under the Fourth Term San Diego County Permit. The Regional Monitoring and Assessment Report is expected to utilize the entire body of data and information collected by the Copermittees during the term of this Order to assess improvements to water quality on a regional scale.

Provision F.4 (Regional Clearinghouse) requires the Copermittees to develop, update, and maintain an internet-based Regional Clearinghouse that can be used to store, disseminate, and share the Copermittees' documents, monitoring data, special studies, and any other data or information.

Most of the documents and data that are generated by the Copermittees can be provided in electronic format, and made available to the San Diego Water Board and the public on the internet. The San Diego Water Board has been gradually transitioning its document submittal requirements to electronic submittals. Provision F.4 has been included to further these efforts.

Provision F.4 has also been included to improve the exchange and availability of information among the Copermittees, as well as between the Copermittees and the San Diego Water Board. Provision F.4 will also make the information generated during the implementation of the Order more accessible to the public.

Provision F.5 (Report of Waste Discharge) requires the Copermittees to submit a Report of Waste Discharge to reapply for renewal of the Order prior to its expiration, in accordance with 40 CFR 122.21(d)(2) and CWC section 13376.

Provision F.5 requires the Copermittees to submit a Report of Waste Discharge 180 days in advance of the expiration of this Order. Provision F.5 also describes the minimum information to be included in the Report of Waste Discharge, based on USEPA guidance "Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems," dated May 17, 1996.

G. Principal Watershed Copermittee Responsibilities

Purpose: Provision G includes the requirements for the Principal Watershed Copermittee designated by the Copermittees in each Watershed Management Area.

Discussion: Unlike previous NPDES requirements, there will no longer be a single Principal Copermittee. Provision G.1 requires the Copermittees to designate a Principal Watershed Copermittee for each Watershed Management Area. There are ten (10) Watershed Management Areas in the San Diego Region, as defined in Table B-1 under Provision B.1 of the Order. An individual Copermittee should not be the Principal Watershed Copermittee for more than two (2) Watershed Management Areas. There could be up to ten (10) Principal Water Copermittees designated for the Watershed Management Areas in the San Diego Region.

Provision G.2 describes the minimum responsibilities of each Principal Watershed Copermittee. The primary responsibility of the Principal Watershed Copermittees is to serve as the liaison between the Copermittees in the Watershed Management Area and the San Diego Water Board on general permit issues. Ideally, the Principal Watershed Copermittee can represent the interests of all the Copermittees within a Watershed Management Area during discussions or meetings to facilitate communication with the San Diego Water Board. The Principal Watershed Copermittees are also responsible for facilitating and coordinating the implementation efforts of the Copermittees and submittals of required documents and reports.

The Principal Watershed Copermittee is responsible for facilitating the efforts of the Copermittees within the Watershed Management Area to develop the Water Quality Improvement Plan required under Provision B, and submit it for approval in accordance with Provision F.1. The Principal Watershed Copermittee is also responsible for coordinating the submittal of the document updates, Progress Report Presentations, and Annual Reports required from the Copermittees within each Watershed Management Area under Provisions F.2, F.3.a, and F.3.b. The Principal Watershed Copermittees are responsible for coordinating with each other to develop and submit the Regional Clearinghouse, Regional Monitoring and Assessment Report, and the Report of Waste Discharge required under Provisions F.3.c, F.4, and F.5.

The designated Principal Watershed Copermittee for each Watershed Management Area does not necessarily have to serve as the Principal Watershed Copermittee for the entire term of the Order. If the Copermittees in a Watershed Management Area choose to designate a new Principal Watershed Copermittee, the change may be submitted as part of the Annual Report required under Provision F.3.b, with an update to the Water Quality Improvement Plan in accordance with Provision F.2.c.

Provision G.3 specifies that the Principal Watershed Copermittee is not responsible for ensuring that the other Copermittees within the Watershed Management Area are in compliance with the requirements of this Order

H. Modification of Order

Purpose: Provision H provides the conditions under which modifications to Order No. R9-2013-0001, as amended, may occur.

Discussion: Provision H allows for modifications to Order No. R9-2013-0001, as amended, for bases in addition to modifications (minor and major) allowed under the federal regulations at 40 CFR 122.62 and 122.63.

Modifications to the Order require re-opening the Order (see Water Code section 13223), subject to the requirements of 40 CFR 122.44, 122.62 to 122.64, and 124.5, but only for the specific provisions subject to the modification. Proposed modifications of the Order will be made available for public review, a public notice and comment period, and a public hearing if requested. Comments on the provisions not subject to the proposed modifications are not required to be considered in the San Diego Water Board's responses to comments or during the public hearing.

Provision H.4 was included to specify that the Order will be re-opened for modifications if the Basin Plan is amended to modify an existing TMDL or incorporate a new TMDL, or the monitoring and assessment program requirements need to be updated or revised.

I. Standard Permit Provisions and General Provisions

Purpose: Provision I incorporates the standard permit provisions required to be included in all NPDES permits, as well as several other general provisions.

Discussion: Provision I refers to Attachment B to the Order. Attachment B expressly incorporates the conditions applicable to all NPDES permits as provided under 40 CFR 122.41(a)-(n), as well as the applicable conditions for MS4s and storm water discharges provided under 40 CFR 122.42(c) and 40 CFR 122.42(d), respectively. Attachment B also includes several general provisions that are typically included in or applicable to waste discharge requirements issued by the San Diego Water Board.

IX. ATTACHMENTS

The attachments to the Order are discussed below. The discussions describe the content of the attachments.

Attachment A – Discharge Prohibitions and Special Protections

Section 1 of Attachment A includes the Waste Discharge Prohibitions from the Basin Plan. They have been provided verbatim in their entirety.

Section 2 of Attachment A includes the “*Special Protections for Areas of Special Biological Significance, Governing Point Source Discharges of Storm Water and Nonpoint Source Waste Discharges*” applicable to permitted point source discharges of storm water, adopted under State Water Board Resolution No. 2012-0012, as amended by Resolution No. 2012-0031. The terms, prohibitions, and special conditions (collectively referred to as special conditions) are established as limitations on point source storm water discharges. These special conditions provide Special Protections for marine aquatic life and natural water quality in ASBS, as required for State Water Quality Protection Areas pursuant to California Public Resources Code sections 36700(f) and 36710(f). These Special Protections were adopted by the State Water Board as part of the Ocean Plan General Exception.

Attachment B – Standard Permit Provisions and General Provisions

Conditions applicable to all NPDES permits, as required under 40 CFR 122.41, and conditions applicable to MS4s and storm water discharges, as required under 40 CFR 122.42(c) and 122.42(d), respectively are provided in Attachment B to the Order. They have been provided expressly in their entirety.

In addition to the standard provisions required to be incorporated into the Order and NPDES permit pursuant to 40 CFR 122.41 and 40 CFR 122.42, several other general provisions apply to this Order. These general provisions are typically included in or applicable to waste discharge requirements issued by the San Diego Water Board. Many of the general provisions were developed by the State Water Board. Where a general provision is derived from statute or regulation, a citation of the statute or regulation section is provided. General provisions that do not provide a citation are included under the authority provided CWC 13377.

Attachment C – Acronyms, Abbreviations and Definitions

The acronyms and abbreviations that are used in the Order are provided in Attachment C. Attachment C also includes definitions that may provide an explanation or description of the meaning or intent of specific terms or phrases included in the Order.

Attachment D – Jurisdictional Runoff Management Program Annual Report Form

An example of the Jurisdictional Runoff Management Program Annual Report Form required to be submitted by each Copermittee as part of the Annual Reports required under Provision F.3.b.(1)(e) is provided as Attachment D to the Order. An electronic version of the form will be available from the San Diego Water Board after the adoption of the Order.

The Jurisdictional Runoff Management Program Annual Report Form includes the minimum information necessary to demonstrate that the Copermittee is implementing and in compliance with the requirements of Provision E, and includes much of the information required to be reported pursuant to 40 CFR 122.42(c).

The information that must be provided on the Jurisdictional Runoff Management Program Annual Report Form is limited to the fiscal year, which begins July 1 and ends June 30 of the following year. The information expected to be provided by the Copermittees in each section of the Jurisdictional Runoff Management Program Annual Report Form is discussed below.

I. COPERMITTEE INFORMATION

The name of the Copermittee (e.g. name of city, county, or special district) and the contact information for the storm water program manager are provided under this section.

II. LEGAL AUTHORITY

The Copermittee must confirm whether or not the legal authorities under Provision E.1.a have been established for itself within its jurisdiction.

The Copermittee must also confirm whether or not a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative has certified that the Copermittee obtained and maintains adequate legal authority, as required under Provision E.1.b. The certification statement required by Provision E.1.b is only required to be submitted with the first Annual Report required under Provision F.3.b.

III. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM DOCUMENT UPDATE

The Copermittee must inform the San Diego Water Board whether or not an update to its jurisdictional runoff management program document was required or recommended by the San Diego Water Board during the reporting period. An update to the jurisdictional runoff management program is required under Provision F.2.a. The San Diego Water Board may recommend modifications to the jurisdictional runoff management program as part of the iterative approach and adaptive management process required under Provision B.5, which may result in an update that is necessary for the Copermittee's jurisdictional runoff management document.

If an update was required or recommended, the Copermittee must confirm whether or not the update was completed and made available on the Regional Clearinghouse within the reporting period. If no update was required or recommended, an answer is not required. If the answer is NO, meaning the required or recommended update was not completed and/or made available on the Regional Clearinghouse, the Copermittee must attach a

schedule for the completion of the update and/or posting of the updated document on the Regional Clearinghouse.

IV. ILLICIT DISCHARGE DETECTION AND ELIMINATION PROGRAM

The Copermittee must confirm whether or not a program was implemented during the fiscal year to actively detect and eliminate illicit discharges and connections in accordance with the requirements under Provision E.2.

In addition to confirming that a program to detect and eliminate illicit discharges was implemented during the reporting period, the Copermittee is also required to report on several items related to the program. The information that must be reported is limited to the fiscal year for the Annual Report.

All non-storm water discharges are considered illicit discharges unless the source is identified as one of the categories on non-storm water discharges under Provisions E.2.a.(1)-(5). If a non-storm water discharge is identified as one of the categories on non-storm water discharges under Provisions E.2.a.(1)-(5), the discharge is a non-storm water discharge, but not an illicit discharge. If a non-storm water discharge is identified but not in one of the categories on non-storm water discharges under Provisions E.2.a.(1)-(5), the discharge is both a non-storm water discharge and an illicit discharge.

V. DEVELOPMENT PLANNING PROGRAM

The Copermittee must confirm whether or not a development planning program was implemented during the fiscal year in accordance with the requirements under Provision E.3.

The Copermittee must also inform the San Diego Water Board whether or not an update to its BMP Design Manual was required or recommended by the San Diego Water Board during the fiscal year. An update to the BMP Design Manual is required under Provision F.2.b. The San Diego Water Board may recommend modifications to the BMP Design Manual, which may result in an update that is necessary for Copermittee's the BMP Design Manual.

If an update was required or recommended, the Copermittee must confirm whether or not the update was completed and made available on the Regional Clearinghouse within the reporting period. If no update was required or recommended, an answer is not required. If the answer is NO, meaning the required or recommended update was not completed and/or made available on the Regional Clearinghouse, the Copermittee must attach a schedule for the completion of the update and/or posting of the updated document on the Regional Clearinghouse.

The Copermittee is also required to report on several items related to the program. For the development and redevelopment projects that are reviewed under the program, the Copermittee must report the total number projects submitted for review during the fiscal year. Of those projects, the Copermittee must report the number that are Priority Development Projects, as defined under Provision E.3.b.(1). The Copermittee must also report the number of Priority Development Projects that were approved and/or granted occupancy during the fiscal year, regardless of when the project was originally submitted for review. Any projects that were approved during the fiscal year and granted any

exemptions from the BMP Design Manual requirements and/or allowed to implement alternative compliance options in accordance with Provision E.3.c.(3) must be reported.

Finally, the Copermittee must also report on several items related to its oversight of permanent BMPs on Priority Development Projects within its jurisdiction, as required under Provision E.3.e. The information that must be reported is limited to the fiscal year for the Annual Report.

VI. CONSTRUCTION MANAGEMENT PROGRAM

The Copermittee must confirm whether or not a construction management program was implemented during the fiscal year in accordance with the requirements under Provision E.4.

The Copermittee is also required to report on several items related to its oversight construction projects within its jurisdiction. The information that must be reported is limited to the fiscal year for the Annual Report.

VII. EXISTING DEVELOPMENT MANAGEMENT PROGRAM

The Copermittee must confirm whether or not an existing development management program was implemented during the fiscal year in accordance with the requirements under Provision E.5.

The Copermittee is also required to report on several items related to its oversight in areas of existing development within its jurisdiction. The information that must be reported is limited to the fiscal year for the Annual Report. The information must also be separated into four categories of existing development: municipal, commercial, industrial, and residential.

VIII. PUBLIC EDUCATION AND PARTICIPATION

The Copermittee must confirm whether or not a public education program component was implemented during the fiscal year in accordance with the requirements under Provision E.7.a.

The Copermittee must also confirm whether or not a public participation program component was implemented during the fiscal year in accordance with the requirements under Provision E.7.b.

IX. FISCAL ANALYSIS

The Copermittee must confirm a summary of its fiscal analysis, conducted in accordance with the requirements under Provision E.8, has been attached to the form.

X. CERTIFICATION

A Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative must sign and certify the Jurisdictional Runoff Management Program Annual Report Form. The appropriate box must be checked to indicate the whether a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative is signing the form.

Attachment E – Specific Provisions for Total Maximum Daily Loads

Attachment E provides specific provisions for implementing the load allocations (LAs) and wasteload allocations (WLAs) of Total Maximum Daily Loads (TMDLs) adopted by the San Diego Water Board and approved by USEPA in which the Copermitees are identified as responsible for discharges subject to the requirements of the TMDLs. Federal regulations require that NPDES requirements incorporate water quality based effluent limitations (WQBELs) that must be consistent with the requirements and assumptions of any available WLAs,⁴⁶ which may be expressed as numeric effluent limitations, when feasible, and/or as a best management practice (BMP) program of expanded or better-tailored BMPs.⁴⁷ Where the TMDL includes WLAs that provide numeric pollutant load or pollutant parameter objectives, the WLA has been, where feasible, translated into numeric WQBELs.⁴⁸

For each TMDL in Attachment E, four sections are included:

- a. **Applicability:** This section provides the resolution under which the TMDL Basin Plan amendment was adopted and approved, with the applicable adoption and approval dates. This section also gives the effective date of the TMDL and where the TMDL is applicable (i.e. Watershed Management Area and water body). The Copermitees that are responsible for implementing the specific provisions are also given in this section.
- b. **Final TMDL Compliance Requirements:** For each TMDL, the final TMDL compliance requirements consist of the final TMDL compliance date(s), the final WQBELs, and the final TMDL compliance determination requirements. The final WQBELs are expressed in terms of receiving water limitations, effluent limitations, and/or best management practices (BMPs). The final WQBELs for the TMDLs are incorporated by reference into Provision A of the Order. The final WQBELs become enforceable when the final TMDL compliance dates have passed. Applicable BMPs within the final WQBELs must be incorporated into the Water Quality Improvement Plans. Compliance with the final WQBELs will be determined in accordance with the options provided under the final TMDL compliance determination requirements.
- c. **Interim TMDL Compliance Requirements:** If the final TMDL compliance date has not passed and there are interim TMDL compliance requirements, they are included in this section. If there are interim WQBELs with interim compliance dates, the interim WQBELs become enforceable when the corresponding interim compliance dates have passed. Compliance with the interim WQBELs will be determined in accordance with the options provided under the interim TMDL compliance determination requirements.
- d. **Specific Monitoring and Assessment Requirements:** If there are specific monitoring and assessment requirements that cannot be met with the monitoring and assessment program

⁴⁶ 40 CFR 122.44(d)(1)(vii)(B)

⁴⁷ 40 CFR 122.44(k)(2) and 40 CFR 122.44(k)(3)

⁴⁸ November 26, 2014 Memorandum from the USEPA, Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLA"

requirements under Provision D of the Order, the additional requirements are included in this section.

The requirements of the TMDLs are based on and consistent with the assumptions and requirements of any available adopted and approved TMDLs that have been incorporated into the Basin Plan. Modifications to the requirements for the TMDLs in Attachment E cannot be made unless the TMDLs are modified in the Basin Plan.

A modification to any aspect of a TMDL in the Basin Plan requires a Basin Plan amendment. A Basin Plan amendment to modify a TMDL will require the San Diego Water Board to adopt a resolution to amend the Basin Plan, which includes a separate public process. When the San Diego Water Board adopts a Basin Plan amendment, it subsequently requires approval from the State Water Board, the Office of Administrative Law, and the USEPA before it becomes effective.

If and when the TMDLs are modified in the Basin Plan, the San Diego Water Board will revise the requirements of the Order in accordance with the Basin Plan amendment. When a Basin Plan amendment to modify a TMDL becomes effective, the San Diego Water Board will modify the requirements of the Order pursuant to the requirements of Provision H.4 of the Order as soon as possible.

VOLUME I

TAB 3

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

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

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

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

December 16, 2009

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

9174 Sky Park Court, Suite 100, San Diego, California 92123-4340

Phone • (858) 467-2952 • Fax (858) 571-6972

<http://www.waterboards.ca.gov/sandiego>

To request copies of the Orange County Municipal Storm Water Permit, please contact Ben Neill, Water Resources Control Engineer at (858) 467 – 2983, bneill@waterboards.ca.gov

Documents also are available at: <http://www.waterboards.ca.gov/sandiego>

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

Adopted by the
California Regional Water Quality Control Board
San Diego Region
on December 16, 2009

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
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9174 Sky Park Court, Suite 100
San Diego, California 92123-4340
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STATE OF CALIFORNIA
ARNOLD SCHWARZENEGGER, Governor
LINDA S. ADAMS, Agency Secretary, California Environmental Protection Agency



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

David King	<i>Vice Chair</i>	Recreation / Wildlife
Eric Anderson		Irrigated Agriculture
Wayne Rayfield		Water Quality
Grant Destache		Industrial Water Use
George Loveland		Water Supply
Marc Luker		Undesignated (Public)

David W. Gibson, *Executive Officer*
Michael P. McCann, *Assistant Executive Officer*

This permit was prepared under the direction of

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by

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Attachment A – Basin Plan Prohibitions

Attachment B – Standard Provisions, Reporting Requirements, and Notifications

Attachment C – Definitions

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Attachment E – Receiving Waters And MS4 Discharge Monitoring And Reporting
Program No. R9-2009-0002

Attachment F – Data

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

A. BASIS FOR THE ORDER

1. This Order is based on the federal Clean Water Act (CWA), the Porter-Cologne Water Quality Control Act (Division 7 of the Water Code, commencing with Section 13000), applicable State and federal regulations, all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Resources Control Board (State Board), the Water Quality Control Plan for the San Diego Basin adopted by the Regional Board, the California Toxics Rule, and the California Toxics Rule Implementation Plan.
2. This Order reissues National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108740, which was first adopted by the Regional Board on July 16, 1990 (Order No. 90-38), and then reissued on August 8, 1996 (Order No. 96-03) and February 13, 2002 (Order No. R9-2002-01). On August 21, 2006, in accordance with Order No. R9-2002-01, the County of Orange, as the Principal Copermittee, submitted a Report of Waste Discharge (ROWD) for reissuance of the municipal separate storm sewer system (MS4) Permit.
3. This Order is consistent with the following precedential Orders adopted by the State Water Resources Control Board (State Board) addressing MS4 NPDES Permits: Order 99-05, Order WQ-2000-11, Order WQ 2001-15, Order WQO 2002-0014, and Order WQ-2009-0008 (*SWRCB/OCC FILE A-1780*).
4. The Fact Sheet / Technical Report for the Order No. R9-2009-0002, NPDES No. CAS0108740, Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District Within the San Diego Region includes cited regulatory and legal references and additional explanatory information and data in support of the requirements of this Permit. This information, including any supplements thereto, and any response to comments on the Tentative Orders, is hereby incorporated by reference into these findings.

B. REGULATED PARTIES

1. Each of the persons in Table 1 below, hereinafter called Copermittees or dischargers, owns or operates an MS4, through which it discharges runoff into waters of the United States within the San Diego Region. These MS4s fall into one or more of the following categories: (1) a medium or large MS4 that services a population of greater than 100,000 or 250,000 respectively; or (2) a small MS4 that is "interrelated" to a medium or large MS4; or (3) an MS4 which contributes to a

violation of a water quality standard; or (4) an MS4 which is a significant contributor of pollutants to waters of the United States (waters of the U.S).

Table 1. Municipal Copermitttees

1. City of Aliso Viejo	8. City of Mission Viejo
2. City of Dana Point	9. City of Rancho Santa Margarita
3. City of Laguna Beach	10. City of San Clemente
4. City of Laguna Hills	11. City of San Juan Capistrano
5. City of Laguna Niguel	12. County of Orange
6. City of Laguna Woods	13. Orange County Flood Control District
7. City of Lake Forest	

C. DISCHARGE CHARACTERISTICS

1. Runoff discharged from an MS4 contains waste, as defined in the California Water Code (CWC), and pollutants that adversely affect the quality of the waters of the State. The discharge of runoff from an MS4 is a “discharge of pollutants from a point source” into waters of the U.S. as defined in the CWA.
2. MS4 storm water and non-storm water discharges are likely to contain pollutants that cause or threaten to cause a violation of water quality standards, as outlined in the Regional Board’s Water Quality Control Plan for the San Diego Basin (Basin Plan). Storm water and non-storm water discharges from the MS4 are subject to the conditions and requirements established in the San Diego Basin Plan for point source discharges. These surface water quality standards must be complied with at all times, irrespective of the source and manner of discharge.
3. The most common categories of pollutants in runoff include total suspended solids, sediment, pathogens (e.g., bacteria, viruses, protozoa); heavy metals (e.g., copper, lead, zinc and cadmium); petroleum products and polynuclear aromatic hydrocarbons; synthetic organics (e.g., pesticides, herbicides, and PCBs); nutrients (e.g., nitrogen and phosphorus fertilizers); oxygen-demanding substances (decaying vegetation, animal waste); detergents; and trash.
4. The discharge of pollutants and/or increased flows from MS4s may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives and/or impair or threaten to impair designated beneficial uses resulting in a condition of pollution (i.e., unreasonable impairment of water quality for designated beneficial uses), contamination, or nuisance.
5. Pollutants in runoff can threaten and adversely affect human health. Human illnesses have been clearly linked to recreating near storm drains flowing to coastal waters. Also, runoff pollutants in receiving waters can bioaccumulate in the tissues of invertebrates and fish, which may be eventually consumed by humans.

6. Runoff discharges from MS4s often contain pollutants that cause toxicity to aquatic organisms (i.e., adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). Toxic pollutants impact the overall quality of aquatic systems and beneficial uses of receiving waters.
7. The Copermitttees discharge runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within one of the eleven hydrologic units (San Juan Hydrologic Unit) comprising the San Diego Region as shown in Tables 2a and 2b. Some of the receiving water bodies have been designated as impaired by the Regional Board and the United States Environmental Protection Agency (USEPA) in 2006 pursuant to CWA section 303(d). Also shown in the Tables are the watershed management areas (WMAs) as defined in the Regional Board report, Watershed Management Approach, January 2002.

Table 2a. Common Watersheds and CWA Section 303(d) Impaired Waters

Regional Board Watershed Management Area (WMA)	Hydrologic Area (HA) or Hydrologic Subarea (HSA) of the San Juan Hydrologic Unit	Major Receiving Water Bodies	303(d) Pollutant(s)/stressor or Water Quality Effect¹
Laguna Coastal Streams	Laguna HA, excluding Aliso HSA and Dana Point HSA	Laguna Canyon Creek, Pacific Ocean	Bacterial indicators Sediment toxicity
Aliso Creek	Aliso HSA	Aliso Creek, English Canyon, Pacific Ocean	Toxicity Phosphorus Bacterial indicators Benzo[b]fluoranthene Dieldrin Sediment Toxicity
Dana Point Coastal Streams	Dana Point HSA	Dana Point Harbor, Salt Creek, Pacific Ocean	Bacterial indicators
San Juan Creek	Mission Viejo HA	San Juan Creek, Trabuco Creek, Oso Creek, Canada Gobernadora, Bell Canyon, Verdugo Canyon, Pacific Ocean	Bacterial indicators DDE Chloride Sulfates Total dissolved solids

¹ The listed 303(d) pollutant(s) do not necessarily reflect impairment of the entire corresponding WMA or all corresponding major surface water bodies. The specific impaired portions of each WMA are listed in the State Water Resources Control Board's 2006 Section 303(d) List of Water Quality Limited Segments.

Table 2a. Common Watersheds and CWA Section 303(d) Impaired Waters

Regional Board Watershed Management Area (WMA)	Hydrologic Area (HA) or Hydrologic Subarea (HSA) of the San Juan Hydrologic Unit	Major Receiving Water Bodies	303(d) Pollutant(s)/stressor or Water Quality Effect ¹
San Clemente Coastal Streams	San Clemente HA	Prima Deshecha, Segunda Deshecha, Pacific Ocean	Bacterial indicators Phosphorus Turbidity
San Mateo Creek	San Mateo HA	San Mateo Creek, Christianitos Creek, Pacific Ocean	

Table 2b. Common Watersheds and Municipalities

Municipality	Laguna Coastal Streams	Aliso Creek	Dana Point Coastal Streams	San Juan Creek	San Clemente Coastal Streams	San Mateo Creek
Aliso Viejo	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>				
Dana Point			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Laguna Beach	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>				
Laguna Hills *		<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>		
Laguna Niguel		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Laguna Woods *		<input checked="" type="checkbox"/>				
Lake Forest *		<input checked="" type="checkbox"/>				
Mission Viejo		<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>		
Rancho Santa Margarita				<input checked="" type="checkbox"/>		
San Clemente					<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
San Juan Capistrano				<input checked="" type="checkbox"/>		
County of Orange *	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Orange County Flood Control District *	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	

* Municipality also includes areas within watersheds of the Santa Ana Regional Board that are outside the scope of this Order

8. Trash is a persistent pollutant which can enter receiving waters from the MS4 resulting in accumulation and transport in receiving waters over time. Trash poses a serious threat to the Beneficial Uses of the receiving waters, including, but not limited to, human health, rare and endangered species, navigation and human recreation.
9. The Copermittees' water quality monitoring data submitted to date documents persistent violations of Basin Plan water quality objectives for various runoff-related pollutants (fecal coliform bacteria, total suspended solids, turbidity, metals, etc.) at

various watershed monitoring stations. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicates that the majority of urbanized receiving waters have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Orange County.

10. When natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost. Therefore, runoff leaving a developed area is significantly greater in runoff volume, velocity, and peak flow rate than pre-development runoff from the same area. Runoff durations can also increase as a result of flood control and other efforts to control peak flow rates. Increased volume, velocity, rate, and duration of runoff, and decreased natural clean sediment loads, greatly accelerate the erosion of downstream natural channels. Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as a 3-5 percent conversion from natural to impervious surfaces. The increased runoff characteristics from new development must be controlled to protect against increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.
11. Development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. which can either be washed or directly dumped into the MS4. As a result, the runoff leaving the developed urban area is significantly greater in pollutant load than the pre-development runoff from the same area. These increased pollutant loads must be controlled to protect downstream receiving water quality.
12. Development and urbanization especially threaten environmentally sensitive areas (ESAs), such as water bodies designated as supporting a RARE beneficial use (supporting rare, threatened or endangered species) and CWA 303(d)-impaired water bodies. Such areas have a much lower capacity to withstand pollutant shocks than might be acceptable in other areas. In essence, development that is ordinarily insignificant in its impact on the environment may become significant in a particularly sensitive environment. Therefore, additional control to reduce storm water pollutants from new and existing development may be necessary for areas adjacent to or discharging directly to an ESA.
13. Although dependent on several factors, the risks typically associated with properly managed infiltration of runoff (especially from residential land use areas) are not significant. The risks associated with infiltration can be managed by many techniques, including (1) designing landscape drainage features that promote infiltration of runoff, but do not "inject" runoff (injection bypasses the natural processes of filtering and transformation that occur in the soil); (2) taking reasonable

steps to prevent the illegal disposal of wastes; (3) protecting footings and foundations; (4) ensuring that each drainage feature is adequately maintained in perpetuity; and (5) pretreatment.

14. Non-storm water (dry weather) discharge from the MS4 is not considered a storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable (MEP) standard from CWA 402(p)(3)(B)(iii), which is explicitly for “Municipal ... *Stormwater Discharges* (emphasis added)” from the MS4. Non-storm water discharges, per CWA 402(p)(3)(B)(ii), are to be effectively prohibited. Such dry weather non-storm water discharges have been shown to contribute significant levels of pollutants and flow in arid, developed Southern California watersheds and are to be effectively prohibited under the Clean Water Act.
15. Non-storm water discharges to the MS4 granted an influent exception [i.e., which are exempt from the effective prohibition requirement set forth in CWA section 402(p)(3)(B)(ii)] under 40 CFR 122. 26 are included within this Order. Any exempted discharges identified by Copermittees as a source of pollutants are subsequently required to be *addressed* (emphasis added) as illicit discharges through prohibition and incorporation into existing IC/ID programs. The Copermittees have identified landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the United States.

D. RUNOFF MANAGEMENT PROGRAMS

1. General

- a. This Order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in storm water runoff to the maximum extent practicable (MEP). However, since MEP is a dynamic performance standard, which evolves over time as runoff management knowledge increases, the Copermittees’ runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc. in order to achieve the evolving MEP standard. Absent evidence to the contrary, this continual assessment, revision, and improvement of runoff management program implementation is expected to ultimately achieve compliance with water quality standards in the Region.
- b. The Copermittees have generally been implementing the jurisdictional runoff management programs required pursuant to Order No. 2002-01 since February 13, 2003. Prior to that, the Copermittees were regulated by Order No. 96-03 since August 8, 1996. Runoff discharges, however, continue to cause or contribute to violations of water quality standards as evidenced by the Copermittees monitoring results.

- c. This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards. Some of the new or modified requirements, such as the revised Watershed Runoff Management Program section, are designed to specifically address high priority water quality problems. Other new or modified requirements address program deficiencies that have been noted during audits, report reviews, and other Regional Board compliance assessment activities.
- d. Updated Jurisdictional Runoff Management Plans (JRMPs) and Watershed Runoff Management Plans (WRMPs), which describe the Copermittees' runoff management programs in their entirety, are needed to guide the Copermittees' runoff management efforts and aid the Copermittees in tracking runoff management program implementation. It is practicable for the Copermittees to update the JRMPs and WRMPs within one year, since significant efforts to develop these programs have already occurred.
- e. Pollutants can be effectively reduced in storm water runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Pollution prevention is the reduction or elimination of pollutant generation at its source and is the best "first line of defense." Source control BMPs (both structural and non-structural) minimize the contact between pollutants and flows (e.g., rerouting run-on around pollutant sources or keeping pollutants on-site and out of receiving waters). Treatment control BMPs remove pollutants that have been mobilized by wet-weather or dry-weather flows.
- f. Runoff needs to be addressed during the three major phases of urban development (planning, construction, and use) in order to reduce the discharge of pollutants from storm water to the MEP, effectively prohibit non-storm water discharges and protect receiving waters. Development which is not guided by water quality planning policies and principles can unnecessarily result in increased pollutant load discharges, flow rates, and flow durations which can negatively impact receiving water beneficial uses. Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. Existing development generates substantial pollutant loads which are discharged in runoff to receiving waters.
- g. Annual reporting requirements included in this Order are necessary to meet federal requirements and to evaluate the effectiveness and compliance of the Copermittees' programs.
- h. This Order establishes Storm Water Action Levels (SALs) for selected pollutants based on USEPA Rain Zone 6 (arid southwest) Phase I MS4 monitoring data for pollutants in storm water. The SALs were computed as the 90th percentile of the data set, utilizing the statistical based population approach, one of three

approaches recommended by the California Water Board's Storm Water Panel in its report, 'The Feasibility of Numerical Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (June 2006). SALs are identified in Section D of this Order. Copermittees shall implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water from the permitted areas so as not to exceed the SALs. Exceedance of SALs may indicate inadequacy of programmatic measures and BMPs required in this Order.

2. Development Planning

- a. The Standard Storm Water Mitigation Plan (SSMP) requirements contained in this Order are consistent with Order WQ-2000-11 adopted by the State Water Resources Control Board (State Board) on October 5, 2000. In the precedential order, the State Board found that the design standards, which essentially require that runoff generated by 85 percent of storm events from specific development categories be infiltrated or treated, reflect the MEP standard. The order also found that the SSMP requirements are appropriately applied to the majority of the Priority Development Project categories contained in Section D.1 of this Order. The State Board also gave Regional Water Quality Control Boards the needed discretion to include additional categories and locations, such as retail gasoline outlets (RGOs), in SSMPs.
- b. Controlling runoff pollution by using a combination of onsite source control and site design BMPs augmented with treatment control BMPs before the runoff enters the MS4 is important for the following reasons: (1) Many end-of-pipe BMPs (such as diversion to the sanitary sewer) are typically ineffective during significant storm events. Whereas, onsite source control BMPs can be applied during all runoff conditions; (2) End-of-pipe BMPs are often incapable of capturing and treating the wide range of pollutants which can be generated on a sub-watershed scale; (3) End-of-pipe BMPs are more effective when used as polishing BMPs, rather than the sole BMP to be implemented; (4) End-of-pipe BMPs do not protect the quality or beneficial uses of receiving waters between the pollutant source and the BMP; and (5) Offsite end-of-pipe BMPs do not aid in the effort to educate the public regarding sources of pollution and their prevention.
- c. Use of Low-Impact Development (LID) site design BMPs at new development, redevelopment and retrofit projects can be an effective means for minimizing the impact of storm water runoff discharges from the development projects on receiving waters. LID is a site design strategy with a goal of maintaining or replicating the pre-development hydrologic regime through the use of design techniques. LID site design BMPs help preserve and restore the natural hydrologic cycle of the site, allowing for filtration and infiltration which can greatly reduce the volume, peak flow rate, velocity, and pollutant loads of storm water runoff. Current runoff management, knowledge, practices and technology have

resulted in the use of LID BMPs as an acceptable means of meeting the storm water MEP standard.

- d. Retail Gasoline Outlets (RGOs) are significant sources of pollutants in storm water runoff. RGOs are points of convergence for motor vehicles for automotive related services such as repair, refueling, tire inflation, and radiator fill-up and consequently produce significantly higher loadings of hydrocarbons and trace metals (including copper and zinc) than other developed areas.
- e. Industrial sites are significant sources of pollutants in runoff. Pollutant concentrations and loads in runoff from industrial sites are similar or exceed pollutant concentrations and loads in runoff from other land uses, such as commercial or residential land uses. As with other land uses, LID site design, source control, and treatment control BMPs are needed at industrial sites in order to meet the MEP standard. These BMPs are necessary where the industrial site is larger than 10,000 square feet. The 10,000 square feet threshold is appropriate, since it is consistent with requirements in other Phase I NPDES storm water regulations throughout California.
- f. If not properly designed or maintained, certain BMPs implemented or required by municipalities for runoff management may create a habitat for vectors (e.g. mosquitoes and rodents). Proper BMP design and maintenance to avoid standing water, however, can prevent the creation of vector habitat. Nuisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities, the Orange County Vector Control District, and the California Department of Public Health during the development and implementation of runoff management programs.
- g. The increased volume, velocity, frequency and discharge duration of storm water runoff from developed areas has the potential to greatly accelerate downstream erosion, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads in storm water runoff and the volume of storm water runoff. Impervious surfaces can neither absorb water nor remove pollutants and thus lose the purification and infiltration provided by natural vegetated soil. Hydromodification measures for discharges to hardened channels are needed for the future restoration of the hardened channels to their natural state, thereby restoring the chemical, physical, and biological integrity and Beneficial Uses of local receiving waters.

3. Construction and Existing Development

- a. In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from industrial and construction sites are subject to dual (State and local) storm water regulation. Under this dual system, each Copermitttee is responsible for enforcing its local permits, plans, and ordinances, and the Regional Board is

responsible for enforcing the General Construction Activities Storm Water Permit, State Board Order 99-08 DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, State Board Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit) and any reissuance of these permits. NPDES municipal regulations require that municipalities develop and implement measures to address runoff from industrial and construction activities. Those measures may require the implementation of additional BMPs than are required under the statewide general permits for activities subject to both State and local regulation.

- b. Identification of sources of pollutants in runoff (such as municipal areas and activities, industrial and commercial sites/sources, construction sites, and residential areas), development and implementation of BMPs to address those sources, and updating ordinances and approval processes are necessary for the Copermittees to ensure that discharges of pollutants from its MS4 in storm water are reduced to the MEP and that non-storm water discharges are not occurring. Inspections and other compliance verification methods are needed to ensure minimum BMPs are implemented. Inspections are especially important at high risk areas for pollutant discharges.
- c. Historic and current development makes use of natural drainage patterns and features as conveyances for runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, anthropogenic, or partially modified features. In these cases, the urban stream is both an MS4 and receiving water.
- d. As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. These discharges may cause or contribute to a condition of contamination or a violation of water quality standards.
- e. Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the U.S. unless they are removed. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. For this reason, pollutant discharges from storm water into MS4s must be reduced using a combination of management measures, including source control, and an effective MS4 maintenance program must be implemented by each Copermittee.
- f. Enforcement of local runoff related ordinances, permits, and plans is an essential component of every runoff management program and is specifically required in the federal storm water regulations and this Order. Each Copermittee is individually responsible for adoption and enforcement of ordinances and/or policies, implementation of identified control measures/BMPs needed to prevent

or reduce pollutants in storm water runoff, and for the allocation of funds for the capital, operation and maintenance, administrative, and enforcement expenditures necessary to implement and enforce such control measures/BMPs under its jurisdiction. Education is an important aspect of every effective runoff management program and the basis for changes in behavior at a societal level. Education of municipal planning, inspection, and maintenance department staffs is especially critical to ensure that in-house staffs understand how their activities impact water quality, how to accomplish their jobs while protecting water quality, and their specific roles and responsibilities for compliance with this Order. Public education, designed to target various urban land users and other audiences, is also essential to inform the public of how individual actions affect receiving water quality and how adverse effects can be minimized.

- g. Public participation during the development of runoff management programs is necessary to ensure that all stakeholder interests and a variety of creative solutions are considered.
- h. Retrofitting existing development with storm water treatment controls, including LID, is necessary to address storm water discharges from existing development that may cause or contribute to a condition of pollution or a violation of water quality standards. Although SSMP BMPs are required for redevelopment, the current rate of redevelopment will not address water quality problems in a timely manner. Cooperation with private landowners is necessary to effectively identify, implement and maintain retrofit projects for the preservation, restoration, and enhancement of water quality.

4. Watershed Runoff Management

- a. Since runoff within a watershed can flow from and through multiple land uses and political jurisdictions, watershed-based runoff management can greatly enhance the protection of receiving waters. Such management provides a means to focus on the most important water quality problems in each watershed. By focusing on the most important water quality problems, watershed efforts can maximize protection of beneficial use in an efficient manner. Effective watershed-based runoff management actively reduces pollutant discharges and abates pollutant sources causing or contributing to watershed water quality problems. Watershed-based runoff management that does not actively reduce pollutant discharges and abate pollutant sources causing or contributing to watershed water quality problems can necessitate implementation of the iterative process outlined in section A.3 of the Tentative Order. Watershed management of runoff does not require Copermittees to expend resources outside of their jurisdictions. Watershed management requires the Copermittees within a watershed to develop a watershed-based management strategy, which can then be implemented on a jurisdictional basis.

- b. Some runoff issues, such as general education and training, can be effectively addressed on a regional basis. Regional approaches to runoff management can improve program consistency and promote sharing of resources, which can result in implementation of more efficient programs.
- c. It is important for the Copermittes to coordinate their water quality protection and land use planning activities to achieve the greatest protection of receiving water bodies. Copermittie coordination with other watershed stakeholders, especially the State of California Department of Transportation, the United States Department of Defense, and water and sewer districts, is also important.

E. STATUTE AND REGULATORY CONSIDERATIONS

1. The Receiving Water Limitations (RWL) language specified in this Order is consistent with language recommended by the USEPA and established in State Board Water Quality Order 99-05, *Own Motion Review of the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03, NPDES Permit No. CAS0108740*, adopted by the State Board on June 17, 1999. The RWL in this Order require compliance with water quality standards, which for storm water discharges is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time. Compliance with receiving water limits based on applicable water quality standards is necessary to ensure that MS4 discharges will not cause or contribute to violations of water quality standards and the creation of conditions of pollution.
2. The Water Quality Control Plan for the San Diego Basin (Basin Plan), identifies the following beneficial uses for surface waters in Orange County: Municipal and Domestic Supply (MUN)², Agricultural Supply (AGR), Industrial Process Supply (PROC), Industrial Service Supply (IND), Ground Water Recharge (GWR), Contact Water Recreation (REC1), Non-contact Water Recreation (REC2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Rare, Threatened, or Endangered Species (RARE), Freshwater Replenishment (FRSH), Hydropower Generation (POW), and Preservation of Biological Habitats of Special Significance (BIOL). The following additional beneficial uses are identified for coastal waters of Orange County: Navigation (NAV), Commercial and Sport Fishing (COMM), Estuarine Habitat (EST), Marine Habitat (MAR), Aquaculture (AQUA), Migration of Aquatic Organisms (MIGR), Spawning, Reproduction, and/or Early Development (SPWN), and Shellfish Harvesting (SHELL).
3. This Order is in conformance with State Board Resolution No. 68-16, *Statement of Policy with Respect to Maintaining High Quality Waters in California*, and the federal Antidegradation Policy described in 40 CFR 131.12.

² Subject to exceptions under the "Sources of Drinking Waters" Policy (Resolution No. 89-33)

4. Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This NPDES permit addresses the management measures required for the urban category, with the exception of septic systems. The adoption and implementation of this NPDES permit relieves the Copermittee from developing a non-point source plan, for the urban category, under CZARA. The Regional Board addresses septic systems through the administration of other programs.
5. Section 303(d)(1)(A) of the CWA requires that “Each state must identify those waters within its boundaries for which the effluent limitations...are not stringent enough to implement any water quality standard (WQS) applicable to such waters.” The CWA also requires states to establish a priority ranking of impaired water bodies known as Water Quality Limited Segments and to establish Total Maximum Daily Loads (TMDLs) for such waters. This priority list of impaired water bodies is called the Section 303(d) List. The current Section 303(d) List was approved by the State Board on October 25, 2006. On June 28, 2007 the 2006 303(d) list for California was given final approval by the United States Environmental Protection Agency (USEPA).
6. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIII B, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Order implements federally mandated requirements under federal Clean Water Act section 402. (33 U.S.C. § 1342(p)(3)(B).) Second, the local agency Copermittees’ obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental and new dischargers who are issued NPDES permits for storm water and non-storm water discharges. Third, the local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order. Fourth, the Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in federal Clean Water Act section 301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their storm water discharges. Fifth, the local agencies’ responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under State law predates the enactment of Article XIII B, Section (6) of the California Constitution. Likewise, the provisions of this Order to implement total maximum daily loads (TMDLs) are federal mandates. The federal Clean Water Act requires TMDLs to be developed for water bodies that do not meet federal water quality standards. (33 U.S.C. sec. 1313(d).) Once the U.S. Environmental Protection Agency or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation. (40 C.F.R. sec. 122.44(d)(1)(vii)(B).)

7. Runoff treatment and/or mitigation must occur prior to the discharge of runoff into receiving waters. Treatment BMPs must not be constructed in waters of the U.S. or State unless the runoff flows are sufficiently pretreated to protect the values and functions of the water body. Federal regulations at 40 CFR 131.10(a) state that in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. Authorizing the construction of an runoff treatment facility within a water of the U.S., or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Furthermore, the construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. Without federal authorization (e.g., pursuant to Clean Water Act Section 404), waters of the U.S. may not be converted into, or used as, waste treatment or conveyance facilities. Similarly, waste discharge requirements pursuant to California Water Code Section 13260 are required for the conversion or use of waters of the State as waste treatment or conveyance facilities. Diversion from waters of the U.S./State to treatment facilities and subsequent return to waters of the U.S. is allowable, provided that the effluent complies with applicable NPDES requirements.
8. The issuance of waste discharge requirements and an NPDES permit for the discharge of runoff from MS4s to waters of the U.S. is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, section 21000 et seq.) in accordance with the CWC section 13389.
9. Multiple water bodies in Orange County have been identified as impaired and placed on the 303(d) list. In 2004, Bacteria Impaired Waters TMDL Project II included six bacteria impaired shorelines in Dana Point Harbor and San Diego Bay: Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park, B Street, G Street Pier, Tidelands Park, and Chula Vista Marina in San Diego Bay. Since then, only Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay can be confirmed as still impaired by indicator bacteria. On June 11, 2008 the Regional Board adopted a Basin Plan amendment to incorporate *Bacteria Impaired Waters TMDL Project II for San Diego Bay and Dana Point Harbor Shorelines*. On June 16, 2009, the State Board approved the Basin Plan amendment. This action meets requirements of section 303(d) of the Clean Water Act (CWA). The Basin Plan amendment process is authorized under section 13240 of the Water Code. The State's Office of Administrative Law (OAL) approved the TMDLs on September 15, 2009. The effective date of the TMDLs is the date of OAL approval. USEPA approved the TMDLs on October 26, 2009.
10. Storm water discharges from developed and developing areas in Orange County are significant sources of certain pollutants that cause, may be causing, threatening to cause or contributing to water quality impairment in the waters of Orange County.

Furthermore, as delineated in the CWA section 303(d) list in Table 3, the Regional Board has found that there is a reasonable potential that municipal storm water and non-storm water discharges from MS4s cause or may cause or contribute to an excursion above water quality standards for the following pollutants: Indicator Bacteria, Phosphorous, Toxicity and Turbidity. In accordance with CWA section 303(d), the Regional Board is required to establish Total Maximum Daily Loads (TMDLs) for these pollutants to these waters to eliminate impairment and attain water quality standards. Therefore, certain early pollutant control actions and further pollutant impact assessments by the Copermittees are warranted and required pursuant to this Order.

Table 3. 2006 Section 303(d) Listed Waterbodies in So. Orange County

Waterbody	Pollutant
Aliso Creek	Indicator Bacteria, Phosphorus, Toxicity
Aliso Creek Mouth	Indicator Bacteria
Dana Point Harbor	Indicator Bacteria
English Canyon Creek	Benzo[b]fluoranthene, Dieldrin, Sediment Toxicity
Laguna Canyon Channel	Sediment Toxicity
Oso Creek (at Mission Viejo Golf Course)	Chloride, Sulfates, Total Dissolved Solids
Pacific Ocean Shoreline, Aliso HSA	Indicator Bacteria
Pacific Ocean Shoreline, Dana Point HSA	Indicator Bacteria
Pacific Ocean Shoreline, Laguna Beach HSA	Indicator Bacteria
Pacific Ocean Shoreline, Lower San Juan HSA	Indicator Bacteria
Pacific Ocean Shoreline, San Clemente HA	Indicator Bacteria
Pacific Ocean Shoreline, San Joaquin Hills HSA	Indicator Bacteria
Prima Deshecha Creek	Phosphorus, Turbidity
San Juan Creek	DDE, Indicator Bacteria
San Juan Creek (mouth)	Indicator Bacteria
Segunda Deshecha Creek	Phosphorus, Turbidity

11. This Order incorporates only those MS4 Waste Load Allocations (WLAs) developed in TMDLs that have been adopted by the Regional Water Board and have been approved by the State Board, Office of Administrative Law and U.S. EPA. Approved TMDL WLAs are to be addressed using water quality-based effluent limitations (WQBELs) calculated as numeric limitations (either in the receiving waters and/or at the point of MS4 discharge) and/or as BMPs. In most cases, the numeric limitation must be achieved to ensure the adequacy of the BMP program. Waste load

allocations for storm water and non-storm water discharges have been included within this Order only if the TMDL has received all necessary approvals. This Order establishes WQBELs and conditions consistent with the requirements and assumptions of the WLAs in the TMDLs as required by 40 CFR 122.44(d)(1)(vii)(B).

A TMDL is the total amount of a particular pollutant that a water body can receive and still meet Water Quality Standards (WQSS), which are comprised of Water Quality Objectives (WQOs), Beneficial Uses and the States Policy on Maintaining High Quality Waters³. The WQOs serve as the primary basis for protecting the associated Beneficial Use. The Numeric Target of a TMDL interprets and applies the numeric and/or narrative WQOs of the WQSS as the basis for the WLAs. This Order addresses TMDLs through Water Quality Based Effluent Limitations (WQBELs) that must be consistent with the assumptions and requirements of the WLA⁴. Federal guidance⁵ states that when adequate information exists, storm water permits are to incorporate numeric water quality based effluent limitations. In most cases, the numeric target(s) of a TMDL are a component of the WQBELs. When the numeric target is based on one or more numeric WQOs, the numeric WQOs and underlying assumptions and requirements will be used in the WQBELs as numeric effluent limitations by the end of the TMDL compliance schedule, unless additional information is required. When the numeric target interprets one or more narrative WQOs, the numeric target may assess the efficacy and progress of the BMPs in meeting the WLAs and restoring the Beneficial Uses by the end of the TMDL compliance schedule.

This Order fulfills a component of the TMDL Implementation Plan adopted by this Regional Board on June 11, 2008 for indicator bacteria in Baby Beach by establishing WQBELs expressed as both BMPs to achieve the WLAs and as numeric limitations⁶ for the City of Dana Point and the County of Orange. The establishment of WQBELs expressed as BMPs should be sufficient to achieve the WLA specified in the TMDL. The Waste Load Allocations (WLAs) and Numeric Targets are the necessary metrics to ensure that the BMPs achieve appropriate concentrations of bacterial indicators in the receiving waters.

³ State Water Resources Control Board, Resolution No. 68-16

⁴ 40 CFR 122.44(d)(1)(vii)(B)

⁵ USEPA, *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 FR 43761, August 26, 1996

⁶ The Waste Load Allocations are defined in Resolution No. R9-2008-0027, A Resolution to Adopt an Amendment to the *Water Quality Control Plan for the San Diego Basin (9)* to Incorporate Total Maximum Daily Loads for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay.

12. This Order requires each Copermitttee to effectively prohibit all types of unauthorized discharges of non-storm water into its MS4. However, historically pollutants have been identified as present in dry weather non-storm water discharges from the MS4s through 303(d) listings, monitoring conducted by the Copermitttees under Order No. R9-2002-0001, and there are others expected to be present in dry weather non-storm water discharges because of the nature of these discharges. This Order includes action levels for pollutants in non-storm water, dry weather, discharges from the MS4 designed to ensure that the requirement to effectively prohibit all types of unauthorized discharges of non-storm water in the MS4 is being complied with. Action levels in the Order are based upon numeric or narrative water quality objectives and criteria as defined in the Basin Plan, the Water Quality Control Plan for Ocean Waters of California (Ocean Plan), and the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP). An exceedance of an action level requires specified responsive action by the Copermitttees. This Order describes what actions the Copermitttees must take when an exceedance of an action level is observed. Exceedances of non-storm water action levels do not alone constitute a violation of this Order but could indicate non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions established in this Order. Failure to undertake required source investigation and elimination action following an exceedance of 2a non-storm water action level (NAL or action level) is a violation of this Order. The Regional Board recognizes that use of action levels will not necessarily result in detection of all unauthorized sources of non-storm water discharges because there may be some discharges in which pollutants do not exceed established action levels. However, establishing NALs at levels appropriate to protect water quality standards is expected to lead to the identification of significant sources of pollutants in dry weather non-storm water discharges.
13. In addition to federal regulations cited in the Fact Sheet / Technical Report for the Order NO. R9-2009-0002, monitoring and reporting required under Order No. R9-2009-0002 is required pursuant to authority under CWC section 13383.

F. PUBLIC PROCESS

1. The Regional Board has notified the Copermitttees, all known interested parties, and the public of its intent to consider adoption of an Order prescribing waste discharge requirements that would serve to renew an NPDES permit for the existing discharge of runoff.
2. The Regional Board has held public hearings on April 11, 2007, February 13, 2008, July 1, 2009, and November 18, 2009 and heard and considered all comments pertaining to the terms and conditions of this Order.

IT IS HEREBY ORDERED that the Copermittees, in order to meet the provisions contained in Division 7 of the California Water Code (CWC) and regulations adopted thereunder, and the provisions of the Clean Water Act (CWA) and regulations adopted thereunder, must each comply with the following:

A. PROHIBITIONS AND RECEIVING WATER LIMITATIONS

1. Discharges into and from municipal separate storm sewer systems (MS4s) in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state are prohibited.
2. Storm water discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP) are prohibited.⁷
3. Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses, water quality objectives developed to protect beneficial uses, and the State policy with respect to maintaining high quality waters) are prohibited.
 - a. Each Copermittee must comply with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order through timely implementation of control measures and other actions to reduce pollutants in storm water discharges in accordance with this Order, including any modifications. If exceedance(s) of water quality standards persist notwithstanding implementation of this Order, the Copermittee must assure compliance with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order by complying with the following procedure:
 - (1) Upon a determination by either the Copermittee or the Regional Board that storm water MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the Copermittee must notify the Regional Board within 30 days and thereafter submit a report to the Regional Board that describes best management practices (BMPs) that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report may be incorporated in the Annual Report unless the Regional Board directs an earlier submittal. The report must include an implementation schedule. The Regional Board may require modifications to the report;

⁷ This prohibition does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer).

- (2) Submit any modifications to the report required by the Regional Board within 30 days of notification;
 - (3) Within 30 days following approval of the report described above by the Regional Board, the Copermittee must revise its Jurisdictional Runoff Management Program and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required; and
 - (4) Implement the revised Jurisdictional Runoff Management Program and monitoring program in accordance with the approved schedule.
- b. The Copermittee must repeat the procedure set forth above to comply with the receiving water limitations for continuing or recurring exceedances of the same water quality standard(s) unless directed to do otherwise by the Regional Board Executive Officer.
 - c. Nothing in section A.3 must prevent the Regional Board from enforcing any provision of this Order while the Copermittee prepares and implements the above report.
4. In addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in Attachment A to this Order.

B. NON-STORM WATER DISCHARGES

1. Each Copermittee must effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate National Pollutant Discharge Elimination System (NPDES) permit; or not prohibited in accordance with sections B.2 and B.3 below.
2. The following categories of non-storm water discharges are not prohibited unless a Copermittee or the Regional Board identifies the discharge category as a source of pollutants to waters of the U.S. Where the Copermittee(s) have identified a category as a source of pollutants, the category shall be addressed as an illicit discharge and prohibited through ordinance, order or similar means. The Regional Board may identify categories of discharge that either requires prohibition or other controls. For such a discharge category, the Copermittee, under direction of the Regional Board, must either prohibit the discharge category or develop and implement appropriate control measures to prevent the discharge of pollutants to the MS4 and report to the Regional Board pursuant to Section K.1 and K.3 of this Order.
 - a. Diverted stream flows;
 - b. Rising ground waters;
 - c. Uncontaminated ground water infiltration [as defined at 40 CFR 35.2005(20)] to

- MS4s;
- d. Uncontaminated pumped ground water⁸;
 - e. Foundation drains⁸;
 - f. Springs;
 - g. Water from crawl space pumps⁸;
 - h. Footing drains⁸;
 - i. Air conditioning condensation;
 - j. Flows from riparian habitats and wetlands;
 - k. Water line flushing^{9,10};
 - l. Discharges from potable water sources not subject to NPDES Permit No. CAG679001, other than water main breaks;
 - m. Individual residential car washing; and
 - n. Dechlorinated swimming pool discharges¹¹.
3. Emergency fire fighting flows (i.e., flows necessary for the protection of life or property) do not require BMPs and need not be prohibited. As part of the Jurisdictional Runoff Management Plan (JRMP), each Copermittee must develop and implement a program to address pollutants from non-emergency fire fighting flows (i.e., flows from controlled or practice blazes and maintenance activities) identified by the Copermittee to be significant sources of pollutants to waters of the United States.
- a. Building fire suppression system maintenance discharges (e.g. sprinkler line flushing) contain waste. Therefore, such discharges are to be prohibited by the Copermittees as illicit discharges through ordinance, order, or similar means.
4. Each Copermittee must examine all dry weather effluent analytical monitoring results collected in accordance with section F.4 of this Order and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 to identify water quality problems which may be the result of any non-prohibited discharge category(ies) identified above in section B.2. Follow-up investigations must be conducted as necessary to identify and control, pursuant to section B.2, any non-prohibited discharge category(ies) listed above.

⁸ Requires enrollment under Order R9-2008-002. Discharges into the MS4 require authorization from the owner and operator of the MS4 system.

⁹ This exemption does not include fire suppression sprinkler system maintenance and testing discharges. Those discharges may be regulated under Section B.3.

¹⁰ Requires enrollment under Order R9-2002-0020.

¹¹ Including saline swimming pool discharges directly to a saline water body.

C. NON-STORM WATER DRY WEATHER ACTION LEVELS

1. Each Copermittee, beginning no later than May 1, 2011, shall implement the non-storm water dry weather action level (NAL) monitoring as described in Attachment E of this Order.
2. In response to an exceedance of an NAL, each Copermittee must investigate and identify the source of the exceedance in a timely manner. However, if any Copermittee identifies exceedances of NALs that prevent them from adequately conducting source investigations in a timely manner, then the Copermittees may submit a prioritization plan and timeline that identifies the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees must submit an action report dependant on the source of the pollutant exceedance as follows:
 - a. If the Copermittee identifies the source of the exceedance as natural (non-anthropogenically influenced) in origin and in conveyance into the MS4; then the Copermittee shall report their findings and documentation of their source investigation to the Regional Board within fourteen days of the source identification.
 - b. If the Copermittee identifies the source of the exceedance as an illicit discharge or connection, then the Copermittees must eliminate the discharge to their MS4 and report the findings, including any enforcement action(s) taken, and documentation of the source investigation to the Regional Board within fourteen days of the source identification. If the Copermittee is unable to eliminate the source of discharge within fourteen days, then the Copermittee must submit, as part of their action report, their plan and timeframe to eliminate the source of the exceedance. Those dischargers seeking to continue such a discharge must become subject to a separate NPDES permit prior to continuing any such discharge.
 - c. If the Copermittee identifies the source of the exceedance as an exempted category of non-storm water discharge, then the Copermittees must determine if this is an isolated circumstance or if the category of discharges must be addressed through the prevention or prohibition of that category of discharge as an illicit discharge. The Copermittee must submit their findings in including a description of the steps taken to address the discharge and the category of discharge, to the Regional Board for review with the next subsequent annual report. Such description shall include relevant updates to or new ordinances, orders, or other legal means of addressing the category of discharge. The Copermittees must also submit a summary of their findings with the Report of Waste Discharge.
 - d. If the Copermittee identifies the source of the exceedance as a non-storm water discharge in violation or potential violation of an existing separate NPDES permit

- (e.g. the groundwater dewatering permit), then the Copermittee must report, within three business days, the findings to the Regional Board including all pertinent information regarding the discharger and discharge characteristics.
- e. If the Copermittee is unable to identify the source of the exceedance after taking and documenting reasonable steps to do so, then the Copermittee must identify the pollutant as a high priority pollutant of concern in the tributary subwatershed, perform additional focused sampling and update their programs within a year to reflect this priority. The Copermittee's annual report shall include these updates to their programs including, where applicable, updates to their watershed workplans (Section G.2), retrofitting consideration (Section F.3.d) and program effectiveness work plans (Section J.4).
 - f. The Copermittees or any interested party, may evaluate existing NALs and propose revised NALs for future Board consideration.
3. An exceedance of an NAL does not alone constitute a violation of the provisions of this Order, but an exceedance of an NAL may indicate lack of compliance with the requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions set forth in Sections A and B of this Order. Failure to timely implement required actions specified in this Order following an exceedance of an NAL constitutes a violation of this Order. However, neither compliance with NALs nor compliance with required actions following observed exceedances, excuses any non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4s or any non-compliance with the prohibitions in Sections A and B of this Order. NALs provide an assessment of the effectiveness of the prohibition of non-storm water discharges and of the appropriateness of exempted non-storm water discharges. During any annual reporting period in which one or more exceedances of NALs have been documented the Copermittee must submit with their next scheduled annual report, a report describing whether and how the observed exceedances did or did not result in a discharge from the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters.
4. Monitoring of effluent will occur at the end-of-pipe prior to discharge into the receiving waters, with a focus on Major Outfalls, as defined in 40 CFR 122.26(B 5-6) and Attachment E of this Order. The Copermittees must develop their monitoring plans to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. At a minimum, outfalls that exceed any NALs once during any year must be monitored in the subsequent year. Any station that does not exceed an NAL for 3 years may be replaced with a different station.

5. Each Copermittee shall monitor for the non-storm water dry weather action levels, which are incorporated into this Order as follows:

a. Action levels for discharges to inland surface waters:

Table 4.a.1: General Constituents

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Fecal Coliform	MPN/ 100 ml	200 ^A 400 ^B	-		BPO
Enterococci	MPN/ 100 ml	33	-	104 ^C	BPO/OP
Turbidity	NTU	-	20		BPO
pH	Units	Within limit of 6.5 to 8.5 at all times			BPO
Dissolved Oxygen	mg/L	Not less than 5.0 in WARM waters and not less than 6.0 in COLD waters			BPO
Total Nitrogen	mg/L	-	1.0	See MDEL	BPO
Total Phosphorus	mg/L	-	0.1	See MDEL	BPO
Methylene Blue Active Substances	mg/L	-	0.5	See MDEL	BPO

A – Based on a minimum of not less than five samples for any 30-day period

B – No more than 10 percent of total samples may exceed 400 per 100 ml during any 30 day period

C – This Value has been set to Ocean Plan Criteria for Designated Beach Areas

BPO – Basin Plan Objective

OP – Ocean Plan

MDAL – Maximum Daily Action Level

AMAL – Average Monthly Action Level

Table 4.a.2: Priority Pollutants

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

CTR – California Toxic Rule

* - Action Levels developed on a case-by-case basis (see below)

The NALs for Cadmium, Copper, Chromium (III), Lead, Nickel, Silver and Zinc will be developed on a case-by-case basis because the freshwater criteria are based on site-specific water quality data (receiving water hardness). For these priority pollutants, the following equations (40 CFR 131.38.b.2) will be required:

$$\begin{aligned} \text{Cadmium (Total Recoverable)} &= \exp(0.7852[\ln(\text{hardness})] - 2.715) \\ \text{Chromium III (Total Recoverable)} &= \exp(0.8190[\ln(\text{hardness})] + .6848) \\ \text{Copper (Total Recoverable)} &= \exp(0.8545[\ln(\text{hardness})] - 1.702) \\ \text{Lead (Total Recoverable)} &= \exp(1.273[\ln(\text{hardness})] - 4.705) \end{aligned}$$

$$\begin{aligned} \text{Nickel (Total Recoverable)} &= \exp(.8460[\ln(\text{hardness})] + 0.0584) \\ \text{Silver (Total Recoverable)} &= \exp(1.72[\ln(\text{hardness})] - 6.52) \\ \text{Zinc (Total Recoverable)} &= \exp(0.8473[\ln(\text{hardness})] + 0.884) \end{aligned}$$

b. Action levels for discharges to bays, harbors and lagoons/estuaries:

Table 4.b: General Constituents

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Total Coliform	MPN/100 ml	1,000	-	10,000	BPO
Fecal Coliform	MPN/100 ml	200 ^A , 400 ^B	-		BPO
Enterococci	MPN/100 ml	35	-	104 ^C	BPO
Turbidity	NTU	75	-	225	OP
pH	Units	Within limit of 6.0 to 9.0 at all times			OP
Priority Pollutants	ug/L	See limitations in Table 4.a.2			

A – Based on a minimum of not less than five samples for any 30-day period

B – No more than 10 percent of total samples may exceed 400 per 100 ml during any 30 day period

C – Designated Beach Areas

OP – California Ocean Plan 2005

BPO – Basin Plan Objective

MDAL – Maximum Daily Action Level

AMAL – Average Monthly Action Level

c. Action levels for discharges to the surf zone:

Table 4.c: General Constituents

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Total Coliform	MPN/100 ml	1,000	-	10,000 1,000 ^A	OP
Fecal Coliform	MPN/100 ml	200 ^B	-	400	OP
Enterococci	MPN/100 ml	35	-	104 ^C	OP

A – Total coliform density shall not exceed 1,000 per 100 ml when the ratio of fecal/total coliform exceeds 0.1

B – During any 30 day period

C – Designated Beach Areas

OP – California Ocean Plan 2005

D. STORM WATER ACTION LEVELS

1. Beginning Year 3 after Order adoption date, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the United States that exceed the Storm Water Action Levels (SALs) for the pollutants listed in Table 5 (below) will require each Copermitttee to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutant(s) to the MEP standard. The Copermitttees must utilize the exceedance information when adjusting and executing annual work plans, as required by this Order. Copermitttees shall take the magnitude, frequency, and number of constituents exceeding the SAL(s), in addition to receiving water quality data and other information, into consideration when reacting to SAL exceedances in an iterative manner. Failure to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the Copermitttee(s) have not complied with the MEP standard.

Table 5. Storm Water Action Levels

Pollutant	Action Level
Turbidity (NTU)	126
Nitrate & Nitrite total (mg/L)	2.6
P total (mg/L)	1.46
Cd total (µg/L)	3.0
Cu total (µg/L)	127
Pb total (µg/L)	250
Ni total (µg/L)	54
Zn total (µg/L)	976

2. The end-of-pipe assessment points for the determination of SAL compliance are all major outfalls, as defined in 40 CFR 122.26(b)(5) and (b)(6). The Copermitttees must develop their monitoring plans to sample a representative percent of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceed SALs must be monitored in the subsequent year. Any station that does not exceed an SAL for 3 years may be replaced with a different station. SAL samples must be 24 hour time weighted composites.
3. The absence of SAL exceedances does not relieve the Copermitttees from implementing all other required elements of this Permit.
4. This Permit does not regulate natural sources and conveyances of constituents listed in Table 5. To be relieved of the requirements to prioritize pollutant/watershed combinations for BMP updates and to continue monitoring a station, the Copermitttee must demonstrate that the likely and expected cause of the SAL exceedance is not anthropogenic in nature.
5. The SALs will be reviewed and updated at the end of every permit cycle. The data collected pursuant to D.2 above can be used to create SALs based upon local data.

It is the goal of the SALs, through the iterative and MEP process, to have outfall storm water discharges meet all applicable water quality standards.

E. LEGAL AUTHORITY

1. Each Copermittee must establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. Nothing herein shall authorize a Co-Permittee or other discharger regulated under the terms of this order to divert, store or otherwise impound water if such action is reasonably anticipated to harm downstream water right holders in the exercise of their water rights. This legal authority must, at a minimum, authorize the Copermittee to:
 - a. Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites. This requirement applies both to industrial and construction sites which have coverage under the statewide general industrial or construction storm water permits, as well as to those sites which do not. Grading ordinances must be updated and enforced as necessary to comply with this Order;
 - b. Prohibit all identified illicit discharges not otherwise allowed pursuant to section B.2;
 - c. Prohibit and eliminate illicit connections to the MS4;
 - d. Control the discharge of spills, dumping, or disposal of materials other than storm water to its MS4;
 - e. Require compliance with conditions in Copermittee ordinances, permits, contracts or orders (i.e., hold dischargers to its MS4 accountable for their contributions of pollutants and flows);
 - f. Utilize enforcement mechanisms to require compliance with Copermittee storm water ordinances, permits, contracts, or orders;
 - g. Control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements among Copermittees. Control of the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements with other owners of the MS4 such as the State of California Department of Transportation, the United States Department of Defense, or Native American Tribes is encouraged;
 - h. Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits and with this Order, including the prohibition on illicit discharges to the MS4. This means the Copermittee must have authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from industrial facilities discharging into its MS4, including construction sites;
 - i. Require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s from storm water to the MEP; and

- j. Require documentation on the effectiveness of BMPs implemented to reduce the discharge of storm water pollutants to the MS4 to the MEP.
2. Each Copermittee must submit within 365 days of adoption of this Order, a statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority to implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order except for the updated requirements for low impact development and hydromodification in section F.1. Each Copermittee must submit as part of its updated SSMP, a statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority to implement and enforce the low impact development and hydromodification requirements in section F.1. These statements must include:
 - a. Identification of all departments within the jurisdiction that conduct runoff related activities, and their roles and responsibilities under this Order. Include an up to date organizational chart specifying these departments and key personnel.
 - b. Citation of runoff related ordinances and the reasons they are enforceable;
 - c. Identification of the local administrative and legal procedures available to mandate compliance with runoff related ordinances and therefore with the conditions of this Order;
 - d. A description of how runoff related ordinances are implemented and appealed; and
 - e. Description of whether the municipality can issue administrative orders and injunctions or if it must go through the court system for enforcement actions.

F. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM (JRMP)

Each Copermittee must implement all requirements of section F of this Order no later than 365 days after adoption of the Order, unless otherwise specified in this Order.

Prior to 365 days after adoption of the Order, each Copermittee must at a minimum implement its Jurisdictional RMP document, as the document was developed and amended to comply with the requirements of Order No. R9-2002-001.

Each Copermittee must develop and implement an updated JRMP for its jurisdiction.

Each updated JRMP must meet the requirements of section F of this Order, reduce the discharge of storm water pollutants from the MS4 to the MEP, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.

1. DEVELOPMENT PLANNING COMPONENT

Each Copermittee must implement a program which meets the requirements of this section and (1) reduces Development Project discharges of storm water pollutants from the MS4 to the MEP; (2) prevents Development Project discharges from the MS4 from causing or contributing to a violation of water quality standards; (3) prevents illicit discharges into the MS4; and (4) manages increases in runoff discharge rates and durations from Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

a. GENERAL PLAN

Each Copermittee must revise as needed its General Plan or equivalent plan (e.g., Comprehensive, Master, or Community Plan) for the purpose of providing effective water quality and watershed protection principles and policies that direct land-use decisions and require implementation of consistent water quality protection measures for all development and redevelopment projects.

b. ENVIRONMENTAL REVIEW PROCESS

Each Copermittee must revise as needed its current environmental review processes to accurately evaluate water quality impacts and cumulative impacts and identify appropriate measures to avoid, minimize and mitigate those impacts for all Development Projects.

c. APPROVAL PROCESS CRITERIA AND REQUIREMENTS FOR ALL DEVELOPMENT PROJECTS

For all proposed Development Projects, each Copermittee during the planning process, and prior to project approval and issuance of local permits, must prescribe the necessary requirements so that Development Project discharges of storm water pollutants from the MS4 will be reduced to the MEP, will not cause or

contribute to a violation of water quality standards, and will comply with Copermittee's ordinances, permits, plans, and requirements, and with this Order. Performance Criteria: Discharges from each approved development project must be subject to the following management measures:

- (1) Source control BMPs that reduce storm water pollutants of concern in runoff, including prevention of illicit discharges into the MS4; prevention of irrigation runoff; storm drain system stenciling or signage; properly designed outdoor material storage areas; properly designed outdoor work areas; and properly designed trash storage areas;
- (2) The following LID BMPs listed below shall be implemented at all Development Projects where applicable and feasible.
 - (a) Conserve natural areas, including existing trees, other vegetation, and soils.
 - (b) Construct streets, sidewalks, or parking lot aisles to the minimum widths necessary, provided that public safety is not compromised.
 - (c) Minimize the impervious footprint of the project.
 - (d) Minimize soil compaction to landscaped areas.
 - (e) Minimize disturbances to natural drainages (e.g., natural swales, topographic depressions, etc.)
 - (f) Disconnect impervious surfaces through distributed pervious areas.
- (3) Buffer zones for natural water bodies, where feasible. Where buffer zones are infeasible, require project proponent to implement other buffers such as trees, access restrictions, etc;
- (4) Measures necessary so that grading or other construction activities meet the provisions specified in section F.2 of this Order; and
- (5) Submittal of proof of a mechanism under which ongoing long-term maintenance of all structural post-construction BMPs will be conducted.
- (6) Infiltration and Groundwater Protection

To protect groundwater quality, each Copermittee must apply restrictions to the use of treatment control BMPs that are designed to primarily function as centralized infiltration devices (such as large infiltration trenches and infiltration basins). Such restrictions must be designed so that the use of such infiltration treatment control BMPs must not cause or contribute to an exceedance of groundwater quality objectives. At a minimum, each treatment control BMP designed to primarily function as a centralized infiltration device must meet the restrictions below, unless it is demonstrated that a restriction is not necessary to protect groundwater quality. The Copermittees may collectively or individually develop alternative restrictions on the use of

- treatment control BMPs which are designed to primarily function as centralized infiltration devices. Alternative restrictions developed by the Copermittees can partially or wholly replace the restrictions listed below. The restrictions are not intended to be applied to small infiltration systems dispersed throughout a development project.
- (a) Runoff must undergo pretreatment such as sedimentation or filtration prior to infiltration;
 - (b) All dry weather flows containing significant pollutant loads must be diverted from infiltration devices and treated through other BMPs;
 - (c) Pollution prevention and source control BMPs must be implemented at a level appropriate to protect groundwater quality at sites where infiltration treatment control BMPs are to be used;
 - (d) Infiltration treatment control BMPs must be adequately maintained so that they remove storm water pollutants to the MEP;
 - (e) The vertical distance from the base of any infiltration treatment control BMP to the seasonal high groundwater mark must be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained;
 - (f) The soil through which infiltration is to occur must have physical and chemical characteristics (such as appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of runoff for the protection of groundwater beneficial uses;
 - (g) Infiltration treatment control BMPs must not be used for areas of industrial or light industrial activity; areas subject to high vehicular traffic (25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway); automotive repair shops; car washes; fleet storage areas (bus, truck, etc.); nurseries; and other high threat to water quality land uses and activities as designated by each Copermittee unless first treated or filtered to remove pollutants prior to infiltration and a comprehensive site-specific evaluation has been conducted; and
 - (h) Infiltration treatment control BMPs must be located a minimum of 100 feet horizontally from any water supply wells.
- (7) Where feasible, landscaping with native or low water species shall be preferred in areas that drain to the MS4 or to waters of the United States.

**d. STANDARD STORM WATER MITIGATION PLANS (SSMPs) – APPROVAL PROCESS
CRITERIA AND REQUIREMENTS FOR PRIORITY DEVELOPMENT PROJECTS**

Within two years of adoption of this Order, the Copermittees must submit an updated model SSMP, to the Regional Board's Executive Officer for a 30 day public review and comment period. The Regional Board's Executive Officer has the discretion to determine the necessity of a public hearing. Within 180 days of determination that the Model SSMP is in compliance with this Permit's provisions, each Copermittee must update their own local SSMP, and amended ordinances consistent with the model SSMP, and shall submit both (local SSMP and amended ordinances) to the Regional Board. The model SSMP must meet the requirements of section F.1.d of this Order to (1) reduce Priority Development Project discharges of storm water pollutants from the MS4 to the MEP, and (2) prevent Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.¹²

(1) Definition of Priority Development Project (PDP):

Priority Development Projects are:

- (a) All new Development Projects that fall under the project categories or locations listed in section F.1.d.(2), and
- (b) Those redevelopment projects that create, add, or replace at least 5,000 square feet of impervious surfaces on an already developed site and the existing development and/or the redevelopment project falls under the project categories or locations listed in section F.1.d.(2). Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to SSMP requirements, the numeric sizing criteria discussed in section F.1.d.(6) applies only to the addition or replacement, and not to the entire development. Where redevelopment results in an increase of more than fifty percent of the impervious surfaces of a previously existing development, the numeric sizing criteria applies to

¹² Updated SSMP and hydromodification requirements must apply to all priority projects or phases of priority projects which have not yet begun grading or construction activities at the time any updated SSMP or hydromodification requirement commences. If lawful prior approval of a project exists, whereby application of an updated SSMP or hydromodification requirement to the project is illegal, the updated SSMP or hydromodification requirement need not apply to the project. Updated Development Planning requirements set forth in Sections F.1. (a) through (h) of this Order must apply to all projects or phases of projects, unless, at the time any updated Development Planning requirement commences, the projects or project phases meet any one of the following conditions: (i) the project or phase has begun grading or construction activities; or (ii) a Copermittee determines that lawful prior approval rights for a project or project phase exist, whereby application of the Updated Development Planning requirement to the project is legally infeasible. Where feasible, the Permittees must utilize the SSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SSMP and hydromodification requirements in their plans.

the entire development.

- (c) One acre threshold: In addition to the Priority Development Project Categories identified in section F.1.d.(2), Priority Development Projects must also include all other pollutant-generating Development Projects that result in the disturbance of one acre or more of land within three years of adoption of this Order.¹³ As an alternative to this one-acre threshold, the Copermittees may collectively identify a different threshold, provided the Copermittees' threshold is at least as inclusive of Development Projects as the one-acre threshold.

(2) Priority Development Project Categories

Where a new Development Project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SSMP requirements.

- (a) New development projects that create 10,000 square feet or more of impervious surfaces (collectively over the entire project site) including commercial, industrial, residential, mixed-use, and public projects. This category includes development projects on public or private land which fall under the planning and building authority of the Copermittees.
- (b) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.
- (c) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet must meet all SSMP requirements except for structural treatment BMP and numeric sizing criteria requirement F.1.d.(6) and hydromodification requirement F.1.h.
- (d) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.
- (e) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges

¹³ Pollutant generating Development Projects are those projects that generate pollutants at levels greater than natural background levels.

from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10 percent or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

- (f) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.
- (g) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.
- (h) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

(3) Pollutants of Concern

As part of its local SSMP, each Copermittee must implement an updated procedure for identifying pollutants of concern for each Priority Development Project. The procedure must address, at a minimum: (1) Receiving water quality (including pollutants for which receiving waters are listed as impaired under CWA section 303(d)); (2) Land-use type of the Development Project and pollutants associated with that land use type; and (3) Pollutants expected to be present on site.

(4) Low Impact Development BMP Requirements

Each Copermittee must require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss.

- (a) The following LID BMPs must be implemented:
 - (i) Each Copermittee must require LID BMPs or make a finding of infeasibility for each Priority Development Project in accordance with the LID waiver program in Section F.1.d.(8);

- (ii) Each Copermittee must incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for Priority Development Projects;
 - (iii) The review of each Priority Development Project must include an assessment of potential collection of storm water for on-site or off-site reuse opportunities;
 - (iv) The review of each Priority Development Project must include an assessment of techniques to infiltrate, filter, store, evaporate, or retain runoff close to the source of runoff; and
 - (v) Within 2 years after adoption of this Order, each Copermittee must review its local codes, policies, and ordinances and identify barriers therein to implementation of LID BMPs. Following the identification of these barriers to LID implementation, where feasible, the Copermittee must take, by the end of the permit cycle, appropriate actions to remove such barriers.
- (b) The following LID BMPs must be implemented at all Priority Development Projects where technically feasible as required below:
- (i) Maintain or restore natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams.
 - (ii) Projects with landscaped or other pervious areas must, where feasible, drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios, etc) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall not exceed the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other pertinent factors.
 - (iii) Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.
 - (iv) Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.
- (c) To protect ground water resources any infiltration LID BMPs must comply with Section F.1.(c)(6).

(d) LID BMPs sizing criteria:

- (i) LID BMPs shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map¹⁴ ("design capture volume");
- (ii) If onsite retention LID BMPs are technically infeasible per section F.1.d.(7)(b), LID biofiltration BMPs may treat any volume that is not retained onsite by the LID BMPs. The LID biofiltration BMPs must be designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP. Due to the flow through design of biofiltration BMPs, the total volume of the BMP, including pore spaces and prefilter detention volume, must be sized to hold at least 0.75 times the design storm volume that is not retained onsite by LID retention BMPs;
- (iii) If it is shown to be technically infeasible to treat the remaining volume up to and including the design capture volume using LID BMPs (retention or biofiltration), the project must implement conventional treatment control BMPs in accordance with Section F.1.d.(6) below and must participate in the LID waiver program in Section F.1.d.(7).

- (e) All LID BMPs shall be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

(5) Source Control BMP Requirements

Each Copermittee must require each Priority Development Project to implement source control BMPs. The source control BMPs to be required must:

- (a) Prevent illicit discharges into the MS4;
- (b) Minimize storm water pollutants of concern in runoff;
- (c) Eliminate irrigation runoff;
- (d) Include storm drain system stenciling or signage;
- (e) Include properly designed outdoor material storage areas;
- (f) Include properly designed outdoor work areas;
- (g) Include properly designed trash storage areas;
- (h) Include water quality requirements applicable to individual priority project categories.

¹⁴ The isopluvial map is available from the County of Orange. The map can also be found as Figure A-1 Exhibit 7.II in the Model WQMP (September 2003), page 5 of 57 at http://www.ocwatersheds.com/documents/2003_DAMP_Exhibit_7_II_Model_WQMP_Attachments.pdf

(6) Treatment Control BMP Requirements¹⁵

Each Copermittee must require each Priority Development Project to implement treatment control BMPs that meet the following requirements:

- (a) All treatment control BMPs for a single Priority Development Project must collectively be sized to comply with the following numeric sizing criteria:
 - (i) Volume-based treatment control BMPs must be designed to mitigate (infiltrate, filter, or treat) the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Isopluvial Map¹⁶; or
 - (ii) Flow-based treatment control BMPs must be designed to mitigate (infiltrate, filter, or treat) either: a) the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour of a storm event; or b) the maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity (for each hour of a storm event), as determined from the local historical rainfall record, multiplied by a factor of two.
- (b) Treatment control BMPs for all Priority Development Projects must mitigate (treat through infiltration, settling, filtration or other unit processes) the required volume or flow of runoff from all developed portions of the project, including landscaped areas.
- (c) All treatment control BMPs must be located so as to remove pollutants from runoff prior to its discharge to any waters of the U.S. Multiple Priority Development Projects may use shared treatment control BMPs as long as construction of any shared treatment control BMP is completed prior to the use or occupation of any Priority Development Project from which the treatment control BMP will receive runoff.
- (d) All treatment control BMPs for Priority Development Projects must, at a minimum:
 - (i) Be ranked with high or medium pollutant removal efficiency for the project's most significant pollutants of concern, as the pollutant removal efficiencies are identified in the Copermittees' Model

¹⁵ This section only applies to those PDPs not implementing LID capable of meeting the design storm criteria for the entire site and meeting technical infeasibility eligibility. Low-Impact Development (LID) and other site design BMPs that are correctly designed to effectively remove pollutants from runoff are considered treatment control BMPs.

¹⁶ The isopluvial map is available from the County of Orange. The map can also be found as Figure A-1 Exhibit 7.II in the Model WQMP (September 2003), page 105 of 157 at http://www.ocwatersheds.com/StormWater/PDFs/2003_DAMP/2003_DAMP_Section_7_New_Development_Significant_Redevelopment.pdf.

SSMP. Treatment control BMPs with a low removal efficiency ranking must only be approved by a Copermittee when a feasibility analysis has been conducted which exhibits that implementation of treatment control BMPs with high or medium removal efficiency rankings are infeasible for a Priority Development Project or portion of a Priority Development Project.

- (ii) Be correctly sized and designed so as to remove storm water pollutants to the MEP.
- (e) Target removal of pollutants of concern from runoff.
- (f) Be implemented close to pollutant sources, and prior to discharging into waters of the U.S.
- (g) Not be constructed within a waters of the U.S. or waters of the State.
- (h) Include proof of a mechanism under which ongoing long-term maintenance will be conducted to ensure proper maintenance for the life of the project. The mechanisms may be provided by the project proponent or Copermittee.
- (i) Be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

(7) Low Impact Development (LID) BMP Waiver Program

The Copermittees must develop, collectively or individually, a LID waiver program for incorporation into local SSMPs, which would allow a Priority Development Project to substitute implementation of all or a portion of required LID BMPs in section F.1.d(4) with implementation of treatment control BMPs and a mitigation project, payment into an in-lieu funding program, and/or watershed equivalent BMP(s) consistent with Section F.1.d.(11). The Copermittees shall submit the LID waiver program as part of their updated model SSMP. At a minimum, the program must meet the requirements below:

- (a) Prior to implementation, the LID waiver program must clearly exhibit that it will not allow PDPs to result in a net impact (after consideration of any mitigation and in-lieu payments) from pollutant loadings over and above the impact caused by projects meeting LID requirements;
- (b) For each PDP participating, a technical feasibility analysis must be included demonstrating that it is technically infeasible to implement LID BMPs that comply with the requirements of Section F.1.(d)(4). The

Copermittee(s) must develop criteria for the technical feasibility analysis including a cost benefit analysis, examination of LID BMPs considered and alternatives chosen. Each PDP participating must demonstrate that LID BMPs were implemented as much as feasible given the site's unique conditions. Analysis must be made of the pollutant loading for each project participating in the LID substitution program. The estimated impacts from not implementing the required LID BMPs in section F.1.d.(4) must be fully mitigated. Technical infeasibility may result from conditions including, but not limited to:

- (i) Locations that cannot meet the infiltration and groundwater protection requirements in section F.1.c.(6). Where infiltration is technically infeasible, the project must still examine the feasibility of other onsite retention LID BMPs;
 - (ii) Smart growth and infill or redevelopment locations where the density and/or nature of the project would create significant difficulty for compliance with the onsite volume retention requirements; and
 - (iii) Other site, geologic, soil or implementation constraints identified in the Copermittees updated local SSMP document.
- (c) The LID waiver program must include mechanisms to verify that each Priority Development Project participating in the program is in compliance with all applicable SSMP requirements;
- (d) The LID waiver program must develop and implement a review process verifying that the BMPs to be implemented meet the designated design criteria. The review process must also verify that each Priority Development Project participating in the program is in compliance with all applicable SSMP requirements.
- (e) The LID waiver program must include performance standards for treatment control BMPs specified in compliance with section F.1.(d)(6).
- (f) Each PDP that participates in the LID waiver program must mitigate for the pollutant loads expected to be discharged due to not implementing the LID BMPs in section F.1.d.(4). Mitigation projects must be implemented within the same hydrologic subarea as the PDP. Mitigation projects outside of the hydrologic subarea but within the same hydrologic unit may be approved provided that the project proponent demonstrates that mitigation projects within the same hydrologic subarea are infeasible and that the mitigation project will address similar beneficial use impacts as expected from the PDPs pollutant load types and amount. Offsite mitigation projects may include green streets projects, existing development retrofit projects, retrofit incentive programs, regional BMPs and stream restoration. Project applicants seeking to utilize these

alternative compliance provisions may propose other offsite mitigation projects, which the Copermittees may approve if they meet the requirements of this subpart.

- (g) A Copermittee may choose to implement a pollutant credit system as part of the LID waiver program provided that such a credit system clearly exhibits that it will not allow PDPs to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements. Any credit system that a Copermittee chooses to implement must be submitted to the Executive Officer for review and approval as part of the waiver program.
- (h) The LID waiver program shall include a storm water mitigation fund developed by the Copermittee(s) to be used for water quality improvement projects which may serve in lieu of the PDP's required mitigation in section F.1.d.(8)(e). The LID waiver program's storm water mitigation fund shall, at a minimum, identify;
 - (i) The entity or entities that will manage the storm water mitigation fund (i.e., assume full responsibility);
 - (ii) The range and types of acceptable projects for which storm water mitigation funds may be expended;
 - (iii) The entity or entities that will assume full responsibility for each water quality improvement project, including its successful completion; and
 - (iv) How the dollar amount of storm water mitigation fund contributions will be determined. In-lieu payments must be proportional to the additional pollutant load discharged by not fully implementing LID.
- (i) Each Copermittee must notify the Regional Board in their annual report of each PDP choosing to participate in the LID waiver program. The annual report must include the following information:
 - (i) Name of the developer of the participating PDP;
 - (ii) Site location;
 - (iii) Reason for LID waiver including technical feasibility analysis;
 - (iv) Description of BMPs implemented;
 - (v) Total amount deposited, if any, into the storm water mitigation fund described in section F.1.d.(8)(f);
 - (vi) Water quality improvement project(s) proposed to be funded; and
 - (vii) Timeframe for implementation of water quality improvement projects.

(8) Site Design and Treatment Control BMP Design Standards

As part of its local SSMP, each Copermittee must develop and require Priority

Development Projects to implement siting, design, and maintenance criteria for each site design and treatment control BMP listed in its local SSMP to determine feasibility and applicability and so that implemented site design and treatment control BMPs are constructed correctly and are effective at pollutant removal, runoff control, and vector minimization. LID techniques, such as soil amendments, must be incorporated into the criteria for appropriate treatment control BMPs. Development of BMP design worksheets which can be used by project proponents is encouraged.

(9) Implementation Process

As part of its local SSMP, each Copermittee must implement a process to verify compliance with SSMP requirements. The process must identify at what point in the planning process Priority Development Projects will be required to meet SSMP requirements and at a minimum, the Priority Development Project must implement the required post-construction BMPs prior to occupancy and/or the intended use of any portion of that project. The process must also include identification of the roles and responsibilities of various municipal departments in implementing the SSMP requirements, as well as any other measures necessary for the implementation of SSMP requirements.

(10) Treatment BMP Review

- (a) The Copermittees must review and update the BMPs that are listed in their local SSMPs as options for treatment control during the third year of implementation of this Order. At a minimum, the update must include removal of obsolete or ineffective BMPs and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update must also add appropriate LID BMPs to any tables or discussions in the local SSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update must include review and revision where necessary of treatment control BMP pollutant removal efficiencies.
 - (b) The update must incorporate findings from BMP effectiveness studies conducted by the Copermittees for projects funded wholly or in part by the State Board or Regional Board.
 - (c) Each Copermittee must implement a mechanism for annually incorporating findings from local treatment BMP effectiveness studies (e.g., ones conducted by, or on-behalf of, public agencies in Orange County) into SSMP project reviews and permitting
- (11) Where a development project, greater than 100 acres in total project size or smaller than 100 acres in size yet part of a larger common plan of

development that is over 100 acres, has been prepared using watershed and/or sub-watershed based water quality, hydrologic, and fluvial geomorphologic planning principles that implement regional LID BMPs in accordance with the sizing and location criteria of this Order and acceptable to the Regional Board, such standards shall govern review of projects with respect to Section F.1 of this Order and shall be deemed to satisfy this Order's requirements for LID site design, buffer zone, infiltration and groundwater protection standards, source control, treatment control, and hydromodification control standards. Regional BMPs must clearly exhibit that they will not result in a net impact from pollutant loadings over and above the impact caused by capture and retention of the design storm. Regional BMPs may be used provided that the BMPs capture and retain the volume of runoff produced from the 24-hour 85th percentile storm event as defined in section F.1.d.(6)(a)(i) and that such controls are located upstream of receiving waters. Any volume that is not retained by the LID BMPs, up to the design capture volume, must be treated using LID biofiltration. Where regional LID implementation has been shown to be technically infeasible (per section F.1.d.7.b) any volume up to and including the design capture volume, not retained by LID BMPs, nor treated by LID biofiltration, must be treated using conventional treatment control BMPs in accordance with Section F.1.d.(6) and participation in the LID waiver program in Section F.1.d.(7).

e. BMP CONSTRUCTION VERIFICATION

Prior to occupancy and/or intended use of any portion of the Priority Development Project subject to SSMP requirements, each Copermittee must inspect the constructed site design, source control, and treatment control BMPs to verify that they have been constructed and are operating in compliance with all specifications, plans, permits, ordinances, and this Order.

f. BMP MAINTENANCE TRACKING

- (1) Each Copermittee must develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance within its jurisdiction since July 2001. LID BMPs implemented on a lot by lot basis at a single family residential home, such as rainbarrels, are not required to be tracked or inventoried. At a minimum, the database must include information on BMP type, location, watershed, date of construction, party responsible for maintenance, maintenance certifications or verifications, inspections, inspection findings, and corrective actions, including whether the site was referred to the Vector Control District.
- (2) Each Copermittee must establish a mechanism not only to track post-construction BMPs, but also to ensure that appropriate easements and ownerships are properly recorded in public records and the information is

conveyed to all appropriate parties when there is a change in project or site ownership.

- (3) Each Copermittee must verify that approved post-construction BMPs are operating effectively and have been adequately maintained by implementing the following measures:
 - (a) An annual inventory of all approved BMPs within the Copermittee's jurisdiction. LID BMPs implemented on a lot by lot basis at a single family residential home, such as rainbarrels, are not required to be tracked or inventoried. The inventory must also include all BMPs approved for Priority Development Projects since July 2001;
 - (b) The designation of high priority BMPs. High-priority designation must include consideration of BMP size, recommended maintenance frequency, likelihood of operational and maintenance issues, location, receiving water quality, and other pertinent factors;
 - (c) Verify implementation, operation, and maintenance of BMPs by inspection, self-certification, surveys, or other equally effective approaches with the following conditions:
 - (i) The implementation, operation, and maintenance of at least 90 percent of approved and inventoried final project public and private SSMPs (a.k.a. WQMPs) must be verified annually. All post-construction BMPs shall be verified within every four year period;
 - (ii) Operation and maintenance verifications must be required prior to each rainy season;
 - (iii) All (100 percent) projects with BMPs that are high priority must be inspected by the Copermittee annually prior to each rainy season;
 - (iv) All (100 percent) public agency projects with BMPs must be inspected by the Copermittee annually;
 - (v) At least 50 percent of projects with drainage insert treatment control BMPs must be inspected by the Copermittee annually;
 - (vi) Appropriate follow-up measures (including re-inspections, enforcement, maintenance, etc.) must be conducted to ensure the treatment BMPs continue to reduce storm water pollutants as originally designed;
 - (vii) All inspections must verify effective operation and maintenance of the treatment control BMPs, as well as compliance with all ordinances, permits, and this Order; and
 - (viii) Inspections must note observations of vector conditions, such as mosquitoes. Where conditions are identified as contributing to mosquito production, the Copermittee must notify the Orange County Vector Control District.

g. ENFORCEMENT OF DEVELOPMENT SITES

Each Copermittee must enforce its storm water ordinance for all Development Projects and at all development sites as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions must include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit or occupancy denials for non-compliance.

h. HYDROMODIFICATION – LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS¹⁷

Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects. The HMP shall be incorporated into the local SSMP and implemented by each Copermittee so that estimated post-project runoff discharge rates and durations shall not exceed pre-development discharge rates and durations. Where the proposed project is located on an already developed site, the pre-project discharge rate and duration shall be that of the pre-developed, naturally occurring condition. The HMP shall be submitted to the Executive Officer within 2 years of permit adoption. The HMP will be made available for public review and comment and the Executive Officer will determine the need for a public hearing.

(1) The HMP must:

- (a) Identify a method for assessing susceptibility of channel segments which receive runoff discharges from Priority Development Projects. The geomorphic stability within the channel shall be assessed. A performance standard shall be created that ensures that the geomorphic stability within the channel not be compromised as a result of receiving runoff discharges from Priority Development Projects.
- (b) Utilize continuous simulation of the entire rainfall record (or other analytical method proposed by the Copermittees and deemed acceptable

¹⁷ Updated SSMP and hydromodification requirements shall apply to all priority projects or phases of priority projects which have not yet begun grading or construction activities at the time any updates SSMP or hydromodification requirement commences. If a Copermittee determines that lawful prior approval of a project exists, whereby application of an updated SSMP or hydromodification requirement to the project is legally infeasible, the updated SSMP or hydromodification requirement need not apply to the project. The Copermittees shall utilize the SSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SSMP and hydromodification requirements in their plans.

by the Regional Board) to identify a range of runoff flows¹⁸ for which priority Development Project post-project runoff flow rates and durations shall not exceed pre-development (naturally occurring) runoff flow rates and durations by more than 10 percent, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses. In addition, the identified range of runoff flow rates and durations must compensate for the loss of sediment supply due to the development. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches. In the case of an artificially hardened (concrete lined, rip rap, etc.) channel, the lower boundary of the range of runoff flows identified shall correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks of a comparable soft-bottomed channel.

- (c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project (naturally occurring) runoff flow rates and durations by more than 10 percent for the range of runoff flows identified under section F.1.h.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses; (2) do not result in channel conditions which do not meet the channel standard developed under section F.1.h.(1)(a) for channel segments downstream of Priority Development Project discharge points; and (3) compensate for the loss of sediment supply due to development.
- (d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent runoff from the projects from increasing and/or continuing unnatural rates of erosion of channel beds and banks, silt pollutants generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.
- (e) Include a review of pertinent literature.
- (f) Identify areas within the San Juan Hydrologic Unit where historic hydromodification has resulted in a negative impact to benthic macroinvertebrate and benthic periphyton by identifying areas with low or very low Index of Biotic Integrity (IBI) scores.

¹⁸ The identified range of runoff flows to be controlled should be expressed in terms of peak flow rates of rainfall events, such as "10% of the pre-development 2-year runoff event up to the pre-project 10-year runoff event."

- (g) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects. This protocol must include the use of the IBI score as a metric for assessing impacts and improvements to downstream watercourses.
 - (h) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.
 - (i) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.
 - (j) Include technical information supporting any standards and criteria proposed.
 - (k) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.
 - (l) Include a description of pre- and post-project monitoring and other program evaluation, including IBI score, to be conducted to assess the effectiveness of implementation of the HMP.
 - (m) Include mechanisms for assessing and addressing cumulative impacts within a watershed on channel morphology.
 - (n) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.
- (2) In addition to the hydrologic control measures that must be implemented per section F.1.h.(1)(c), the HMP must include a suite of management measures to be used on Priority Development Projects to protect and restore downstream beneficial uses and prevent or further prevent adverse physical changes to downstream channels. The measures must be based on a prioritized consideration of the following elements in this order:
- (a) Hydrologic control measures;
 - (b) On-site management controls;
 - (c) Regional controls located upstream of receiving waters; and
 - (d) In-stream controls.

Where stream channels are adjacent to, or are to be modified as part of a Priority Development Project, management measures must include buffer zones and setbacks. Under no circumstances will in-stream controls include the use of non-naturally occurring hardscape materials such as concrete,

riprap, gabions, etc. The suite of management measures shall also include stream restoration as a viable option to achieve the channel standard in section F.1.h.(1)(a).

(3) Each individual Copermitee has the discretion to not require Section F.1.h. at Priority Development Projects where the project:

- (a) Discharges storm water runoff into underground storm drains discharging directly to bays or the ocean; or
- (b) Discharges storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes.

(4) HMP Reporting and Implementation

- (a) Within 2 years of adoption of the Order, the Copermitees shall submit to the Regional Board a draft HMP that has been reviewed by the public, including the analysis that identifies the appropriate limiting range of flow rates per section F.1.h.(1)(b).
- (b) Within 180 days of receiving Regional Board comments on the draft HMP, the Copermitees shall submit a final HMP that addressed the Regional Board's comments.
- (c) Within 90 days of receiving a finding of adequacy from the Executive Officer, each Copermitee shall incorporate and implement the HMP for all Priority Development Projects.
- (d) Prior to approval of the HMP by the Regional Board, the early implementation measures likely to be included in the HMP shall be encouraged by the Copermitees.

(5) Interim Hydromodification Criteria

Within one year of adoption of this Order, each Copermitee must ensure that all Priority Development Projects are implementing the following criteria by comparing the pre-development (naturally occurring) and post-project flow rates and durations using a continuous simulation hydrologic model such as US EPA's Hydrograph Simulation Program-Fortran (HSPF):

- (a) For flow rates from 10 percent of the 2-year storm event to the 5 year storm event, the post-project peak flows shall not exceed pre-development (naturally occurring) peak flows.
- (b) For flow rates from the 5 year storm event to the 10 year storm event the post-project peak flows may exceed pre-development (naturally

occurring) flows by up to 10 percent for a 1-year frequency interval.

The interim hydromodification criteria do not apply to Priority Development Projects where the project discharges (1) storm water runoff into underground storm drains discharging directly to bays or the ocean, or (2) storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes.

Within one year of adoption of this Order, each Copermitttee must submit a signed, certification statement to the Regional Board verifying implementation of the interim hydromodification criteria.

- (6) No part of section F.1.h shall alleviate the Copermitttees responsibilities for implementing Low Impact Development BMPs as required under section F.1.d.(4).

i. TRAINING AND EDUCATION

(1) Municipal Departments and Personnel Education

Municipal Development Planning: Each Copermitttee must implement an education program so that its planning and development review staffs and contractors (and Planning Boards and Elected Officials, if applicable) have an understanding of:

- (a) Federal, State, and local water quality laws and regulations applicable to Development Projects;
- (b) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); and
- (c) Methods of minimizing impacts to receiving water quality resulting from development, including:
 - (i) Storm water management plan development and review;
 - (ii) Local sensitive water bodies, including 303(d)-impairments and ESAs;
 - (iii) Methods to control downstream erosion impacts;
 - (iv) Identification of pollutants of concern;
 - (v) Site design BMP techniques;
 - (vi) Source control BMPs;
 - (vii) Selection of the most effective treatment control BMPs for the pollutants of concern; and
 - (viii) Public heath concerns related to storm water management infrastructure.

(2) Project Applicants, Developers, Contractors, Property Owners, and other Responsible Parties

- (a) Each Copermittee must implement a New Development / Redevelopment education program using all media as appropriate to:
- (i) Measurably increase the knowledge of the target communities regarding MS4s, impacts of runoff on receiving waters, and potential BMP solutions for the target audience; and
 - (ii) To measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment.
- (b) Each Copermittee must educate each target community on the following topics where appropriate:
- (i) The importance of educating all construction workers in the field about storm water issues and BMPs through formal or informal training;
 - (ii) Federal, State, and local water quality laws and regulations applicable to new development and redevelopment activities;
 - (iii) Site design, source control, pollution prevention, and treatment BMPs;
 - (iv) General runoff concepts; and
 - (v) Other topics of local importance, including local water quality conditions, impaired waterbodies and environmentally sensitive areas.

2. CONSTRUCTION COMPONENT

Each Copermittee must implement a construction program which meets the requirements of this section, prevents illicit discharges into the MS4, implements and maintains structural and non-structural BMPs to reduce pollutants in storm water runoff from construction sites to the MS4, reduces construction site discharges of storm water pollutants from the MS4 to the MEP, and prevents construction site discharges from the MS4 from causing or contributing to a violation of water quality standards.

a. ORDINANCE UPDATE

Within 365 days of adoption of this Order, each Copermittee must review and update its grading ordinances and other ordinances as necessary to achieve full compliance with this Order, including requirements for the implementation of all designated BMPs and other measures.

b. SOURCE IDENTIFICATION

Each Copermittee must maintain an updated watershed based inventory of all construction sites within its jurisdiction. The use of an automated database system, such as Geographical Information Systems (GIS) is required.

c. SITE PLANNING AND PROJECT APPROVAL PROCESS

Each Copermittee must incorporate consideration of potential water quality impacts prior to approval and issuance of construction and grading permits.

- (1) Each construction and grading permit must require proposed construction sites to implement designated BMPs and other measures so that illicit discharges into the MS4 are prevented and storm water pollutants discharged from the site will be reduced to the maximum extent practicable and will not cause or contribute to a violation of water quality standards.
- (2) Prior to permit issuance, the project proponent's runoff management plan (or equivalent construction BMP plan) must be required to comply, and reviewed to verify compliance, with the local grading ordinance, other applicable local ordinances, and this Order.
- (3) Prior to permit issuance, each Copermittee must verify that project proponents subject to California's statewide General NPDES Permit for Storm Water Discharges Associated With Construction Activities, (hereinafter General Construction Permit), have existing coverage under the General Construction Permit.

d. BMP IMPLEMENTATION

- (1) Designate BMPs: Each Copermittee must designate a minimum set of BMPs and other measures to be implemented at all construction sites. The designated minimum set of BMPs must include:
 - (a) Management Measures:
 - (i) Pollution prevention, where appropriate;
 - (ii) Development and implementation of a site-specific runoff management plan;
 - (iii) Minimization of areas that are cleared and graded to only the portion of the site that is necessary for construction;
 - (iv) Minimization of exposure time of disturbed soil areas;
 - (v) Minimization of grading during the wet season and correlation of grading with seasonal dry weather periods to the extent feasible;
 - (vi) Limitation of grading to a maximum disturbed area as determined by each Copermittee before either temporary or permanent erosion controls are implemented to prevent storm water pollution. The Copermittee has the option of temporarily increasing the size of

disturbed soil areas by a set amount beyond the maximum, if the individual site is in compliance with applicable storm water regulations and the site has adequate control practices implemented to prevent storm water pollution;

- (vii) Temporary stabilization and reseeded of disturbed soil areas as rapidly as feasible;
- (viii) Wind erosion controls;
- (ix) Tracking controls;
- (x) Non-stormwater management measures to prevent illicit discharges and control storm water pollution sources;
- (xi) Waste management measures;
- (xii) Preservation of natural hydrologic features where feasible;
- (xiii) Preservation of riparian buffers and corridors where feasible;
- (xiv) Evaluation and maintenance of all BMPs, until removed; and
- (xv) Retention, reduction, and proper management of all storm water pollutant discharges on site to the MEP standard.

(b) Erosion and Sediment Controls:

- (i) Erosion prevention. Erosion prevention is to be used as the most important measure for keeping sediment on site during construction;
- (ii) Sediment controls. Sediment controls are to be used as a supplement to erosion prevention for keeping sediment on-site during construction;
- (iii) Slope stabilization must be used on all active slopes during rain events regardless of the season and on all inactive slopes during the rainy season and during rain events in the dry season; and
- (iv) Permanent revegetation or landscaping as early as feasible.

(c) Designate enhanced BMPs¹⁹ for 303(d) impairments and ESAs: Each Copermitttee must implement, or require implementation of, enhanced measures to address the exceptional threat to water quality posed by all construction sites tributary to CWA section 303(d) water body segments impaired for sediment or turbidity. Each Copermitttee must also implement, or require implementation of, enhanced, site-specific measures for construction sites within or adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

- (i) Active Sediment Treatment (AST): Each Copermitttee must require implementation of advanced treatment for sediment at construction

¹⁹ Enhanced BMPs are control actions specifically targeted to the pollutant or condition of concern and of higher quality and effectiveness than the minimum control measures otherwise required. Enhanced in this Order means better, not simply more, BMPs.

sites (or portions thereof) that are determined by the Copermittee to be an exceptional threat to water quality. In evaluating the threat to water quality, the following factors must be considered by the Copermittee:

- [a] Soil erosion potential or soil type;
- [b] The site's slopes;
- [c] Project size and type;
- [d] Sensitivity of receiving water bodies;
- [e] Proximity to receiving water bodies;
- [f] Non-storm water discharges;
- [g] Ineffectiveness of other BMPs;
- [h] Proximity and sensitivity of aquatic threatened and endangered species of concern;
- [i] Known effects of AST chemicals; and
- [j] Any other relevant factors.

- (d) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each construction site within its jurisdiction year round. BMP implementation requirements, however, can vary based on wet and dry seasons. Dry season BMP implementation must plan for and address unseasonal rain events that may occur during the dry season (May 1 through September 30).

e. INSPECTION OF CONSTRUCTION SITES

Each Copermittee must conduct construction site inspections for compliance with its ordinances (grading, storm water, etc.), permits (construction, grading, etc.), and this Order. Priorities for inspecting sites must consider the nature and size of the construction activity, topography, and the characteristics of soils and receiving water quality.

- (1) During the wet season, each Copermittee must inspect at least biweekly (every two weeks), all construction sites within its jurisdiction meeting any of the following criteria:
- (a) All sites 30 acres or more in size with rough grading or active slopes occurring during the wet season;
 - (b) All sites one acre or more, and tributary to a CWA section 303(d) water body segment impaired for sediment or within or directly adjacent to, or discharging directly to, the ocean or a receiving water within an ESA; and
 - (c) Other sites determined by the Copermittees or the Regional Board as a significant threat to water quality. In evaluating threat to water quality, the following factors must be considered: (1) soil erosion potential; (2) site

slope; (3) project size and type; (4) sensitivity of receiving water bodies; (5) proximity to receiving water bodies; (6) non-storm water discharges; (7) past record of non-compliance by the operators of the construction site; and (8) any other relevant factors.

- (2) During the wet season, each Copermittee must inspect at least monthly, all construction sites with one acre or more of soil disturbance not meeting the criteria specified above in section F.2.e.(1).
- (3) During the wet season, each Copermittee must inspect construction sites less than one acre in size as needed to ensure compliance with its ordinances and this Order.
- (4) Each Copermittee must inspect all construction sites as needed during the dry season. Sites meeting the criteria in section F.2.e.(1) must be inspected at least once in August or September each year.
- (5) Re-inspections: Based upon site inspection findings, each Copermittee must implement all follow-up actions (i.e., re-inspection, enforcement) necessary to comply with this Order. Reinspection frequencies must be determined by each Copermittee based upon the severity of deficiencies, the nature of the construction activity, and the characteristics of soils and receiving water quality.
- (6) Inspections of construction sites must include, but not be limited to:
 - (a) Check for coverage under the General Construction Permit (Notice of Intent (NOI) and/or Waste Discharge Identification No.) during initial inspections;
 - (b) Assessment of compliance with Copermittee ordinances and permits related to runoff, including the implementation and maintenance of designated minimum BMPs;
 - (c) Assessment of BMP effectiveness;
 - (d) Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff;
 - (e) Education and outreach on storm water pollution prevention, as needed; and
 - (f) Creation of a written or electronic inspection report.
- (7) The Copermittees must track the number of inspections for each inventoried construction site throughout the reporting period to verify that each site is inspected at the minimum frequencies required.

f. ENFORCEMENT OF CONSTRUCTION SITES

- (1) Each Copermittee must develop and implement an escalating enforcement

process that achieves prompt corrective actions at construction sites for violations of the Copermittee's water quality protection permit requirements and ordinances. This enforcement process must include authorizing the Copermittee's construction site inspectors to take immediate enforcement actions when appropriate and necessary. The enforcement process must include appropriate sanctions such as stop work orders, non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

- (2) Each Copermittee must be able to respond to complaints received from third-parties and to ensure the Regional Board that corrective actions have been implemented.

g. REPORTING OF NON-COMPLIANT SITES

- (1) In addition to the notification requirements in Attachment B, each Copermittee must notify the Regional Board when the Copermittee issues a stop work order or other high level enforcement to a construction site in its jurisdiction as a result of storm water violations.
- (2) Each Copermittee shall annually notify the Regional Board, prior to the commencement of the wet season, of all construction sites with alleged violations. Information may be provided as part of the JRMP annual report if submitted prior to the rainy season. Information provided shall include, but not be limited to, the following:
 - (a) WDID number if enrolled under the General Construction Permit
 - (b) Site Location, including address
 - (c) Current violations or suspected violations

h. TRAINING AND EDUCATION

- (1) Municipal Staff and Contractors: Requirements for municipal staff and contractors are described in the Municipal Component section of this Order.
- (2) Construction Site Owner / Operator Responsibilities:

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee must implement a program to educate project applicants, developers, contractors, property owners, and other responsible parties. The education program must provide an understanding of the topics listed below, as appropriate for the audience being educated.

- (a) The importance of educating all construction workers in the field about storm water issues and BMPs through formal or informal training;

- (b) Federal, State, and local water quality laws and regulations applicable to construction and grading activities;
- (c) Site design, source control, pollution prevention, and treatment BMPs;
- (d) General runoff concepts; and
- (e) Other topics of local importance, including local water quality conditions, impaired waterbodies and environmentally sensitive areas.

3. EXISTING DEVELOPMENT COMPONENT

a. MUNICIPAL

Each Copermittee must implement a municipal program which meets the requirements of this section, prevents illicit discharges into the MS4, reduces municipal discharges of storm water pollutants from the MS4 to the MEP, and prevents municipal discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification / Inventory

Each Copermittee must maintain an updated watershed-based inventory of municipal areas and activities. The inventory must include the name, address (if applicable), and a description of the area/activity; which pollutants are potentially generated by the area/activity; whether the area/activity is adjacent to an ESA; and identification of whether the area/activity is tributary to a CWA section 303(d) water body segment and generates pollutants for which the water body segment is impaired. The use of an automated database system, such as Geographical Information Systems (GIS) is required when applicable.

(2) General BMP Implementation

- (a) Pollution Prevention: Each Copermittee must implement pollution prevention methods in its municipal program and must require their use by appropriate municipal departments, personnel, and contractors, where appropriate.
- (b) Designate Minimum BMPs: Each Copermittee must designate a minimum set of BMPs for all municipal areas and activities. The designated minimum BMPs for municipal areas and activities must be area or activity specific as appropriate. BMPs must be designated for special events that are expected to generate significant trash and litter.
- (c) Designate BMPs for ESAs and 303(d) Impairments: Each Copermittee must designate enhanced measures for municipal areas and activities tributary to CWA section 303(d) impaired water body segments when an area or activity generates pollutants for which the water body segment is

impaired. Each Copermittee must also designate additional controls for municipal areas and activities within or directly adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

- (d) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum and enhanced BMPs and any additional measures necessary based on its inventory to comply with this Order for each municipal area or activity within its jurisdiction.

(3) BMP Implementation for Management of Pesticides, Herbicides, and Fertilizers

Each Copermittee must implement BMPs to reduce the contribution of storm water pollutants associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from municipal areas and activities to MS4s and receiving waters. Such BMPs must include, at a minimum:

- (a) Educational activities, permits, certifications and other measures for municipal applicators and distributors;
- (b) Integrated Pest Management (IPM) measures that rely on non-chemical solutions;
- (c) The use of native vegetation;
- (d) Schedules for irrigation and chemical application; and
- (e) The collection and proper disposal of unused pesticides, herbicides, and fertilizers.

(4) BMP implementation for Flood Control Structures

- (a) Each Copermittee must implement procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies.
- (b) Each Copermittee must include water quality protection measures, where feasible, when retrofitting existing flood control structural devices.
- (c) Each Copermittee must evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device. The inventory and evaluation must be completed by and submitted to the Regional Board in the 2nd year JRMP Annual Report.

(5) BMP Implementation for Sweeping of Municipal Areas

Where municipal area sweeping is implemented as an MS4 BMP for municipal roads, streets, highways, and parking facilities, each Copermittee must design and implement the program based on the following criteria:

- (a) Optimize pickup of trash and debris based on land uses, trash collection schedules, seasonal factors (e.g., special events, tourism, etc.) and inspections of municipal areas/activities.

(6) Operation and Maintenance of Municipal Separate Storm Sewer System (MS4) and Structural Controls

- (a) Treatment Controls: Each Copermittee must implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce storm water pollutant discharges to or from its MS4s and related drainage structures.
- (b) MS4 and Facilities: Each Copermittee must implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities must, at a minimum, include:
 - (i) Inspection and removal of accumulated waste at least once a year between May 1 and September 30 of each year for all MS4 facilities;
 - (ii) Additional cleaning as necessary between October 1 and April 30 of each year for facilities that receive or collect high volumes of trash and debris;
 - (iii) Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year;
 - (iv) Open channels must be cleaned of observed anthropogenic litter in a timely manner;
 - (v) Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed;
 - (vi) Proper disposal of waste removed pursuant to applicable laws; and
 - (vii) Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

(7) Infiltration From Sanitary Sewer to MS4/Provide Preventive Maintenance of Both

- (a) Each Copermittee must implement controls and measures to prevent and eliminate infiltration of seepage from municipal sanitary sewers to MS4s through thorough, routine preventive maintenance of the MS4. Each Copermittee that operates both a municipal sanitary sewer system and a MS4 must implement controls and measures to prevent and eliminate infiltration of seepage from the municipal sanitary sewers to the MS4s that must include overall sanitary sewer and MS4 surveys and thorough, routine preventive maintenance of both.

(b) Each Copermittee must implement controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary. Such controls must include:

- (i) Adequate plan checking for construction and new development,
- (ii) Incident response training for municipal employees that identify sanitary sewer spills;
- (iii) Code enforcement inspections;
- (iv) MS4 maintenance and inspections;
- (v) Interagency coordination with sewer agencies; and
- (vi) Proper education of municipal staff and contractors conducting field operations on the MS4 or municipal sanitary sewer (if applicable).

(8) Inspection of Municipal Areas and Activities

(a) At a minimum, each Copermittee must inspect the following high priority municipal areas and activities annually:

- (i) Roads, Streets, Highways, and Parking Facilities;
- (ii) Flood Management Projects and Flood Control Devices;
- (iii) Areas and activities tributary to a CWA section 303(d) impaired water body segment, where an area or activity generates pollutants for which the water body segment is impaired.
- (iv) Areas and activities within or adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order);
- (v) Municipal Facilities:
 - [a] Active or closed municipal landfills;
 - [b] Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewage collection systems;
 - [c] Solid waste transfer facilities;
 - [d] Land application sites;
 - [e] Corporate yards including maintenance and storage yards for materials, waste, equipment and vehicles; and
 - [f] Household hazardous waste collection facilities.
- (vi) Municipal airfields;
- (vii) Parks and recreation facilities;
- (viii) Special event venues following special events (festivals, sporting events, etc.);
- (ix) Power washing; and
- (x) Other municipal areas and activities that the Copermittee determines may contribute a significant pollutant load to the MS4.

(b) Other municipal areas and activities must be inspected as needed and in response to water quality data, valid public complaints, and findings from

municipal or contract staff.

- (c) Based upon site inspection findings, each Copermittee must implement all follow-up actions necessary to comply with this Order.

(9) Enforcement of Municipal Areas and Activities

Each Copermittee must enforce its storm water ordinance for all municipal areas and activities as necessary to maintain compliance with this Order.

(10) Training and Education

Each Copermittee must ensure that all municipal personnel and contractors that have responsibilities for selecting, implementing, and evaluating BMPs for municipal areas and activities are adequately trained and educated to perform such tasks.

(a) Municipal Departments and Personnel Education

- (i) Municipal Construction Activities: Each Copermittee must implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:
- [a] Federal, State, and local water quality laws and regulations applicable to construction and grading activities;
 - [b] The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment);
 - [c] Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities;
 - [d] The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application;
 - [e] Current advancements in BMP technologies;
 - [f] SSMP Requirements including treatment options, site design, source control, and applicable tracking mechanisms; and
 - [g] Other topics of local importance, including local water quality conditions, impaired water bodies, environmentally sensitive areas, and public health and disease vector issues associated with runoff.
- (ii) Municipal Industrial/Commercial Activities: Each Copermittee must train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at

least once a year. Training must cover inspection and enforcement procedures, BMP implementation, and review of monitoring data

- (iii) Municipal Other Activities: Each Copermittee must implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

b. COMMERCIAL / INDUSTRIAL

Each Copermittee must implement a commercial / industrial program that meets the requirements of this section, prevents illicit discharges into the MS4, reduces commercial / industrial discharges of storm water pollutants from the MS4 to the MEP, and prevents commercial / industrial discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification

- (a) Each Copermittee must maintain an updated watershed-based inventory of all industrial and commercial sites/sources within its jurisdiction (regardless of ownership) that could contribute a significant pollutant load to the MS4. The inventory must include the following minimum information for each industrial and commercial site/source: name; address; pollutants potentially generated by the site/source; and identification of whether the site/source is tributary to a Clean Water Act section 303(d) water body segment and generates pollutants for which the water body segment is impaired; and a narrative description including SIC codes which best reflects the principal products or services provided by each facility.

At a minimum, the following sites/sources must be included in the inventory:

- (i) Commercial Sites/Sources:
 - [a] Automobile repair, maintenance, fueling, or cleaning;
 - [b] Airplane repair, maintenance, fueling, or cleaning;
 - [c] Boat repair, maintenance, fueling, or cleaning;
 - [d] Equipment repair, maintenance, fueling, or cleaning;
 - [e] Automobile and other vehicle body repair or painting;
 - [f] Mobile automobile or other vehicle washing;
 - [g] Automobile (or other vehicle) parking lots and storage facilities;
 - [h] Retail or wholesale fueling;
 - [i] Pest control services;
 - [j] Eating or drinking establishments, including food markets;

- [k] Mobile carpet, drape or furniture cleaning;
- [l] Cement mixing or cutting;
- [m] Masonry;
- [n] Painting and coating;
- [o] Botanical or zoological gardens and exhibits;
- [p] Landscaping;
- [q] Nurseries and greenhouses;
- [r] Golf courses, parks and other recreational areas/facilities;
- [s] Cemeteries;
- [t] Pool and fountain cleaning;
- [u] Marinas;
- [v] Portable sanitary services;
- [w] Building material retailers and storage;
- [x] Animal facilities;
- [y] Mobile pet services;
- [z] Power washing services; and
- [aa] Other sites and sources with a history of un-authorized discharges to the MS4.

(ii) Industrial Sites/Sources:

- [a] Industrial Facilities, as defined at 40 CFR § 122.26(b)(14), including those subject to the General Industrial Permit or other individual NPDES permit;
- [b] Operating and closed landfills;
- [c] Facilities subject to SARA Title III; and
- [d] Hazardous waste treatment, disposal, storage and recovery facilities.

(iii) ESAs and 303(d) Listed Waterbodies: All other commercial or industrial sites/sources tributary to a CWA Section 303(d) impaired water body segment, where the site/source generates pollutants for which the water body segment is impaired. All other commercial or industrial sites/sources within or directly adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(iv) All other commercial or industrial sites/sources that the Copermitttee determines may contribute a significant pollutant load to the MS4.

(2) General BMP Implementation

(a) Pollution Prevention: Each Copermitttee must require the use of pollution prevention methods by industrial and commercial sites/sources.

- (b) Designate / Update Minimum BMPs: Each Copermittee must designate a minimum set of BMPs for all industrial and commercial sites/sources. Where BMPs have already been designated, each Copermittee must review its existing BMPs for adequacy. The designated minimum BMPs must be specific to facility types and pollutant-generating activities, as appropriate.
- (c) Designate Enhanced BMPs for ESAs and 303(d) Impairments: Each Copermittee must designate enhanced measures for industrial and commercial sites/sources tributary to CWA section 303(d) impaired water body segments (where a site/source generates pollutants for which the water body segment is impaired). Each Copermittee must also designate additional controls for industrial and commercial sites/sources within or directly adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).
- (d) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum and enhanced BMPs and any additional measures necessary based on inspections, incident responses, and water quality data to comply with this Order at each industrial and commercial site/source within its jurisdiction.

(3) BMP Implementation for Mobile Businesses

- (a) Each Copermittee must develop and implement a program to reduce the discharge of storm water pollutants from mobile businesses to the MEP and to prohibit non-storm water discharges pursuant to Section B of this Order. Each Copermittee must keep as part of their commercial source inventory a listing of mobile businesses known to operate within its jurisdiction. The program must include:
 - (i) Development and implementation of minimum standards and BMPs to be required for each of the various types of mobile businesses;
 - (ii) Development and implementation of an enforcement strategy which specifically addresses the unique characteristics of mobile businesses;
 - (iii) Notification of those mobile businesses known to operate within the Copermittee's jurisdiction of the minimum standards and BMP requirements and local ordinances;
 - (iv) Development and implementation of an outreach and education strategy; and
 - (v) Inspection of mobile businesses as needed to implement the program.
- (b) If they choose to, the Copermittees may cooperate in developing and implementing their programs for mobile businesses, including sharing of mobile business inventories, BMP requirements, enforcement action

information, and education.

(4) Inspection of Industrial and Commercial Sites/Sources

Each Copermittee must conduct industrial and commercial site inspections for compliance with its ordinances, permits, and this Order.

(a) Inspection Procedures: Inspections must include but not be limited to:

- (i) Review of BMP implementation plans, if the site uses or is required to use such a plan;
- (ii) Review of facility monitoring data, if the site monitors its runoff;
- (iii) Check for coverage under the General Industrial Permit (Notice of Intent (NOI) and/or Waste Discharge Identification Number), if applicable;
- (iv) Assessment of compliance with Copermittee ordinances and permits related to runoff;
- (v) Assessment of BMP implementation, maintenance and effectiveness;
- (vi) Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff; and
- (vii) Education and training on storm water pollution prevention, as conditions warrant.

(b) Each Copermittee shall annually notify the Regional Board, prior to the commencement of the wet season, of all Industrial Sites and Industrial Facilities subject to the General Industrial Permit or other individual NPDES permit with alleged violations. Information may be provided as part of the JRMP annual report if submitted prior to the rainy season. Information provided shall include, but not be limited to, the following:

- (i) WDID number if enrolled under the General Industrial Permit;
- (ii) Site Location, including address;
- (iii) Current violations or suspected violations; and
- (iv) Past Violation history.

(c) Frequencies: At a minimum, 20 percent of the sites inventoried as required in section F.3.b.(1) above (excluding mobile sources and food facilities) must be inspected each year. Mobile businesses must be

inspected pursuant to the enforcement strategy developed pursuant to section F.3.b.(3). Other inspection frequencies must be based upon findings of the Copermittee's existing program and the following factors:

- (i) Type of activity (SIC code);
 - (ii) Materials used at the facility;
 - (iii) Wastes generated;
 - (iv) Pollutant discharge potential;
 - (v) Non-storm water discharges;
 - (vi) Size of facility;
 - (vii) Proximity to receiving water bodies;
 - (viii) Sensitivity of receiving water bodies;
 - (ix) Whether the facility is subject to the General Industrial Permit or an individual NPDES permit;
 - (x) Whether the facility has filed a No Exposure Certification/Notice of Non-Applicability;
 - (xi) Facility design;
 - (xii) Total area of the site, area of the site where industrial or commercial activities occur, and area of the site exposed to rainfall and runoff;
 - (xiii) The facility's compliance history; and
 - (xiv) Any other relevant factors.
- (d) Food Facilities: Each food facility must be inspected annually for compliance with the Copermittee's water quality ordinances and this Order. Each inspection of a food facility must, at a minimum, address the following concerns:
- (i) Trash storage and disposal;
 - (ii) Grease storage and disposal;
 - (iii) Washwater discharges to the MS4 (e.g., from floor mats, driveways, sidewalks, etc.);
 - (iv) Identification of outdoor sewer and MS4 connections; and
 - (v) Education of property managers when grease and/or trash facilities are shared by multiple facilities.
- (e) Third-Party Inspections: Each Copermittee may develop and implement a third party inspection program for verifying industrial and commercial site/source compliance with its ordinances, permits, and this Order. To the extent that third party inspections are conducted to fulfill the requirements of this Order, the Copermittee will be responsible for conducting and documenting quality assurance and quality control of the third-party inspections.
- (i) Each inspection conducted by a third-party must, at a minimum, result in the following:

- [a] Photo documentation of potential storm water violations identified during the third party inspection;
 - [b] Reporting to the Copermittee of identified significant potential violations, including imminent or observed illegal discharges, within 24 hours of the third party inspection;
 - [c] Reporting to the Copermittee of all inspection findings within one week of the inspection being conducted; and
 - [d] Copermittee follow-up and/or enforcement actions for identified potential storm water violations within two business days of the inspection or potential violation report receipt.
- (f) Based upon site inspection findings, each Copermittee must implement all follow-up actions and enforcement necessary to comply with this Order.
- (g) To the extent that the Regional Board has conducted an inspection of an industrial site during a particular year, the requirement for the responsible Copermittee to inspect this facility during the same year will be satisfied.
- (h) The Copermittees must track the number of inspections for the inventoried industrial and commercial sites/sources throughout the reporting period to verify that the sites/sources are inspected at the minimum frequencies listed in this Order.

(5) Enforcement of Industrial and Commercial Sites/Sources

Each Copermittee must enforce its storm water ordinance for all industrial and commercial sites/sources as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions must include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

(6) Training and Education for Owners and Operators of Commercial and Industrial Activities

- (a) Each Copermittee must implement an education program using all media as appropriate to (1) measurably increase the knowledge of owners and operators of commercial and industrial activities regarding MS4s, impacts of runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce storm water pollutant releases and eliminate prohibited non-storm water discharges to MS4s and the environment. At a minimum, the education program must meet the requirements of this section and address the following issues:
- (i) Laws, regulations, permits, & requirements;

- (ii) Best management practices;
- (iii) General runoff concepts; and
- (iv) Other topics, including public reporting mechanisms, water conservation, low-impact development techniques.

(b) BMP Notification: At least twice during the five-year period of this Order, each Copermittee must notify the owner/operator of each inventoried industrial and commercial site/source of the BMP requirements applicable to the site/source.

c. RESIDENTIAL

Each Copermittee must implement a residential program which meets the requirements of this section, prevents illicit discharges into the MS4, reduces residential discharges of storm water pollutants from the MS4 to the MEP, and prevents residential discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Threat to Water Quality Prioritization

Each Copermittee must identify residential areas and activities that pose a high threat to water quality. At a minimum, these must include:

- (a) Automobile repair, maintenance, washing, and parking;
- (b) Home and garden care activities and product use (pesticides, herbicides, and fertilizers);
- (c) Disposal of trash, pet waste, green waste, and household hazardous waste (e.g., paints, cleaning products);
- (d) Any other residential source that the Copermittee determines may contribute a significant pollutant load to the MS4;
- (e) Any residential areas tributary to a CWA section 303(d) impaired water body, where the residence generates pollutants for which the water body is impaired; and
- (f) Any residential areas within or directly adjacent to or discharging directly to a coastal lagoon, the ocean, or other receiving waters within an environmentally sensitive area (as defined in Attachment C of this Order).

(2) BMP Implementation

- (a) Pollution Prevention: Each Copermittee must actively encourage the use of pollution prevention methods by residents.
- (b) Designate BMPs: Each Copermittee must designate minimum BMPs for high-threat-to-water quality residential areas and activities. The designated minimum BMPs for high-threat-to-water quality residential

areas and activities must be area or activity specific.

- (c) Hazardous Waste BMPs: Each Copermittee must facilitate the proper management and disposal of used oil, toxic materials, and other household hazardous wastes. Such facilitation must include educational activities, public information activities, and establishment of collection sites operated by the Copermittee or a private entity. Curbside collection of household hazardous wastes is encouraged.
- (d) Implement BMPs: Each Copermittee must implement, or require implementation of, the designated minimum BMPs and any additional measures necessary to comply with Sections A and B of this Order.
- (e) Each Copermittee must implement, or require implementation of, BMPs for residential areas and activities that have not been designated a high threat to water quality, as necessary.

(3) Enforcement of Residential Areas and Activities

Each Copermittee must enforce its storm water ordinance for all residential areas and activities as necessary to maintain compliance with this Order.

(4) Evaluation of Oversight of Residential Areas and Activities

Each Copermittee must annually review the effectiveness of efforts to reduce residential discharges of storm water pollutants from the MS4 and eliminate illicit residential discharges into the MS4. The evaluation must consider findings from monitoring data, municipal employee comments, inspections, complaints, and other appropriate sources.

(5) Common Interest Areas (CIA) / Home Owner Association (HOA) Areas

Each Copermittee must implement measures specifically to ensure that runoff within common interest developments, including areas managed by associations, meets the objectives of this section and Order.

- (a) BMP Implementation: Each Copermittee must implement management measures based on a review of pertinent factors, including:
 - (i) Current maintenance duties and procedures used by CIA/HOA maintenance associations within its jurisdiction;
 - (ii) Whether streets and storm drains are publicly or privately owned within the CIA/HOA;
 - (iii) Whether the CIA/HOA area has been identified as a high priority residential area;
 - (iv) Proximity to 303(d)-listed waterbodies, the ocean, environmentally

- sensitive areas;
- (v) Evaluation of water quality monitoring data;
- (vi) Evaluation of existing illegal discharge/illicit connection activities;
- (vii) Other activities conducted or authorized by the HOA that may pose a significant risk to inland or coastal receiving waters.

- (b) Legal Authority and Enforcement: Within one year of adoption of this Order, each Copermittee must review its Municipal Code to determine the most appropriate method to implement and enforce runoff management measures within CIA/HOA areas.

(6) Residential Education Program

- (a) Each Copermittee must implement a Residential Education Program using all media as appropriate to (1) measurably increase the knowledge regarding MS4s, impacts of runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce storm water and eliminate prohibited non-storm water pollutant releases to MS4s and the environment.
- (b) Copermittee educational programs must emphasize underserved target audiences, residents and managers of CIA/HOA areas, high-risk behaviors, and “allowable” behaviors and discharges. At a minimum, the education program must meet the requirements of this section and address the following issues:
 - (i) Laws, regulations, permits, and requirements;
 - (ii) Best management practices;
 - (iii) General runoff concepts;
 - (iv) Existing water quality, including local water quality conditions, impaired waterbodies and environmentally sensitive areas; and
 - (v) Other topics, including public reporting mechanisms, water conservation, low-impact development techniques, and public health and disease vector issues associated with runoff.

d. Retrofitting Existing Development

Each Copermittee must develop and implement a retrofitting program which meets the requirements of this section. The goals of the existing development retrofitting program are to reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharges of storm water pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards. Where feasible, at the discretion of the Copermittee, the existing development retrofitting program may be coordinated with flood control projects and infrastructure

improvement programs.

(1) Source Identification

The Copermittee must identify and inventory existing developments (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting. Potential retrofitting candidates must include but are not limited to:

- (a) Development that contributes pollutants of concern to a TMDL or a ESA;
- (b) Receiving waters channelized or otherwise hardened;
- (c) Development tributary to receiving waters that are channelized or otherwise hardened;
- (d) Developments tributary to receiving waters that are significantly eroded;
- (e) Developments tributary to an ASBS or SWQPA; and
- (f) Development that causes hydraulic constriction.

(2) Each Copermittee shall evaluate and rank the inventoried existing developments to prioritize retrofitting. Criteria for evaluation must include but is not limited to:

- (a) Feasibility;
- (b) Cost effectiveness;
- (c) Pollutant removal effectiveness;
- (d) Impervious area potentially treated;
- (e) Maintenance requirements;
- (f) Landowner cooperation;
- (g) Neighborhood acceptance;
- (h) Aesthetic qualities; and
- (i) Efficacy at addressing concern.

(3) Each Copermittee must consider the results of the evaluation in prioritizing work plans for the following year. Highly feasible projects expected to benefit water quality should be given a high priority to implement source control and treatment control BMPs. Where feasible, the retrofit projects should be designed in accordance with the SSMP requirements within sections F.1.d.(3) through F.1.d.(8). In addition, the Copermittee shall encourage retrofit projects to implement where feasible the Hydromodification requirements in Section F.1.h.

(4) When requiring retrofitting on existing development, the Copermittees will cooperate with private landowners to encourage retrofitting projects. The Copermittee may consider the following practices in cooperating and encouraging private landowners to retrofit their existing development:

- (a) Demonstration retrofit projects;
- (b) Retrofits on public land and easements;

- (c) Education and outreach;
 - (d) Subsidies for retrofit projects;
 - (e) Requiring retrofit projects as mitigation or ordinance compliance;
 - (f) Public and private partnerships; and
 - (g) Fees for existing discharges to the MS4.
- (5) The completed retrofit BMPs shall be tracked and inspected in accordance with section F.1.f.
- (6) Where constraints on retrofitting preclude effective BMP deployment on existing developments at locations critical to protect receiving waters, a Copermittee may propose a regional mitigation project to improve water quality. Such regional projects may include but are not limited to:
- (a) Regional water quality treatment BMPs;
 - (b) Urban creek or wetlands restoration and preservation;
 - (c) Daylighting and restoring underground creeks;
 - (d) Localized rainfall storage and reuse to the extent such projects are fully protective of downstream water rights;
 - (e) Hydromodification project; and
 - (f) Removal of invasive plant species.
- (7) A retrofit project or regional mitigation project may qualify as a Watershed Water Quality Activity provided it meets the requirements in section G. Watershed Runoff Management Program.

4. ILLICIT DISCHARGE DETECTION AND ELIMINATION

Each Copermittee must implement a program which meets the requirements of this section to actively detect and eliminate illicit discharges and disposal into the MS4. The program must address all types of illicit discharges and connections excluding those non-storm water discharges not prohibited by the Copermittee in accordance with section B of this Order.

a. PREVENT AND DETECT ILLICIT DISCHARGES AND CONNECTIONS

Each Copermittee must implement measures to prevent and detect illicit discharges to the MS4.

- (1) Legal Authority: Each Copermittee must retain legal authority to prevent and eliminate illicit discharges and connections to the MS4.
- (2) Inspections: Each Copermittee must include use of appropriate municipal personnel and contractors to assist in identifying illicit discharges and connections during their daily activities.

- (a) Inspections for illegal discharges and connections must be conducted during routine maintenance of all MS4 facilities.
- (b) Municipal staff and contractors conducting non-MS4 field operations must be trained to report suspected illegal discharges and connections to proper municipal staff.

b. MAINTAIN MS4 MAP

Each Copermittee must maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction. The use of GIS is required. The accuracy of the MS4 map must be confirmed during dry weather field screening and analytical monitoring and must be updated at least annually. The GIS layers of the MS4 map must be submitted with the updated Jurisdictional Runoff Management Plan within 365 days after adoption of this Order.

c. FACILITATE PUBLIC REPORTING OF ILLICIT DISCHARGES AND CONNECTIONS - PUBLIC HOTLINE

Each Copermittee must promote, publicize and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from MS4s. Each Copermittee must facilitate public reporting through development and operation of a public hotline. Public hotlines can be Copermittee-specific or shared by Copermittees. All storm water hotlines must be capable of receiving reports in both English and Spanish 24 hours per day and seven days per week.

d. DRY WEATHER FIELD SCREENING AND ANALYTICAL MONITORING

Each Copermittee must conduct dry weather field screening and analytical monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect illicit discharges and connections in accordance with Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order.

e. INVESTIGATION / INSPECTION AND FOLLOW-UP

Each Copermittee must implement procedures to investigate and inspect portions of the MS4 that, based on the results of field screening, analytical monitoring, or other appropriate information, indicate a reasonable potential of containing illicit discharges, illicit connections, or other sources of pollutants in non-storm water.

- (1) Develop response criteria for data: Each Copermittee must develop, update, and use numeric criteria action levels (or other actions level criteria where appropriate) to determine when follow-up investigations will be performed in response to water quality monitoring. The criteria must include required

non-storm water action levels (see Section C) and a consideration of 303(d)-listed waterbodies and environmentally sensitive areas (ESAs) as defined in Attachment C.

- (2) Respond to data: Each Copermittee must investigate portions of the MS4 for which water quality data or conditions indicates a potential illegal discharge or connection.
- (a) Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) must be investigated immediately.
 - (b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Copermittees must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation shall be included in the Annual Report.
 - (c) Analytical data: Within five business days of receiving analytical laboratory results that exceed action levels, the Copermittees must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation shall be included in the Annual Report.
- (3) Respond to notifications: Each Copermittee must respond to and resolve each reported incident (e.g., public hotline, staff notification, etc.) in a timely manner. Criteria may be developed to assess the validity of, and prioritize the response to, each report.

f. ELIMINATION OF ILLICIT DISCHARGES AND CONNECTIONS

Each Copermittee must take immediate action to initiate steps necessary to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections after detection. Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment. Illicit discharges that pose a serious threat to the public's health or the environment must be eliminated immediately.

g. ENFORCE ORDINANCES

Each Copermittee must implement and enforce its ordinances, orders, or other legal authority to prevent illicit discharges and connections to its MS4 and to eliminate detected illicit discharges and connections to its MS4.

h. PREVENT AND RESPOND TO SEWAGE SPILLS (INCLUDING FROM PRIVATE LATERALS AND FAILING SEPTIC SYSTEMS) AND OTHER SPILLS

(1) Each Copermittee must implement management measures and procedures to prevent, respond to, contain and clean up all sewage (see below) and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems). Copermittees must coordinate with spill response teams to prevent entry of spills into the MS4 and contamination of surface water, ground water and soil. Each Copermittee must coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies so that maximum water quality protection is available at all times.

(2) Each Copermittee must develop and implement a mechanism whereby it is notified of all sewage spills from private laterals and failing septic systems into its MS4. Each Copermittee must implement management measures and procedures to prevent, respond to, and coordinate a response to contain and clean up sewage from any such notification.

i. EDUCATION AND TRAINING

Each Copermittee must implement educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials.

5. PUBLIC PARTICIPATION COMPONENT

Each Copermittee must incorporate a mechanism for public participation in the updating, development, and implementation of the Jurisdictional Runoff Management Program.

G. WATERSHED RUNOFF MANAGEMENT PROGRAM

1. Lead Watershed Copermittee Identification

Watershed Copermittees shall identify the Lead Watershed Copermittee for their Watershed Management Area (WMA). The Lead Watershed Copermittees shall serve as liaisons between the Permittees and Regional Board, where appropriate.

2. Watershed Water Quality Workplan (Watershed Workplan)

The Watershed Workplan shall describe the Permittees' development and implementation of a collective watershed strategy to assess and prioritize the water quality problems within the watershed's receiving waters, identify and model sources of the highest priority water quality problem(s), develop a watershed-wide BMP implementation strategy to abate highest priority water quality problems, and a monitoring strategy to evaluate BMP effectiveness and changing water quality prioritization in the WMA.

The work plan shall, at a minimum:

- a.** Characterize the receiving water quality in the WMA. Characterization shall include use of regularly collected water quality data, reports, monitoring and analysis generated in accordance with the requirements of the Receiving Waters Monitoring and Reporting Program, as well as applicable information available from other public and private organizations.
- b.** Identify the highest priority water quality problem(s), in terms of constituents by location, in the WMA's receiving waters. Identified water quality problem(s) shall, at a minimum, give consideration to; TMDLs, receiving waters listed on the CWA section 303(d) list, waters with persistent violations of water quality standards, toxicity, or impacts to beneficial uses, and other pertinent conditions.
- c.** Identify the sources of the highest water quality problem(s) within the WMA. Efforts to determine such sources shall include, but not be limited to: use of information from the construction, industrial/commercial, municipal, and residential source identification programs required within the Jurisdictional Runoff Program (JRMP) of this Order; specific actions to model pollutant transport to receiving waters for the sake of identifying the source(s) point(s) of origin; water quality monitoring data collected as part of the Receiving Water Monitoring and Reporting Program required by this Order, and additional focused water quality monitoring to identify specific sources within the watershed.
- d.** Develop a watershed BMP implementation strategy to attain receiving water quality objectives in the identified highest priority water quality problem(s). The BMP implementation strategy shall include a schedule for implementation of the BMP projects to abate specific receiving water quality problems. BMPs not

contributing to measured pollutant reductions or improvements to water quality must be removed and replaced with alternative BMPs. Identified watershed water quality problems may be the result of jurisdictional discharges that will need to be addressed with BMPs applied in a specific jurisdiction in order to generate a benefit to the watershed.

- e. Develop a strategy to model and monitor improvements in receiving water quality directly resulting from implementation of the BMPs described in the Watershed Workplan. The modeling and monitoring strategy shall generate the necessary data to report on the measured pollutant reduction that results from proper BMP implementation. Monitoring shall, at a minimum, be conducted in the receiving water to demonstrate reduction in pollutant concentrations and progression towards attainment of receiving water quality objectives.
 - f. Establish a schedule for development and implementation of the Watershed strategy outlined in the Workplan. The schedule shall, at a minimum, include forecasted dates of planned actions to address Provisions E.2(a) through E.2(e) and dates for watershed review meetings through the remaining portion of this Permit cycle. Annual watershed workplan review meetings must be open to the public and appropriately publically noticed such that interested parties may come and provide comments on the watershed program.
3. **Watershed Workplan Implementation** – Watershed Copermittee’s shall begin implementing the Watershed Workplan within 60-days of acceptance by the Regional Board Executive Officer. If within 30 days of submittal, the Regional Board has not taken an action, the Workplan shall be deemed acceptable.
 4. **Copermittee Collaboration** – Watershed Copermittees shall collaborate to develop and implement the Watershed Workplan. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.
 5. **Public Participation** – Watershed Copermittees shall implement a watershed-specific public participation mechanism within each watershed. A required component of the watershed-specific public participation shall be a minimum 30-day public review of the Watershed Workplan prior to submittal for acceptance by the Regional Board Executive Officer. Opportunity for the public to review and comment on the Watershed Workplan must occur before the workplan is implemented.
 6. **Watershed Workplan Review and Updates** – Watershed Copermittees shall review and update the Watershed Workplan annually to identify needed changes to the prioritized water quality problem(s) listed in the workplan. All updates to the Watershed Workplan shall be presented during an Annual Watershed Review Meeting. Annual Watershed Review Meetings shall occur once every calendar year and be conducted by the Watershed Copermittees. Annual Watershed Review Meetings shall be open to the public and adequately noticed. Individual Watershed Copermittees shall also review and modify their jurisdictional programs and JRMP

Annual Reports, as necessary, so that they are consistent with the updated Watershed Workplan.

7. Aliso Creek Watershed Runoff Management Plan (WRMP) Provisions

The following provisions apply to the Aliso Creek WRMP. Requirements in this subsection must supersede requirements prescribed by the Regional Board on October 18, 2005.²⁰

- a. Each Copermittee within the Aliso Creek Watershed must implement the monitoring and reporting program described in *Aliso Creek 13325 Directive, Revised Monitoring Program Design – Integration with NPDES Program*, December 2004 (Revised Aliso Creek Program).
- b. Each Copermittee must provide annual reports by March 1 of each year beginning in 2011 for the preceding annual period of January through December. The annual reports must contain the following information:
 - (1) Water quality data and assessment from the Revised Aliso Creek Program. Each municipality must implement the monitoring and reporting program described in the Revised Aliso Creek Program. All information submitted in the report must conform to a SWAMP-Compatible Quality Assurance Project Plan²¹. The report must contain an assessment of compliance with applicable water quality standards for each monitoring station. The report must include data in tabular and graphical form, and electronic data must be submitted to the Regional Board.
 - (2) Program Assessment. A description and assessment of each municipality's program implemented within the high-priority storm drain locations (as identified Revised Aliso Creek Program) to reduce discharges of indicator fecal bacteria/pathogens. Monitoring alone is not sufficient to assess progress of the municipal programs. Municipalities must demonstrate each year that their programs are effective and resulting in a reduction of bacteria sources.
 - (i) For structural and nonstructural management practices implemented, the assessment must contain a description of the

²⁰ On October 12, 2005, the Regional Board accepted proposed changes to the bacteria monitoring program that had been conducted since spring 2001 pursuant to an Investigative Order from the Regional Board's executive officer. The October 18, 2005, letter from the Regional Board's executive officer revised the Investigative Order and instituted the new monitoring and reporting requirements.

²¹ The State Water Resource Control Board (State Board) has prepared an electronic template for Quality Assurance Project Plans (QAPP) to assist in QAPP development, to provide a common format that will allow for review to be expedited, and to provide information on Surface Water Ambient Monitoring (SWAMP) consistency. Additional information and the template are available on-line at <http://www.waterboards.ca.gov/swamp/qapp.html>.

practice, capital and maintenance costs, expectations for effectiveness, date implemented, and any observed results.

(ii) For structural and nonstructural management practices evaluated, the assessment must contain a description of the practice(s), conclusions from the evaluation, and whether and when the practice is planned for implementation by the municipality or group of municipalities.

(3) Status Reports. Updates on high-priority storm drain areas. Status reports must be provided by each municipality that discuss the causes of impairment and subsequent management activities implemented within the reporting period in the high priority areas and the planned activities for the next reporting period.

(4) Certification Statement. The technical reports submitted to the Regional Board must include the following certification statement signed by either the principal executive officer, ranking elected official, or duly authorized representative of that person:

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(s) directly responsible for gathering the information, the information is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

- c. The annual reports must be submitted until the Regional Board determines they are no longer warranted. If requested by a municipality, the monitoring program may be modified or reduced by the Regional Board. The monitoring program and annual reporting may be modified in response to adopted TMDLs and additional Clean Water Act 303(d) listings for impairment.
- d. Municipalities must continue meeting on a quarterly basis to discuss efforts to reduce bacteria in the Aliso Creek watershed.

H. FISCAL ANALYSIS

- 1. Secure Resources:** Each Copermittee must secure the resources necessary to meet all requirements of this Order.
- 2. Annual Analysis:** Each Copermittee must conduct an annual fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs required by this Order. The analysis must include estimated expenditures for the reporting period, the preceding period, and the next reporting period.
 - a.** Each analysis must include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.
 - b.** Each analysis must include a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items.
- 3. Annual Reporting:** Each Copermittee must submit its annual fiscal analysis with the annual JRMP report.

I. TOTAL MAXIMUM DAILY LOADS

The waste load allocations (WLAs) of fully approved and adopted TMDLs are incorporated as Water Quality Based Effluent Limitations on a pollutant by pollutant, watershed by watershed basis. Early TMDL requirements, including monitoring, may be required and inserted into this Order pursuant to Finding E.10

1. Baby Beach Bacterial Indicator TMDL Water Quality Based Effluent Limitations

- a. The Copermitees in the Baby Beach watershed shall implement BMPs capable of achieving the interim and final Bacterial Indicator Waste Load Allocations (WLAs) in discharges to Baby Beach as described in Table 6.

Table 6: TMDL Waste Load Reduction Milestones

<u>Action</u>	<u>Date</u>
Meet 50% wasteload reductions	3 years after effective date for dry weather
	7 years after effective date for wet weather
Meet 100% wasteload reductions	5 years after effective date for dry weather
	10 years after effective date for wet weather

- b. The Copermitees shall conduct necessary monitoring, as described in Attachment A to Resolution No. R9-2008-0027, and submit annual progress reports as part of their yearly reports.
- c. The following WLAs (Table 7) are to be met in Baby Beach receiving water by the end of the year 2019 for wet weather and 2014 for dry weather:

Table 7: Final Bacterial Indicator Waste Load Allocations for Baby Beach

<u>Bacterial Indicator</u>	<u>Waste Load Allocation</u>	
	Dry Weather (Billion MPN / Day)	Wet Weather (Billion MPN / 30 Days)
Total Coliform	0.86	3,254
Fecal Coliform	0.17	112
<i>Enterococcus</i>	0.03	114

MPN: Most Probable Number

- d. The Copermitees must meet the following Numeric Targets (Table 8) in Baby Beach receiving waters in order to meet the underlying assumptions of the TMDL. The Numeric Targets are to be met once 100 percent of the WLA reductions have been achieved (see Table 7 above).

Table 8: Final Bacterial Indicator Numeric Targets for Baby Beach

<u>Bacterial Indicator</u>	30-day geo mean (MPN / 100mL)	Single Sample Max (MPN / 100mL)
	Dry Weather only	Dry and Wet Weather
Total Coliform	1,000	10,000
Fecal Coliform	200	400
<i>Enterococcus</i>	35	104

MPN: Most Probable Number

J. PROGRAM EFFECTIVENESS ASSESSMENT AND REPORTING

1. Jurisdictional Program Effectiveness Assessments

a. OBJECTIVES OF EFFECTIVENESS ASSESSMENTS

Beginning with the Annual Report due in 2011, each Copermittee must annually assess the effectiveness of its Jurisdictional Runoff Management Program (JRMP) implementation at meeting the following objectives:

- (1) Objective for 303(d) Waterbodies: Reduce storm water pollutant loadings.
 - (a) Each Copermittee must establish annual assessment measures or methods specifically for reducing discharges of storm water pollutants from its MS4 into each downstream 303(d)-listed water body for which that waterbody is impaired. Assessment measures must be developed for each of the six outcome levels described by CASQA.²²
 - (b) Each Copermittee must annually conduct each established assessment measure or method and evaluate the outcome. Each outcome must then be used to assess the effectiveness of implemented management measures toward reducing MS4 discharges of the specific pollutants causing or contributing to conditions of impairment.
 - (c) The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.
- (2) Objective for Environmentally-Sensitive Areas: Prevent storm water MS4 discharges from causing or contributing to conditions of pollution, nuisance, or contamination.
 - (a) Each Copermittee must establish annual measures or methods specifically for assessing the effectiveness of its management measures for protecting downstream ESAs from adverse effects caused by discharges from its MS4. Assessment measures must be developed for each of the six outcome levels described by CASQA.
 - (b) Each Copermittee must annually implement each established assessment measure or method and evaluate the outcome. Each outcome must be used to assess the effectiveness of implemented management measures toward reducing MS4 discharges of the specific pollutants causing or contributing to conditions of impairment.
 - (c) The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.
- (3) Objectives for major program component outcomes: Determined by Each

²² Effectiveness assessment outcome levels as defined by CASQA are defined in Attachment C of this Order. See "*Municipal Stormwater Program Effectiveness Assessment Guidance*" (CASQA, May 2007) for guidance for assessing program activities at the various outcome levels.

Copermittee.

- (a) Each Copermittee must annually develop objectives for each program component in Section F and the overall JRMP. The objectives must be established as appropriate in response to program implementation and evaluation of water quality and management practices.
 - (b) Assessment approaches for program implementation must include a mix of specific activities, general program components, and water quality data.
 - (c) The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.
- (4) Objectives for actions taken to protect receiving water limitations in accordance with this Order.
- (a) Each Copermittee must develop and implement an effectiveness assessment strategy for each measure conducted in response to a determination to implement the “iterative” approach to prevent or reduce any storm water pollutants that are causing or contributing to the exceedance of water quality standards as outlined in this Order

b. ASSESSMENT REVIEW

- (1) Based on the results of the effectiveness assessments, each Copermittee must annually review its jurisdictional activities and BMPs to identify modifications and improvements needed to maximize JRMP effectiveness, as necessary to achieve compliance with this Order.
- (2) Each Copermittee must develop and annually conduct an Integrated Assessment²³ of each effectiveness assessment objective above (Section J.1.a) and the overall JRMP using a combination of outcomes as appropriate to the objectives.²⁴

2. Program Modifications

- a. Each Copermittee must develop and implement a plan and schedule to address program modifications and improvements identified during annual effectiveness assessments.
- b. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs must be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or

²³ Integrated assessment is defined in Attachment C. It is the process of evaluating whether program implementation is resulting in the protection or improvement of water quality. Integrated assessment combines assessments of program implementation and water quality.

²⁴ Not all program components need be addressed at each of the six outcome levels.

contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems must be modified and improved to correct the water quality problems.

3. Effectiveness Assessment and Program Response Reporting

- a. Each Copermittee must include a description and summary of its annual and long-term effectiveness assessments within each Annual Report. Beginning with the Annual Report due in 2011, the Program Effectiveness reporting must include:
- (1) 303(d) waterbodies: A description and results of the annual assessment measures or methods specifically for reducing discharges of storm water pollutants from its MS4 into each 303(d)-listed waterbody;
 - (2) ESAs: A description and results of the annual assessment measures or methods specifically for managing discharges of pollutants from its MS4 into each downstream ESA;
 - (3) Other Program Components: A description of the objectives and corresponding assessment measures and results used to evaluate the effectiveness of each general program component. The results must include findings from both program implementation and water quality assessment where applicable;
 - (4) Receiving water protection: A description and results of the annual assessment measures or methods employed specifically for actions taken to protect receiving water limitations in accordance with Section A.3 of this Order;
 - (5) A description of the steps taken to use dry-weather and wet-weather monitoring data to assess the effectiveness of the programs for 303(d) impairments, ESAs, and general program components;
 - (6) A description of activities conducted in response to investigations of illicit discharge and illicit connection activities, including how each investigation was resolved and the pollutant(s) involved;
 - (7) Responses to effectiveness assessments: A description of each program modification, made in response to the results of effectiveness assessments conducted pursuant to Section J.1.a, and the basis for determining (pursuant to Section J.2.b.) that each modified activity and/or BMP represents an improvement with respect to reducing the discharge of storm water pollutants from the MS4.
 - (8) A description of the steps that will be taken to improve the Copermittee's ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6. Include a time schedule for when improvement will occur; and
 - (9) A description of the steps that will be taken to identify aspects of the Copermittee's Jurisdictional Runoff Management Program that will be changed based on the results of the effectiveness assessment.

4. Work Plan

Each Copermittee must develop a work plan to address their high priority water quality problems in an iterative manner over the life of the permit. The goal of the work plan is to demonstrate a responsive and adaptive approach for the judicious and effective use of available resources to attack the highest priority problems. The work plan shall include, at a minimum, the following:

- a.** The problems and priorities identified during the assessment;
- b.** A list of priority pollutants and known or suspected sources;
- c.** A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts;
- d.** A description and schedule for new and/or modified BMPs. The schedule is to include dates for significant milestones;
- e.** A description of how the selected activities will address an identified high priority problem. This will include a description of the expected effectiveness and benefits of the new and/or modified BMPs;
- f.** A description of implementation effectiveness metrics;
- g.** A description of how efficacy results will be used to modify priorities and implementation; and
- h.** A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments.

The Copermittee shall submit the work plan to the Regional Board within 365 days of adoption of the Order. Annual updates are also required and shall be included with the annual JRMP report. The Regional Board will assess the work plan for compliance with the specific and overall requirements of the Order. To increase effectiveness and efficiencies, Copermittees may combine their implementation efforts and work plans within a hydrologic area or sub area. Each Copermittee, however, maintains individual responsibility for developing and implementing an acceptable work plan.

K. REPORTING

The Copermittees may propose alternate reporting criteria and schedules, as part of their updated JRMP, for the Executive Officer's acceptance. The Copermittees shall submit the updated JRMP within 365 days after adoption of this Order.

1. Runoff Management Plans**a. JURISDICTIONAL RUNOFF MANAGEMENT PLANS**

- (1) Copermittees: The written account of the overall program to be conducted by each Copermittee to meet the jurisdictional requirements of section F of this Order is referred to as the Jurisdictional Runoff Management Plan (JRMP). Each Copermittee must revise and update its existing JRMP so that it describes all activities the Copermittee will undertake to implement the requirements of this Order. Each Copermittee must submit its updated and revised JRMP to the Regional Board 365 days after adoption of this Order.
- (2) At a minimum, each Copermittee's JRMP must be updated and revised to demonstrate compliance with each applicable section of this Order.

b. WATERSHED WORKPLANS

- (1) Copermittees: The written account of the program conducted by each watershed group of Copermittees is referred to as the Watershed Workplan. Copermittees within each watershed shall be responsible for updating and revising each Watershed Workplan. Each Watershed Workplan shall be updated and revised to describe any changes in water quality problems or priorities in the WMAs, and any necessary change to actions Copermittees will take to implement jurisdictional or watershed BMPs to address those identified.
- (2) Lead Watershed Copermittee: Each Lead Watershed Permittee shall be responsible for coordinating the production of the Watershed Workplan, as well as coordinating Annual Watershed Review Meetings and public participation/public noticing in accordance with the requirements of this Order. The Lead Watershed Permittee shall submit the Watershed Workplan to the Principal.
- (3) Principal Copermittee: The Principal Permittee shall assemble and submit the Watershed Workplan to the Regional Board no later than 365 days after adoption of this Order, and shall be prepared to implement the workplan within 60 days of the Regional Board Executive Officer deeming the workplan acceptable.

- (4) Each Watershed Workplan shall, at a minimum, include:
- (a) Identification of the Lead Watershed Permittee for the watershed.
 - (b) An updated watershed map.
 - (c) Identification and description of all applicable water quality data, reports, analyses, and other information to be used to assess receiving water quality.
 - (d) Assessment and analysis of the watershed's water quality data, reports, analyses, and other information, used during identification and prioritization of the watershed's water quality problems.
 - (e) A prioritized list of water quality problems within the WMA including rationale explaining the method/logic used to determine prioritization.
 - (f) Identification of the likely sources, pollutant discharges, and/or other factors causing the high priority water quality problems within the WMA.
 - (g) A description of the strategy to be used to guide Copermittee implementation of BMPs either jurisdictionally or on a watershed-wide basis to abate the highest water quality problems
 - (h) A list of criteria used to evaluate BMP effectiveness and how it was applied.
 - (i) A GIS map of BMPs implemented and BMPs scheduled for implementation.
 - (j) A description of the public participation mechanisms to be used and the parties anticipated to be involved during the development and implementation of the Watershed Workplan.
 - (k) A description of Copermittee collaboration to accomplish development of the Watershed Workplan, including a schedule for Watershed meetings.
 - (l) A description of how TMDLs and 303(d)-listed water bodies were considered during prioritization of watershed water quality problems
 - (m) A description of the strategy to model and monitor improvement in receiving water quality directly resulting from implementation of the BMPs described in the Watershed Workplan.
 - (n) A scheduled annual Watershed Workplan Review Meeting once every calendar year. This meeting shall be open to the public.

2. Other Required Reports and Plans

a. SSMP UPDATES

- (1) Copermittees must submit their updated model SSMP in accordance with the applicable requirements of section F.1 with the JRMP two years after adoption of this Order.
- (2) Within 180 days of determination that the Model SSMP is in compliance with this Permit's provisions, each Copermittee must update their own local SSMP, and amended ordinances consistent with the model SSMP, and shall submit both (local SSMP and amended ordinances) to the Regional Board.
- (3) For SSMP-related requirements of Section F.1 with subsequent

implementation due dates, updated SSMPs must be submitted with the JRMP annual report covering the applicable reporting period.

b. REPORT OF WASTE DISCHARGE

The Principal Copermittee must submit to the Regional Board, no later than 210 days in advance of the expiration date of this Order, a Report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements. The fourth annual report for this Order may serve as the ROWD, provided it contains the minimum information below.

At a minimum, the ROWD must include the following: (1) Proposed changes to the Copermittees' runoff management programs; (2) Proposed changes to monitoring programs; (3) Justification for proposed changes; (4) Name and mailing addresses of the Copermittees; (5) Names and titles of primary contacts of the Copermittees; and (6) Any other information necessary for the reissuance of this Order.

3. Annual Reports

a. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM (JRMP) ANNUAL REPORTS

- (1) Copermittees: Each Copermittee must generate individual JRMP Annual Reports which cover implementation of its jurisdictional activities during the past annual reporting period. Each Annual Report must verify and document compliance with this Order as directed in this section. Each Copermittee must retain records through 2015, available for review, that document compliance with each requirement of this Order. Each Copermittee must submit to the Principal Copermittee its individual JRMP Annual Report by the date specified by the Principal Copermittee. The reporting period for these annual reports must be the previous fiscal year. For example, the report submitted September 30, 2010 must cover the reporting period July 1, 2009 to June 30, 2010.
- (2) Principal Copermittee: The Principal Copermittee is responsible for collecting and assembling each Copermittee's individual JRMP Annual Report. The Principal Copermittee must submit Unified JRMP Annual Reports to the Regional Board by September 30 of each year, beginning on September 30, 2011. The Unified JRMP Annual Report must contain the 13 individual JRMP Annual Reports.
- (3) Each JRMP Annual Report must contain, at a minimum, the following information:
 - (a) Information required to be reported annually in Section H (Fiscal Analysis) of this Order;

- (b) Information required to be reported annually in Section J (Program Effectiveness) of this Order;
- (c) The completed Reporting Checklist found in Attachment D, and
- (d) Information for each program component by watershed as described in the following Table 9:

Table 9. Annual Reporting Requirements

Program Component	Reporting Requirement
New Development	1. Updated relevant sections of the General Plan and environmental review process and a description of planned updates within the next annual reporting period, if applicable
	2. Revisions to the local SSMP, including where applicable: <ul style="list-style-type: none"> (a) Identification and summary of where the SSMP fails to meet the requirements of this Order; (b) Updated procedures for identifying pollutants of concern for each Priority Development Project; (c) Updated treatment BMP ranking matrix; and (d) Updated site design and treatment control BMP design standards;
	3. Verification that site design, source control, and treatment BMPs were required on all applicable Priority Development Projects;
	4. Description of the application of LID and site design BMPs in the planning and approval process;
	5. Description of projects subject to the local waiver provision for numeric sizing of treatment control BMP requirements;
	6. Description and summary of the LID site design BMP substitution program, if applicable;
	7. Description and summary of the process to verify compliance with SSMP requirements;
	8. Updates to the BMPs that are listed in the local SSMP as options for treatment control;
	9. Description of the treatment control maintenance tracking process and verification that the requirements of this Order were met during the reporting period; <ul style="list-style-type: none"> (a) Updated watershed-based database of approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction, including updates to the list of high-priority treatment BMPs;
	10. Description of the process for identifying and evaluating hydrologic conditions of concern and requiring a suite of management measures within all Priority Development Projects to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels;
	11. Description of enforcement activities applicable to the new development and redevelopment component and a summary of the effectiveness of those activities;

Program Component	Reporting Requirement
Construction	1. Updated relevant ordinances and description of planned ordinance updates within the next annual reporting period, if applicable;
	2. A description of procedures used for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality;
	3. Designated minimum and enhanced BMPs;
	4. Summary of the inspection program, including the following information: (a) Number and date of inspections conducted at each facility, including the facility address; (b) Number of facilities lacking adequate BMPs; (c) The BMP violations identified during the inspection by facility; (d) Number, date, and types of enforcement actions by facility; (e) Narrative description of inspection findings and follow-up activities for each facility;
Municipal	1. Updated source inventory;
	2. Changes to the designated municipal BMPs;
	3. Descriptions of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies;
	4. Summary and assessment of BMPs implemented at retrofitted flood control structures, including: (a) List of projects with BMP retrofits; and (b) List and description of structures retrofitted without BMPs;
	5. Description and assessment of the municipal structural treatment control operations and maintenance activities, including: (a) Number of inspections and types of facilities; and (b) Summary of findings;
	6. Description of the municipal areas/facilities operations and maintenance activities, including: (a) Number and types of facilities maintained; (b) Amount of material removed and how that material was disposed; and (c) List of facilities planned for bi-annual inspections and the justification;
	7. Description of the municipal areas/programs inspection activities, including: (a) Number and date of inspections conducted at each facility; (b) Number of facilities lacking adequate BMPs; (c) The BMP violations identified during the inspection by facility; (d) Number, date and types of enforcement actions by facility; (e) Narrative description of inspection findings and follow-up activities for each facility;

Program Component	Reporting Requirement
	8. Description of activities implemented to address sewage infiltration into the MS4;
Commercial / Industrial	1. Annual inventory of commercial / industrial sources; 2. Summary of the inspection program, including the following information: (a) Number and date of inspections conducted at each facility including the facility address; (b) Number of facilities lacking adequate BMPs; (c) The BMP violations identified during the inspection by facility; (d) Number, date, and types of enforcement actions by facility; (e) Narrative description of inspection findings and follow-up activities for each facility; 3. Changes to designated minimum and enhanced BMPs; 4. A list of industrial sites, including each name, address, and SIC code, that the Copermittee suspects may require coverage under the General Industrial Permit, but has not submitted an NOI;
Residential	1. Updated minimum BMPs required for residential areas and activities;
	2. Quantification and summary of applicable runoff and storm water enforcement actions within residential areas and activities;
	3. Description of efforts to manage runoff and storm water pollution in common interest areas;
Illicit Discharge Detection and Elimination	1. Changes to the legal authority to implement Illicit Discharge Detection and Elimination activities; 2. Changes to the established investigation procedures; 3. Public reporting mechanisms, including phone numbers and web pages; 4. All data and assessments from the Dry Weather Effluent Analytical Monitoring activities; 5. Response criteria developed for water quality data and notifications; 6. Summaries of illicit discharges (including spills and water quality data events) and how each significant case was resolved; 7. A description of instances when field screening and analytical data exceeded action levels, but for which no investigation was conducted; 8. A description of enforcement actions taken in response to investigations of illicit discharges and a description of the effectiveness of those enforcement measures; 9. A description of controls to prevent infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems;
Work Plan	Priorities, strategy, implementation schedule and effectiveness evaluation;

(4) Each JRMP Annual Report must also include the following information

regarding non-storm water discharges (see Section B.2. of this Order):

- (a) Identification of non-storm water discharge categories identified as a source of pollutants to waters of the U.S;
- (b) A description of ordinances, orders, or similar means to prohibit non-storm water discharge categories identified under section B.2 above ;
- (c) Identification of any control measures to be required and implemented for non-storm water discharge categories identified as needing said controls by the Regional Board; and
- (d) A description of a program to address pollutants from non-emergency fire fighting flows identified by the Copermittee to be significant sources of pollutants.

4. Interim Reporting Requirements

For the July 2009-June 2010 reporting period, the Jurisdictional RMP must be submitted on January 31, 2011. Each Jurisdictional RMP Annual Report submitted for this reporting period must, at a minimum, include comprehensive descriptions of all activities conducted to fully implement the Copermittees' Jurisdictional RMP documents, as those documents were developed to comply with the requirements of Order No. 2002-01. The Principal Copermittee must submit these documents in a unified manner, consistent with the unified reporting requirements of Order No. 2002-01.

5. Universal Reporting Requirements

All submittals must include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal. The Principal Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal and the sections of the submittals for which it is responsible.

L. MODIFICATION OF PROGRAMS

Modifications of Jurisdictional Runoff Management Programs and/or Watershed Runoff Management Programs may be initiated by the Executive Officer of the Regional Board or by the Copermittees. Requests by Copermittees must be made to the Executive Officer, and must be submitted during the annual review process. Requests for modifications should be incorporated, as appropriate, into the Annual Reports or other deliverables required or allowed under this Order.

1. Minor Modifications: Minor modifications to Jurisdictional Runoff Management Programs, and/or Watershed Runoff Management Programs, may be accepted by the Executive Officer where the Executive Officer finds the proposed modification complies with all discharge prohibitions, receiving water limitations, and other requirements of this Order.
2. Modifications Requiring an Amendment to this Order: Proposed modifications that are not minor require amendment of this Order in accordance with this Order's rules, policies, and procedures.

M. PRINCIPAL COPERMITTEE RESPONSIBILITIES

Within 180 days of adoption of this Order, the Copermittees must designate the Principal Copermittee and notify the Regional Board of the name of the Principal Copermittee. The Principal Copermittee must, at a minimum:

1. Serve as liaison between the Copermittees and the Regional Board on general permit issues, and when necessary and appropriate, represent the Copermittees before the Regional Board.
2. Coordinate permit activities among the Copermittees and facilitate collaboration on the development and implementation of programs required under this Order.
3. Integrate individual Copermittee documents and reports into single unified documents and reports for submittal to the Regional Board as required under this Order.
4. Produce and submit documents and reports as required by section K of this Order and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order.

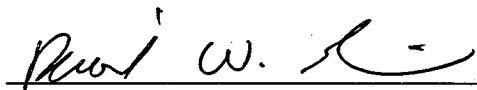
N. RECEIVING WATERS AND MS4 DISCHARGE MONITORING AND REPORTING PROGRAM

Pursuant to CWC section 13267, the Copermittees must comply with all the requirements contained in Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order.

O. STANDARD PROVISIONS, REPORTING REQUIREMENTS, AND NOTIFICATIONS

1. Each Copermittee must comply with Standard Provisions, Reporting Requirements, and Notifications contained in Attachment B of this Order. This includes 24 hour/5 day reporting requirements for any instance of non-compliance with this Order as described in section 5.e of Attachment B.
2. All plans, reports and subsequent amendments submitted in compliance with this Order must be implemented immediately (or as otherwise specified). All submittals by Copermittees must be adequate to implement the requirements of this Order.

I, David W. Gibson, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on December 16, 2009.



David W. Gibson
Executive Officer

VOLUME II
TAB 1

LEXSTAT

DEERING'S CALIFORNIA CODES ANNOTATED
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*** Deering's California Codes are current with urgency legislation through Chapter 22 ***
of the 2016 Regular Session and Chapter 8 of the 2015-16 2nd Extraordinary Session,
and ballot measures approved by the electorate at the June 7, 2016, Presidential Primary Election

CONSTITUTION OF THE STATE OF CALIFORNIA
Article XIII A. [TAX LIMITATION INITIATIVE]

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XIII A § 4 (2016)

§ 4. Special local taxes

Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

HISTORY:

Adopted June 6, 1978.

VOLUME II
TAB 2

LEXSTAT

Deering's California Codes Annotated
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CONSTITUTION OF THE STATE OF CALIFORNIA
Article XIII B. GOVERNMENT SPENDING LIMITATION

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XIII B § 6 (2016)

§ 6. Reimbursement for new programs and services

(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates:

(1) Legislative mandates requested by the local agency affected.

(2) Legislation defining a new crime or changing an existing definition of a crime.

(3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

(4) Legislative mandates contained in statutes within the scope of paragraph (7) of subdivision (b) of Section 3 of Article I. (b)

(1) Except as provided in paragraph (2), for the 2005-06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the State pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law.

(2) Payable claims for costs incurred prior to the 2004-05 fiscal year that have not been paid prior to the 2005-06 fiscal year may be paid over a term of years, as prescribed by law.

(3) Ad valorem property tax revenues shall not be used to reimburse a local government for the costs of a new program or higher level of service.

(4) This subdivision applies to a mandate only as it affects a city, county, city and county, or special district.

(5) This subdivision shall not apply to a requirement to provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee or retiree, or of any local government

employee organization, that arises from, affects, or directly relates to future, current, or past local government employment and that constitutes a mandate subject to this section. (c) A mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility.

HISTORY:

Adopted November 6, 1979. Amendment approved by voters, Prop. 1A, effective November 3, 2004; amendment approved by voters, Prop. 42, effective June 4, 2014.

VOLUME II
TAB 3

LEXSTAT

DEERING'S CALIFORNIA CODES ANNOTATED
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CONSTITUTION OF THE STATE OF CALIFORNIA
Article XIII C. [VOTER APPROVAL FOR LOCAL TAX LEVIES]

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XIII C § 1 (2016)

§ 1. Definitions

As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local

government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

HISTORY:

Adopted by voters, Prop. 218 § 3, effective November 6, 1996. Amendment approved by voters, Prop. 26 § 3, effective November 3, 2010.

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CONSTITUTION OF THE STATE OF CALIFORNIA
Article XIII C. [VOTER APPROVAL FOR LOCAL TAX LEVIES]

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XIII C § 2 (2016)

§ 2. Local government tax limitation

Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

HISTORY:

Adopted by voters, Prop. 218 § 3, effective November 6, 1996.

VOLUME II
TAB 4

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CONSTITUTION OF THE STATE OF CALIFORNIA
Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XIII D § 2 (2016)

§ 2. Definitions

As used in this article:

- (a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.
- (b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."
- (c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.
- (d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.
- (e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.
- (f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.
- (g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.
- (h) "Property-related service" means a public service having a direct relationship to property ownership.
- (i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

HISTORY:

Adopted by voters, Prop. 218 § 4, effective November 6, 1996.

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CONSTITUTION OF THE STATE OF CALIFORNIA
Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XIII D § 3 (2016)

§ 3. Limitation of property taxes, assessments, fees and charges

(a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

- (1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.
- (2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.
- (3) Assessments as provided by this article.
- (4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

HISTORY:

Adopted by voters, Prop. 218 § 4, effective November 6, 1996.

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CONSTITUTION OF THE STATE OF CALIFORNIA
Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XIII D § 6 (2016)

§ 6. Property related fees and charges

(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted.

Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

HISTORY:

Adopted by voters, Prop. 218 § 4, effective November 6, 1996.

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TAB 5

1 of 1 DOCUMENT

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*** Current through PL 114-165, approved 6/3/16 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
STANDARDS AND ENFORCEMENT

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33 USCS § 1311

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved--

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 USCS § 1314(b)], or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act [33 USCS § 1317]; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act [33 USCS § 1283] prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act [33 USCS § 1314(d)(1)]; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 USCS § 1370]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315 [33 USCS § 1325]), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act [33 USCS § 1317];

(B) [Repealed]

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in ac-

33 USCS § 1311

cordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act [33 USCS § 1317] which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act [33 USCS § 1314(b)(4)]; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3) (A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 402(a)(1) [33 USCS § 1342(a)(1)] in a permit issued after enactment of the Water Quality Act of 1987 [enacted Feb. 4, 1987], compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable. The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations. Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations. Effluent limitations established pursuant to this section or section 302 of this Act [33 USCS § 1312] shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste or medical waste. Notwithstanding any other provisions of this Act [33 USCS §§ 1251 et seq.] it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants.

(1) General authority. The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F)) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications. A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that--

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

33 USCS § 1311

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification. If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants.

(A) General authority. Up on petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)], toxic pollutants subject to section 307(a) of this Act [33 USCS § 1317(a)], and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing.

(i) Sufficient information. The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination. The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) of this Act [33 USCS § 1317(a)].

(iii) Listing as toxic pollutant. If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) [33 USCS § 1317(a)], the Administrator shall list the pollutant as a toxic pollutant under section 307(a) [33 USCS § 1317(a)].

(iv) Nonconventional criteria determination. If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions. A petition for listing of a pollutant under this paragraph--

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314];

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition. A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314].

(E) Burden of proof. The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants. The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements. The Administrator, with the concurrence of the State, may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that--

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act [33 USCS § 1314(a)(6)];

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures pro-

33 USCS § 1311

tection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 304(a)(1) of this Act [33 USCS § 1314(a)(1)] after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act [33 USCS § 1251(a)(2)]. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions.

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act [33 USCS §§ 1251 et seq.] available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act [33 USCS § 1342] or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the

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date of enactment of the Water Quality Act of 1987 [enacted Feb. 7, 1987]. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 201 of this Act [33 USCS § 1281(b)-(g)], section 307 of this Act [33 USCS § 1317], and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(2) (A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and--

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this Act [33 USCS §§ 1251 et seq.] for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 402 [33 USCS § 1342] to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection [enacted Dec. 27, 1977] or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 204 of this Act [33 USCS § 1284], and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 307(a) and (b) [33 USCS § 1317(a), (b)] during the period of such time modification.

(j) Modification procedures.

(1) Any application filed under this section for a modification of the provisions of--

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later than [than] the 365th day which begins after the date of enactment of the Municipal Wastewater Treatment Construction Grant Amendments of 1981 [enacted Dec. 29, 1981], except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after the date of the enactment of the Water Quality Act of 1987 [enacted Feb. 7, 1987], and except as provided in paragraph (5);

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314] or not later than 270 days after the date of enactment of the Clean Water Act of 1977 [enacted Dec. 27, 1977], whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this Act [33 USCS §§ 1251 et seq.], unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g).

(A) Effect of filing. An application for a modification under subsection (g) and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this Act [33 USCS §§ 1251 et seq.] for all pollutants not the subject of such application or petition.

(B) Effect of disapproval. Disapproval of an application for a modification under subsection (g) shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this Act [33 USCS §§ 1251 et seq.].

(4) Deadline for subsection (g) decision. An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) Extension of application deadline.

(A) In general. In the 180-day period beginning on the date of the enactment of this paragraph [enacted Oct. 31, 1994], the city of San Diego, California, may apply for a modification pursuant to subsection (h) of the requirements of subsection (b)(1)(B) with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) Application. An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will--

- (i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and
- (ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) Additional conditions. The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies. A

(D) Preliminary decision deadline. The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology. In the case of any facility subject to a permit under section 402 [33 USCS § 1342] which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 402 [33 USCS § 1342], in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industry-wide application.

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(l) Toxic pollutants. Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this Act [33 USCS § 1317(a)(1)].

(m) Modification of effluent limitation requirements for point sources.

(1) The Administrator, with the concurrence of the State, may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 403 [33 USCS § 1343], with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that--

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection [enacted Jan. 8, 1983] by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section 403 [33 USCS § 1343] exceed by an unreasonable amount the benefits to be obtained, including the objectives of this Act [33 USCS §§ 1251 et seq.];

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 101(a)(2) of this Act [33 USCS § 1251(a)(2)];

(G) the applicant accepts as a condition to the permit a contractual [contractual] obligation to use funds in the amount required (but not less than \$ 250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this Act [33 USCS §§ 1251 et seq.] applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors.

(1) General rule. The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 307(b) [33 USCS § 1317(b)] for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that--

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(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 304(b) or 304(g) and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application--

(i) is based solely on information and supporting data submitted to the Administrator during the rule-making for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a nonwater quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications. An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision. The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information. The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications. For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on the date of the enactment of this subsection [enacted Feb. 7, 1987] shall be treated as having been submitted to the Administrator on the 180th day following such date of enactment [enacted Feb. 7, 1987]. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application. An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial. If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports. By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 301 or 304 of this Act [33 USCS § 1311 or 1314] or any national categorical pretreatment standard under section 307(b) of this Act [33 USCS § 1317(b)] filed before, on, or after such date of enactment [enacted Feb. 7, 1987].

(o) Application fees. The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of section 301, section 304(d)(4), and section 316(a) of this Act [33 USCS §§ 1311(c), (g), (i), (k), (m), (n), 1314(d)(4), 1316(a)]. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations.

(1) In general. Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 402(b) [33 USCS § 1342(b)], may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remaining operation. Such modified requirements shall apply the best available

technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations. The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 303 of this Act [33 USCS § 1313].

(3) Definitions. For purposes of this subsection--

(A) Coal remining operation. The term "coal remining operation" means a coal mining operation which begins after the date of the enactment of this subsection [enacted Feb. 4, 1987] at a site on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(B) Remined area. The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(C) Pre-existing discharge. The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws. Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 to any coal remining operation, including the application of such Act to suspended solids.

VOLUME II
TAB 6

LEXSTAT

UNITED STATES CODE SERVICE
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*** Current through PL 114-165, approved 6/3/16 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
STANDARDS AND ENFORCEMENT

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33 USCS § 1313

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards.

(1) In order to carry out the purpose of this Act [33 USCS §§ 1251 et seq.], any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. If the Administrator makes such a determination he shall, within three months after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this Act [33 USCS §§ 1251 et seq.] unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3) (A) Any State which prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972] has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of

this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations.

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], if--

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication.

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2) (A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act [33 USCS §§ 1251 et seq.]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 307(a)(1) of this Act [33 USCS § 1317(a)(1)] for which criteria have been published under section 304(a) [33 USCS § 1314(a)], the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 304(a)(8) [33 USCS § 1314(a)(8)]. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act [33 USCS §§ 1251 et seq.], such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act [33 USCS §§ 1251 et seq.], he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water

quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act [33 USCS §§ 1251 et seq.], or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act [33 USCS §§ 1251 et seq.].

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this Act [33 USCS §§ 1251 et seq.].

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision.

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) [33 USCS § 1311(b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 [33 USCS § 1311] are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 304(a)(2)(D) [33 USCS § 1314(a)(2)(D)], for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality

standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained. For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process.

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this Act [33 USCS §§ 1251 et seq.].

(2) Each State shall submit not later than 120 days after the date of the enactment of the Water Pollution Control Amendments of 1972 [enacted Oct. 18, 1972] to the Administrator for his approval a proposed continuing planning process which is consistent with this Act [33 USCS §§ 1251 et seq.]. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this Act [33 USCS §§ 1251 et seq.]. The Administrator shall not approve any State permit program under title IV of this Act [33 USCS §§ 1341 et seq.] for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 301(b)(1), section 301(b)(2), section 306, and section 307 [33 USCS §§ 1311(b)(1), (2), 1316, 1317], and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 208 [33 USCS § 1288], and applicable basin plans under section 209 of this Act [33 USCS § 1289];

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 301 and 302 [33 USCS §§ 1311, 1312].

(f) Earlier compliance. Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 301(b)(1) and 301(b)(2) [33 USCS § 1311(b)(1), (2)] nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards. Water quality standards relating to heat shall be consistent with the requirements of section 316 of this Act [33 USCS § 1326].

(h) Thermal water quality standards. For the purposes of this Act [33 USCS §§ 1251 et seq.] the term "water quality standards" includes thermal water quality standards.

(i) Coastal recreation water quality criteria.

(1) Adoption by States.

(A) Initial criteria and standards. Not later than 42 months after the date of the enactment of this subsection [enacted Oct. 10, 2000], each State having coastal recreation waters shall adopt and submit to the Administrator water quality

criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 304(a) [33 USCS § 1314(a)].

(B) New or revised criteria and standards. Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 304(a)(9) [33 USCS § 1314(a)(9)], each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt.

(A) In general. If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception. If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B), the Administrator shall publish any revised or new standard under this subsection not later than 42 months after the date of the enactment of this subsection [enacted Oct. 10, 2000].

(3) Applicability. Except as expressly provided by this subsection, the requirements and procedures of subsection (c) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

HISTORY:

(June 30, 1948, ch 758, Title III, § 303, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 846; Feb. 4, 1987, P.L. 100-4, Title III, § 308(d), Title IV, § 404(b), 101 Stat. 39, 68; Oct. 10, 2000, P.L. 106-284, § 2, 114 Stat. 870.)

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TAB 7

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*** Current through PL 114-165, approved 6/3/16 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
STANDARDS AND ENFORCEMENT

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33 USCS § 1319

§ 1319. Enforcement

(a) State enforcement; compliance orders.

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1328, or 1345] in a permit issued by a State under an approved permit program under section 402 or 404 of this Act [33 USCS § 1342 or 1344], he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person--

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by him or by a State or in a permit issued under section 404 of this Act [33 USCS § 1344] by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 308 of this Act [33 USCS § 1318] shall not take effect until the person to whom it is issued has had an opportunity to confer

with the Administrator concerning the alleged violation.

(5) (A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this Act [33 USCS §§ 1251 et seq.] or in any permit issued under this Act [33 USCS §§ 1251 et seq.], has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 402 of this Act [33 USCS § 1342] was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 301(b)(1)(A) [33 USCS § 1311(b)(1)(A)] to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 301(b)(1)(A) or (C) of this Act [33 USCS § 1311(b)(1)(A), (C)], (B) that such person cannot meet the requirements for a time extension under section 301(i)(2) of this Act [33 USCS § 1311(i)(2)], and (C) that the most expeditious and appropriate means of compliance with this Act [33 USCS §§ 1251 et seq.] by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this Act [33 USCS §§ 1251 et seq.] at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions. The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties.

(1) Negligent violations. Any person who--

(A) negligently violates section 301, 302, 306, 307, 308, 311(b)(3), 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act [33 USCS § 1342(a)(3) or (b)(8)] or in a permit issued under section 404 of this Act [33 USCS § 1344] by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 402 of this Act [33 USCS § 1342] by the Administrator or a State;

shall be punished by a fine of not less than \$ 2,500 nor more than \$ 25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$ 50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations. Any person who--

(A) knowingly violates section 301, 302, 306, 307, 308, 311(b)(3), 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1318, 1321(b)(3), 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act [33 USCS § 1342(a)(3) or (b)(8)] or in a permit issued under section 404 of this Act [33 USCS § 1344] by the Secretary of the Army or by a State;

or
(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 402 of this Act [33 USCS § 1342] by the Administrator or a State;

shall be punished by a fine of not less than \$ 5,000 nor more than \$ 50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$ 100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment.

(A) General rule. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 311(b)(3), 318, or 405 of this Act [33 USCS § 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator or by a State, or in a permit issued under section 404 of this Act [33 USCS § 1344] by the Secretary of the Army or by a State, 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. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than \$ 1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions. For the purpose of subparagraph (A) of this paragraph--

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury--

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements. Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act [33 USCS §§ 1251 et seq.] or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this Act [33 USCS §§ 1251 et seq.], shall upon conviction, be punished by a fine of not

more than \$ 10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$ 20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person". For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 502(5) of this Act [33 USCS § 1365(5)], any responsible corporate officer.

(7) Hazardous substance defined. For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of this Act [33 USCS § 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 USCS § 9602], (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 USCS § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 USCS §§ 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of this Act [33 USCS § 1317(a)], and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 USCS § 2606].

(d) Civil penalties; factors considered in determining amount. Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator, or by a State, or in a permit issued under section 404 of this Act [33 USCS § 1344] by a State[,], or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act [33 USCS § 1342(a)(3) or (b)(8)], and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$ 25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(e) State liability for judgments and expenses. Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutants into treatments works. Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 307 [33 USCS § 1317(d)], the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this Act [33 USCS §§ 1251 et seq.]. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this Act [33 USCS §§ 1251 et seq.].

(g) Administrative penalties.

(1) Violations. Whenever on the basis of any information available--

(A) the Administrator finds that any person has violated section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator or by a State, or in a permit issued under section 404 [33 USCS § 1344] by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 404 of this Act [33 USCS § 1344] by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties.

(A) Class I. The amount of a class I civil penalty under paragraph (1) may not exceed \$ 10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed \$ 25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of title 5, United States Code, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II. The amount of a class II civil penalty under paragraph (1) may not exceed \$ 10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed \$ 125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of title 5, United States Code. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount. In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons.

(A) Public notice. Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence. Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing. If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order. An order issued under this subsection shall become final 30 days after its issuance unless a

petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order.

(A) Limitation on actions under other sections. Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this Act [33 USCS §§ 1251 et seq.]; except that any violation--

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 311(b) or section 505 of this Act [33 USCS § 1321(b) or 1365].

(B) Applicability of limitation with respect to citizen suits. The limitations contained in subparagraph (A) on civil penalty actions under section 505 of this Act [33 USCS § 1365] shall not apply with respect to any violation for which--

(i) a civil action under section 505(a)(1) of this Act [33 USCS § 1365(a)(1)] has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 505(a)(1) of this Act [33 USCS § 1365(a)(1)] has been given in accordance with section 505(b)(1)(A) [33 USCS § 1365(b)(1)(A)] prior to commencement of an action under this subsection and an action under section 505(a)(1) [33 USCS § 1365(a)(1)] with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance. No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this Act [33 USCS §§ 1251 et seq.] or with the terms and conditions of any permit issued pursuant to section 402 or 404 of this Act [33 USCS § 1342 or 1344].

(8) Judicial review. Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment--

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection. If any person fails to pay an assessment of a civil penalty--

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during

which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas. The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures. Nothing in this subsection shall change the procedures existing on the day before the date of the enactment of the Water Quality Act of 1987 [enacted Feb. 4, 1987] under other subsections of this section for issuance and enforcement of orders by the Administrator.

HISTORY:

(June 30, 1948, ch. 758, Title III, § 309, as added, Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 859; Dec. 27, 1977, P.L. 95-217, §§ 54(b), 55, 56, 67(c)(2), 91 Stat. 1591, 1592, 1606; Feb. 4, 1987, P.L. 100-4, Title III, §§ 312, 313(a)(1), (b)(1), (c), 314(a), 101 Stat. 42, 45, 46; Aug. 18, 1990, P.L. 101-380, Title IV, Subtitle C, § 4301(c), 104 Stat. 537.)

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*** Current through PL 114-165, approved 6/3/16 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
PERMITS AND LICENSES

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33 USCS § 1342

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [33 USCS § 407], shall be deemed to be permits issued under this title [33 USCS §§ 1341 et seq.], and permits issued under this title [33 USCS §§ 1341 et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [33 USCS § 407], pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act [33 USCS §§ 1251 et seq.], to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each

such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.]. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343];

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act [33 USCS § 1318] or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act [33 USCS § 1318];

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act [33 USCS § 1317(b)] into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 [33 USCS § 1316] if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 [33 USCS § 1311] if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308 [33 USCS §§ 1284(b), 1317, 1318].

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator.

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)].

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.]. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph [enacted Dec. 27, 1977], the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.].

(e) Waiver of notification requirement. In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories. The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants. Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works. In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 309(a) of this Act [33 USCS § 1319(a)] that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited. Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [33 USCS § 1319].

(j) Public information. A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [33 USCS §§ 1319, 1365], with sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343], except any standard imposed under section 307 [33 USCS § 1317] for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act [33 USCS § 1311, 1316, or 1342], or (2) section 13 of the Act of March 3, 1899 [33 USCS § 407], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899 [33 USCS § 407], the discharge by such source shall not be a violation of this Act [33 USCS §§ 1251 et seq.] if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement.

(1) Agricultural return flows. The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations. The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and

which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities.

(A) NPDES permit requirements for silvicultural activities. The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) Other requirements. Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 404 [33 USCS § 1344], existing permitting requirements under section 402 [33 USCS § 1342], or from any other federal law.

(C) The authorization provided in Section 505(a) [33 USCS § 1365(a)] does not apply to any non-permitting program established under 402(p)(6) [33 USCS § 1342(p)(6)] for the silviculture activities listed in 402(l)(3)(A) [33 USCS § 1342(l)(3)(A)], or to any other limitations that might be deemed to apply to the silviculture activities listed in 402(l)(3)(A) [33 USCS § 1342(l)(3)(A)].

(m) Additional pretreatment of conventional pollutants not required. To the extent a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act [33 USCS § 1317(b)(1)]. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act [33 USCS §§ 1317, 1319], affect State and local authority under sections 307(b)(4) and 510 of this Act [33 USCS §§ 1317(b)(4), 1370], relieve such treatment works of its obligations to meet requirements established under this Act [33 USCS §§ 1251 et seq.], or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program.

(1) State submission. The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage. A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval or major category partial permit programs. The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs. The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding.

(1) General prohibition. In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) [33 USCS § 1314(b)] subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) [33 USCS § 1311(b)(1)(C) or 1313(d) or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4) [33 USCS § 1313(d)(4)].

(2) Exceptions. A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if--

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B) (i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) [33 USCS § 1311(c), (g), (h), (i), (k), (n), or 1326(a)]; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act [33 USCS §§ 1251 et seq.] or for reasons otherwise unrelated to water quality.

(3) Limitations. In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 [33 USCS § 1313] applicable to such waters.

(p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B) A discharge associated with industrial activity.

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

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

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

(3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 [33 USCS § 1311].

(B) Municipal discharge. Permits for discharges from municipal storm sewers--

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements.

(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows.

(1) Requirement for permits, orders, and decrees. Each permit, order, or decree issued pursuant to this Act [33 USCS §§ 1251 et seq.] after the date of enactment of this subsection [enacted Dec. 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance. Not later than July 31, 2001, and after providing notice and

opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report. Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels. No permit shall be required under this Act [33 USCS §§ 1251 et seq.] by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

HISTORY:

(June 30, 1948, ch 758, Title IV, § 402, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 880; Dec. 27, 1977, P.L. 95-217, §§ 33(c), 54(c)(1), 65, 66, 91 Stat. 1577, 1591, 1599, 1600; Feb. 4, 1987, P.L. 100-4, Title IV, §§ 401-403, 404(a), (c) [(d)], 405, 101 Stat. 65-69; Oct. 31, 1992, P.L. 102-580, Title III, § 364, 106 Stat. 4862; Dec. 21, 1995, P.L. 104-66, Title II, Subtitle B, § 2021(e)(2), 109 Stat. 727; Dec. 21, 2000, P.L. 106-554, § 1(a)(4), 114 Stat. 2763; July 30, 2008, P.L. 110-288, § 2, 122 Stat. 2650.)

(As amended Feb. 7, 2014, P.L. 113-79, Title XII, Subtitle C, § 12313, 128 Stat. 992.)

VOLUME II
TAB 9

LEXSTAT

UNITED STATES CODE SERVICE
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*** Current through PL 114-165, approved 6/3/16 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
GENERAL PROVISIONS

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33 USCS § 1362

§ 1362. Definitions

Except as otherwise specifically provided, when used in this Act [33 USCS §§ 1251 et seq.]:

- (1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.
- (2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.
- (3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.
- (4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act [33 USCS § 1288].
- (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.
- (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 312 of this Act [33 USCS § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.
- (7) The term "navigable waters" means the waters of the United States, including the territorial seas.
- (8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.
- (9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone [15 UST § 1606].

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D--Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters.

(A) In general. The term "coastal recreation waters" means--

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) [33 USCS § 1313(c)] by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions. The term "coastal recreation waters" does not include--

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material.

(A) In general. The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions. The term "floatable material" includes--

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) Pathogen indicator. The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

(24) Oil and gas exploration and production. The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) Recreational vessel.

(A) In general. The term "recreational vessel" means any vessel that is--

- (i) manufactured or used primarily for pleasure; or
- (ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) Exclusion. The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that--

- (i) is engaged in commercial use; or
- (ii) carries paying passengers.

(26) Treatment works. The term "treatment works" has the meaning given the term in section 212 [33 USCS § 1292].

HISTORY:

(June 30, 1948, ch 758, Title V, § 502, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 886; Dec. 27, 1977, P.L. 95-217, § 33(b), 91 Stat. 1577; Feb. 4, 1987, P.L. 100-4, Title V, §§ 502(a), 503, 101 Stat. 75; Nov. 18, 1988, P.L. 100-688, Title III, Subtitle B, § 3202(a), 102 Stat. 4154; Feb. 10, 1996, P.L. 104-106, Div A, Title III, Subtitle C, § 325(c)(3), 110 Stat. 259; Oct. 10, 2000, P.L. 106-284, § 5, 114 Stat. 875; Aug. 8, 2005, P.L. 109-58, Title III, Subtitle C, § 323, 119 Stat. 694; July 30, 2008, P.L. 110-288, § 3, 122 Stat. 2650.)

(As amended June 10, 2014, P.L. 113-121, Title V, Subtitle B, § 5012(b), 128 Stat. 1328.)

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TAB 10

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*** Current through PL 114-165, approved 6/3/16 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
GENERAL PROVISIONS

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33 USCS § 1365

§ 1365. Citizen suits

(a) Authorization; jurisdiction. Except as provided in subsection (b) of this section and section 309(g)(6) [33 USCS § 1319(g)(6)], any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act [33 USCS §§ 1251 et seq.] or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [33 USCS §§ 1251 et seq.] which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act [33 USCS § 1319(d)].

(b) Notice. No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act [33 USCS §§ 1316, 1317(a)]. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected.

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting

such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States. Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs. The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted. Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation. For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act [33 USCS § 1311(a)]; (2) an effluent limitation or other limitation under section 301 or 302 of this Act [33 USCS § 1311 or 1312]; (3) standard of performance under section 306 of this Act [33 USCS § 1316]; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act [33 USCS § 1317]; (5) certification under section 401 of this Act [33 USCS § 1341]; (6) a permit or condition thereof issued under section 402 of this Act [33 USCS § 1342], which is in effect under this Act [33 USCS §§ 1251 et seq.] (including a requirement applicable by reason of section 313 of this Act [33 USCS § 1323]); or (7) a regulation under section 405(d) of this Act [33 USCS § 1345(d)],.

(g) "Citizen" defined. For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors. A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act [33 USCS §§ 1251 et seq.] the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

HISTORY:

(June 30, 1948, ch 758, Title V, § 505, as added Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 888; Feb. 4, 1987, P.L. 100-4, Title III, § 314(c), Title IV, § 406(d)(2), Title V, §§ 504, 505(c), 101 Stat. 49, 73, 75, 76.)

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TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
GENERAL PROVISIONS

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33 USCS § 1370

§ 1370. State authority

Except as expressly provided in this Act [33 USCS §§ 1251 et seq.], nothing in this Act [33 USCS §§ 1251 et seq.] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act [33 USCS §§ 1251 et seq.], such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act [33 USCS §§ 1251 et seq.]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

HISTORY:

(June 30, 1948, ch. 758, Title V, § 510, as added, Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 893.)

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TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 123 -- STATE PROGRAM REQUIREMENTS
SUBPART A -- GENERAL

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40 CFR 123.1

§ 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National Pollutant Discharge Elimination System -- NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator will approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program.

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under § 123.23(b) for activities within the scope of the newly approved program. The authorized State will retain jurisdiction over its existing permits as described in

paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

NOTE: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

(i) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

NOTE: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

HISTORY: [48 FR 14178, Apr. 1, 1983, as amended at 54 FR 256, Jan. 4, 1989; 54 FR 18784, May 2, 1989; 58 FR 67981, Dec. 22, 1993; 59 FR 64343, Dec. 14, 1994; 63 FR 45114, 45122, Aug. 24, 1998]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
Clean Water Act, 33 U.S.C. 1251 et seq.

NOTES:

[EFFECTIVE DATE NOTE: 63 FR 45114, 45122, Aug. 24, 1998, revised paragraphs (a) and (c), effective Sept. 23, 1998.]

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 123 Reorganizations, see: 62 FR 61170, Nov. 14, 1997.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 123 Final interpretive rule, see: 81 FR 30183, May 16, 2016.]

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TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM
SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

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40 CFR 122.26

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

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

- (i) A discharge with respect to which a permit has been issued prior to February 4, 1987;
- (ii) A discharge associated with industrial activity (see § 122.26(a)(4));
- (iii) A discharge from a large municipal separate storm sewer system;
- (iv) A discharge from a medium municipal separate storm sewer system;

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

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

- (A) The location of the discharge with respect to waters of the United States as defined at 40 CFR 122.2.
- (B) The size of the discharge;
- (C) The quantity and nature of the pollutants discharged to waters of the United States; and
- (D) Other relevant factors.

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

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

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

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

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

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

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

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

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

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

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

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

(3) Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4) (i), (ii), and (iii) or (b)(7) (i), (ii), and (iii) of this section, that are under the purview of the designated regional authority,

shall comply with the application requirements of paragraph (d) of this section.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

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

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

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

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

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

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

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

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

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

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

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

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

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

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

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

(iii) Which is not a combined sewer; and

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

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

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

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

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

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

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

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which

are exempted under category (xi) in paragraph (b)(14) of this section);

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT 1 TO § 122.26(b)(15).--SUMMARY OF COVERAGE
OF "STORM WATER DISCHARGES ASSOCIATED WITH SMALL
CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

Automatic Designation: . Construction activities that result in a
Required Nationwide land disturbance of equal to or greater

Coverage	than one acre and less than five acres. . Construction activities disturbing less than one acre if part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (see § 122.26(b)(15)(i).)
Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator.	. Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (see § 122.26(b)(15)(ii).)
Potential Waiver: Waiver from Requirements as Determined by the NPDES Permitting Authority.	Any automatically designated construction activity where the operator certifies: (1) A rainfall erosivity factor of less than five, or (2) That the activity will occur within an area where controls are not needed based on a TMDL or, for non-impaired waters that do not require a TMDL, an equivalent analysis for the pollutant(s) of concern. (see § 122.26(b)(15)(i).)

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

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

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

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

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

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

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

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

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

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

(A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under 40 CFR 262.34); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

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

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

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

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

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

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

an existing NPDES permit);

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

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

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

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

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

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

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

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

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

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

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

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

(F) The name of the receiving water.

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

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

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

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

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

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

(2) [Reserved]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under section 314(a) of the CWA (include the following: A description of those publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);

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

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

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

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

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

(D) Field screening. Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential

presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents (or surfactants) shall be provided along with a description of the flow rate. Where the field analysis does not involve analytical methods approved under 40 CFR part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

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

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

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

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

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

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

(7) Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced 1/4 mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be undertaken at these major outfalls.

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

(v) Management programs. (A) A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but are not limited to: Procedures to control pollution resulting from construction activities;

floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under State law as well as local requirements.

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

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

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

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

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

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

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

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

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

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

(ii) Source identification. The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(1) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

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

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

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

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

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

Total suspended solids (TSS)

Total dissolved solids (TDS)

COD

BOD₅

Oil and grease

Fecal coliform

Fecal streptococcus

pH

Total Kjeldahl nitrogen

Nitrate plus nitrite

Dissolved phosphorus

Total ammonia plus organic nitrogen

Total phosphorus

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

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under § 122.21(c)(7)) for BOD₅, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

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

storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

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

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

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

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

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

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

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

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

(6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

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

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

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

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

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

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

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

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

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

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

(2) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: Any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(7) (vi) and (vii).

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

include:

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application

before May 18, 1992.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

municipal separate storm sewer system.

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

(3) The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by 40 CFR 35.2005(b)(11) that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Materials or products from past industrial activity;

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

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

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

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

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

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

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

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

(iv) All "no exposure" certifications must include the following certification statement, and be signed in accordance with the signatory requirements of § 122.22: "I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of "no exposure" and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

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

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

NOTES:

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

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

LexisNexis (R) Notes:

RESEARCH GUIDES 2-8(IV) Bender's Federal Practice Forms, (Matthew Bender), Rule 8(IV). General Rules of Pleading --"Environmental Law" through "Insurance", Form No. 8(IV):3 Complaint to Halt Violations of Clean Water Act.

VOLUME II
TAB 14

LEXSTAT

LEXISNEXIS' CODE OF FEDERAL REGULATIONS
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*** This document is current through the June 22, 2016 issue of the Federal Register ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM
SUBPART C -- PERMIT CONDITIONS

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40 CFR 122.41

§ 122.41 Conditions applicable to all permits (applicable to State programs, see § 123.25).

The following conditions apply to all NPDES permits. Additional conditions applicable to NPDES permits are in § 122.42. All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

(a) Duty to comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

(1) The permittee shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants and with standards for sewage sludge use or disposal established under section 405(d) of the CWA within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if the permit has not yet been modified to incorporate the requirement.

(2) The Clean Water Act provides that 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, 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 \$ 25,000 per day for each violation. The Clean Water 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 1 year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than \$ 50,000 per day of violation, or by imprisonment of not more than 2 years, or both. Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of \$ 5,000 to \$ 50,000 per day of violation, or imprisonment for not more than 3 years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than \$ 100,000 per day of violation, or

imprisonment of not more than 6 years, or both. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 318 or 405 of the 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 CWA, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than \$ 1,000,000 and can be fined up to \$ 2,000,000 for second or subsequent convictions.

(3) 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. Administrative penalties for Class I violations are not to exceed \$ 10,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed \$ 25,000. Penalties for Class II violations are not to exceed \$ 10,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed \$ 125,000.

(b) Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit.

(c) Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(d) Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

(e) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. 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 a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

(f) Permit actions. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(g) Property rights. This permit does not convey any property rights of any sort, or any exclusive privilege.

(h) Duty to provide information. The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the Director upon request, copies of records required to be kept by this permit.

(i) Inspection and entry. The permittee shall allow the Director, or an authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of credentials and other documents as may be required by law, to:

(1) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

(2) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

(3) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

(4) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

(j) Monitoring and records. (1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(2) Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

(3) Records of monitoring information shall include:

(i) The date, exact place, and time of sampling or measurements;

(ii) The individual(s) who performed the sampling or measurements;

(iii) The date(s) analyses were performed;

(iv) The individual(s) who performed the analyses;

(v) The analytical techniques or methods used; and

(vi) The results of such analyses.

(4) Monitoring must be conducted according to test procedures approved under 40 CFR Part 136 unless another method is required under 40 CFR subchapters N or O.

(5) The Clean Water 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 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than \$ 20,000 per day of violation, or by imprisonment of not more than 4 years, or both.

(k) Signatory requirement. (1) All applications, reports, or information submitted to the Director shall be signed and certified. (See § 122.22)

(2) The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than \$ 10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

(l) Reporting requirements. (1) Planned changes. The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:

(i) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in § 122.29(b); or

(ii) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under § 122.42(a)(1).

(iii) The alteration or addition results in a significant change in the permittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan;

(2) Anticipated noncompliance. The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

(3) Transfers. This permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Clean Water Act. (See § 122.61; in some cases, modification or revocation and reissuance is mandatory.)

(4) Monitoring reports. Monitoring results shall be reported at the intervals specified elsewhere in this permit.

(i) Monitoring results must be reported on a Discharge Monitoring Report (DMR) or forms provided or specified by the Director for reporting results of monitoring of sludge use or disposal practices. As of December 21, 2016 all reports and forms submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, permittees may be required to report electronically if specified by a particular permit or if required to do so by state law.

(ii) If the permittee monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR Part 136, or another method required for an industry-specific waste stream under 40 CFR subchapters N or O, the results of such monitoring shall be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the Director.

(iii) Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.

(5) Compliance schedules. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.

(6) Twenty-four hour reporting. (i) The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A report shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The report shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times), and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. For noncompliance events related to combined sewer overflows, sanitary sewer overflows, or bypass events, these reports must include the data described above (with the exception of time of discovery) as well as the type of event (combined sewer overflows, sanitary sewer overflows, or bypass events), type of sewer overflow structure (e.g., manhole, combine sewer overflow outfall), discharge volumes untreated by the treatment works treating domestic sewage, types of human

health and environmental impacts of the sewer overflow event, and whether the noncompliance was related to wet weather. As of December 21, 2020 all reports related to combined sewer overflows, sanitary sewer overflows, or bypass events submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, permittees may be required to electronically submit reports related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section by a particular permit or if required to do so by state law. The Director may also require permittees to electronically submit reports not related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section.

(ii) The following shall be included as information which must be reported within 24 hours under this paragraph.

(A) Any unanticipated bypass which exceeds any effluent limitation in the permit. (See § 122.41(g).

(B) Any upset which exceeds any effluent limitation in the permit.

(C) Violation of a maximum daily discharge limitation for any of the pollutants listed by the Director in the permit to be reported within 24 hours. (See § 122.44(g).)

(iii) The Director may waive the written report on a case-by-case basis for reports under paragraph (1)(6)(ii) of this section if the oral report has been received within 24 hours.

(7) Other noncompliance. The permittee shall report all instances of noncompliance not reported under paragraphs (1)(4), (5), and (6) of this section, at the time monitoring reports are submitted. The reports shall contain the information listed in paragraph (1)(6). For noncompliance events related to combined sewer overflows, sanitary sewer overflows, or bypass events, these reports shall contain the information described in paragraph (1)(6) and the applicable required data in appendix A to 40 CFR part 127. As of December 21, 2020 all reports related to combined sewer overflows, sanitary sewer overflows, or bypass events submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, permittees may be required to electronically submit reports related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section by a particular permit or if required to do so by state law. The Director may also require permittees to electronically submit reports not related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section.

(8) Other information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, it shall promptly submit such facts or information.

(9) Identification of the initial recipient for NPDES electronic reporting data. The owner, operator, or the duly authorized representative of an NPDES-regulated entity is required to electronically submit the required NPDES information (as specified in appendix A to 40 CFR part 127) to the appropriate initial recipient, as determined by EPA, and as defined in § 127.2(b) of this chapter. EPA will identify and publish the list of initial recipients on its Web site and in the Federal Register by state and by NPDES data group [see § 127.2(c) of this chapter]. EPA will update and maintain this listing.

(m) Bypass -- (1) Definitions. (i) Bypass means the intentional diversion of waste streams from any portion of a treatment facility.

(ii) Severe property damage means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably

be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

(2) Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (m)(3) and (m)(4) of this section.

(3) Notice --(i) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass. As of December 21, 2020 all notices submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, permittees may be required to report electronically if specified by a particular permit or if required to do so by state law.

(ii) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in paragraph (1)(6) of this section (24-hour notice).

(4) Prohibition of bypass. (i) Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(C) The permittee submitted notices as required under paragraph (m)(3) of this section.

(ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (m)(4)(i) of this section.

(n) Upset -- (1) Definition. Upset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the 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.

(2) Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of paragraph (n)(3) of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

(3) Conditions necessary for a 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:

(i) An upset occurred and that the permittee can identify the cause(s) of the upset;

(ii) The permitted facility was at the time being properly operated; and

(iii) The permittee submitted notice of the upset as required in paragraph (1)(6)(ii)(B) of this section (24 hour notice).

(iv) The permittee complied with any remedial measures required under paragraph (d) of this section.

(4) Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

HISTORY: [48 FR 14153, Apr. 1, 1983, as amended at 48 FR 39620, Sept. 1, 1983; 49 FR 38049, Sept. 26, 1984; 50 FR 4514, Jan. 31, 1985; 50 FR 6940, Feb. 19, 1985; 54 FR 255, Jan. 4, 1989; 54 FR 18783, May 2, 1989; 65 FR 30886, 30908, May 15, 2000; 72 FR 11200, 11211, Mar. 12, 2007; 80 FR 64064, 64097, Oct. 22, 2015]

AUTHORITY: (Clean Water Act (33 U.S.C. 1251 et seq.), Safe Drinking Water Act (42 U.S.C. 300f et seq.), Clean Air Act (42 U.S.C. 7401 et seq.), Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.))

NOTES:

[EFFECTIVE DATE NOTE: 72 FR 11200, 11211, Mar. 12, 2007, revised paragraphs (j)(4), and (l)(4)(ii), effective Apr. 11, 2007; 80 FR 64064, 64097, Oct. 22, 2015, revised paragraphs (l)(4)(i), (l)(6)(i), (l)(7), and (m)(3) and adding paragraph (l)(9).]

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

VOLUME II
TAB 15

LEXSTAT

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40 CFR 122.44

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(a)(1) Technology-based effluent limitations and standards based on: effluent limitations and standards promulgated under section 301 of the CWA, or new source performance standards promulgated under section 306 of CWA, on case-by-case effluent limitations determined under section 402(a)(1) of CWA, or a combination of the three, in accordance with § 125.3 of this chapter. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of § 122.29(d) (protection period).

(2) Monitoring waivers for certain guideline-listed pollutants.

(i) The Director may authorize a discharger subject to technology-based effluent limitations guidelines and standards in an NPDES permit to forego sampling of a pollutant found at 40 CFR Subchapter N of this chapter if the discharger has demonstrated through sampling and other technical factors that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(ii) This waiver is good only for the term of the permit and is not available during the term of the first permit issued to a discharger.

(iii) Any request for this waiver must be submitted when applying for a reissued permit or modification of a reissued permit. The request must demonstrate through sampling or other technical information, including information generated during an earlier permit term that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(iv) Any grant of the monitoring waiver must be included in the permit as an express permit condition and the

reasons supporting the grant must be documented in the permit's fact sheet or statement of basis.

(v) This provision does not supersede certification processes and requirements already established in existing effluent limitations guidelines and standards.

(b)(1) Other effluent limitations and standards under sections 301, 302, 303, 307, 318 and 405 of CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the Director shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. See also § 122.41(a).

(2) Standards for sewage sludge use or disposal under section 405(d) of the CWA unless those standards have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator. When there are no applicable standards for sewage sludge use or disposal, the permit may include requirements developed on a case-by-case basis to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge. If any applicable standard for sewage sludge use or disposal is promulgated under section 405(d) of the CWA and that standard is more stringent than any limitation on the pollutant or practice in the permit, the Director may initiate proceedings under these regulations to modify or revoke and reissue the permit to conform to the standard for sewage sludge use or disposal.

(3) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I, J, and N of this chapter.

(c) Reopener clause: For any permit issued to a treatment works treating domestic sewage (including "sludge-only facilities"), the Director shall include a reopener clause to incorporate any applicable standard for sewage sludge use or disposal promulgated under section 405(d) of the CWA. The Director may promptly modify or revoke and reissue any permit containing the reopener clause required by this paragraph if the standard for sewage sludge use or disposal is more stringent than any requirements for sludge use or disposal in the permit, or controls a pollutant or practice not limited in the permit.

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

(iii) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable

ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

(iv) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

(v) Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

(1) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(2) The fact sheet required by § 124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(3) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(4) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(vii) When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge

prepared by the State and approved by EPA pursuant to 40 CFR 130.7.

(2) Attain or maintain a specified water quality through water quality related effluent limits established under section 302 of CWA;

(3) Conform to the conditions to a State certification under section 401 of the CWA that meets the requirements of § 124.53 when EPA is the permitting authority. If a State certification is stayed by a court of competent jurisdiction or an appropriate State board or agency, EPA shall notify the State that the Agency will deem certification waived unless a finally effective State certification is received within sixty days from the date of the notice. If the State does not forward a finally effective certification within the sixty day period, EPA shall include conditions in the permit that may be necessary to meet EPA's obligation under section 301(b)(1)(C) of the CWA;

(4) Conform to applicable water quality requirements under section 401(a)(2) of CWA when the discharge affects a State other than the certifying State;

(5) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of CWA;

(6) Ensure consistency with the requirements of a Water Quality Management plan approved by EPA under section 208(b) of CWA;

(7) Incorporate section 403(c) criteria under part 125, subpart M, for ocean discharges;

(8) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors," under 40 CFR part 125, subpart D;

(9) Incorporate any other appropriate requirements, conditions, or limitations (other than effluent limitations) into a new source permit to the extent allowed by the National Environmental Policy Act, 42 U.S.C. 4321 et seq. and section 511 of the CWA, when EPA is the permit issuing authority. (See § 122.29(c)).

(e) Technology-based controls for toxic pollutants. Limitations established under paragraphs (a), (b), or (d) of this section, to control pollutants meeting the criteria listed in paragraph (e)(1) of this section. Limitations will be established in accordance with paragraph (e)(2) of this section. An explanation of the development of these limitations shall be included in the fact sheet under § 124.56(b)(1)(i).

(1) Limitations must control all toxic pollutants which the Director determines (based on information reported in a permit application under § 122.21(g)(7) or in a notification under § 122.42(a)(1) or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c) of this chapter; or

(2) The requirement that the limitations control the pollutants meeting the criteria of paragraph (e)(1) of this section will be satisfied by:

(i) Limitations on those pollutants; or

(ii) Limitations on other pollutants which, in the judgment of the Director, will provide treatment of the pollutants under paragraph (e)(1) of this section to the levels required by § 125.3(c).

(f) Notification level. A "notification level" which exceeds the notification level of § 122.42(a)(1)(i), (ii) or (iii), upon a petition from the permittee or on the Director's initiative. This new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c)

(g) Twenty-four hour reporting. Pollutants for which the permittee must report violations of maximum daily

discharge limitations under § 122.41(1)(6)(ii)(C) (24-hour reporting) shall be listed in the permit. This list shall include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(h) Durations for permits, as set forth in § 122.46.

(i) Monitoring requirements. In addition to § 122.48, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall;

(iii) Other measurements as appropriate including pollutants in internal waste streams under § 122.45(i); pollutants in intake water for net limitations under § 122.45(f); frequency, rate of discharge, etc., for noncontinuous discharges under § 122.45(e); pollutants subject to notification requirements under § 122.42(a); and pollutants in sewage sludge or other monitoring as specified in 40 CFR part 503; or as determined to be necessary on a case-by-case basis pursuant to section 405(d)(4) of the CWA.

(iv) According to sufficiently sensitive test procedures (i.e., methods) approved under 40 CFR part 136 for the analysis of pollutants or pollutant parameters or required under 40 CFR chapter I, subchapter N or O.

(A) For the purposes of this paragraph, a method is "sufficiently sensitive" when:

(1) The method minimum level (ML) is at or below the level of the effluent limit established in the permit for the measured pollutant or pollutant parameter; or

(2) The method has the lowest ML of the analytical methods approved under 40 CFR part 136 or required under 40 CFR chapter I, subchapter N or O for the measured pollutant or pollutant parameter.

Note to paragraph (i)(1)(iv)(A): Consistent with 40 CFR part 136, applicants or permittees have the option of providing matrix or sample specific minimum levels rather than the published levels. Further, where an applicant or permittee can demonstrate that, despite a good faith effort to use a method that would otherwise meet the definition of "sufficiently sensitive", the analytical results are not consistent with the QA/QC specifications for that method, then the Director may determine that the method is not performing adequately and the Director should select a different method from the remaining EPA-approved methods that is sufficiently sensitive consistent with 40 CFR 122.44(i)(1)(iv)(A). Where no other EPA-approved methods exist, the Director should select a method consistent with 40 CFR 122.44(i)(1)(iv)(B).

(B) In the case of pollutants or pollutant parameters for which there are no approved methods under 40 CFR part 136 or methods are not otherwise required under 40 CFR chapter I, subchapter N or O, monitoring shall be conducted according to a test procedure specified in the permit for such pollutants or pollutant parameters.

(2) Except as provided in paragraphs (i)(4) and (5) of this section, requirements to report monitoring results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year. For sewage sludge use or disposal practices, requirements to monitor and report results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the sewage sludge use or disposal practice; minimally this shall be as specified in 40 CFR part 503 (where applicable), but in no case less than once a year. All results must be electronically reported in compliance with 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127.

(3) Requirements to report monitoring results for storm water discharges associated with industrial activity which

are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(4) Requirements to report monitoring results for storm water discharges associated with industrial activity (other than those addressed in paragraph (i)(3) of this section) shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. At a minimum, a permit for such a discharge must require:

(i) The discharger to conduct an annual inspection of the facility site to identify areas contributing to a storm water discharge associated with industrial activity and evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed;

(ii) The discharger to maintain for a period of three years a record summarizing the results of the inspection and a certification that the facility is in compliance with the plan and the permit, and identifying any incidents of non-compliance;

(iii) Such report and certification be signed in accordance with § 122.22; and

(iv) Permits for storm water discharges associated with industrial activity from inactive mining operations may, where annual inspections are impracticable, require certification once every three years by a Registered Professional Engineer that the facility is in compliance with the permit, or alternative requirements.

(5) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under § 122.41(l) (1), (4), (5), and (6) at least annually.

(j) Pretreatment program for POTWs. Requirements for POTWs to:

(1) Identify, in terms of character and volume of pollutants, any Significant Industrial Users discharging into the POTW subject to Pretreatment Standards under section 307(b) of CWA and 40 CFR part 403.

(2)(i) Submit a local program when required by and in accordance with 40 CFR part 403 to assure compliance with pretreatment standards to the extent applicable under section 307(b). The local program shall be incorporated into the permit as described in 40 CFR part 403. The program must require all indirect dischargers to the POTW to comply with the reporting requirements of 40 CFR part 403.

(ii) Provide a written technical evaluation of the need to revise local limits under 40 CFR 403.5(c)(1), following permit issuance or reissuance.

(3) For POTWs which are "sludge-only facilities," a requirement to develop a pretreatment program under 40 CFR part 403 when the Director determines that a pretreatment program is necessary to assure compliance with Section 405(d) of the CWA.

(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

(2) Authorized under section 402(p) of the CWA for the control of storm water discharges;

(3) Numeric effluent limitations are infeasible; or

(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

NOTE TO PARAGRAPH (k)(4): Additional technical information on BMPs and the elements of BMPs is contained in the following documents: Guidance Manual for Developing Best Management Practices (BMPs), October 1993, EPA No. 833/B-93-004, NTIS No. PB 94-178324, ERIC No. W498); Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices, September 1992, EPA No. 832/R-92-005, NTIS No. PB 92-235951, ERIC No. N482); Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA No. 833/R-92-001, NTIS No. PB 93-223550; ERIC No. W139; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices, September 1992; EPA 832/R-92-006, NTIS No. PB 92-235969, ERIC No. N477; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA 833/R-92-002, NTIS No. PB 94-133782; ERIC No. W492. Copies of those documents (or directions on how to obtain them) can be obtained by contacting either the Office of Water Resource Center (using the EPA document number as a reference) at (202) 260-7786; or the Educational Resources Information Center (ERIC) (using the ERIC number as a reference) at (800) 276-0462. Updates of these documents or additional BMP documents may also be available. A list of EPA BMP guidance documents is available on the OWM Home Page at <http://www.epa.gov/owm>. In addition, States may have BMP guidance documents.

These EPA guidance documents are listed here only for informational purposes; they are not binding and EPA does not intend that these guidance documents have any mandatory, regulatory effect by virtue of their listing in this note.

(1) Reissued permits. (1) Except as provided in paragraph (1)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62.)

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) Exceptions -- A permit with respect to which paragraph (1)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if --

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(1) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous

effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) Limitations. In no event may a permit with respect to which paragraph (l)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

(m) Privately owned treatment works. For a privately owned treatment works, any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this part. Alternatively, the Director may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The Director's decision to issue a permit with no conditions applicable to any user, to impose conditions on one or more users, to issue separate permits, or to require separate applications, and the basis for that decision, shall be stated in the fact sheet for the draft permit for the treatment works.

(n) Grants. Any conditions imposed in grants made by the Administrator to POTWs under sections 201 and 204 of CWA which are reasonably necessary for the achievement of effluent limitations under section 301 of CWA.

(o) Sewage sludge. Requirements under section 405 of CWA governing the disposal of sewage sludge from publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established, in accordance with any applicable regulations.

(p) Coast Guard. When a permit is issued to a facility that may operate at certain times as a means of transportation over water, a condition that the discharge shall comply with any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, that establish specifications for safe transportation, handling, carriage, and storage of pollutants.

(q) Navigation. Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with § 124.59 of this chapter.

(r) Great Lakes. When a permit is issued to a facility that discharges into the Great Lakes System (as defined in 40 CFR 132.2), conditions promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132.

(s) Qualifying State, Tribal, or local programs. (1) For storm water discharges associated with small construction activity identified in § 122.26(b)(15), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. Where a qualifying State, Tribal, or local program does not include one or more of the elements in this paragraph (s)(1), then the Director must include those elements as conditions in the permit. A qualifying State, Tribal, or local erosion and sediment control program is one that includes:

(i) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

(ii) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(iii) Requirements for construction site operators to develop and implement a storm water pollution prevention plan. (A storm water pollution prevention plan includes site descriptions, descriptions of appropriate control measures,

copies of approved State, Tribal or local requirements, maintenance procedures, inspection procedures, and identification of non-storm water discharges); and

(iv) Requirements to submit a site plan for review that incorporates consideration of potential water quality impacts.

(2) For storm water discharges from construction activity identified in § 122.26(b)(14)(x), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. A qualifying State, Tribal or local erosion and sediment control program is one that includes the elements listed in paragraph (s)(1) of this section and any additional requirements necessary to achieve the applicable technology-based standards of "best available technology" and "best conventional technology" based on the best professional judgment of the permit writer.

HISTORY: [48 FR 14153, Apr. 1, 1983, as amended at 49 FR 31842, Aug. 8, 1984; 49 FR 38049, Sept. 26, 1984; 50 FR 6940, Feb. 19, 1985; 50 FR 7912, Feb. 27, 1985; 54 FR 256, Jan. 4, 1989; 54 FR 18783, May 2, 1989; 54 FR 23895, June 2, 1989; 57 FR 11413, Apr. 2, 1992; 57 FR 33049, July 24, 1992; 60 FR 15386, Mar. 23, 1995; 64 FR 42434, 42469, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 64 FR 68722, 68847, Dec. 8, 1999; 65 FR 30886, 30908, May 15, 2000; 65 FR 43586, 43661, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001; 66 FR 65256, 65337, Dec. 18, 2001; 69 FR 41576, 41682, July 9, 2004; 70 FR 60134, 60191, Oct. 14, 2005; 71 FR 35006, 35040, June 16, 2006; 72 FR 11200, 11212, Mar. 12, 2007; 79 FR 49001, 49013, Aug. 19, 2014, as corrected at 79 FR 56274, 56275, Sept. 19, 2014; 80 FR 64064, 64098, Oct. 22, 2015]

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

NOTES:

[EFFECTIVE DATE NOTE: 79 FR 49001, 49013, Aug. 19, 2014, revised paragraph (i)(1)(iv), effective Sept. 18, 2014; 80 FR 64064, 64098, Oct. 22, 2015, revised paragraph (i)(2), effective Dec. 21, 2015.]

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

VOLUME II
TAB 16

LEXSTAT

LEXISNEXIS' CODE OF FEDERAL REGULATIONS
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*** This document is current through the June 22, 2016 issue of the Federal Register ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 130 -- WATER QUALITY PLANNING AND MANAGEMENT

Go to the CFR Archive Directory

40 CFR 130.2

§ 130.2 Definitions.

- (a) The Act. The Clean Water Act, as amended, 33 U.S.C. 1251 et seq.
- (b) Indian Tribe. Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.
- (c) Pollution. The man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.
- (d) Water quality standards (WQS). Provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.
- (e) Load or loading. An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (natural background loading).
- (f) Loading capacity. The greatest amount of loading that a water can receive without violating water quality standards.
- (g) Load allocation (LA). The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.
- (h) Wasteload allocation (WLA). The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.
- (i) Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that

point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

(j) Water quality limited segment. Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

(k) Water quality management (WQM) plan. A State or areawide waste treatment management plan developed and updated in accordance with the provisions of sections 205(j), 208 and 303 of the Act and this regulation.

(l) Areawide agency. An agency designated under section 208 of the Act, which has responsibilities for WQM planning within a specified area of a State.

(m) Best Management Practice (BMP). Methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.

(n) Designated management agency (DMA). An agency identified by a WQM plan and designated by the Governor to implement specific control recommendations.

HISTORY: [50 FR 1779, Jan. 11, 1985, as amended at 54 FR 14359, Apr. 11, 1989; 65 FR 43586, 43662, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
33 U.S.C. 1251 et seq.

NOTES:

NOTES APPLICABLE TO ENTIRE CHAPTER:

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

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

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

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

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 130 Notice of change in procedures, see: 73 FR 52928, Sept. 12, 2008.]

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and ballot measures approved by the electorate at the June 7, 2016, Presidential Primary Election

WATER CODE
Division 7. Water Quality
Chapter 1. Policy

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code § 13000 (2016)

§ 13000. Legislative findings and declarations

The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

The Legislature further finds and declares that the health, safety and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation originating inside or outside the boundaries of the state; that the waters of the state are increasingly influenced by interbasin water development projects and other statewide considerations; that factors of precipitation, topography, population, recreation, agriculture, industry and economic development vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.

HISTORY:

Added Stats 1969 ch 482 § 18, operative January 1, 1970.

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WATER CODE
Division 7. Water Quality
Chapter 1. Policy

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code § 13001 (2016)

§ 13001. Power and duty of state board and regional boards

It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality. The state board and regional boards in exercising any power granted in this division shall conform to and implement the policies of this chapter and shall, at all times, coordinate their respective activities so as to achieve a unified and effective water quality control program in this state.

HISTORY:

Added Stats 1969 ch 482 § 18, operative January 1, 1970.

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WATER CODE

Division 7. Water Quality

Chapter 5.5. Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code § 13370 (2016)

§ 13370. Public interest in state implementation of provisions of federal act, etc.

The Legislature finds and declares as follows:

(a) The Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.), as amended, provides for permit systems to regulate the discharge of pollutants and dredged or fill material to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Control Act for the purpose of carrying out its responsibilities under this program.

HISTORY:

Added Stats 1972 ch 1256 § 1, effective December 19, 1972. Amended Stats 1978 ch 746 § 1; Stats 1980 ch 676 § 319; Stats 1987 ch 1189 § 1.

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GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 1. Legislative Intent

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 17500 (2016)

§ 17500. Legislative findings and declarations

The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.

It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution. Further, the Legislature intends that the Commission on State Mandates, as a quasi-judicial body, will act in a deliberative manner in accordance with the requirements of Section 6 of Article XIII B of the California Constitution.

HISTORY:

Added Stats 1984 ch 1459 § 1. Amended Stats 2004 ch 890 § 2 (AB 2856).

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GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 2. General Provisions

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 17514 (2016)

§ 17514. "Costs mandated by the state"

"Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

HISTORY:

Added Stats 1984 ch 1459 § 1.

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BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS

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* This document is current through Register 2016, No. 24, June 10, 2016 *

TITLE 2. ADMINISTRATION

DIVISION 2. FINANCIAL OPERATIONS

CHAPTER 2.5. COMMISSION ON STATE MANDATES

ARTICLE 3. TEST CLAIMS

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2 CCR 1183.1 (2016)

§ 1183.1. Test Claim Filing

(a) In order to obtain a mandate determination, a local agency or school district shall file a test claim with the Commission. A local agency or school district may file a test claim as follows:

(1) A county auditor, auditor-controller, or director of finance who has assumed the duties of controller, may file on behalf of a county.

(2) A city manager, director of finance, or other officer with a delegation by ordinance or resolution from the city council, may file on behalf of a city.

(3) A district superintendent may file on behalf of a school district.

(4) A chancellor, vice chancellor, director of finance, or other officer with authority delegated by the governing body by ordinance or resolution, may file on behalf of a community college district.

(5) A general manager or other officer with authority delegated by the governing body by ordinance or resolution may file on behalf of a special district.

(b) Claimants may agree to submit a test claim as a joint effort, as provided in section 1183.1(g) of these regulations. Otherwise, the first claim filed on a statute or executive order by a similarly situated claimant is the test claim and no duplicate test claims will be accepted by the Commission. Other similarly situated affected agencies may participate in the process by submitting comments in writing on any agenda item as provided in section 1181.10 of these regulations, and may attend any Commission hearing on the test claim and provide written or oral comments to the Commission. Affected agencies that are not similarly situated, meaning that test claim statutes affect them differently, may file a test claim on the same statutes as the first claim, but must demonstrate how and why they are affected differently.

(c) Except as provided in Government Code sections 17573 and 17574, any test claim or amendment filed with the Commission must be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of first incurring increased costs as a result of a statute or executive order, whichever is later. For purposes of claiming based on the date of first incurring costs, "within 12 months" means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.

(d) All test claims, or amendments thereto, shall be filed on a form developed by the executive director and shall contain all of the elements and supplemental documents required by statute, regulation and the form. When an omnibus bill is pled, claimant shall file only the relevant pages of the statute, including the Legislative Counsel's Digest and the specific statutory changes at issue.

(e) The claimant shall file the test claim, or amendment thereto, and accompanying documents with the Commission in accordance with section 1181.3 of these regulations.

(f) Within 10 days of receipt of a test claim, or amendment thereto, Commission staff shall notify the claimant if the test claim is complete or incomplete. Test claims will be considered incomplete if any of the elements required in subdivisions (c) and (d) of this section are illegible or are not included. If a complete test claim is not received within 30 calendar days from the date the incomplete test claim was returned, the executive director may disallow the original test claim filing date. A new test claim may be accepted on the same statute or executive order alleged to impose a reimbursable state-mandated program.

(g) Test claims may be prepared as a joint effort between two or more claimants and filed with the Commission if the claimants attest to all of the following in the test claim filing:

- (1) The claimants allege state-mandated costs result from the same statute or executive order;
- (2) The claimants agree on all issues of the test claim; and
- (3) The claimants have designated one contact person to act as the resource for information regarding the test claim.

(h) Any test claim, or portion of a test claim, that the Commission lacks jurisdiction to hear for any reason may be dismissed by the executive director with a written notice stating the reason for dismissal.

(i) Any party may appeal to the Commission for review of the actions and decisions of the executive director under this section pursuant to section 1181.1 of these regulations.

AUTHORITY:

Note: Authority cited: Sections 17527(g) and 17553, Government Code. Reference: Sections 17521, 17530, 17551, 17553, 17557(e), 17573, 17574, 24000, 24300.5, 26881, 26900, 26970, 26972, 34852, 35034, 35035, 37209, 40805.5 and 56723, Government Code.

HISTORY:

1. Amendment of section heading, section and Note filed 7-23-96; operative 7-23-96. Submitted to OAL for printing only (Register 96, No. 30).
2. Amendment of section heading, section and Note filed 9-6-2005; operative 9-6-2005. Exempt from OAL review and submitted to OAL for printing only pursuant to Government Code section 17527(g) (Register 2005, No. 36).
3. New article 3 (sections 1183.1-1183.18) and repealer and new section filed 5-19-2014; operative 7-1-2014 pursuant to Government Code section 11343.4(a)(3). Exempt from OAL review and submitted to OAL for printing only pursuant to Government Code section 17527 (Register 2014, No. 21).
4. Amendment of subsection (a), including redesignation of portion of former subsection (a) as new subsection (b) and subsection relettering, new subsections (a)(1)-(5) and amendment of Note filed 9-24-2015; operative 10-1-2015 pursuant to Government Code section 11343.4(b)(3). Exempt from OAL review and submitted to OAL for filing and printing only pursuant to Government Code section 17527(g) (Register 2015, No. 39).

VOLUME III
TAB 1

LEXSEE

**PUD NO. 1 OF JEFFERSON COUNTY AND CITY OF TACOMA, PETITIONERS
v. WASHINGTON DEPARTMENT OF ECOLOGY, ET AL.**

No. 92-1911

SUPREME COURT OF THE UNITED STATES

**511 U.S. 700; 114 S. Ct. 1900; 128 L. Ed. 2d 716; 1994 U.S. LEXIS 4271; 62 U.S.L.W.
4408; 94 Cal. Daily Op. Service 3843; 94 Daily Journal DAR 7236; 24 ELR 20945; 38
ERC (BNA) 1593; 8 Fla. L. Weekly Fed. S 172**

February 23, 1994, Argued

May 31, 1994, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON.

DISPOSITION: 121 Wash. 2d 179, 849 P.2d 646,
affirmed.

COUNSEL: Howard E. Shapiro argued the cause for
petitioners. With him on the briefs were Michael A.
Swiger, Gary D. Bachman, Albert R. Malanca, and
Kenneth G. Kieffer.

Christine O. Gregoire, Attorney General of Washington,
argued the cause for respondents. With her on the briefs
were Jay J. Manning, Senior Assistant Attorney General,
and William C. Frymire, Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for
the United States as amicus curiae urging affirmance.
With him on the brief were Solicitor General Days,
Acting Assistant Attorney General Schiffer, James A.
Feldman, and Anne S. Almy. *

* Briefs of amici curiae urging reversal were
filed for the American Forest & Paper Association
et al. by John R. Molm, Winifred D. Simpson,
and James A. Lamberth; for Niagara Mohawk
Power Corp. by Edward Berlin, Kenneth G. Jaffe,
Paul J. Kaleta, Brian K. Billinson, and Timothy P.
Sheehan; for the Northwest Hydroelectric
Association by Richard M. Glick and Lory J.
Kraut; for Pacific Northwest Utilities by Sherilyn
Peterson and R. Gerard Lutz; and for the Western
Urban Water Coalition by Benjamin S. Sharp and

Guy R. Martin.

Briefs of amici curiae urging affirmance were
filed for the State of Vermont et al. by Jeffrey L.
Amestoy, Attorney General of Vermont, and
Ronald A. Shems, Assistant Attorney General,
Robert Abrams, Attorney General of New York,
and Kathleen Liston Morrison, Assistant Attorney
General, Grant Woods, Attorney General of
Arizona, Winston Bryant, Attorney General of
Arkansas, Daniel E. Lungren, Attorney General of
California, Richard Blumenthal, Attorney General
of Connecticut, Charles M. Oberly III, Attorney
General of Delaware, Robert A. Butterworth,
Attorney General of Florida, Michael J. Bowers,
Attorney General of Georgia, Robert A. Marks,
Attorney General of Hawaii, Larry EchoHawk,
Attorney General of Idaho, Roland A. Burris,
Attorney General of Illinois, Pamela Fanning
Carter, Attorney General of Indiana, Bonnie J.
Campbell, Attorney General of Iowa, Robert T.
Stephan, Attorney General of Kansas, Chris
Gorman, Attorney General of Kentucky, Michael
E. Carpenter, Attorney General of Maine, J.
Joseph Curran, Jr., Attorney General of Maryland,
Scott Harshbarger, Attorney General of
Massachusetts, Frank J. Kelley, Attorney General
of Michigan, Hubert H. Humphrey III, Attorney
General of Minnesota, Mike Moore, Attorney
General of Mississippi, Jeremiah W. Nixon,
Attorney General of Missouri, Joseph P. Mazurek,
Attorney General of Montana, Don Stenberg,
Attorney General of Nebraska, Frankie Sue Del

Papa, Attorney General of Nevada, Jeffrey R. Howard, Attorney General of New Hampshire, Fred DeVesa, Acting Attorney General of New Jersey, Tom Udall, Attorney General of New Mexico, Michael F. Easley, Attorney General of North Carolina, Heidi Heitkamp, Attorney General of North Dakota, Lee Fisher, Attorney General of Ohio, Susan B. Loving, Attorney General of Oklahoma, Theodore R. Kulongoski, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Jefferey B. Pine, Attorney General of Rhode Island, T. Travis Medlock, Attorney General of South Carolina, Charles W. Burson, Attorney General of Tennessee, Dan Morales, Attorney General of Texas, Jan Graham, Attorney General of Utah, Stephen D. Rosenthal, Attorney General of Virginia, Darrell V. McGraw, Jr., Attorney General of West Virginia, James E. Doyle, Attorney General of Wisconsin, Joseph B. Meyer, Attorney General of Wyoming, and John Payton, Corporation Counsel of the District of Columbia; and for American Rivers et al. by Paul M. Smith.

JUDGES: O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, post, p. 723. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, post, p. 724.

OPINION BY: O'CONNOR

OPINION

[*703] [***723] [**1905] JUSTICE O'CONNOR delivered the opinion of the Court.

[***LEdHR1A] Petitioners, a city and a local utility district, want to build a hydroelectric project on the Dosewallips River in Washington State. We must decide whether respondent state environmental agency (hereinafter respondent) properly conditioned a permit for the project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs.

[*704] I

This case involves the complex statutory and

regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities. The Federal Water Pollution Control Act, commonly known as the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.*, is a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 1251(a). The Act also seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." § 1251(a)(2).

To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments. Under the Act, the Administrator of the Environmental Protection Agency (EPA) is required, among other things, to establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources. See §§ 1311, 1314. Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. §§ 1311(b) (1)(C), 1313. These state water quality standards provide "a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12, 48 L. Ed. 2d 578, 96 S. Ct. 2022 (1976).

A state water quality standard "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). In setting standards, the State must comply with the following broad requirements:

"Such standards shall be such as to protect the public health or welfare, enhance the quality of water and [*705] serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational [and other purposes.]" *Ibid.*

See also § 1251(a)(2).

A 1987 amendment to the Clean Water Act makes clear that § 303 also contains an "antidegradation policy" -- that is, a policy requiring [**1906] that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation. Specifically, the Act permits the revision of certain effluent limitations or water quality [***724] standards "only if such revision is subject to and consistent with the antidegradation policy established under this section." § 1313(d)(4)(B). Accordingly, EPA's regulations implementing the Act require that state water quality standards include "a statewide antidegradation policy" to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 CFR § 131.12 (1993). At a minimum, state water quality standards must satisfy these conditions. The Act also allows States to impose more stringent water quality controls. See 33 U.S.C. §§ 1311(b)(1)(C), 1370. See also 40 CFR § 131.4(a) (1993) ("As recognized by section 510 of the Clean Water Act[, 33 U.S.C. § 1370], States may develop water quality standards more stringent than required by this regulation").

The State of Washington has adopted comprehensive water quality standards intended to regulate all of the State's navigable waters. See Washington Administrative Code (WAC) 173-201-010 to 173-201-120 (1986). The State created an inventory of all the State's waters, and divided the waters into five classes. 173-201-045. Each individual fresh surface water of the State is placed into one of these classes. 173-201-080. The Dosewallips River is classified AA, extraordinary. 173-201-080(32). The water quality [*706] standard for Class AA waters is set forth at 173-201-045(1). The standard identifies the designated uses of Class AA waters as well as the criteria applicable to such waters.¹

¹ WAC 173-201-045(1) (1986) provides in pertinent part:

"(1) Class AA (extraordinary).

"(a) General characteristic. Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses.

"(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

"(i) Water supply (domestic, industrial,

agricultural).

"(ii) Stock watering.

"(iii) Fish and shellfish:

"Salmonid migration, rearing, spawning, and harvesting.

"Other fish migration, rearing, spawning, and harvesting.

...

"(iv) Wildlife habitat.

"(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

"(vi) Commerce and navigation.

"(c) Water quality criteria

"(i) Fecal coliform organisms.

"(A) Freshwater -- fecal coliform organisms shall not exceed a geometric mean value of 50 organisms/100 mL, with not more than 10 percent of samples exceeding 100 organisms/100 mL.

"(B) Marine water -- fecal coliform organisms shall not exceed a geometric mean value of 14 organisms/100 mL, with not more than 10 percent of samples exceeding 43 organisms/100 mL.

"(ii) Dissolved oxygen [shall exceed specific amounts].

...

"(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

"(iv) Temperature shall not exceed [certain levels].

...

"(v) pH shall be within [a specified range].

"(vi) Turbidity shall not exceed [specific levels].

"(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

"(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste."

[*707] In addition to these specific standards applicable to Class AA waters, the State has adopted a statewide [***725] antidegradation policy. That policy provides:

"(a) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

"(b) No degradation will be allowed of waters lying in national parks, national recreation areas, national wildlife refuges, national scenic rivers, and other areas of national ecological importance.

...

"(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term [**1907] and irreparable harm to the environment." 173-201-035(8).

As required by the Act, EPA reviewed and approved the State's water quality standards. See 33 U.S.C. § 1313(c)(3); 42 Fed. Reg. 56792 (1977). Upon approval by EPA, the state standard became "the water quality standard for the applicable waters of that State." 33 U.S.C. § 1313(c)(3).

States are responsible for enforcing water quality standards on intrastate waters. § 1319(a). In addition to these primary enforcement responsibilities, § 401 of the Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. 33 U.S.C. § 1341. Specifically, § 401

requires an applicant for a federal license or permit to conduct any activity "which may result in any discharge into the navigable waters" to obtain from the State a certification "that any such discharge will comply with the applicable provisions of sections [1311, 1312, 1313, 1316, and 1317 of this title]." 33 U.S.C. § 1341(a). Section 401(d) further provides that "any certification [*708] . . . shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations and other limitations, under section [1311 or 1312 of this title] . . . and with any other appropriate requirement of State law set forth in such certification." 33 U.S.C. § 1341(d). The limitations included in the certification become a condition on any federal license. *Ibid.* ²

² Section 401, as set forth in 33 U.S.C. § 1341, provides in relevant part:

"(a) Compliance with applicable requirements; application; procedures; license suspension

"(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

...

"(d) Limitations and monitoring requirements of certification

"Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and

shall become a condition on any Federal license or permit subject to the provisions of this section."

[***726] II

Petitioners propose to build the Elkhorn Hydroelectric Project on the Dosewallips River. If constructed as presently planned, the facility would be located just outside the Olympic National Park on federally owned land within the Olympic National Forest. The project would divert water from a 1.2-mile reach of the river (the bypass reach), run the [*709] water through turbines to generate electricity and then return the water to the river below the bypass reach. Under the Federal Power Act (FPA), 41 Stat. 1063, as amended, 16 U.S.C. § 791a *et seq.*, the Federal Energy Regulatory Commission (FERC) has authority to license new hydroelectric facilities. As a result, petitioners must get a FERC license to build or operate the Elkhorn Project. Because a federal license is required, and because the project may result in discharges into the Dosewallips River, petitioners are also required to obtain state certification of the project pursuant to § 401 of the Clean Water Act, 33 U.S.C. § 1341.

The water flow in the bypass reach, which is currently undiminished by appropriation, ranges seasonally between 149 and 738 cubic feet per second (cfs). The Dosewallips supports two species of salmon, coho and chinook, as well as steelhead trout. As originally proposed, the project was to include a diversion dam which would completely block [**1908] the river and channel approximately 75% of the river's water into a tunnel alongside the streambed. About 25% of the water would remain in the bypass reach, but would be returned to the original riverbed through sluice gates or a fish ladder. Depending on the season, this would leave a residual minimum flow of between 65 and 155 cfs in the river. Respondent undertook a study to determine the minimum stream flows necessary to protect the salmon and steelhead fishery in the bypass reach. On June 11, 1986, respondent issued a § 401 water quality certification imposing a variety of conditions on the project, including a minimum stream flow requirement of between 100 and 200 cfs depending on the season.

A state administrative appeals board determined that the minimum flow requirement was intended to enhance, not merely maintain, the fishery, and that the certification condition therefore exceeded respondent's authority under state law. App. to Pet. for Cert. 55a-57a. On appeal, the

[*710] State Superior Court concluded that respondent could require compliance with the minimum flow conditions. *Id.*, at 29a-45a. The Superior Court also found that respondent had imposed the minimum flow requirement to protect and preserve the fishery, not to improve it, and that this requirement was authorized by state law. *Id.*, at 34a.

The Washington Supreme Court held that the antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows. 121 Wash. 2d 179, 186-187, 849 P.2d 646, 650 (1993). [***727] The court also found that § 401(d), which allows States to impose conditions based upon several enumerated sections of the Clean Water Act and "any other appropriate requirement of State law," 33 U.S.C. § 1341(d), authorized the stream flow condition. Relying on this language and the broad purposes of the Clean Water Act, the court concluded that § 401(d) confers on States power to "consider all state action related to water quality in imposing conditions on section 401 certificates." 121 Wash. 2d at 192, 849 P.2d at 652. We granted certiorari, 510 U.S. 810 (1993), to resolve a conflict among the state courts of last resort. See 121 Wash. 2d 179, 849 P.2d 646 (1993); *Georgia Pacific Corp. v. Dept. of Environmental Conservation*, 159 Vt. 639, 628 A.2d 944 (1992) (table); *Power Authority of New York v. Williams*, 60 N.Y.2d 315, 457 N.E.2d 726, 469 N.Y.S.2d 620 (1983). We now affirm.

III

[***LEdHR1A] The principal dispute in this case concerns whether the minimum stream flow requirement that the State imposed on the Elkhorn Project is a permissible condition of a § 401 certification under the Clean Water Act. To resolve this dispute we must first determine the scope of the State's authority under § 401. We must then determine whether the limitation at issue here, the requirement that petitioners maintain minimum stream flows, falls within the scope of that authority.

[*711] A

There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the project will result in two possible discharges -- the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity. Brief for

Petitioners 27-28. Petitioners contend, however, that the minimum stream flow requirement imposed by the State was unrelated to these specific discharges, and that as a consequence, the State lacked the authority under § 401 to condition its certification on maintenance of stream flows sufficient to protect the Dosewallips fishery.

[***LEdHR2A] If § 401 consisted solely of subsection (a), which refers to a state certification that a "discharge" will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force. Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a [**1909] project. Section 401(d) provides that any certification shall set forth "any effluent limitations and other limitations . . . necessary to assure that *any applicant*" will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. § 1341(d) (emphasis added). The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge." The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose "other limitations" on the project in general to assure compliance with various provisions of the Clean Water Act and with "any other appropriate [***728] requirement of State law." Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, *post*, at 726, we see no such anomaly. Section 401(a)(1) identifies the category of activities [*712] subject to certification -- namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.

Our view of the statute is consistent with EPA's regulations implementing § 401. The regulations expressly interpret § 401 as requiring the State to find that "there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards." 40 CFR § 121.2(a)(3) (1993) (emphasis added). See also EPA, *Wetlands and 401 Certification* 23 (Apr. 1989) ("In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, . . . and with 'any other appropriate requirement of State law'"). EPA's

conclusion that *activities* -- not merely discharges -- must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference. See, e. g., *Arkansas v. Oklahoma*, 503 U.S. 91, 110, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992); *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

[***LEdHR3A] Although § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded. The State can only ensure that the project complies with "any applicable effluent limitations and other limitations, under [33 U.S.C. §§ 1311, 1312]" or certain other provisions of the Act, "and with any other appropriate requirement of State law." 33 U.S.C. § 1341(d). The State asserts that the minimum stream flow requirement was imposed to ensure compliance with the state water quality standards adopted pursuant to § 303 of the Clean Water Act, 33 U.S.C. § 1313.

[***LEdHR2A] [***LEdHR3A] We agree with the State that ensuring compliance with § 303 is a proper function of the § 401 certification. Although § 303 is not one of the statutory provisions listed in § 401(d), [*713] the statute allows States to impose limitations to ensure compliance with § 301 of the Act, 33 U.S.C. § 1311. Section 301 in turn incorporates § 303 by reference. See 33 U.S.C. § 1311(b)(1)(C); see also H. R. Conf. Rep. No. 95-830, p. 96 (1977) ("Section 303 is always included by reference where section 301 is listed"). As a consequence, state water quality standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. This interpretation is consistent with EPA's view of the statute. See 40 CFR § 121.2(a)(3) (1992); EPA, *Wetlands and 401 Certification*, *supra*. Moreover, limitations to assure compliance with state water quality standards are also permitted by § 401(d)'s reference to "any other appropriate requirement of State law." We do not speculate on what additional state laws, if any, might be incorporated by this language. ³ [***729] [**1910] But at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are "appropriate" requirements of state law. Indeed, petitioners appear to agree that the State's authority under § 401 includes limitations designed to ensure compliance with state water quality standards. Brief for Petitioners 9, 21.

3 The dissent asserts that § 301 is concerned solely with discharges, not broader water quality standards. *Post*, at 730, n. 2. Although § 301 does make certain discharges unlawful, see 33 U.S.C. § 1311(a), it also contains a broad enabling provision which requires States to take certain actions, to wit: "In order to carry out the objective of this chapter [viz. the chemical, physical, and biological integrity of the Nation's water] there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, . . . established pursuant to any State law or regulations . . ." 33 U.S.C. § 1311(b)(1)(C). This provision of § 301 expressly refers to state water quality standards, and is not limited to discharges.

B

[***LEdHR1A] [***LEdHR4A] Having concluded that, pursuant to § 401, States may condition certification upon any limitations necessary to ensure [*714] compliance with state water quality standards or any other "appropriate requirement of State law," we consider whether the minimum flow condition is such a limitation. Under § 303, state water quality standards must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). In imposing the minimum stream flow requirement, the State determined that construction and operation of the project as planned would be inconsistent with one of the designated uses of Class AA water, namely "salmonid [and other fish] migration, rearing, spawning, and harvesting." App. to Pet. for Cert. 83a-84a. The designated use of the river as a fish habitat directly reflects the Clean Water Act's goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Indeed, the Act defines pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water." § 1362(19). Moreover, the Act expressly requires that, in adopting water quality standards, the State must take into consideration the use of waters for "propagation of fish and wildlife." § 1313(c)(2)(A).

Petitioners assert, however, that § 303 requires the State to protect designated uses solely through implementation of specific "criteria." According to

petitioners, the State may not require them to operate their dam in a manner consistent with a designated "use"; instead, say petitioners, under § 303 the State may only require that the project comply with specific numerical "criteria."

[***LEdHR4A] We disagree with petitioners' interpretation of the language of § 303(c)(2)(A). Under the statute, a water quality standard must "consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A) (emphasis added). The text makes it plain that water quality standards contain two components. We think the language [*715] of § 303 is most naturally read to require [***730] that a project be consistent with *both* components, namely, the designated use *and* the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.

Consequently, pursuant to § 401(d) the State may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards. In granting certification pursuant to § 401(d), the State "shall set forth any . . . limitations . . . necessary to assure that [the applicant] will comply with any . . . limitations under [§ 303] . . . and with any other appropriate requirement of State law." A certification requirement that an applicant operate the project consistently with state water quality standards -- *i. e.*, consistently with the designated uses of the water body and the water quality criteria -- is both a "limitation" to assure "compl[iance] with . . . [**1911] limitations" imposed under § 303, and an "appropriate" requirement of state law.

EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria. In its regulations governing state water quality standards, EPA defines criteria as "*elements* of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 CFR § 131.3(b) (1993) (emphasis added). The regulations further provide that "when criteria are met, water quality will *generally* protect the designated use." *Ibid.* (emphasis added). Thus, the EPA regulations implicitly recognize that in some circumstances, criteria

alone are insufficient to protect a designated use.

Petitioners also appear to argue that use requirements are too open ended, and that the Act only contemplates enforcement of the more specific and objective "criteria." But this argument is belied by the open-ended nature of the criteria [*716] themselves. As the Solicitor General points out, even "criteria" are often expressed in broad, narrative terms, such as "there shall be no discharge of toxic pollutants in toxic amounts." Brief for United States as *Amicus Curiae* 18. See *American Paper Institute, Inc. v. EPA*, 302 U.S. App. D.C. 80, 996 F.2d 346, 349 (CADC 1993). In fact, under the Clean Water Act, only one class of criteria, those governing "toxic pollutants listed pursuant to section 1317(a)(1)," need be rendered in numerical form. See 33 U.S.C. § 1313(c)(2)(B); 40 CFR § 131.11(b)(2) (1993).

Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the river as a fishery, must be translated into specific limitations for individual projects. For example, the standards state that "toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use." WAC 173-201-045(1)(c)(vii) (1986). Similarly, the state standards specify that "aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste." 173-201-045(1)(c)(viii). We think petitioners' [***731] attempt to distinguish between uses and criteria loses much of its force in light of the fact that the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics."

Petitioners further argue that enforcement of water quality standards through use designations renders the water quality criteria component of the standards irrelevant. We see no anomaly, however, in the State's reliance on both use designations and criteria to protect water quality. The specific numerical limitations embodied in the criteria are a convenient enforcement mechanism for identifying minimum water conditions which will generally achieve the requisite water quality. And, in most circumstances, satisfying the criteria will, as EPA recognizes, be sufficient to maintain the [*717] designated use. See 40 CFR § 131.3(b) (1993). Water quality standards, however, apply to an entire class of

water, a class which contains numerous individual water bodies. For example, in the State of Washington, the Class AA water quality standard applies to 81 specified fresh surface waters, as well as to all "surface waters lying within the mountainous regions of the state assigned to national parks, national forests, and/or wilderness areas," all "lakes and their feeder streams within the state," and all "unclassified surface waters that are tributaries to Class AA waters." WAC 173-201-070 (1986). While enforcement of criteria will in general protect the uses of these diverse waters, a complementary requirement that activities also comport with designated uses enables the States to ensure that each activity -- even if not foreseen by the criteria -- will be consistent with the specific uses and attributes of a particular body of water.

Under petitioners' interpretation of the statute, however, if a particular criterion, such as turbidity, were missing from the list [**1912] contained in an individual state water quality standard, or even if an existing turbidity criterion were insufficient to protect a particular species of fish in a particular river, the State would nonetheless be forced to allow activities inconsistent with the existing or designated uses. We think petitioners' reading leads to an unreasonable interpretation of the Act. The criteria components of state water quality standards attempt to identify, for all the water bodies in a given class, water quality requirements generally sufficient to protect designated uses. These criteria, however, cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect the State's hundreds of individual water bodies. Requiring the States to enforce only the criteria component of their water quality standards would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the [*718] water's designated uses. Given that there is no textual support for imposing this requirement, we are loath to attribute to Congress an intent to impose this heavy regulatory burden on the States.

The State also justified its minimum stream flow as necessary to implement the "antidegradation policy" of § 303, 33 U.S.C. § 1313(d)(4)(B). When the Clean Water Act was enacted in 1972, the water quality standards of [***732] all 50 States had antidegradation provisions. These provisions were required by federal law. See U.S.

Dept. of Interior, Federal Water Pollution Control Administration, Compendium of Department of Interior Statements on Non-degradation of Interstate Waters 1-2 (Aug. 1968); see also Hines, A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water, 62 Iowa L. Rev. 643, 658-660 (1977). By providing in 1972 that existing state water quality standards would remain in force until revised, the Clean Water Act ensured that the States would continue their antidegradation programs. See 33 U.S.C. § 1313(a). EPA has consistently required that revised state standards incorporate an antidegradation policy. And, in 1987, Congress explicitly recognized the existence of an "antidegradation policy established under [§ 303]." § 1313(d)(4)(B).

EPA has promulgated regulations implementing § 303's antidegradation policy, a phrase that is not defined elsewhere in the Act. These regulations require States to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy." 40 CFR § 131.12 (1993). These "implementation methods shall, at a minimum, be consistent with the . . . existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *Ibid.* EPA has explained that under its antidegradation regulation, "no activity is allowable . . . which could partially or completely eliminate any existing use." EPA, Questions and [*719] Answers on Antidegradation 3 (Aug. 1985). Thus, States must implement their antidegradation policy in a manner "consistent" with existing uses of the stream. The State of Washington's antidegradation policy in turn provides that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." WAC 173-201-035(8)(a) (1986). The State concluded that the reduced stream flows would have just the effect prohibited by this policy. The Solicitor General, representing EPA, asserts, Brief for United States as *Amicus Curiae* 18-21, and we agree, that the State's minimum stream flow condition is a proper application of the state and federal antidegradation regulations, as it ensures that an "existing instream water use" will be "maintained and protected." 40 CFR § 131.12(a)(1) (1993).

Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity." This is

an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the [**1913] water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, *i. e.*, diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. 33 U.S.C. § 1362(19). This broad conception of pollution -- one which [***733] expressly evinces Congress' concern with the physical and biological integrity of water -- refutes petitioners' assertion that the Act draws a sharp distinction between the regulation of water "quantity" and water "quality." Moreover, § 304 of the Act expressly recognizes that water "pollution" may result from "changes [*720] in the movement, flow, or circulation of any navigable waters . . ., including changes caused by the construction of dams." 33 U.S.C. § 1314(f). This concern with the flowage effects of dams and other diversions is also embodied in the EPA regulations, which expressly require existing dams to be operated to attain designated uses. 40 CFR § 131.10(g)(4) (1992).

Petitioners assert that two other provisions of the Clean Water Act, §§ 101(g) and 510(2), 33 U.S.C. §§ 1251(g) and 1370(2), exclude the regulation of water quantity from the coverage of the Act. Section 101(g) provides "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). Similarly, § 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. § 1370. In petitioners' view, these provisions exclude "water quantity issues from direct regulation under the federally controlled water quality standards authorized in § 303." Brief for Petitioners 39 (emphasis deleted).

This language gives the States authority to allocate water rights; we therefore find it peculiar that petitioners argue that it prevents the State from regulating stream flow. In any event, we read these provisions more narrowly than petitioners. Sections 101(g) and 510(2) preserve the authority of each State to allocate water

quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. In *California v. FERC*, 495 U.S. 490, 498, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990), construing an analogous provision of the Federal Power Act, ⁴ we explained that "minimum stream [*721] flow requirements neither reflect nor establish 'proprietary rights' to water. Cf. *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 176, 90 L. Ed. 1143, 66 S. Ct. 906, and n. 20 (1946). Moreover, the certification itself does not purport to determine petitioners' proprietary right to the water of the Dosewallips. In fact, the certification expressly states that a "State Water Right Permit (Chapters 90.03.250 RCW and 508-12 WAC) must be obtained prior to commencing construction of the project." App. to Pet. for Cert. 83a. The certification merely determines the nature of the use to which that proprietary right may be put under the Clean Water Act, if and when it is obtained from the State. Our view is reinforced by the legislative history of the 1977 [***734] amendment to the Clean Water Act adding § 101(g). See 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978) ("The requirements [of the Act] may incidentally affect individual water rights. . . . [**1914] It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations").

4 The relevant text of the Federal Power Act provides: "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077, 16 U.S.C. § 821.

IV

Petitioners contend that we should limit the State's authority to impose minimum flow requirements because FERC has comprehensive authority to license hydroelectric projects pursuant to the FPA, 16 U.S.C. §

791a *et seq.* In petitioners' view, the minimum flow requirement imposed here interferes with FERC's authority under the FPA.

[*722] The FPA empowers FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." § 797(e). The FPA also requires FERC to consider a project's effect on fish and wildlife. §§ 797(e), 803(a)(1). In *California v. FERC*, *supra*, we held that the California Water Resources Control Board, acting pursuant to state law, could not impose a minimum stream flow which conflicted with minimum stream flows contained in a FERC license. We concluded that the FPA did not "save" to the States this authority. *Id.*, 495 U.S. at 498.

[***LEdHR1A] No such conflict with any FERC licensing activity is presented here. FERC has not yet acted on petitioners' license application, and it is possible that FERC will eventually deny petitioners' application altogether. Alternatively, it is quite possible, given that FERC is required to give equal consideration to the protection of fish habitat when deciding whether to issue a license, that any FERC license would contain the same conditions as the state § 401 certification. Indeed, at oral argument the Deputy Solicitor General stated that both EPA and FERC were represented in this proceeding, and that the Government has no objection to the stream flow condition contained in the § 401 certification. Tr. of Oral Arg. 43-44.

Finally, the requirement for a state certification applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters. For example, a permit from the Army Corps of Engineers is required for the installation of any structure in the navigable waters which may interfere with navigation, including piers, docks, and ramps. Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1151, § 10, 33 U.S.C. § 403. Similarly, a permit must be obtained from the Army Corps of Engineers [*723] for the discharge of dredged or fill material, and from the Secretary of the Interior or Agriculture for the construction of reservoirs, canals, and other water storage systems on federal land. See 33 U.S.C. §§ 1344(a), (e); 43 U.S.C. § 1761 (1988 ed. and Supp. IV). [***735] We assume that a § 401 certification would also be required

for some licenses obtained pursuant to these statutes. Because § 401's certification requirement applies to other statutes and regulatory schemes, and because any conflict with FERC's authority under the FPA is hypothetical, we are unwilling to read implied limitations into § 401. If FERC issues a license containing a stream flow condition with which petitioners disagree, they may pursue judicial remedies at that time. Cf. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 778, n. 20, 80 L. Ed. 2d 753, 104 S. Ct. 2105 (1984).

In summary, we hold that the State may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard. The judgment of the Supreme Court of Washington, accordingly, is affirmed.

So ordered.

CONCUR BY: STEVENS

CONCUR

JUSTICE STEVENS, concurring.

While I agree fully with the thorough analysis in the Court's opinion, I add this comment [****1915**] for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards. See, e. g., § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

DISSENT BY: THOMAS

DISSENT

[***724**] JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court today holds that a State, pursuant to § 401 of the Clean Water Act, may condition the certification necessary to obtain a federal license for a proposed hydroelectric project upon the maintenance of a minimum flow rate in the river to be utilized by the project. In my view, the Court makes three fundamental

errors. First, it adopts an interpretation that fails adequately to harmonize the subsections of § 401. Second, it places no meaningful limitation on a State's authority under § 401 to impose conditions on certification. Third, it gives little or no consideration to the fact that its interpretation of § 401 will significantly disrupt the carefully crafted federal-state balance embodied in the Federal Power Act. Accordingly, I dissent.

I

A

Section 401(a)(1) of the Federal Water Pollution Control Act, otherwise known as the Clean Water Act (CWA or Act), 33 U.S.C. § 1251 *et seq.*, provides that "any applicant for a Federal license or permit to conduct any activity . . ., which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such [*****736**] discharge will comply with . . . applicable provisions of [the CWA]." 33 U.S.C. § 1341(a)(1). The terms of § 401(a)(1) make clear that the purpose of the certification process is to ensure that discharges from a project will meet the requirements of the CWA. Indeed, a State's authority under § 401(a)(1) is limited to certifying that "any discharge" that "may result" from "any activity," such as petitioners' proposed hydroelectric project, will "comply" with the enumerated provisions of the CWA; if the discharge will fail to comply, the State may "deny" the certification. *Ibid.* In addition, under § 401(d), a State may place conditions on a [***725**] § 401 certification, including "effluent limitations and other limitations, and monitoring requirements," that may be necessary to ensure compliance with various provisions of the CWA and with "any other appropriate requirement of State law." § 1341(d).

The minimum stream flow condition imposed by respondents in this case has no relation to any possible "discharge" that might "result" from petitioners' proposed project. The term "discharge" is not defined in the CWA, but its plain and ordinary meaning suggests "a flowing or issuing out," or "something that is emitted." Webster's Ninth New Collegiate Dictionary 360 (1991). Cf. 33 U.S.C. § 1362(16) ("The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants"). A minimum stream flow requirement, by contrast, is a limitation on the amount of

water the project can take in or divert from the river. See *ante*, at 709. That is, a minimum stream flow requirement is a limitation on intake -- the opposite of discharge. Imposition of such a requirement would thus appear to be beyond a State's authority as it is defined by § 401(a)(1).

The Court remarks that this reading of § 401(a)(1) would have "considerable force," *ante*, at 711, were it not for what the Court understands to be the expansive terms of § 401(d). That subsection, as set forth in 33 U.S.C. § 1341(d), provides:

"Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that *any applicant* for a Federal license or permit [**1916] will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal [*726] license or permit subject to the provisions of this section." (Emphasis added.)

According to the Court, the fact that § 401(d) refers to an "applicant," rather than a "discharge," complying with various provisions of the Act "contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge.'" *Ante*, at 711. In the Court's view, § 401(d)'s reference to an applicant's compliance "expands" a State's authority beyond the limits set out in § 401(a)(1), *ibid.*, [***737] thereby permitting the State in its certification process to scrutinize the applicant's proposed "activity as a whole," not just the discharges that may result from the activity, *ante*, at 712. The Court concludes that this broader authority allows a State to impose conditions on a § 401 certification that are unrelated to discharges. *Ante*, at 711-712.

While the Court's interpretation seems plausible at first glance, it ultimately must fail. If, as the Court asserts, § 401(d) permits States to impose conditions

unrelated to discharges in § 401 certifications, Congress' careful focus on discharges in § 401(a)(1) -- the provision that describes the scope and function of the certification process -- was wasted effort. The power to set conditions that are unrelated to discharges is, of course, nothing but a conditional power to deny certification for reasons unrelated to discharges. Permitting States to impose conditions unrelated to discharges, then, effectively eliminates the constraints of § 401(a)(1).

Subsections 401(a)(1) and (d) can easily be reconciled to avoid this problem. To ascertain the nature of the conditions permissible under § 401(d), § 401 must be read as a whole. See *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988) (statutory interpretation is a "holistic endeavor"). As noted above, § 401(a)(1) limits a State's authority in the certification process to addressing concerns related to discharges and to ensuring that any discharge resulting from a project will comply with specified provisions of the Act. It is reasonable [*727] to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while § 401(d) permits a State to place conditions on a certification to ensure compliance of the "applicant," those conditions must still be related to discharges. In my view, this interpretation best harmonizes the subsections of § 401. Indeed, any broader interpretation of § 401(d) would permit that subsection to swallow § 401(a)(1).

The text of § 401(d) similarly suggests that the conditions it authorizes must be related to discharges. The Court attaches critical weight to the fact that § 401(d) speaks of the compliance of an "applicant," but that reference, in and of itself, says little about the nature of the conditions that may be imposed under § 401(d). Rather, because § 401(d) conditions can be imposed only to ensure compliance with specified provisions of law -- that is, with "applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard[s] of performance under section 1316 of this title, . . . prohibition[s], effluent standard[s], or pretreatment standard[s] under section 1317 of this title, [or] . . . any other appropriate requirement[s] of State law" -- one should logically turn to those provisions for guidance in determining the nature, scope, and purpose of § 401(d) conditions. Each of the four identified CWA provisions describes discharge-related limitations. See §

1311 (making it unlawful to discharge any pollutant except in compliance with enumerated provisions of the Act); § 1312 (establishing effluent limitations on point source discharges); [***738] § 1316 (setting national standards of performance [**1917] for the control of discharges); and § 1317 (setting pretreatment effluent standards and prohibiting the discharge of certain effluents except in compliance with standards).

The final term on the list -- "appropriate requirement[s] of State law" -- appears to be more general in scope. Because [*728] this reference follows a list of more limited provisions that specifically address discharges, however, the principle *eiusdem generis* would suggest that the general reference to "appropriate" requirements of state law is most reasonably construed to extend only to provisions that, like the other provisions in the list, impose discharge-related restrictions. Cf. *Cleveland v. United States*, 329 U.S. 14, 18, 91 L. Ed. 12, 67 S. Ct. 13 (1946) ("Under the *eiusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it"); *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84, 112 L. Ed. 2d 374, 111 S. Ct. 415 (1990). In sum, the text and structure of § 401 indicate that a State may impose under § 401(d) only those conditions that are related to discharges.

B

The Court adopts its expansive reading of § 401(d) based at least in part upon deference to the "conclusion" of the Environmental Protection Agency (EPA) that § 401(d) is not limited to requirements relating to discharges. *Ante*, at 712. The agency regulation to which the Court defers is 40 CFR § 121.2(a)(3) (1993), which provides that the certification shall contain "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." *Ante*, at 712. According to the Court, "EPA's conclusion that *activities* -- not merely discharges -- must comply with state water quality standards . . . is entitled to deference" under *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). *Ante*, at 712.

As a preliminary matter, the Court appears to resort to deference under *Chevron* without establishing through an initial examination of the statute that the text of the section is ambiguous. See *Chevron, supra*, 467 U.S. at 842-843. More importantly, the Court invokes *Chevron*

deference to support its interpretation even though the Government does not seek [*729] deference for the EPA's regulation in this case.¹ That the Government itself has not contended that an agency interpretation exists reconciling the scope of the conditioning authority under § 401(d) with the terms of § 401(a)(1) should suggest to the Court that there is no "agency construction" directly addressing the question. *Chevron, supra*, at 842.

1 The Government, appearing as *amicus curiae* "supporting affirmance," instead approaches the question presented by assuming, *arguendo*, that petitioners' construction of § 401 is correct: "Even if a condition imposed under Section 401(d) were valid only if it assured that a 'discharge' will comply with the State's water quality standards, the [minimum flow condition set by respondents] satisfies that test." Brief for United States as *Amicus Curiae* 11.

In fact, the regulation to which the [***739] Court defers is hardly a definitive construction of the scope of § 401(d). On the contrary, the EPA's position on the question whether conditions under § 401(d) must be related to discharges is far from clear. Indeed, the only EPA regulation that specifically addresses the "conditions" that may appear in § 401 certifications speaks exclusively in terms of limiting discharges. According to the EPA, a § 401 certification shall contain "[a] statement of *any conditions* which the certifying agency deems necessary or desirable *with respect to the discharge of the activity*." 40 CFR § 121.2(a)(4) (1993) (emphases added). In my view, § 121.2(a)(4) should, at the very least, give the Court pause before it resorts to *Chevron* deference in this case.

II

The Washington Supreme Court held that the State's water quality standards, promulgated [**1918] pursuant to § 303 of the Act, 33 U.S.C. § 1313, were "appropriate" requirements of state law under § 401(d), and sustained the stream flow condition imposed by respondents as necessary to ensure compliance with a "use" of the river as specified in those standards. As an alternative to their argument that § 401(d) conditions must be discharge related, petitioners assert that [*730] the state court erred when it sustained the stream flow condition under the "use" component of the State's water quality standards without reference to the corresponding "water quality

criteria" contained in those standards. As explained above, petitioners' argument with regard to the scope of a State's authority to impose conditions under § 401(d) is correct. I also find petitioners' alternative argument persuasive. Not only does the Court err in rejecting that § 303 argument, in the process of doing so it essentially removes all limitations on a State's conditioning authority under § 401.

The Court states that, "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are 'appropriate' requirements of state law" under § 401(d). *Ante*, at 713. ² A water quality standard promulgated pursuant to § 303 must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). The Court asserts that this language "is most naturally read to require that a project be consistent with *both* components, namely, the designated use *and* the water quality criteria." *Ante*, at 715. In the Court's view, then, the "use" of a body of water is independently enforceable through § 401(d) without reference to the corresponding criteria. *Ibid*.

2 In the Court's view, § 303 water quality standards come into play under § 401(d) either as "appropriate" requirements of state law or through § 301 of the Act, which, according to the Court, "incorporates § 303 by reference." *Ante*, at 713 (citations omitted). The Court notes that through § 303, "the statute allows States to impose limitations to ensure compliance with § 301 of the Act." *Ibid*. Yet § 301 makes unlawful only "the [unauthorized] *discharge* of any pollutant by any person." 33 U.S.C. § 1311(a) (emphasis added); cf. *supra*, 511 U.S. at 727. Thus, the Court's reliance on § 301 as a source of authority to impose conditions unrelated to discharges is misplaced.

[**740] The Court's reading strikes me as contrary to common sense. It is difficult to see how compliance with a "use" of a body of water could be enforced without reference to the [*731] corresponding criteria. In this case, for example, the applicable "use" is contained in the following regulation: "Characteristic uses shall include, but not be limited to, . . . salmonid migration, rearing, spawning, and harvesting." Wash. Admin. Code (WAC) 173-201-045(1)(b)(iii) (1986). The corresponding criteria, by contrast, include measurable factors such as

quantities of fecal coliform organisms and dissolved gases in the water. 173-201-045(1)(c)(i) and (ii). ³ Although the Act does not further address (at least not expressly) the link between "uses" and "criteria," the regulations promulgated under § 303 make clear that a "use" is an aspirational goal to be attained through compliance with corresponding "criteria." Those regulations suggest that "uses" are to be "achieved and protected," and that "water quality criteria" are to be adopted to "protect the designated use[s]." 40 CFR §§ 131.10(a), 131.11(a)(1) (1993).

3 Respondents concede that petitioners' project "will likely not violate any of Washington's water quality criteria." Brief for Respondents 24.

The problematic consequences of decoupling "uses" and "criteria" become clear once the Court's interpretation of § 303 is read in the context of § 401. In the Court's view, a State may condition the § 401 certification "upon *any limitations* necessary to ensure compliance" with the "uses of the water body." *Ante*, at 713-714, 715 (emphasis added). Under the Court's interpretation, then, state environmental agencies may pursue, through § 401, their water goals in any way they choose; the conditions imposed on certifications need not relate to discharges, nor to water quality criteria, nor to any objective or quantifiable standard, so long as they tend to [**1919] make the water more suitable for the uses the State has chosen. In short, once a State is allowed to impose conditions on § 401 certifications to protect "uses" in the abstract, § 401(d) is limitless.

To illustrate, while respondents in this case focused only on the "use" of the Dosewallips River as a fish habitat, this particular river has a number of other "characteristic uses," [*732] including "recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment)." WAC 173-201-045(1)(b)(v) (1986). Under the Court's interpretation, respondents could have imposed any number of conditions related to recreation, including conditions that have little relation to water quality. In *Town of Summersville*, 60 F.E.R.C. P61,291, p. 61,990 (1992), for instance, the state agency required the applicant to "construct . . . access roads and paths, low water stepping stone bridges, . . . a boat launching facility . . . , and a residence and storage building." These conditions presumably would be sustained under the approach the Court adopts today. ⁴ In the end, it is difficult to conceive of a condition that

would fall outside a [***741] State's § 401(d) authority under the Court's approach.

4 Indeed, as the § 401 certification stated in this case, the flow levels imposed by respondents are "in excess of those required to maintain water quality in the bypass region," App. to Pet. for Cert. 83a, and therefore conditions not related to water quality must, in the Court's view, be permitted.

III

The Court's interpretation of § 401 significantly disrupts the careful balance between state and federal interests that Congress struck in the Federal Power Act (FPA), 16 U.S.C. § 791 *et seq.* Section 4(e) of the FPA authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." 16 U.S.C. § 797(e). In the licensing process, FERC must balance a number of considerations: "In addition to the power and development purposes for which licenses are issued, [FERC] shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational [*733] opportunities, and the preservation of other aspects of environmental quality." *Ibid.* Section 10(a) empowers FERC to impose on a license such conditions, including minimum stream flow requirements, as it deems best suited for power development and other public uses of the waters. See 16 U.S.C. § 803(a); *California v. FERC*, 495 U.S. 490, 494-495, 506, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990).

In *California v. FERC*, the Court emphasized FERC's exclusive authority to set the stream flow levels to be maintained by federally licensed hydroelectric projects. California, in order "to protect [a] stream's fish," had imposed flow rates on a federally licensed project that were significantly higher than the flow rates established by FERC. *Id.*, at 493. In concluding that California lacked authority to impose such flow rates, we stated:

"As Congress directed in FPA § 10(a), FERC set the conditions of the [project]

license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would constitute a veto of the project that was approved and licensed by [**1920] FERC." *Id.*, 495 U.S. at 506-507 (citations and internal quotation marks omitted).

California v. FERC reaffirmed our decision in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 164, 90 L. Ed. 1143, 66 S. Ct. 906 (1946), in which we warned against "vesting in [state authorities] [*734] a veto power" over federal hydroelectric projects. Such authority, we concluded, could "destroy the effectiveness" of the FPA and "subordinate to the control of the State the 'comprehensive' [***742] planning" with which the administering federal agency (at that time the Federal Power Commission) was charged. *Ibid.*

Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in *California v. FERC* and *First Iowa* they did not possess. As the language of § 401(d) expressly states, any condition placed in a § 401 certification, including, in the Court's view, a stream flow requirement, "shall become a condition on any Federal license or permit." 33 U.S.C. § 1341(d) (emphasis added). Any condition imposed by a State under § 401(d) thus becomes a "term . . . of the license as a matter of law," *Department of Interior v. FERC*, 293 U.S. App. D.C. 182, 952 F.2d 538, 548 (CADC 1992) (citation and internal quotation marks omitted), regardless of whether FERC favors the limitation. Because of § 401(d)'s mandatory language, federal courts have uniformly held that FERC has no power to alter or review § 401 conditions, and that the

proper forum for review of those conditions is state court. Section 401(d) conditions imposed by States are [*735] therefore binding on FERC. Under the Court's interpretation, then, it appears that the mistake of the State in *California v. FERC* was not that it had trespassed into territory exclusively reserved to FERC; rather, it simply had not hit upon the proper device -- that is, the § 401 certification -- through which to achieve its objectives.

5 See, e. g., *Keating v. FERC*, 288 U.S. App. D.C. 344, 927 F.2d 616, 622 (CADC 1991) (federal review inappropriate because a decision to grant or deny § 401 certification "presumably turns on questions of substantive state environmental law -- an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence"); *Department of Interior v. FERC*, 952 F.2d at 548; *United States v. Marathon Development Corp.*, 867 F.2d 96, 102 (CA1 1989); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (CA3 1988). FERC has taken a similar position. See *Town of Summersville*, 60 F.E.R.C. P61,291, p. 61,990 (1992) ("Since pursuant to Section 401(d) . . . all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission. The only alternatives available to the Commission are either to issue a license with the conditions included or to deny" the application altogether); accord, *Central Maine Power Co.*, 52 F.E.R.C. P61,033, pp. 61,172-61,173 (1990).

Although the Court notes in passing that "the limitations included in the certification become a condition on any federal license," *ante*, at 708, it does not acknowledge or discuss the shift of power from FERC to the States that is accomplished by its decision. Indeed, the Court merely notes that "any conflict with FERC's authority under the FPA" in this case is "hypothetical" at this stage, *ante*, at 723, because "FERC has not yet acted on petitioners' license application," *ante*, at 722. We are assured that "it is quite possible . . . that any FERC license would contain the same conditions as the state § 401 certification." *Ibid*.

The Court's observations simply miss the point. Even

if FERC might have no objection to the stream flow condition established by respondents *in this case*, such a happy coincidence will likely prove to be the exception, rather than the rule. In issuing licenses, FERC must balance the Nation's power needs together with the need for energy conservation, [***743] irrigation, flood control, fish and wildlife protection, and recreation. 16 U.S.C. § 797(e). State environmental agencies, by contrast, need only consider parochial environmental interests. Cf., e. g., Wash. Rev. Code § 90.54.010(2) (1992) (goal of State's water policy is to "insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington"). As a result, it is likely that conflicts will arise between a [**1921] FERC-established stream flow level and a state-imposed level.

Moreover, the Court ignores the fact that its decision nullifies the congressionally mandated process for resolving such state-federal disputes when they develop. Section 10(j)(1) of the FPA, 16 U.S.C. § 803(j)(1), which was added as part [*736] of the Electric Consumers Protection Act of 1986 (ECPA), 100 Stat. 1244, provides that every FERC license must include conditions to "protect, mitigate damage to, and enhance" fish and wildlife, including "related spawning grounds and habitat," and that such conditions "shall be based on recommendations" received from various agencies, including state fish and wildlife agencies. If FERC believes that a recommendation from a state agency is inconsistent with the FPA -- that is, inconsistent with what FERC views as the proper balance between the Nation's power needs and environmental concerns -- it must "attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities" of the state agency. § 803(j)(2). If, after such an attempt, FERC "does not adopt in whole or in part a recommendation of any [state] agency," it must publish its reasons for rejecting that recommendation. *Ibid*. After today's decision, these procedures are a dead letter with regard to stream flow levels, because a State's "recommendation" concerning stream flow "shall" be included in the license when it is imposed as a condition under § 401(d).

More fundamentally, the 1986 amendments to the FPA simply make no sense in the stream flow context if, in fact, the States already possessed the authority to establish minimum stream flow levels under § 401(d) of the CWA, which was enacted years before those

amendments. Through the ECPA, Congress strengthened the role of the States in establishing FERC conditions, but it did not make that authority paramount. Indeed, although Congress could have vested in the States the final authority to set stream flow conditions, it instead left that authority with FERC. See *California v. FERC*, 495 U.S. at 499. As the Ninth Circuit observed in the course of rejecting California's effort to give *California v. FERC* a narrow reading, "there would be no point in Congress requiring [FERC] to consider the state agency recommendations on environmental matters and [*737] make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." *Sayles Hydro Associates v. Maughan*, 985 F.2d 451, 456 (1993).

Given the connection between § 401 and federal hydroelectric licensing, it is remarkable that the Court does not at least attempt to fit its interpretation of § 401 into the larger statutory framework governing the licensing process. At the very least, the significant impact the [***744] Court's ruling is likely to have on that process should compel the Court to undertake a closer examination of § 401 to ensure that the result it reaches was mandated by Congress.

IV

Because the Court today fundamentally alters the federal-state balance Congress carefully crafted in the FPA, and because such a result is neither mandated nor supported by the text of § 401, I respectfully dissent.

REFERENCES

To Full Text Opinion

61A Am Jur 2d, Pollution Control 133, 142, 144, 151, 158; 78 Am Jur 2d, Waters 292

11 Federal Procedure, L Ed, Environmental Protection 32:262; 24 Federal Procedure, L Ed, Natural and Marine Resources 56:313, 56:315

9 Federal Procedural Forms, L Ed, Environmental Protection 29:91

20 Am Jur Pl & Pr Forms (Rev), Pollution Control, Form 81

33 USCS 1341

L Ed Digest, Energy 30; Environmental Law 32, 40; Waters 20

L Ed Index, Hydroelectric Power; Water Pollution

ALR Index, Federal Water Pollution Control Act; Hydroelectric Power; Water Pollution

Annotation References:

Supreme Court's views as to construction and application of Federal Water Pollution Control (Clean Water) Act (33 USCS 1251-1376). 84 L Ed 2d 895.

VOLUME III
TAB 2

LEXSEE

CITY OF ARCADIA, et al., Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, - and - NATURAL RESOURCES DEFENSE COUNCIL, et al., Defendants-Intervenors.

No. C 02-5244 SBA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

265 F. Supp. 2d 1142; 2003 U.S. Dist. LEXIS 9044

May 16, 2003, Decided

May 16, 2003, Filed

SUBSEQUENT HISTORY: Affirmed by City of Arcadia v. United States EPA, 411 F.3d 1103, 2005 U.S. App. LEXIS 11240 (9th Cir. Cal., 2005) Related proceeding at City of Arcadia v. State Water Res. Control Bd., 2006 Cal. App. LEXIS 92 (Cal. App. 4th Dist., Jan. 26, 2006)

DISPOSITION: [**1] Defendants' motion to dismiss granted; plaintiffs' motion for partial summary judgment denied, and objections overruled. Action dismissed in its entirety, without leave to amend in part and with prejudice in part. Intervenors' evidentiary objections overruled as moot.

COUNSEL: For Plaintiff: Noam I. Duzman, Richard Montevideo, Robert S. Bower, Rutan & Tucker LLP, Costa Mesa, CA.

For USA, Defendant: Charles M. O'Connor, AUSA & Chief, Environment & Natural Resources, United States Attorney's Office, San Francisco, CA. AND-- S. Randall Humm - Trial Attorney, Pamela Tonglao - Trial Attorney, U.S. Dept. of Justice, Washington, DC.

JUDGES: SAUNDRA BROWN ARMSTRONG, United States District Judge.

OPINION BY: SAUNDRA BROWN ARMSTRONG

OPINION

[*1143] **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, DENYING AS MOOT PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND DISMISSING ACTION**

[Docket Nos. 18, 28, 31, 43, 47]

Plaintiffs City of Arcadia and other California cities (collectively, "Plaintiffs") bring this action against defendants United States Environmental Protection Agency ("EPA"), the EPA Administrator, and the EPA Region IX Administrator (collectively, "Defendants") for injunctive and declaratory relief. The Natural Resources Defense Council, Santa Monica BayKeeper, and Heal the Bay (collectively, "Intervenors") have intervened as defendants.

Now before the Court are Defendants' [**2] Motion to Dismiss Second Amended Complaint (the "Motion to Dismiss"), in which Intervenors join, and Plaintiffs' Motion for Summary Adjudication of Issues (the "Motion for Partial Summary Judgment"). Having read and considered the papers submitted and being fully informed, the Court GRANTS the Motion to Dismiss, DENIES AS MOOT the Motion for Partial Summary Judgment, and DISMISSES this action.¹

¹ These matters are suitable for disposition without a hearing. *See* Fed. R. Civ. P. 78; Civ. L.R. 7-1(b).

I. BACKGROUND

2

2 Over the years the Court has had the pleasure and privilege of reading some excellent moving papers. Some of these submissions stand out as truly superlative. Defendants' opening and reply briefs for their Motion to Dismiss are shining examples of such superlative submissions. In these briefs Defendants discuss three areas of federal law generally regarded as highly complex--environmental regulation, administrative law, and justiciability--in direct, succinct, well-supported, and powerfully illuminating fashion. Whereas a poor presentation of the statutory and regulatory framework and Defendants' arguments might have required the Court to spend hours to apprehend their arguments, the high quality of Defendants' writing enabled the Court to grasp them in a matter of minutes. Defendants' briefs also thankfully avoid leveling the sorts of thinly veiled (or, at times, not-at-all-veiled) *ad hominem* attacks that unfortunately pervade too much legal writing nowadays. The Court thus commends Defendants' counsel for their outstanding writing and expresses its appreciation for it.

[**3] A. Statutory and Regulatory Background

1. Water Pollution Control Under the Clean Water Act

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, utilizes two fundamental approaches to control water pollution: technology-based regulations and water quality standards. Technology-based [*1144] regulations seek to reduce pollution by requiring a discharger to effectuate equipment or process changes, without reference to the effect on the receiving water; water quality standards fix the permissible level of pollution in a specific body of water regardless of the source of pollution.

The National Pollutant Discharge Elimination System ("NPDES") permit program is a key means of implementing both technology-based requirements and water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1); 40 C.F.R. § 122.44(a), (d)(1). An NPDES permit establishes specific limits of pollution for an individual discharger. A discharge of pollutants (other than dredged or fill material) from any "point source,"

which is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may [**4] be discharged," 33 U.S.C. § 1362(14), into the waters of the United States is prohibited unless that discharge complies with the discharge limits and other requirements of an NPDES permit. *Id.* §§ 1311(a), 1362(12). At present, 45 states, including California, are authorized to administer the NPDES permit program. State Program Status, at http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=general. In the remaining states, EPA issues the permits. 33 U.S.C. § 1342(a).

2. Total Maximum Daily Loads ("TMDLs")

Section 303(d) of the CWA and EPA's implementing regulations require states to identify and prioritize waterbodies where technology-based effluent limitations and other required controls are insufficiently stringent to attain water quality standards. *See* 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7(b). States must develop a "total maximum daily load," or "TMDL," for each pollutant of concern in each waterbody so identified. A TMDL represents the maximum amount of pollutant "loading" that a waterbody can receive from all combined sources without exceeding applicable [**5] state water quality standards. Although the term "total maximum daily load" is not expressly defined in the CWA, EPA's regulations define a TMDL for a pollutant as the sum of: (1) the "wasteload allocations," which is the amount of pollutant that can be discharged to a waterbody from point sources, (2) the "load allocations," which represent the amount of a pollutant in a waterbody attributable to nonpoint sources or natural background, and (3) a margin of safety. 40 C.F.R. §§ 130.2(g)-(i), 130.7(c)(1).

Under CWA Section 303(d)(2), EPA is required to review and approve or disapprove TMDLs established by states for impaired waters within thirty days of submission. 33 U.S.C. § 1313(d)(2). If EPA disapproves a state TMDL submission, EPA must issue its own TMDL for that waterbody within thirty days. *Id.*

3. Implementation of TMDLs

TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing. *Pronsolino v. Natri*, 291 F.3d 1123, 1129 (9th Cir. 2002) ("TMDLs are primarily informational tools that allow the states to proceed from the identification of [**6] waters requiring additional

planning to the required plans.") (citing *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984-85 (9th Cir. 1994)). A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. *See, e.g., Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) ("Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies. . . . The theory is that individual-discharge permits [*1145] will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL."); *Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp. 962, 966 (W.D. Wash. 1996) ("TMDL development in itself does not reduce pollution. . . . TMDLs inform the design and implementation of pollution control measures."); *Pronsolino*, 291 F.3d at 1129 ("TMDLs serve as a link in an implementation chain that includes . . . state or local plans for point and nonpoint [**7] source pollution reduction . . ."); *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir. 1996) (noting that a TMDL sets a goal for reducing pollutants). Thus, a TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies.

For point sources, limitations on pollutant loadings may be implemented through the NPDES permit system. 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA regulations require that effluent limitations in NPDES permits be "consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. *Id.* For nonpoint sources, limitations on loadings are not subject to a federal nonpoint source permitting program, and therefore any nonpoint source reductions can be enforced against those responsible for the pollution only to the extent that a state institutes such reductions as regulatory requirements pursuant to state authority. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1355-56 (N.D. Cal. 2000), *aff'd sub nom. Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). [**8]

4. California Water Quality Control Statutory and Regulatory Framework

California effectuates the foregoing requirements of the CWA primarily through institutions and procedures set out in certain provisions of the California Water Code

(the "Water Code"), including those of the California Porter-Cologne Water Quality Control Act (the "Porter-Cologne Act"), Cal. Water Code § 13000 *et seq.* These Water Code provisions established the State Water Resources Control Board (the "State Board") within the California Environmental Protection Agency to formulate and adopt state policy for water quality control. Cal. Water Code §§ 174-186, 13100, 13140. The State Board is designated as the state water pollution control agency for all purposes stated in the CWA and is the agency authorized to exercise powers delegated to it under the CWA. 33 U.S.C. § 1313; Cal. Water Code § 13160.

The Porter-Cologne Act established nine California Regional Water Quality Control Boards (individually, a "Regional Board"; collectively, the "Regional Boards"), Cal. Water Code §§ 13200, 13201, which operate under the purview of the State Board, *see id.* § 13225. Each Regional [**9] Board is comprised of nine members, *id.* § 13201, and is required to appoint an executive officer, *id.* § 13220(c), to whom the Regional Board may delegate all but some of its powers and duties, *id.* § 13223. Each Regional Board is required to formulate and adopt water quality control plans for all areas within the region. *Id.* § 13240. The State Board may approve such plan, or it may return it to the Regional Board for further submission and resubmission to the State Board. *Id.* § 13245. It must act on any water quality control plan within 60 days of a Regional Board's submission of such plan to the State Board, or 90 days after resubmission of such plan. *Id.* § 13246. A water quality control plan will not become effective unless and until it is approved by the State Board, followed by approval by the state's Office of Administrative Law ("OAL") in accordance with the appropriate procedures. [*1146] *Id.* § 13245; Cal. Gov't Code §§ 11340.2, 11349.3, 11353(b)(5).

The State Board is required to formulate, adopt, and revise general procedures for the formulation, adoption, and implementation of water quality control plans by the Regional Boards. Cal. Water Code § 13164. [**10] The State Board may adopt water quality control plans for purposes of the CWA that include the regional water quality control plans submitted by the Regional Boards. *See id.* § 13170. Such plans, when adopted by the State Board, supersede any regional water quality control plans for the same waters to the extent of any conflict. *Id.*

B. Factual Summary and Procedural History

1. The Consent Decree

The events underlying the instant action were set in motion by the disposition of *Heal the Bay, Inc., et al. v. Browner, et al.*, No. C 98-4825 SBA ("*Heal the Bay*"), an action previously before this Court. In *Heal the Bay*, an individual and two environmental groups (which groups are now two of the three Intervenor in the instant action) brought a civil action against EPA, the EPA Administrator, and the EPA Region IX Administrator. Their suit primarily concerned EPA's alleged failure to perform its alleged duty under the CWA either to approve or to disapprove TMDLs submitted to EPA by the state of California.

On March 23, 1999, the Court filed an Amended Consent Decree (the "Consent Decree")³ in which "EPA agreed to ensure that a TMDL [would] [**11] be completed for each and every pairing of a [Water Quality Limited Segment, as defined in 40 C.F.R. 130.2(j),] and an associated pollutant in the Los Angeles Region" set forth in an attachment to the Consent Decree by specified deadlines. (Consent Decree PP2a, 2b, 3, 3c.)⁴ Pursuant to the Consent Decree, for each pairing EPA was required either to approve a TMDL submitted by California by a specified deadline or, if it did not approve a TMDL by the date specified, to establish a TMDL within one year of the deadline, unless California submitted and EPA approved a TMDL prior to EPA's establishing the TMDL within the one-year period. (*Id.* P3a.) By March 24, 2002, EPA was required either to have approved a state-submitted TMDL for trash in the Los Angeles River or to have established the TMDL itself. (*Id.* PP2d, 3a; *id.* Att. 2, 3.)⁵

3 No original consent decree was entered. Rather, according to Defendants' representations in their opening brief, the Consent Decree incorporated amendments from an original proposal at the urging of proposed intervenors California Association of Sanitation Agencies and California Alliance of POTWs. (*See* Mot. to Dismiss at 6.)

[**12]

4 The Court takes judicial notice of the existence of the Consent Decree and the contents thereof. *See, e.g., Egan v. Teets*, 251 F.2d 571, 577 n.10 (9th Cir. 1957) (holding that district court was entitled to take judicial notice of prior proceedings involving same petitioner before same district court). The Consent Decree is filed as Docket No. 25 in *Heal the Bay*, No. C 98-4825

SBA.

5 Defendants contend that the relevant deadline was March 22, 2002, (Mot. to Dismiss at 6), and Plaintiffs echo this contention in their Second Amended Complaint, (Second Am. Compl. P25). Review of the terms of the Consent Decree, however, reveal that the deadline was a different date. The Consent Decree defines "effective date" as the date on which the Consent Decree is entered. (*Id.* P2d.) Although the Court signed the Consent Decree on March 22, 1999, (*id.* at 29), it was not entered on the docket until March 24, 1999. Under the terms of Attachments 2 and 3 of the Consent Decree, TMDLs for trash for all Water Quality Limited Segments the Los Angeles River were to be submitted by California within two years of the effective date--March 24, 2001. (*Id.* Atts. 2, 3.) Since EPA was required to ensure that a TMDL was in place within one year of California's deadline to submit a proposed TMDL, (*id.* P3a), the deadline for final approval or establishment of a TMDL was March 24, 2002.

Nevertheless, based on the evidence tendered by EPA, it is clear that EPA believed that the deadline was March 22, 2002. (*See* Decl. of David W. Smith in Supp. of EPA's Mot. to Dismiss, Ex. B at 2.) As is evident from the discussion below, this discrepancy is immaterial to the Court's analysis of the merits of the Motion to Dismiss.

[**13] [*1147] **2. EPA's Issuance of TMDLs and Approval of State-submitted TMDLs**

One of the responsibilities of the Regional Board for the Los Angeles region (the "Los Angeles Regional Board") is to develop TMDLs under the CWA for waterbodies in Los Angeles and Ventura Counties. (Decl. of Dennis Dickerson in Supp. of EPA's Mot. to Dismiss (the "Dickerson Declaration") P2.) With few exceptions, TMDLs are developed as draft TMDLs by Los Angeles Regional Board staff and then submitted to the board to be adopted as amendments to the Los Angeles Regional Board's Water Quality Control Plan, which is known as the Basin Plan. (*Id.*) Basin Plan amendments are then submitted to the State Board, and then subsequently to the OAL; after they have been approved by both of these agencies, they are submitted to EPA. (*Id.*)

On September 19, 2001, the Los Angeles Regional Board adopted TMDLs for trash for the Los Angeles

River watershed. (*Id.* P3.) "Trash" was defined as man-made litter, as defined in California Government Code § 68055.1(g). (*Id.* Ex. A at 2). These TMDLs (the "State Trash TMDLs") were approved by the State Board on February 19, 2002, by OAL on July 16, 2002, and ultimately [**14] by EPA by letter dated August 1, 2002. (*Id.* P3, Ex. C; Second Am. Compl. for Injunctive & Declaratory Relief ("SAC") PP27, 30.) Prior to its approval of the State Trash TMDLs, however, EPA issued its own TMDLs for trash for the Los Angeles River Basin (the "EPA Trash TMDLs") on March 19, 2002. (SAC P26; Decl. of David W. Smith in Supp. of EPA's Mot. to Dismiss (the "Smith Declaration") Ex. B.) The EPA's August 1, 2002, letter approving the State Trash TMDLs announced that they "superseded" the EPA Trash TMDLs. (SAC P31; Smith Decl. P7, Ex. C.)

3. TMDLs Now in Effect and Implementation Provisions

Under the provisions of the TMDLs now in effect--the State Trash TMDLs--the numeric target is zero trash in the Los Angeles River. (Dickerson Decl. Ex. A at 16, 29.) Based on this target, California has determined that the wasteload allocations for trash in the Los Angeles River also must be zero. (*Id.*)

To achieve this goal, California has provided, along with the State Trash TMDLs, implementation provisions that specify a phasing-in of progressive reductions in municipal stormwater wasteload allocations over a ten-year period, following completion of a two-year initial [**15] baseline monitoring period. (*Id.* Ex. A at 21.) While the baseline monitoring program is taking place, cities will be deemed to be in compliance with the wasteload allocations provided that all of the trash that is collected during this period is disposed of in compliance with all applicable regulations. (*Id.* Ex. A at 27.) A baseline monitoring report is due to the Los Angeles Regional Board by February 15, 2004. (*Id.* P6.)⁶

6 Plaintiffs have filed Plaintiffs' Objections to Declarations of David W. Smith and Dennis Dickerson Offered by Defendants in Support of Defendants' Motion to Dismiss Second Amended Complaint ("Plaintiffs' Objections"). Plaintiffs' Objections challenge the admissibility of, *inter alia*, the statements in paragraph 6 of the Dickerson Declaration. The Court considers and resolves the objections to these statements in note 20, *infra*. Although Plaintiffs have objected to all

the statements in paragraph 6, careful review of the arguments advanced in these objections reveals that they are not in fact objecting to the statement in paragraph 6 that "the baseline monitoring report is due to the [Los Angeles] Regional Board by February 15, 2004." (Dickerson Decl. P6; *see* Pls.' Objections at 3-4.) To the extent that Plaintiffs are in fact objecting to this statement, however, the Court OVERRULES their objections to this statement for the reasons set forth in note 20, *infra*.

[**16] [**1148] The State Trash TMDLs and incremental wasteload allocations will be implemented through the Los Angeles stormwater permit, which the Los Angeles Regional Board will need to amend to incorporate specific, enforceable permit requirements. (*Id.* P8.)⁷ The implementation provisions in the TMDLs allow permittees to "employ a variety of strategies to meet the progressive reductions in their Waste Load Allocations" and maintain that they "are free to implement trash reduction in any manner they choose." (*Id.* Ex. A at 29.) The wasteload reduction strategies are broadly classified as either end-of-pipe full capture structural controls, partial capture control systems, and/or institutional controls. (*Id.*) The provisions state that permittees will be deemed to be in compliance with the final wasteload allocation for their associated drainage areas if they utilize "full capture systems" that are adequately sized and maintained and maintenance records are available for inspection by the Los Angeles Regional Board. (*Id.* Ex. A at 30.)

7 Under heading II.2 of Plaintiffs' Objections, Plaintiffs object to the statements in paragraph 8 of the Dickerson Declaration relating to the Los Angeles Regional Board's understanding of how the State Trash TMDLs will be implemented. (Pls.' Objections at 4.) All of the grounds on which Plaintiffs object are meritless. First, Plaintiffs contend that the statements are objectionable as "extra-record evidence." Such evidence, however, may be considered by the Court in connection with a motion to dismiss for lack of subject matter jurisdiction. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Since Defendants contend that Plaintiffs' challenges to the merits of EPA's approval of the State Trash TMDLs are unripe, and since the Court considers how these

TMDLs will be implemented at least in part for this purpose, this evidence is properly before the Court. Second, Plaintiffs contend that the statements constitute inadmissible hearsay. These statements, however, do not contain or even implicitly rely on any out-of-court statement by one other than Mr. Dickerson for the truth of the matter stated.

Third, Plaintiffs claim that the statements lack foundation, although they do not explain what they mean by this. To the extent Plaintiffs are asserting that the declarant lacks personal knowledge of the Los Angeles Regional Board's intentions, that assertion is refuted by the fact that Mr. Dickerson has been Executive Officer of the board since 1997. (Dickerson Decl. P1.) Fourth, Plaintiffs insist that "the statements are objectionable and inadmissible as the best evidence of the implementation requirements vis-a-vis the TMDLs, is set forth in the TMDLs themselves, as well as in the terms of other enforceable documents, documenting the actions taken by the [Los Angeles] Regional Board, such as the terms of the Municipal Storm Water Permit referenced in the declaration." (Pls.' Objections at 4.) This objection misunderstands the nature of the "best evidence" rule: that rule applies *only* where the witness attempts to testify as to the *contents of a writing, recording, or photograph*. See Fed. R. Evid. 1002. Such is not the case here. Moreover, this objection reflects a fundamental misunderstanding of the nature of TMDLs. TMDLs are *not* self-executing; they require the appropriate state to issue regulations implementing them. It is also not clear what Plaintiffs mean by their assertion that documents "documenting the actions taken by the Regional Board" constitute "enforceable documents." Finally, Plaintiffs assail the statements at issue as "not competent." (*Id.*) Plaintiffs do not explain what they mean by this objection. The Court thus disregards it. Accordingly, the Court **OVERRULES** the objections under Heading II.2 of Plaintiffs' Objections.

[**17] [*1149] **4. The Instant Action**

Plaintiffs filed their initial complaint on June 28, 2002, in the United States District Court for the Central

District of California. On August 30, 2002, they filed an amended complaint. On October 30, 2002, the case was transferred to this Court, the United States District Court for the Northern District of California. Pursuant to the parties' stipulation and the Court's Order thereon, Plaintiffs filed a Second Amended Complaint for Injunctive and Declaratory Relief (the "SAC" or "Complaint") on December 12, 2002.

The SAC is the operative complaint for purposes of the Motion to Dismiss and the Motion for Partial Summary Judgment. The SAC purports to assert three claims for relief. The First Claim for Relief is ostensibly brought pursuant to a provision of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706, (SAC at 34), although certain allegations thereunder also invoke the CWA, the Regulatory Flexibility Act (the "RFA"), and the Small Business Regulatory Enforcement Fairness Act of 1996 (the "SBREFA"), (*id.* PP84-85).⁸ The First Claim for Relief alleges several violations of the APA: (1) EPA acted without authority [**18] and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79); (2) EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (*id.* PP80, 83); (3) EPA acted arbitrarily and capriciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (*id.* PP81-82); (4) the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (*id.* PP84-86);⁹ and (5) EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance with the procedures of the CWA and California law, (*id.* P87).¹⁰ The Second Claim for Relief challenges [*1150] the validity of two alleged agency actions, the EPA Trash TMDLs and the "*de facto* TMDL procedure," under the APA, 5 U.S.C. § 551 *et seq.*; the [**19] RFA, 5 U.S.C. § 601 *et seq.*; and the SBREFA, 5 U.S.C. § 801 *et seq.* (SAC at 40; *id.* PP89-99.) The violations alleged under the Second Claim for Relief, however, appear to relate mostly to procedural requirements under the RFA and the SBREFA. (See *id.* PP91-93, 95-98 (invoking 5 U.S.C. §§ 601(5), 601(6), 603, 604(a), 604(b), 605(b), and 611).)¹¹ The Third Claim for Relief is derivative of the first two

claims. It seeks a declaration under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, as to which party's interpretation of the law is correct and a judicial determination of Plaintiffs' rights and duties. (*Id.* PP100-105.)

8 With respect to the First Claim for Relief, the SAC comes perilously close to violating Federal Rule of Civil Procedure 8(a)'s mandate of providing "a *short and plain* statement of the claim showing that the pleader is entitled to relief..." Fed. R. Civ. P. 8(a) (emphasis added). In particular, Plaintiffs' practice of indicating that the First Claim for Relief is based exclusively on the APA, (SAC at 34), yet at the same time claiming in the allegations thereunder that the actions at issue violate other statutes, (*id.* PP84-85), is confusing. Aside from potentially misleading Defendants as to the nature of the claims against them, it has required the Court to spend needless additional time and effort scrutinizing the allegations of the SAC because the Court cannot trust the accuracy of the headings of the SAC. The practice is especially reprehensible because the Court has already been forced to spend undue time and effort identifying and parsing out the five independent, discrete claims for relief that are set out in stream-of-consciousness fashion in the allegations underlying the "First Claim for Relief"--which heading necessarily suggests a *single* claim. *See infra*.

[**20]

9 This alleged *de facto* TMDL procedure is also claimed to violate the CWA, the RFA, and the SBREFA. (*Id.* PP84-85.)

10 Although not clearly stated, this last claim (claim (5)) within the First Claim for Relief appears to challenge the *merits* of EPA's approval of the State Trash TMDLs, as opposed to, for example, challenging EPA's authority to approve *any* state-submitted TMDLs after it issued the EPA Trash TMDLs, (*see id.* PP80, 83). Presumably, this last claim encompasses challenges to, for example, EPA's approval of the State Trash TMDLs where these TMDLs covered "unlisted" waters. (*See id.* PP42, 49, 62.) Defendants appear to have also construed this claim as challenging the merits of EPA's approval of the State Trash TMDLs, and they move to dismiss this claim as unripe. (*See Mot. to Dismiss*

at 20-24.) Plaintiffs appear to concur in Defendants' construction of this claim. (*See Pls.' Opp. Br.* at 16-20.) Accordingly, the Court construes this last claim as challenging the merits of EPA's approval of the State Trash TMDLs.

11 This is yet another example of Plaintiffs' objectionable drafting of the SAC. In particular, the paragraph alleging improper agency action supposedly giving rise to the Second Claim for Relief, paragraph 96, identifies four bases on which the CWA, the APA, the RFA, and the SBREFA were violated. (*Id.* P96.) Of these four bases, however, only the first (denoted reason "(a)") appears to have anything to do with the APA; the remaining three ("(b)," "(c)," and "(d)") appear to relate solely to provisions of the RFA and SBREFA, at least based on the allegations of the previous paragraphs under the heading "Second Claim for Relief." (*Id.*; *compare id.* (*e.g.*, alleging that EPA failed to perform an initial screening of the EPA Trash TMDLs to determine whether they would have a significant economic impact on a substantial number of small entities) *with id.* PP91-93, 95 (*e.g.*, alleging that RFA requires agencies to screen all proposed rules and identify whether such rules would have such an impact, (*id.* P92))).

The Court is thus left with the distinct impression that either Plaintiffs have been careless in drafting the Second Claim for Relief or they have invoked various statutes and inserted a number of allegations in scattershot fashion in the hope that something will slip by Defendants undetected and "stick." Aside from arguably violating Rule 8(a), this practice is unfair not only to Defendants, but also to the Court, because it makes the Court's resolution of Defendants' arguments considerably more difficult. (Nor is the Court interested in any supporting evidence or clarification from Plaintiffs' counsel regarding the nature of their claims that is not in the four corners of the SAC or incorporated therein by reference. The SAC speaks for itself on that score.) Based on its review of the SAC, the Court construes the allegations underlying the Second Claim for Relief as alleging violation of the APA, the RFA, and the SBREFA only with respect to EPA's alleged failure to provide Plaintiffs with notice and an opportunity for comment with

regard to the *de facto* TMDL procedure, discussed *infra*, and the establishment of the EPA Trash TMDLs; the Court construes them to allege violation of the RFA and the SBREFA, but not the APA, with regard to the remaining allegations under the heading of "Second Claim for Relief." (See SAC P96.)

[**21] On January 13, 2003, Defendants and Intervenor filed answers to the SAC. On that same day, Defendants also filed the instant Motion to Dismiss, which seeks dismissal of the entire action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Intervenor filed Intervenor's Notice in Support of Defendants' Motion to Dismiss on February 3, 2003, indicating in brief fashion that they agreed with the arguments in the Motion to Dismiss and therefore supported the motion. On March 10, 2003, Plaintiffs filed their Motion for Partial Summary Judgment.

Most of the plaintiffs in the instant action are currently plaintiffs in a California state court action against the Los Angeles Regional Board and the State Board challenging the legality of the State Trash TMDLs. (*Id.* P33.) Three other lawsuits have similarly been filed challenging either [*1151] California's establishment of the State Trash TMDLs or EPA's approval of the same. (*Id.*)

II. LEGAL STANDARD

A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) authorizes a party to seek dismissal of an action for lack of subject matter jurisdiction. "When subject matter jurisdiction is challenged under [**22] Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001). "A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment." *Id.* (quoting *Smith v. McCullough*, 270 U.S. 456, 459, 70 L. Ed. 682, 46 S. Ct. 338 (1926)). In adjudicating such a motion, the court is not limited to the pleadings, and may properly consider extrinsic evidence. See *Ass'n of Am. Med. Colleges v. United States*, 217

F.3d 770, 778 (9th Cir. 2000). The court presumes lack of jurisdiction until the plaintiff proves otherwise. See *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

B. Rule 12(b)(6)

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a claim. [**23] *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); accord *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). The complaint is construed in the light most favorable to the plaintiff, and all properly pleaded factual allegations are taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969); see also *Everest & Jennings, Inc. v. Am. Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). "Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro*, 250 F.3d at 731. In adjudicating a motion to dismiss, the court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). [**24]

When the complaint is dismissed for failure to state a claim, "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Leave to amend is properly denied "where the amendment would be futile." *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

III. DISCUSSION

Defendants have filed a Motion to Dismiss; Plaintiffs have filed a Motion for Partial Summary Judgment. The Motion for Partial Summary Judgment seeks adjudication of issues pertaining to Plaintiffs' challenge to the procedural legitimacy of the State Trash TMDLs. Because the Court grants the Motion to Dismiss (as discussed below), it does not reach the merits of the Motion for Partial Summary Judgment and therefore

denies it as moot. Accordingly, the following discussion pertains [*1152] only to the Motion to Dismiss, except where noted.

At the outset, the Court notes that it need not analyze all the arguments presented in Defendants' opening brief because Plaintiffs [**25] concede that certain of their claims are moot. In particular, Defendants contend in their opening brief for the Motion to Dismiss that the EPA Trash TMDLs no longer have any force or effect because EPA has announced that the State Trash TMDLs "supercede" the EPA Trash TMDLs; consequently, Defendants maintain, Plaintiffs' claims that EPA lacked authority to establish the EPA Trash TMDLs, (SAC P78-79), and that the procedures by which EPA established them were unlawful, (*id.* PP81-82, 90, 94, 96-97, 99), are moot. (Mot. to Dismiss at 12-15.) In their opposition brief, Plaintiffs express satisfaction with Defendants' assurances that the EPA Trash TMDLs are no longer (and can never be) in effect and therefore "withdraw their claims directly challenging the validity of EPA's TMDLs . . ." (Pls.' Opp. Br. at 4 n.6.) Defendants acknowledge this withdrawal in their reply brief. (Defs.' Reply Br. at 1.) As a result, the Court GRANTS the Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) with regard to claims (1) and (3) (SAC PP78-79 and SAC PP81-82, respectively) within the First Claim for Relief of the SAC identified in Part I.B.4 of this Order, *supra*. The Court [**26] also GRANTS the Motion to Dismiss pursuant to Rule 12(b)(1) with regard to the Second Claim for Relief of the SAC to the extent it challenges the validity of the EPA Trash TMDLs. (*See* SAC PP90, 94, 96-97, 99.) The Court now addresses the parties' arguments in relation to the remaining claims.

A. Challenge to EPA's Authority to Approve the State Trash TMDLs

Plaintiffs claim that EPA lacked authority to approve the State Trash TMDLs because it had already established the EPA Trash TMDLs. (SAC PP80, 83.) Defendants move to dismiss this claim pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (Mot. to Dismiss at 19-20.) Defendants contend that EPA in fact has a statutory *obligation* under 33 U.S.C. § 1313 to review any proposed TMDLs submitted by a state and either approve them or disapprove them. (*Id.*) Defendants assert that nothing in the CWA or otherwise divests EPA of jurisdiction to

approve a state-submitted TMDL once EPA has issued its own TMDLs, and in fact, recognizing such a principle would thwart Congressional intent to vest states with the primary responsibility of implementing the CWA's provisions. [**27] (*Id.* at 20.) Plaintiffs counter (in less than straightforward fashion) that by allowing California to submit the State Trash TMDLs to EPA after EPA established the EPA Trash TMDLs, EPA effectively "remanded" a "TMDL submission" to California, and EPA lacked authority to "remand" this submission and subsequently approve California's "resubmission." (*See* Pls.' Opp. Br. at 15-16.)¹²

12 Plaintiffs also argue that EPA lacked authority to approve the State Trash TMDLs because these TMDLs cover "unlisted" waters; according to Plaintiffs, EPA has authority only to approve TMDLs for "listed" waters. (*Id.* at 14-15.) As Defendants correctly point out, this argument goes to the merits of EPA's approval of the State Trash TMDLs, not to the issue of whether EPA had any authority to approve any state-submitted TMDLs after issuing its own TMDLs--the issue raised by this claim. (Defs.' Reply Br. at 10 n.9.) Plaintiffs' argument is relevant only to their own Motion for Partial Summary Judgment, not to the arguments raised in the Motion to Dismiss.

[**28] Plaintiffs' counterargument is meritless. No authority supports the conclusion that EPA lacks authority to approve [*1153] state-submitted TMDLs after EPA has established its own TMDLs, nor does this conclusion logically follow from the proposition that EPA is required to approve or disapprove a state-submitted TMDL within 30 days of submission. Moreover, as Defendants astutely note, recognizing such a principle "would lead to absurd results. Under this scenario, once EPA establishes a TMDL, the State could never update it or modify it based on changed circumstances." (Mot. to Dismiss at 20.) Finally, like Defendants, (*see* Defs.' Reply Br. at 10), the Court is at a loss to understand what Plaintiffs mean by their contention that EPA "remanded" the EPA Trash TMDLs to California for revision and resubmission. Nothing in the allegations of the Complaint remotely suggest any sort of sending back of TMDLs to California for revision or additional development. And even if there were such a "remand," it does not follow that EPA lacked authority to approve the State Trash TMDLs.

For these reasons, the Court GRANTS the Motion to Dismiss with respect to claim (2) within the First Claim for Relief, [**29] (SAC PP80, 83), *see supra* Part I.B.4. Additionally, it is evident that Plaintiffs cannot amend the SAC to allege facts sufficient to rehabilitate this claim because it is meritless as a matter of law. Accordingly, this claim is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE.

B. The "De_Facto TMDL Procedure"

Under claim (4) within their First Claim for Relief, *see supra* Part I.B.4, and the Second Claim for Relief, Plaintiffs challenge the "*de facto* TMDL procedure,"¹³ which they consider to consist of:

the establishment by the [Los Angeles] Regional Board of the TMDL, followed by the preparation and notice of the TMDL by USEPA, followed by the approval of the TMDL by the State Board, followed by the "establishment" by USEPA of the EPA TMDL, followed by the determination by USEPA to review and/or approve the subsequently submitted State TMDL, and to thereafter find the USEPA established TMDL is "superceded"

(SAC P85.) Plaintiffs assert that this procedure violates the APA, the RFA, and the SBREFA. (*Id.* PP84-85, 96-98.) Plaintiffs allege not only that they have previously suffered from the effectuation of the *de facto* [**30] TMDL procedure, but also that they will suffer from the effectuation of the procedure in the future. (*See id.* PP84-86.)

13 Plaintiffs do not expressly use the phrase "*de facto* TMDL procedure" in the SAC. Instead, they refer to this procedure as the "TMDL Procedure" and contend that EPA has effected a "*de facto* adoption" of the "TMDL Procedure." (SAC P85.) For ease of reference, the Court will refer to what Plaintiffs call the "TMDL Procedure" as the "*de facto* TMDL procedure."

Defendants move to dismiss these claims by pointing out that the APA and the RFA, which was amended by the SBREFA, permit challenges *only* to "final agency action." (Mot. to Dismiss at 16-19.)¹⁴ They explain that the APA defines "agency action" to include "the whole or

a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." (*Id.* at 16 (quoting 5 U.S.C. § 551(13).) (They do not indicate whether this definition applies to the RFA and [**31] SBREFA as well.) Defendants assert that what Plaintiffs characterize as a *de* [**1154] *facto* TMDL procedure is not an "agency action," much less a final agency action, but in fact a sequence of events; as such, they maintain, the procedure cannot give rise to a challenge under the APA or under the RFA, as amended by the SBREFA.

14 Defendants also contend that the RFA, as amended by the SBREFA, provides a narrow and exclusive means of judicial review that is not available here due to the nature of Plaintiffs' challenge to the *de facto* TMDL procedure. (*See id.* at 16.)

Plaintiffs respond to Defendants' arguments somewhat curiously. Despite vehemently asserting that Defendants' arguments are incorrect, they do not dispute that a challenge will lie only to final agency action. Instead, they contend that the *de facto* TMDL procedure "led up to and resulted in 'final agency action,'" (Pls.' Opp. Br. at 22), namely the August 1, 2002, approval of the State Trash TMDLs. Plaintiffs also argue at great length that [**32] their challenge to this procedure is not moot because it falls under the "capable of repetition, yet evading review" exception to the mootness doctrine. (*Id.* at 22-25.)

Defendants' arguments are persuasive, and Plaintiffs' responses are both unconvincing and nonresponsive. As Defendants correctly note, (*see* Defs.' Reply Br. at 4-5), Plaintiffs' suggestion that they are challenging EPA's approval of the State Trash TMDLs, as opposed to the so-called "TMDL procedure," is belied by the allegations of the SAC: by their plain language, the allegations of paragraphs 84 through 86 and paragraphs 96 through 98 challenge the "TMDL procedure," (SAC 84-86, 96-98); Plaintiffs' challenge to EPA's approval of the State Trash TMDLs is set out in paragraph 87, (*see id.* P87), the justiciability of which challenge is discussed in Part III.C of this Order, *infra*. Plaintiffs do not demonstrate how the "procedure" is "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act" or falls within any other definition, statutory or otherwise, of final agency action. 15 Indeed, as Defendants also correctly note, (*see* [**33] Defs.' Reply Br. at 4-5), Plaintiffs' assertion that the

TMDL procedure *consummated in* final agency action, namely EPA's approval of the State Trash TMDLs, is an implicit admission that the "procedure" itself is not final agency action. Nor do Plaintiffs make any effort to distinguish or refute any of the authorities cited by Defendants in support of their arguments. Finally, as Defendants yet again correctly point out, Plaintiffs' mootness argument is nonresponsive because Defendants do not contend that this claim is moot. (*Id.* at 8.)¹⁶

15 Even though the Court has not been able to locate a statutory definition of "agency action" for purposes of the RFA and SBREFA, Plaintiffs have put forward no argument to suggest that it should be given a meaning substantially different than that provided in the APA. The Court sees no reason to conclude that "agency action" should be given a significantly more expansive definition than that provided for purposes of the APA.

16 Plaintiffs do not respond to Defendants' argument that judicial review is unavailable under the RFA, as amended by the SBREFA, for alleged violations of 5 U.S.C. § 603. (Mot. to Dismiss at 18.) The Court agrees with Defendants that the implication of this lack of response is that any opposition to this argument is waived. (*See* Defs.' Reply Br. at 3-4.) The Court disagrees with Defendants, however, that Plaintiffs have failed to respond to Defendants' arguments that the *de facto* TMDL procedure does not constitute "final agency action" under the RFA, as amended by the SBREFA; but the Court finds their response to this argument meritless for the reasons stated above.

[**34] In sum, it is apparent that the alleged *de facto* TMDL procedure, consisting of the various events identified in paragraph 85 of the SAC, is not subject to challenge under the APA, RFA, or SBREFA because it is not final agency action within the meaning of those statutes. *Cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990) (rejecting challenge to alleged land withdrawal [*1155] review program on grounds that alleged program was not final agency action within meaning of APA). Accordingly, the Court GRANTS Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) with respect to claim (4) within the First Claim for Relief, (SAC PP84-86). The Court also GRANTS Defendants' motion pursuant to Rule 12(b)(6) with regard to the Second

Claim for Relief. Given that the Second Claim for Relief challenges the validity of the EPA Trash TMDLs and the alleged *de facto* TMDL procedure alone, and given that Plaintiffs have withdrawn their challenge to the validity of the EPA Trash TMDLs, the Second Claim for Relief is now dismissed in its entirety.

It is further evident that Plaintiffs cannot amend the SAC to allege [**35] facts sufficient to rehabilitate these claims because they are not actionable as a matter of law. Accordingly, both claim (4) within the First Claim for Relief and the Second Claim for Relief are DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE.

C. Ripeness of Plaintiffs' Challenge to EPA's Approval of State Trash TMDLs

Plaintiffs' remaining claim (aside from the Third Claim for Relief, which is dependent on the First and Second Claims for Relief) challenges the merits of EPA's approval of the State Trash TMDLs. (*See id.* P87.) Defendants move to dismiss this claim as unripe for judicial review. Specifically, Defendants contend that the issues are not yet sufficiently developed to be fit for judicial review under the APA because Plaintiffs' existing NPDES permit imposes no obligations on Plaintiffs in connection with the State Trash TMDLs and because the Los Angeles Regional Board intends to revisit these TMDLs at the end of the monitoring period. (Mot. to Dismiss at 21-23.) Defendants further contend that Plaintiffs will not suffer any immediate hardship if review is withheld because EPA's approval of the State Trash TMDLs imposes no present, affirmative duties on [**36] Plaintiffs and requires no immediate changes in Plaintiffs' conduct. (*Id.* at 23-24.)

Plaintiffs respond by arguing that they have suffered "injury in fact," both economic and non-economic. (Pls.' Opp. Br. at 16-17.) Citing to the text of the State Trash TMDLs, a copy of which is appended to the Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss (the "Montevideo Declaration") as Exhibit 3, Plaintiffs claim that they are impacted by these TMDLs:

By the terms of the TMDL itself, most Plaintiffs are directly impacted by its terms and presently have express monitoring obligations to comply with,

not to mention pending compliance dates requiring annual reductions in trash. Moreover, the TMDL calls out very specific and expensive implementation measures, including possible implementation through full capture vortex systems totaling \$ 109.3 million for all affected entities within the County [of Los Angeles] by the end of Year 1, and a total of \$ 2,053,100,000 for the first 12 years of implementation. Even the Trash TMDL itself concludes that "Trash abatement in the Los Angeles [**37] River system may be expensive."

(Pls.' Opp. Br. at 18 (citing Montevideo Decl., Ex. 3 (State Trash TMDLs)) (internal citations and emphasis omitted).) Similarly, Plaintiffs maintain that "to come into compliance by the Compliance Dates, [they] must begin employing strategies now to meet the progressive reductions in Waste Load Allocations required by the State Trash TMDL[s]." (*Id.* at 19.) [*1156] Plaintiffs further allege that the NPDES permit that applies to all of Plaintiffs provides that the State Trash TMDLs are "effective and enforceable." (*Id.* at 18 (citing Montevideo Decl., Ex. 5, at 10 P14).) Citing paragraph 36 of the SAC, they also contend that they have suffered from the TMDLs' being in effect because they are exposed to "unwarranted enforcement action and third party citizen suits." (*Id.*) Finally, Plaintiffs contend that they have suffered "procedural injuries," to wit, their being "forced to submit comments to two different levels of government (the State of California and the EPA) on two sets of TMDL over a series of many months and several hearings." (*Id.* at 20.)

Defendants dispute all of Plaintiffs' arguments in their reply. Defendants note that [**38] "Plaintiffs point to no present effect of the TMDLs on their day-to-day conduct." (Defs.' Reply Br. at 12.) They point out that, contrary to Plaintiffs' contention, Plaintiffs in fact have no monitoring obligations with which to comply because the Los Angeles County Department of Public Works has assumed that responsibility for all of Plaintiffs. (*Id.*) Defendants clarify that the first compliance date under the TMDLs is not until 2006, and the TMDLs identify several potential compliance options without mandating the use of any particular measure. (*Id.*) They further note that Plaintiffs fail to respond to the record evidence that the Los Angeles Regional Board will revisit the TMDLs

at the conclusion of the monitoring period, that is, prior to the first compliance deadline, and that such reconsideration has been considered a rational basis for delaying judicial review. (*Id.* at 13 (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998), and *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1323 (9th Cir. 1992)).) Finally, Defendants assail Plaintiffs' reliance on the aforementioned [**39] statement in Plaintiffs' NPDES permit because this statement does not establish that the State Trash TMDLs are effective or enforceable against *Plaintiffs*. (*Id.*)

The "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18, 125 L. Ed. 2d 38, 113 S. Ct. 2485 (1993). Unripe claims are subject to dismissal for lack of subject matter jurisdiction. *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 784 n.9 (9th Cir. 2000). In determining whether a case is ripe for review, a court must consider two main issues: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). To address these issues in the context of a challenge to the lawfulness of administrative action, the Supreme Court has identified three factors to consider: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further [**40] administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998).

In light of these three factors, the Court finds this claim unripe for review. First, delayed review would cause, at most, minimal hardship to the parties. Indeed, Plaintiffs have not demonstrated that they will suffer *any* hardship if review is delayed. Despite their preoccupation with various official pronouncements that the State Trash TMDLs are "effective" and "enforceable," Plaintiffs cannot point to a single future event or condition that is fairly certain to occur and will adversely [*1157] impact *Plaintiffs* themselves.¹⁷ That is because the TMDLs do not presently impose any obligations on Plaintiffs and because they are subject to revision before such obligations will be imposed. Nor do Plaintiffs provide

any evidence or explanation whatever of the "unwarranted enforcement action and third party citizen suits" to which they claim to be exposed.

17 The Court notes parenthetically that Plaintiffs' invocation of "injury in fact" in their opposition brief, (Pls.' Opp. Br. at 16-17), is inapposite. Injury-in-fact is a concept that relates to the issue of standing, not ripeness. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Plaintiffs appear to confuse Defendants' arguments as relating to standing, not ripeness. (Pls.' Opp. Br. at 20 ("Federal courts have long recognized procedural injuries, as well as actual injuries, as an alternative basis for standing.")) Nevertheless, the Court construes Plaintiffs' allegations of "injury in fact" as allegations of hardship.

[**41] Equally unsupported is Plaintiffs' contention that they will bear economic costs in complying with the State Trash TMDLs. The sole evidentiary basis of this allegation, set out in paragraph 35 of the SAC and discussed more thoroughly in Plaintiffs' Opposition, is the estimates provided in the text of the TMDLs themselves. (*See* SAC P35; Pls.' Opp. Br. at 18.) But this matter is inadmissible hearsay because it is offered by an out-of-court declarant, *i.e.*, the Los Angeles Regional Board, for the truth of the matter stated, *i.e.*, that the TMDLs will in fact impose these costs.¹⁸ Yet even if this evidence were admissible, it would be insufficient to support Plaintiffs' contention that they will suffer economic injury: the cited portions of the State Trash TMDLs provide estimates of costs to be borne by "permittees"; there is no indication that these costs will be borne by *Plaintiffs* in particular. (*See* Montevideo Decl., Ex. 3, at 37, 40, *cited in* Pls.' Opp. Br. at 18.) Similarly, Plaintiffs provide no evidentiary support for the bald contention in their opposition brief that *Plaintiffs* must begin employing "strategies" now to meet the progressive reductions [**42] in wasteload allocations required by the State Trash TMDLs. (Pls.' Opp. Br. at 19.)

18 The author of the State Trash TMDLs appears to be the Los Angeles Regional Board. (*See* Montevideo Decl., Ex. 3.) Since the Los Angeles Regional Board is an entity created by state law and is subordinate to a state agency, the State Board, the text of the State Trash TMDLs is

arguably ascribable to the State Board and the state of California as well.

But these statements cannot be attributed to EPA by virtue of its approval of the State Trash TMDLs. Plaintiffs have laid no legal or evidentiary foundation tending to show that EPA's mere approval of the *TMDLs themselves* implies that EPA further agreed with or endorsed as accurate California's estimates of the costs of compliance provided with those TMDLs.

Even if Plaintiffs will be forced to comply with obligations imposed by the State Trash TMDLs and will suffer costs therefrom, the first Compliance Point is not until Year 3 of the implementation period, which runs [**43] from October 1, 2005, to September 30, 2006. (*See* Montevideo Decl., Ex. 3, at 28.) Thus, as a practical matter, Plaintiffs have three years to reach the specified Compliance Point. They have "ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n*, 523 U.S. at 734. Accordingly, Plaintiffs cannot be heard to complain that they will suffer hardship if review is withheld at the present time.¹⁹

19 To the extent that Plaintiffs identify past events that are not alleged to recur in the future, such as Plaintiffs' allegedly having to submit comments to two levels of government, for the purpose of demonstrating hardship, those events are irrelevant because Plaintiffs are solely seeking *prospective* relief (aside from attorney's fees and costs of suit).

[*1158] Second, judicial intervention would likely interfere with further administrative action on the part of the state of California. Plaintiffs have not refuted Defendants' [**44] evidence that the Los Angeles Regional Board will be revisiting the State Trash TMDLs at the end of the monitoring period.²⁰ It is thus possible that the compliance [*1159] dates or compliance points will be altered or abolished altogether. The State Board may submit new TMDLs to EPA for review and potential approval well before the compliance dates in the State Trash TMDLs. And even if the State Trash TMDLs remain mostly intact, it is certainly possible that the State Board will approve additional regulations that alleviate much of the burden on Plaintiffs. Again, Plaintiffs must bear in mind that it is the state of California, not the federal government, that is charged with implementing

the State Trash TMDLs.

20 Plaintiffs' Objections challenge the admissibility of, *inter alia*, the portion of Defendants' evidence tending to show that the Los Angeles Regional Board will be revisiting the State Trash TMDLs at the end of the monitoring period, namely relevant statements in paragraphs 6 and 12 of the Dickerson Declaration. (The statements in paragraph 7 of the Dickerson Declaration and Exhibit C thereto also constitute such evidence, (*see* Mot. to Dismiss at 22), although Plaintiffs do not object to those statements.)

Plaintiffs challenge the statements in paragraph 6 of the Dickerson Declaration on five grounds. First, Plaintiffs contend that these statements are irrelevant "to the issue in question." (Pls.' Objections at 3.) The Court is unclear about what Plaintiffs mean by "the issue in question," but at any rate, the Court overrules this objection because these statements are indeed relevant to an important issue relating to ripeness: whether the Los Angeles Regional Board will revisit the State Trash TMDLs at the end of the monitoring period. Second, Plaintiffs assert that the statements are inadmissible hearsay because they seek "to introduce statements from parties other than the declarant, into evidence." (*Id.*) This argument fails because the statements are not offered for the truth of the matter stated by persons or parties other than Mr. Dickerson. That the Los Angeles Regional Board's *discussed* (*i.e.*, verbally articulated) the possibility of reopening the TMDLs in the future does not implicate hearsay concerns, *see United States v. Ballis*, 28 F.3d 1399, 1405 (5th Cir. 1994); and the board's orders to its staff are more akin to written or verbal acts.

Third, Plaintiffs assail the statements as "incompetent" because "the opinions and views of individual Regional Board members is [*sic*] not relevant or admissible evidence of the actions or positions of the entire Board." (Pls.' Objections at 3 (emphasis omitted).) But nowhere are the "opinions and views" of the individual Regional Board members set out in the statements in paragraph 6. Fourth, Plaintiffs claim that these

statements are "not the best evidence of the position of the entire Regional Board, as the views and positions of an entire Board can only be discerned from the meeting minutes and resolutions which confirm the actions of the public body." (*Id.* (emphasis omitted).) But the "views and positions" of the board are not set out therein. Fifth, Plaintiffs argue that the statements should be excluded as "extra-record evidence." This objection is meritless because the statements are relevant to the ripeness of Plaintiffs' challenge to EPA's approval of the State Trash TMDLs, and the Court may appropriately look beyond the pleadings in evaluating a motion to dismiss pursuant to Rule 12(b)(1).

In sum, Plaintiffs appear to have construed the statements in paragraph 6 of the Dickerson Declaration as stating that the Los Angeles Regional Board intends to *revise* the State Trash TMDLs after completion of the monitoring period, and they have evidently made their objections with this understanding in mind. Careful review of these statements reveals, however, that these statements demonstrate only that board staff have been ordered to report on the TMDLs and make recommendations on whether or not to revise the TMDLs based on the result of the monitoring. Thus, the import of the statements in paragraph 6 is that *the board will be in a position to revisit, and potentially reconsider, the TMDLs at the end of the monitoring period*, not that they have actually decided to revise the TMDLs. Accordingly, and for the reasons stated above, the Court **OVERRULES** the objections under heading II.1 in Plaintiffs' Objections.

Although Plaintiffs have objected to the admissibility of the statements in paragraph 12 of the Dickerson Declaration, the Court does not rely on those statements in evaluating issues of ripeness. The Court finds that the statements in paragraphs 6 and 7 of the Dickerson Declaration are sufficient to support a conclusion that the Los Angeles Regional Board will be revisiting--which is not to be confused with an intent to revise--the State Trash TMDLs at the end of the monitoring period. Accordingly, the Court **OVERRULES AS MOOT** the objections under heading II.5 in Plaintiffs' Objections.

Finally, the Court has reviewed the remaining objections in Plaintiffs' Objections. The Court does not rely on any of the matter to which Plaintiffs have objected other than those under headings II.1 and II.2 in evaluating the Motion to Dismiss. Accordingly, the Court **OVERRULES AS MOOT** the remaining objections in Plaintiffs' Objections.

[**45] Finally, the Court would benefit from further factual development of the issues presented. For example, Plaintiffs allege that in approving the State Trash TMDLs, EPA failed "to use 'best science' and [failed] to carefully consider suggestions on how to structure the TMDL program to be more effective and flexible to ensure workable solutions, with such failure resulting in an inequitable share of the burden [of pollution reduction] being placed on municipalities, such as Plaintiffs herein, to attain water quality standards." (SAC P47.) Since TMDLs are not self-executing, but require issuance of state regulations for implementation, delaying review will enable the Court to determine more easily and accurately whether the TMDL program could in fact have been structured more flexibly and whether Plaintiffs are bearing an inequitable share of the burden of pollution reduction.

In light of the Court's evaluation of the foregoing three factors, the Court concludes that Plaintiffs' claim is unripe for judicial review. Accordingly, Plaintiffs' claim (5) within the First Claim for Relief, (*id.* P87), is **DISMISSED** pursuant to Rule 12(b)(1) due to the Court's lack of subject matter jurisdiction. [**46] Since the Court lacks jurisdiction over this claim, it lacks authority to grant Plaintiffs leave to amend the claim; accordingly, the claim is dismissed **WITHOUT LEAVE TO AMEND** in this action. Finally, because the Court necessarily does not reach the merits of the claim, the dismissal is **WITHOUT PREJUDICE**.

D. Third Claim for Relief

Plaintiffs' Third Claim for Relief is wholly predicated on their first two claims for relief. Because these two claims for relief are dismissed, the Third Claim for Relief is **DISMISSED** on the same bases, and to the same extent, as the two claims (and sub-claims thereunder) are dismissed.

E. Motion for Partial Summary Judgment

Plaintiffs' Motion for Partial Summary Judgment seeks summary judgment in Plaintiffs' favor on the issues of (1) whether Defendants had authority and jurisdiction to approve the State Trash TMDLs to the extent that they covered unlisted waters and (2) whether Defendants had authority and jurisdiction to approve the State Trash TMDLs given that they had previously established the EPA Trash TMDLs. For the reasons stated above, the Court grants the Motion to Dismiss. Accordingly, the Motion for Partial Summary Judgment [**47] is **DENIED AS MOOT**. For the same reason, the Court **OVERRULES AS MOOT** Intervenor's Evidentiary Objections to Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss ²¹ and Plaintiffs' Objections to [*1160] Declaration of Anjali I. Jaiswal and Exhibits.

21 Although the Montevideo Declaration relates both to Plaintiffs' opposition to the Motion to Dismiss and to Plaintiffs' Motion for Partial Summary Judgment, Intervenor's objections to the Montevideo Declaration are made in connection with their opposition to the Motion for Partial Summary Judgment. Accordingly, the Court considers their objections solely for that purpose.

IV. CONCLUSION

Plaintiffs have no reason or right to be before this Court, at least at this time. All of their claims are moot, meritless, or unripe. Plaintiffs' challenges to the EPA Trash TMDLs were quite obviously mooted out the minute that EPA approved the State Trash TMDLs. Indeed, given [**48] that Plaintiffs readily withdrew these challenges based solely on Defendants' representations in their moving papers that the EPA Trash TMDLs are void, (Pls.' Opp. Br. at 4 n.6), the Court wonders why Plaintiffs proceeded to file a lawsuit on this basis. Plaintiffs' challenge to EPA's authority to approve the State Trash TMDLs following its establishment of the EPA Trash TMDLs and their challenge to the "*de facto* TMDL procedure" are so patently meritless that the Court fails to understand why Plaintiffs decided to assert these claims in the first place. Finally, Plaintiffs' challenges to the "merits" of the State Trash TMDLs may very well be valid, but in the absence of any indication that they will suffer imminent hardship, these claims are premature.

The Court does not suggest by any means that Plaintiffs have acted in bad faith by continuing to

prosecute this action after EPA approved the State Trash TMDLs. But after receiving Defendants' opening brief for their Motion to Dismiss, Plaintiffs should have recognized that their claims could not be maintained at present, if at all. The arguments in their opposition brief appear to reflect more of a "win at all costs" approach than [**49] considered judgment. And while the Court does not doubt that Plaintiffs would appreciate a judicial declaration as to the validity of the State Trash TMDLs, the Court lacks jurisdiction to grant such relief where Plaintiffs are not in jeopardy of imminent harm and future events could obviate the controversy.

Accordingly,

IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss Second Amended Complaint [Docket No. 18] is GRANTED, such that:

a. The First Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED, as follows:

i. The claim that EPA acted without authority and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79), is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

ii. The claim that EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (SAC PP80, 83), is DISMISSED

WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief [**50] can be granted;

iii. The claim that EPA acted arbitrarily and capriciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (SAC PP81-82), is DISMISSED WITHOUT LEAVE TO AMEND and [*1161] WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

iv. The claim that the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (SAC PP84-86), is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief can be granted;

v. The claim that EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance with the procedures of the CWA and California law, (SAC P87), is DISMISSED WITHOUT

LEAVE TO AMEND in this action and WITHOUT PREJUDICE as unripe and, thus, for lack of subject matter jurisdiction;

b. The Second Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED, as [**51] follows:

i. To the extent the Second Claim for Relief challenges the validity of the EPA Trash TMDLs, the claim is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE as moot and, thus, for lack of subject matter jurisdiction;

ii. To the extent the Second Claim for Relief challenges the validity of the alleged *de facto* TMDL procedure, the claim is DISMISSED WITHOUT LEAVE TO AMEND and WITH PREJUDICE for failure to state a claim upon which relief can be granted;

c. The Third Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED on the same bases, and to the same extent, as the First and Second Claims for Relief are dismissed, given that the Third Claim for Relief is derivative of the first two claims.

2. Plaintiffs' Motion for Summary Adjudication of Issues [Docket No. 28] is

DENIED AS MOOT.

3. Plaintiffs' Objections to Declarations of David W. Smith and Dennis Dickerson Offered by Defendants in Support of Defendants' Motion to Dismiss Second Amended Complaint [Docket No. 31] are OVERRULED on the merits with respect to the objections under headings II.1 and II.2 therein and OVERRULED AS MOOT with respect [**52] to all remaining objections.

4. Intervenors' Evidentiary Objections to Declaration of Richard Montevideo in Support of Plaintiffs' Motion for Summary Adjudication of Issues, and in Opposition to Defendants' Motion to Dismiss [Docket No. 43] are OVERRULED AS MOOT.

5. Plaintiffs' Objections to Declaration of Anjali I. Jaiswal and Exhibits [Docket No. 47] are OVERRULED AS MOOT.

IT IS FURTHER ORDERED THAT this action is DISMISSED in its entirety. The Clerk shall enter judgment in favor of defendants accordingly. All deadlines and events presently calendared are VACATED. [*1162] The Clerk shall close the file and terminate any pending matters.

IT IS SO ORDERED.

Dated: May 16, 2003

SAUNDRA BROWN ARMSTRONG

United States District Judge

JUDGMENT

In accordance with the Court's Order Granting Defendants' Motion to Dismiss, Denying as Moot Plaintiffs' Motion for Partial Summary Judgment, and Dismissing Action,

IT IS HEREBY ORDERED THAT judgment is entered in favor of defendants and defendants-intervenors, and against plaintiffs, on all of plaintiffs' claims for relief as follows:

1. The First Claim for Relief in the Second Amended Complaint for Injunctive and [**53] Declaratory Relief ("SAC") is DISMISSED, such that:

a. The claim that EPA acted without authority and acted arbitrarily and capriciously by establishing the EPA Trash TMDLs prior to receiving for review the State Trash TMDLs, (SAC PP78-79), is DISMISSED WITH PREJUDICE;

b. The claim that EPA acted without authority and arbitrarily and capriciously by reviewing and approving the State Trash TMDLs because EPA had already established the EPA Trash TMDLs, (SAC PP80, 83), is DISMISSED WITH PREJUDICE;

c. The claim that EPA acted arbitrarily and capriciously and in excess of its jurisdiction with regard to the manner by which it established the EPA Trash TMDLs, (SAC PP81-82), is DISMISSED WITH PREJUDICE;

d. The claim that the collective actions of California and EPA relating to issuance of the EPA Trash TMDLs and subsequent approval of the

State Trash TMDLs constitute a "*de facto* TMDL procedure" that is arbitrary, capricious, and contrary to law, (SAC PP84-86), is DISMISSED WITH PREJUDICE;

e. The claim that EPA acted arbitrarily and capriciously by approving the State Trash TMDLs because those TMDLs were "patently defective" and established not in accordance [**54] with the procedures of the CWA and California law, (SAC P87), is DISMISSED WITHOUT PREJUDICE;

2. The Second Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED WITH PREJUDICE in its entirety; and

3. The Third Claim for Relief in the Second Amended Complaint for Injunctive and Declaratory Relief is DISMISSED to the same extent as the First and Second Claims for Relief are dismissed.

IT IS SO ORDERED.

Dated: May 16, 2003

SAUNDRA BROWN ARMSTRONG

United States District Judge

VOLUME III
TAB 3

LEXSEE

DEFENDERS OF WILDLIFE and THE SIERRA CLUB, Petitioners, v. CAROL M. BROWNER, in her official capacity as Administrator of the United States Environmental Protection Agency, Respondent. CITY OF TEMPE, ARIZONA; CITY OF TUCSON, ARIZONA; CITY OF MESA, ARIZONA; PIMA COUNTY, ARIZONA; and CITY OF PHOENIX, ARIZONA, Intervenors-Respondents.

No. 98-71080

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

191 F.3d 1159; 1999 U.S. App. LEXIS 22212; 99 Cal. Daily Op. Service 7618; 99 Daily Journal DAR 9661; 30 ELR 20116

**August 11, 1999, Argued and Submitted, San Francisco, California
September 15, 1999, Filed**

SUBSEQUENT HISTORY: [**1] As Amended **OPINION**
December 7, 1999.

PRIOR HISTORY: Petition to Review a Decision of
the Environmental Protection Agency. EPA No. 97-3.

DISPOSITION: PETITION DENIED.

COUNSEL: Jennifer Anderson and David Baron,
Arizona Center for Law in the Public Interest, Phoenix,
Arizona, for the petitioners.

Alan Greenberg, Attorney, U.S. Department of Justice,
Environment & Natural Resources Division, Denver,
Colorado, for the respondent.

Craig Reece, Phoenix City Attorney's Office, Phoenix,
Arizona; Stephen J. Burg, Mesa City Attorney's Office,
Mesa, Arizona; Timothy Harrison, Tucson City
Attorney's Office, Tucson, Arizona; and Harlan C.
Agnew, Deputy County Attorney, Tucson, Arizona, for
the intervenors-respondents.

David Burchmore, Squire, Sanders & Dempsey,
Cleveland, Ohio, for the amici curiae.

JUDGES: Before: John T. Noonan, David R. Thompson,
and Susan P. Graber, Circuit Judges. Opinion by Judge
Graber.

OPINION BY: SUSAN P. GRABER

[*1161] AMENDED OPINION

GRABER, Circuit Judge:

Petitioners challenge the Environmental Protection Agency's (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits to five municipalities, for their separate storm sewers, without requiring numeric limitations [**2] to ensure compliance with state water-quality standards. Petitioners sought administrative review of the decision within the EPA, which the Environmental Appeals Board (EAB) denied. This timely petition for review ensued. For the reasons that follow, we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Title 26 U.S.C. § 1342(a)(1) authorizes the EPA to issue NPDES permits, thereby allowing entities to discharge some pollutants. In 1992 and 1993, the cities of Tempe, Tucson, Mesa, and Phoenix, Arizona, and Pima County, Arizona (Intervenors), submitted applications for NPDES permits. The EPA prepared draft permits for public comment; those draft permits did not attempt to ensure compliance with Arizona's water-quality standards.

Petitioner Defenders of Wildlife objected to the permits, arguing that they must contain numeric limitations to ensure strict compliance with state

water-quality standards. The State of Arizona also objected.

Thereafter, the EPA added new requirements:

To ensure that the permittee's activities achieve timely compliance with applicable water quality standards (Arizona Administrative Code, Title 18, Chapter 11, Article 1), the [**3] permittee shall implement the [Storm Water Management Program], monitoring, reporting and other requirements of this permit in accordance with the time frames established in the [Storm Water Management Program] referenced in Part I.A.2, and elsewhere in the permit. This timely implementation of the requirements of this permit shall constitute a schedule of compliance authorized by Arizona Administrative Code, section R18-11-121(C).

The Storm Water Management Program included a number of structural environmental controls, such as storm-water detention basins, retention basins, and infiltration ponds. It also included programs to remove illegal discharges.

With the inclusion of those "best management practices," the EPA determined that the permits ensured compliance with state water-quality standards. The Arizona Department of Environmental Quality agreed:

The Department has reviewed the referenced municipal NPDES storm-water permit pursuant to Section 401 of the Federal Clean Water Act to ensure compliance with State water quality standards. We have determined that, based on the information provided in the permit, and the fact sheet, adherence to provisions and [**4] requirements set forth in the final municipal permit, will protect the water quality of the receiving water.

On February 14, 1997, the EPA issued final NPDES permits to Intervenor. Within 30 days of that decision, Petitioners requested an evidentiary hearing with the regional administrator. *See* 40 C.F.R. § 124.74. Although

Petitioners requested a hearing, they conceded that they raised only a legal issue and that a hearing was, in fact, unnecessary. Specifically, Petitioners raised only the legal question whether the Clean Water Act (CWA) requires numeric limitations to ensure strict compliance with state water-quality standards; they did not raise the factual question whether the management practices that the EPA chose would be effective.

[*1162] On June 16, 1997, the regional administrator summarily denied Petitioners' request. Petitioners then filed a petition for review with the EAB. *See* 40 C.F.R. § 124.91(a). On May 21, 1998, the EAB denied the petition, holding that the permits need not contain numeric limitations to ensure strict compliance with state water-quality standards. Petitioners then moved for reconsideration, *see* 40 C.F.R. § 124.91(i), which the EAB denied.

[**5] JURISDICTION

Title 33 U.S.C. § 1369(b)(1)(F) authorizes "any interested person" to seek review in this court of an EPA decision "issuing or denying any permit under section 1342 of this title." "Any interested person" means any person that satisfies the injury-in-fact requirement for Article III standing. *See Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992) [*NRDC II*]. It is undisputed that Petitioners satisfy that requirement. Petitioners allege that "members of Defenders and the Club use and enjoy ecosystems affected by storm water discharges and sources thereof governed by the above-referenced permits," and no other party disputes those facts. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565-66, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity."); *see also NRDC II*, 966 F.2d at 1297 ("NRDC claims, inter alia, that [the] EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water [**6] contaminants. NRDC's allegations . . . satisfy the broad standing requirement applicable here.").

Intervenors argue, however, that they were not parties when this action was filed and that this court cannot redress Petitioners' injury without them. Their real contention appears to be that they are indispensable parties under Federal Rule of Civil Procedure 19. We need not consider that contention, however, because in

fact Intervenor have been permitted to intervene in this action and to present their position fully. In the circumstances, Intervenor have suffered no injury.

DISCUSSION

A. *Standard of Review*

The Administrative Procedures Act (APA), 5 U.S.C. §§ 701-06, provides our standard of review for the EPA's decision to issue a permit. *See American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). Under the APA, we generally review such a decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

On questions of statutory interpretation, we follow the approach from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). [**7] *See NRDC II*, 966 F.2d at 1297 (so holding). In *Chevron*, 467 U.S. at 842-44, the Supreme Court devised a two-step process for reviewing an administrative agency's interpretation of a statute that it administers. *See also Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1452 (9th Cir. 1996) ("The Supreme Court has established a two-step process for reviewing an agency's construction of a statute it administers."). Under the first step, we employ "traditional tools of statutory construction" to determine whether Congress has expressed its intent unambiguously on the question before the court. *Chevron*, 467 U.S. at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43 (footnote omitted). If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. *See id.* at 843. At step two, we must uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

[**8] [*1163] B. *Background*

The CWA generally prohibits the "discharge of any pollutant," 33 U.S.C. § 1311(a), from a "point source" into the navigable waters of the United States. *See* 33 U.S.C. § 1362(12)(A). An entity can, however, obtain an NPDES permit that allows for the discharge of some pollutants. *See* 33 U.S.C. § 1342(a)(1).

Ordinarily, an NPDES permit imposes effluent limitations on such discharges. *See* 33 U.S.C. § 1342(a)(1) (incorporating effluent limitations found in 33 U.S.C. § 1311). First, a permit-holder "shall . . . achieve . . . effluent limitations . . . which shall require the application of the best practicable control technology [BPT] currently available." 33 U.S.C. § 1311(b)(1)(A). Second, a permit-holder "shall . . . achieve . . . any more stringent limitation, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title)." 33 U.S.C. § 1311 [**9] (b)(1)(C) (emphasis added). Thus, although the BPT requirement takes into account issues of practicability, *see Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990), the EPA also "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability," *Oklahoma v. EPA*, 908 F.2d 595, 613 (10th Cir. 1990) (internal quotation marks omitted), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992). *See also Ackels v. EPA*, 7 F.3d 862, 865-66 (9th Cir. 1993) (similar).

The EPA's treatment of storm-water discharges has been the subject of much debate. Initially, the EPA determined that such discharges generally were exempt from the requirements of the CWA (at least when they were uncontaminated by any industrial or commercial activity). *See* 40 C.F.R. § 125.4 (1975).

The Court of Appeals for the District of Columbia, however, invalidated that regulation, holding that "the EPA Administrator does not have authority to exempt categories of point sources from [**10] the permit requirements of § 402 [33 U.S.C. § 1342]." *Natural Resources Defense Council, Inc. v. Costle*, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1377 (D.C. Cir. 1977). "Following this decision, [the] EPA issued proposed and final rules covering storm water discharges in 1980, 1982, 1984, 1985 and 1988. These rules were challenged at the administrative level and in the courts." *American Mining Congress*, 965 F.2d at 763.

Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA. *See NRDC II*, 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and [the] EPA's problems in

implementing regulations, Congress passed the Water Quality Act of 1987 containing amendments to the CWA.") (footnotes omitted). Under the Water Quality Act, from 1987 until 1994,¹ most entities discharging storm water did not need to obtain a permit. See 33 U.S.C. § 1342(p).

1 As enacted, the Water Quality Act extended the exemption to October 1, 1992. Congress later amended the Act to change that date to October 1, 1994. See Pub. L. No. 102-580.

[**11] Although the Water Quality Act generally did not require entities discharging storm water to obtain a permit, it did require such a permit for discharges "with respect to which a permit has been issued under this section before February 4, 1987," 33 U.S.C. § 1342(p)(2)(A); discharges "associated with industrial activity," 33 U.S.C. § 1342(p)(2)(B); discharges from a "municipal separate sewer system serving a population of [100,000] or more," 33 U.S.C. § 1342(p)(2)(C) & (D); and "[a] discharge for which the Administrator . . . determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," 33 U.S.C. § 1342(p)(2)(E).

[*1164] When a permit is required for the discharge of storm water, the Water Quality Act sets two different standards:

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section *and section 1311* of this title.

(B) Municipal discharge

Permits for discharges from municipal [**12] storm sewers -

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the

maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.

33 U.S.C. § 1342(p)(3) (emphasis added).

C. Application of Chevron

The EPA and Petitioners argue that the Water Quality Act is ambiguous regarding whether Congress intended for municipalities to comply strictly with state water-quality standards, under 33 U.S.C. § 1311(b)(1)(C). Accordingly, they argue that we must proceed to step two of *Chevron* and defer to the EPA's interpretation that the statute does require strict compliance. See *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999) ("At step two, we must uphold the administrative regulation unless it is arbitrary, capricious, or [**13] manifestly contrary to the statute.") (citation and internal quotation marks omitted), *petition for cert. filed*, No. 99-243 (Aug. 10, 1999).

Intervenors and *amici*, on the other hand, argue that the Water Quality Act expresses Congress' intent unambiguously and, thus, that we must stop at step one of *Chevron*. See, e.g., *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 118 S. Ct. 927, 938-39, 140 L. Ed. 2d 1 (1998) ("Because we conclude that Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union, we hold that the NCUA's contrary interpretation is impermissible under the first step of *Chevron*."). (emphasis in original); *Sierra Club v. EPA*, 118 F.3d 1324, 1327 (9th Cir. 1997) ("Congress has spoken clearly on the subject and the regulation violates the provisions of the statute. Our inquiry ends at the first prong of *Chevron*."). We agree with Intervenors and *amici*: For the reasons discussed below, the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply [**14] strictly with 33 U.S.C. § 1311(b)(1)(C). That being so, we end our inquiry at the first step of the *Chevron* analysis.

"Questions of congressional intent that can be answered with 'traditional tools of statutory construction' are still firmly within the province of the courts" under *Chevron*. *NRDC II*, 966 F.2d at 1297 (citation omitted).

"Using our 'traditional tools of statutory construction,' *Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. 2778, when interpreting a statute, we look first to the words that Congress used." *Zimmerman*, 170 F.3d at 1173 (alterations, citations, and internal quotation marks omitted). "Rather than focusing just on the word or phrase at issue, we look to the entire statute to determine Congressional intent." *Id.* (alterations, citations, and internal quotation marks omitted).

As is apparent, Congress expressly required industrial storm-water discharges to comply with the requirements of 33 U.S.C. § 1311. *See* 33 U.S.C. § 1342(p)(3)(A) ("Permits for discharges associated with industrial activity shall meet all applicable [**15] provisions of this section and section 1311 of this title.") (emphasis added). By incorporation, then, industrial [**1165] storm-water discharges "shall . . . achieve . . . any more stringent limitation, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any State law or regulation (under authority preserved by section 1370 of this title)." 33 U.S.C. § 1311(b)(1)(C) (emphasis added); *see also* Sally A. Longroy, *The Regulation of Storm Water Runoff and its Impact on Aviation*, 58 J. Air. L. & Com. 555, 565-66 (1993) ("Congress further singled out industrial storm water dischargers, all of which are on the high-priority schedule, and requires them to satisfy all provisions of section 301 of the CWA [33 U.S.C. § 1311]. . . . Section 301 further mandates that NPDES permits include requirements that receiving waters meet water quality based standards.") (emphasis added). In other words, industrial discharges must comply strictly with state water-quality standards.

Congress chose not to include a similar provision for municipal [**16] storm-sewer discharges. Instead, Congress required municipal storm-sewer discharges "to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii).

The EPA and Petitioners argue that the difference in wording between the two provisions demonstrates ambiguity. That argument ignores precedent respecting the reading of statutes. Ordinarily, "where Congress

includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) (citation and internal quotation marks omitted); *see also United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999) (stating the same principle), *petition for cert. filed*, No. 98-323 (Aug. 23, 1999). Applying that familiar [**17] and logical principle, we conclude that Congress' choice to require industrial storm-water discharges to comply with 33 U.S.C. § 1311, but not to include the same requirement for municipal discharges, must be given effect. When we read the two related sections together, we conclude that 33 U.S.C. § 1342(p)(3)(B)(iii) does not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Application of that principle is significantly strengthened here, because 33 U.S.C. § 1342(p)(3)(B) is not merely silent regarding whether municipal discharges must comply with 33 U.S.C. § 1311. Instead, § 1342(p)(3)(B)(iii) replaces the requirements of § 1311 with the requirement that municipal storm-sewer dischargers "reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii). [**18] In the circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Indeed, the EPA's and Petitioners' interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) would render that provision superfluous, a result that we prefer to avoid so as to give effect to all provisions that Congress has enacted. *See Government of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 634 (9th Cir. 1999) ("This court generally refuses to interpret a statute in a way that renders a provision superfluous."), *as amended*, 1999 U.S. App. LEXIS 18691, 1999 WL 604218 (9th Cir. Aug. 12, 1999). Section 1342(p)(3)(B)(iii) creates a lesser standard than § 1311. Thus, if § 1311 continues to apply to municipal storm-sewer discharges, [**1166] the more stringent requirements of that section always would control.

Contextual clues support the plain meaning of § 1342(p)(3)(B)(iii), which we have described above. The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether (and therefore from [**19] § 1311). For example, "the Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture." 33 U.S.C. § 1342(l)(1). Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. *See* 33 U.S.C. § 1342(l)(2). Read in the light of those provisions, Congress' choice to exempt municipal storm-sewer discharges from strict compliance with § 1311 is not so unusual that we should hesitate to give effect to the statutory text, as written.

Finally, our interpretation of § 1342(p)(3)(B)(iii) is supported by this court's decision in *NRDC II*. There, the petitioner had argued that "the EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments." *NRDC II*, 966 F.2d at 1308. This court disagreed with the petitioner's interpretation of the amendments:

Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, *Congress retained the [**20] existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge.*

Id. (emphasis added). The court concluded that, under 33 U.S.C. § 1342(p)(3)(B)(iii), "*Congress did not mandate a minimum standards approach.*" *Id.* (emphasis added). The question in *NRDC II* was not whether § 1342(p)(3)(B)(iii) required strict compliance with state water-quality standards, *see* 33 U.S.C. § 1311(b)(1)(C). Nonetheless, the court's holding applies equally in this action and further supports our reading of 33 U.S.C. § 1342(p).

In conclusion, the text of 33 U.S.C. § 1342(p)(3)(B), the structure of the Water Quality Act as a whole, and

this court's precedent all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

D. *Required Compliance with 33 U.S.C. § 1311(b)(1)(C)*

We are left with Intervenor's contention that the EPA may not, under the CWA, require strict compliance with state water-quality [**21] standards, through numerical limits or otherwise. We disagree.

Although Congress did not require municipal storm-sewer discharges to comply strictly with § 1311(b)(1)(C), § 1342(p)(3)(B)(iii) states that "permits for discharges from municipal storm sewers . . . shall require . . . *such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.*" (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. As this court stated in *NRDC II*, "Congress gave the administrator discretion to determine what controls are necessary. . . . NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language." 966 F.2d at 1308.

Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits . . . to provide [**22] for the attainment of water quality standards." The EPA applied that approach to the permits at issue here. Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include [*1167] either management practices or numeric limitations in the permits was within its discretion. *See NRDC II*, 966 F.2d at 1308 ("Congress did not mandate a minimum standards approach or specify that [the] EPA develop minimal performance requirements."). In the circumstances, the EPA did not act arbitrarily or capriciously by issuing permits to Intervenor.

PETITION DENIED.

VOLUME III
TAB 4

LEXSEE

NATURAL RESOURCES DEFENSE COUNCIL, INC.; SANTA MONICA BAYKEEPER, Plaintiffs-Appellants, v. COUNTY OF LOS ANGELES; LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; MICHAEL ANTONOVICH, in his official capacity as Supervisor; YVONNE BURKE, in her official capacity as Supervisor; GLORIA MOLINA, in her official capacity as Supervisor; ZEV YAROSLAVSKY, in his official capacity as Supervisor; DEAN D. EFSTATHIOU, in his official capacity as Acting Director of Los Angeles County Department of Public Works; DON KNABE, in his official capacity as Supervisor, Defendants-Appellees.

No. 10-56017

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

725 F.3d 1194; 2013 U.S. App. LEXIS 16416; 43 ELR 20180

August 8, 2013, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by L.A. County Flood Control Dist. v. NRDC, 134 S. Ct. 2135, 188 L. Ed. 2d 1124, 2014 U.S. LEXIS 3212 (U.S., 2014)

On remand at, Motion denied by, Motion granted by, in part, Motion denied by, in part, Partial summary judgment granted by, in part, Partial summary judgment denied by, in part NRDC v. County of L.A., 2015 U.S. Dist. LEXIS 40761 (C.D. Cal., Mar. 30, 2015)

PRIOR HISTORY: [**1]

On Remand From The United States Supreme Court. D.C. No. 2:08-cv-01467-AHM-PLA. L.A. County Flood Control Dist. v. NRDC, Inc., 133 S. Ct. 710, 184 L. Ed. 2d 547, 2013 U.S. LEXIS 597 (U.S., 2013) NRDC v. County of L.A., 2010 U.S. Dist. LEXIS 25083 (C.D. Cal., Mar. 2, 2010)

DISPOSITION: REVERSED and REMANDED.

COUNSEL: Aaron Colangelo, Natural Resources Defense Council, Washington, D.C.; Daniel Cooper, Lawyers for Clean Water, San Francisco, California, for Plaintiffs-Appellants.

Andrea Sheridan Ordin, Judith A. Fries, Laurie Dods, Los Angeles County Department of County Counsel, Los

Angeles, California; Howard Gest and David W. Burhenn, Burhenn & Gest LLP, Los Angeles, California, for Defendants-Appellees.

JUDGES: Before: Harry Pregerson and Milan D. Smith, Jr., Circuit Judges, and H. Russel Holland, Senior District Judge.* Opinion by Judge Milan D. Smith, Jr.

* The Honorable H. Russel Holland, Senior District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

OPINION BY: Milan D. Smith, Jr.

OPINION

[*1196] **SUMMARY****

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Environmental Law

On remand from the United States Supreme Court, the panel reversed the district court's grant of summary judgment and held that pollution exceedances detected at monitoring stations of the County of Los Angeles and the

Los Angeles County Flood [**2] Control District were sufficient to establish the County defendants' liability as a matter of law for violations of the terms of their National Pollutant Discharge Elimination System permit issued pursuant to the Clean Water Act.

In *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 184 L. Ed. 2d 547 (2013), the Supreme Court held that a discharge of pollutants does not occur when polluted water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river, and then into a lower portion of the same river. The Supreme Court declined to address the plaintiffs' argument that the County defendants' monitoring data established their liability for permit violations as a matter of law. On remand, the panel held that this court's previous rejection of the plaintiffs' argument was not a final decision, nor was it law of the case.

The panel held that, under the plain language of the NPDES permit, the data collected at the monitoring stations was intended to determine whether the permittees were in compliance with the permit. Accordingly, if the District's monitoring data showed that the [**3] level of pollutants in federally protected water bodies exceeded those allowed under the permit, then, as a matter of permit construction, the monitoring data conclusively demonstrated that the defendants were not in compliance with the permit conditions and were liable for permit violations. The panel held that extrinsic considerations, including the Clean Water Act's monitoring requirements, also supported its holding. The panel remanded the case to the district court for further proceedings, including a determination of the proper remedy for the County defendants' violations.

OPINION

M. SMITH, Circuit Judge:

Plaintiffs-Appellants Natural Resources Defense Council and Santa Monica Baykeeper (collectively, the Plaintiffs) filed suit against the County of Los Angeles and the Los Angeles County Flood Control District (collectively, the County Defendants) alleging that the County Defendants are discharging polluted stormwater in violation of the terms of their National Pollutant Discharge Elimination System (NPDES) permit, issued pursuant to the Federal Water Pollution Control Act (the

Clean Water Act, Act, or CWA), 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251, *et seq.* The district [**4] court granted the County Defendants' motion for summary judgment, reasoning that Plaintiffs failed to prove that any *individual* defendant had discharged pollutants in violation of the Clean Water Act, where Plaintiffs' only evidence of violations was monitoring data taken downstream of the County Defendants' (and others') discharge points, as opposed to data sampled at the relevant discharge points themselves. On appeal, we affirmed the district court's judgment in part and reversed in part. *Natural Res. Def. Council, Inc. v. Cnty. of L.A.*, 673 F.3d 880 (9th Cir. 2011). On January 8, 2013, the Supreme Court reversed our judgment and remanded this case to us for further proceedings. *L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 184 L. Ed. 2d 547 (2013). On February 19, 2013, we ordered the parties to file supplemental briefs addressing the implications of the Supreme Court's ruling. Having considered the Supreme Court's ruling, the responses of the parties in their supplemental briefs, and other matters noted [*1197] herein, we now conclude that the pollution exceedances detected at the County Defendants' monitoring stations are sufficient to establish the County Defendants' [**5] liability for NPDES permit violations as a matter of law. Accordingly, we once again reverse the district court's grant of summary judgment in favor of the County Defendants, and remand to the district court for a determination of the appropriate remedy for the County Defendants' violations.

FACTUAL BACKGROUND

I. Stormwater Runoff in Los Angeles County

Stormwater runoff is surface water generated by precipitation events, such as rainstorms, which flows over streets, parking lots, commercial sites, and other developed parcels of land. When stormwater courses over urban environs, it frequently becomes polluted with contaminants, such as "suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, [and] pesticides[.]"¹ *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 840 (9th Cir. 2003). This polluted stormwater often makes its way into storm drains and sewers, which "generally channel collected runoff into federally protected water bodies," *id.*, such as rivers and oceans. Consequently, stormwater runoff has been recognized as "one of the most significant sources of water pollution in

the nation, at times comparable to, if not [**6] greater than, contamination from industrial and sewage sources." *Id.* (citation omitted).

1 Whereas natural, vegetated soil can absorb rainwater and capture pollutants, paved surfaces and developed land can do neither. Paved facilities with particularly high volumes of motor vehicle traffic--such as parking lots, retail gasoline outlets, and fast food restaurants--are typically responsible for producing higher concentrations of pollutants in storm water runoff.

Los Angeles County (the County) is home to more than 10 million people and covers a sprawling amalgam of populous incorporated cities and significant swaths of unincorporated land. The Los Angeles County Flood Control District (the District) is a public entity governed by the Los Angeles County Board of Supervisors and the Los Angeles County Department of Public Works. The District comprises 84 cities and some unincorporated areas of the County. The County and the District are separate legal entities.

Each city in the District operates a municipal separate storm sewer system (ms4)² that is composed of gutters, catch basins, storm drains, and pipes that collect and convey stormwater. The County also operates its own ms4 that primarily [**7] collects and conveys stormwater runoff in the unincorporated areas of the County. Each of these ms4s connects to the District's substantially larger ms4, an extensive flood-control and storm-sewer infrastructure [*1198] consisting of approximately 500 miles of open channels and 2,800 miles of storm drains. Because a comprehensive map of the County Defendants' storm sewer system does not exist, no one knows the exact size of the LA MS4³ or the locations of all of its storm drain connections and outfalls.⁴ But while the number and location of storm drains and outfalls are too numerous to catalog, it is undisputed that the LA MS4 collects and channels stormwater runoff from across the County. It is similarly undisputed that untreated stormwater is discharged from LA MS4 outfalls into various watercourses, including the Los Angeles and San Gabriel Rivers.⁵ These rivers, in turn, drain into several coastal waters, including, among others, the Santa Monica Bay and the Pacific Ocean.

2 Federal Regulations define an ms4 as:

a conveyance or system of

conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned [**8] or operated by a State, city, town, borough, county, parish, district, association, or other public body . . . having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity . . . ;

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

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works

40 C.F.R. § 122.26(b)(8). Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, an ms4 conveys only untreated stormwater. *See* 40 C.F.R. § 122.26(a)(7), (b)(8).

3 Throughout this Opinion, reference is made to both "ms4" and the "LA MS4." The former is a generic reference to an individual municipal separate storm sewer system without regard to its particular location, while the latter specifically refers to the entire flood control and storm-sewer infrastructure described *supra* that exists in Los Angeles County, and which is made up of the various interconnected [**9] ms4s that are controlled by the County, the District, and the incorporated cities within the District.

4 An "outfall" is defined as a "point source . . . at the point where a municipal separate storm sewer discharges to waters of the United States. . . ." 40 C.F.R. § 122.26(b)(9). It is estimated that the LA

MS4 contains tens of thousands of outfalls where stormwater runoff is discharged into federally protected water bodies.

5 Plaintiffs originally complained about the County Defendants' discharges into four water bodies: the Los Angeles River, the San Gabriel River, the Santa Clara River, and Malibu Creek. *See Natural Res. Def. Council*, 673 F.3d at 883. On remand to this court, however, Plaintiffs only seek review of the district court's summary judgment ruling regarding the County Defendants' discharges into the Los Angeles and San Gabriel Rivers.

II. The County Defendants' NPDES Permit

Section 301(a) of the CWA prohibits the "discharge of any pollutant" from any "point source" into "navigable waters" unless the discharge complies with certain other sections of the CWA.⁶ *See* 33 U.S.C. § 1311(a). One of those sections is section 402, which provides for the issuance of NPDES permits. 33 U.S.C. § 1342. [**10] In nearly all cases, an NPDES permit is required before anyone may lawfully discharge a pollutant from a point source into the navigable waters of the United States. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101-02, 112 S. Ct. 1046, 117 L. Ed. 2d 239 (1992); *Environmental Law Handbook* 323 (Thomas F. P. Sullivan ed., 21st ed. 2011).

6 A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Throughout this litigation, there has been confusion regarding whether the LA MS4 is a "point source" under the CWA. *See Natural Res. Def. Council*, 673 F.3d at 898 (accepting Plaintiffs' argument that "[u]nder the Clean Water Act, the [LA] MS4 is a 'Point Source.'"). The LA MS4 is *not* a single point source. Rather, the LA MS4 is a collection of point sources, including outfalls, that discharge into the navigable waters of the United States.

Congress has empowered the EPA Administrator to delegate NPDES permitting authority to state agencies. 33 U.S.C. § 1342(b). [**11] Pursuant to this authority,

the EPA has authorized the State of California to develop water quality standards and issue NPDES permits. Pursuant to the Porter-Cologne Water Quality Control Act, California state law designates the State Water Resources Control Board and [*1199] nine regional boards as the principal state agencies charged with enforcing federal and state water pollution laws and issuing NPDES permits. *See* Cal. Water Code §§ 13000 *et seq.* The entity responsible for issuing permits in the Los Angeles area is the California State Water Resources Control Board for the Los Angeles Region (the Regional Board).

On June 18, 1990, the Regional Board first issued an NPDES permit (the Permit) regulating stormwater discharges by the County, the District, and the 84 incorporated municipalities in the District (collectively, the Permittees). The Permit has subsequently been renewed or amended several times, and the version of the Permit at issue in this litigation came into force on December 13, 2001.⁷ The Permit covers all relevant discharges that occur "within the boundaries of the Permittee municipalities . . . over which [the municipalities have] regulatory jurisdiction as well as unincorporated [**12] areas in Los Angeles County within the jurisdiction of the Regional Board."

7 On November 8, 2012, the Regional Board issued a new NPDES permit to the County Defendants and various other permittees.

The Permit runs to 99 pages and contains a myriad of rules, regulations, and conditions regarding the Permittees' operation of the LA MS4. However, only two sets of the Permit's provisions are particularly relevant to this appeal; those contained in Part 2, titled "Receiving Water Limitations," and those contained in the section titled "Monitoring and Reporting Program."

Part 2 places limits on the type and amount of pollutants the Permittees may lawfully discharge from the LA MS4. Specifically, Part 2 prohibits "discharges from the [LA] MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives."⁸ The Permit defines "Water Quality Standards and Water Quality Objectives" as "water quality criteria contained in the Basin Plan, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federal approved surface water quality plans."⁹ Succinctly put, the Permit incorporates the pollution standards promulgated [**13]

in other agency documents such as the Basin Plan, and prohibits stormwater discharges that "cause or contribute to the violation" of those incorporated standards. The Permit further provides that the Permittees "shall comply" with the LA MS4 discharge prohibitions outlined in Part 2 "through timely implementation of control measures and other actions to reduce pollutants in the[ir LA MS4] discharges"

8 Part 2 also mandates that "[d]ischarges from the [LA] MS4 of storm water, or non-storm water, for which a Permittee is responsible for [sic], shall not cause or contribute to a condition of nuisance."

9 Under California law, regional boards are required to formulate water quality plans, called "basin plans," which designate the beneficial uses of protected water bodies within the boards' jurisdiction, establish water quality objectives for those water bodies, and establish a program for implementing the basin plan. *See City of Burbank v. State Water Res. Control Bd.*, 35 Cal. 4th 613, 26 Cal. Rptr. 3d 304, 108 P.3d 862, 865 (Cal. 2005) (citing Cal. Water Code § 13050(j)).

The Monitoring and Reporting Program complements Part 2. Under that program, the Permittees are required to monitor the impacts of their LA MS4 discharges [**14] on water quality and to publish the results of all pollution monitoring at least annually. The primary objectives of the monitoring program include "assessing compliance" with the Permit, "measuring and improving the effectiveness" of the Los Angeles Countywide Stormwater Quality Management Program (SQMP),¹⁰ and assessing [*1200] the environmental impact of urban runoff on the receiving waters in the County.

10 The Permit defines the SQMP as "the Los Angeles Countywide Stormwater Quality Management Program, which includes descriptions of programs, collectively developed by the Permittees in accordance with the provisions of the NPDES permit, to comply with applicable federal and state law. . . ."

One of the principal ways the Permittees are required to monitor their LA MS4 discharges is through mass-emissions monitoring. Mass-emissions monitoring measures all constituents present in water, and the readings give a cumulative picture of the pollutant load in

a waterbody. The Permit requires the District, as Principal Permittee, to conduct mass-emissions monitoring at seven enumerated monitoring stations located throughout the County. The District is also responsible for analyzing the resulting [**15] data and submitting a comprehensive report of its findings.¹¹ According to the Permit, the purpose of mass-emissions monitoring is to: (1) estimate the mass emissions from the LA MS4; (2) assess trends in the mass emissions over time; and (3) determine if the LA MS4 is contributing to exceedances of Water Quality Standards by comparing the monitoring results to the applicable pollution standards promulgated in the Basin Plan and similar documents.

11 The District publishes these "Stormwater Monitoring Reports" on the internet at: http://ladpw.org/wmd/NPDES/report_directory.cfm. (last accessed August 1, 2013).

The Permittees sited a mass-emissions monitoring station in both the Los Angeles and San Gabriel Rivers (collectively, the Monitoring Stations). The Los Angeles River monitoring station is located in a channelized portion of the Los Angeles River that runs through the City of Long Beach.¹² The San Gabriel River monitoring station is located in a channelized portion of the San Gabriel River that runs through the City of Pico Rivera. The Monitoring Stations are located downstream of numerous LA MS4 outfalls controlled by the County Defendants and various other non-party Permittees.

12 In [**16] a declaration submitted to the district court, the County Defendants described both Monitoring Stations as being located "in a portion of the District's flood control channel." *See also* "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/npdes/9899_report/SiteDesc.pdf (last accessed August 1, 2013). Thus, it appears that the pertinent river segments are part of *both* the LA MS4 itself *and* "the waters of the United States" that the CWA protects. But regardless of whether the mass-emissions monitoring stations are *also* part of the LA MS4, there is no dispute that the mass-emissions monitoring stations are located *within* the Los Angeles and San Gabriel Rivers, downstream of a significant number of the County Defendants' LA MS4 outfalls. We misconstrued some of the data

before us when we previously held otherwise. *See Natural Res. Def. Council*, 673 F.3d at 899 ("As a matter of law and fact, the [LA] MS4 is distinct from the two navigable rivers; the [LA] MS4 is an intra-state man-made construction--not a naturally occurring Watershed River"); *see also* 53 Fed. Reg. 49,416, 49,453 (Dec. 7, 1988) (EPA observes that "[i]n many situations, [*17] waters of the United States that receive discharges from municipal storm sewers can be mistakenly considered to be part of the storm sewer system.").

Between 2002 and 2008, when this case was filed, the District published annual monitoring reports that contain the data that the District collected at the Monitoring Stations. According to those reports, the Monitoring Stations identified 140 separate exceedances of the Permit's water quality standards, including excessive levels of aluminum, copper, cyanide, zinc, and fecal coliform bacteria in both the Los Angeles and San Gabriel Rivers. The County Defendants do not dispute the accuracy of the monitoring data.

PROCEDURAL BACKGROUND

Using the monitoring data self-reported by the District, Plaintiffs cataloged the [*1201] water quality exceedances measured in various receiving waters in the County. Beginning on May 31, 2007, Plaintiffs sent a series of notice letters to the County Defendants informing them that Plaintiffs believed that they were violating the terms of the Permit.¹³ Specifically, Plaintiffs contended that the water quality exceedances documented in the District's monitoring reports demonstrated liability under the CWA. Dissatisfied [*18] with the County Defendants' response to these letters, Plaintiffs brought this citizen-enforcement action on March 3, 2008. After the district court dismissed certain elements of the Plaintiffs' initial complaint because notice of the Permit violations was defective, Plaintiffs sent the County Defendants an adequate notice letter on July 3, 2008.

13 The CWA requires plaintiffs to provide 60 days notice to an alleged violator, the State in which the violation is alleged to be occurring, and the EPA, before filing suit. 33 U.S.C. § 1365(b)(1)(A).

Plaintiffs filed their First Amended Complaint on September 18, 2008. In the complaint, Plaintiffs asserted

six causes of action under the CWA. Four of the Plaintiffs' claims, which the district court designated the "Watershed Claims," were initially before us on appeal. The first three Watershed Claims allege that, beginning in 2002 or 2003, the County Defendants caused or contributed to exceedances of water quality standards in the Santa Clara River (Claim 1), the Los Angeles River (Claim 2), and the San Gabriel River (Claim 3), in violation of 33 U.S.C. §§ 1311(a), 1342(p). The fourth Watershed Claim alleges that, beginning in 2002, County Defendants [*19] caused or contributed to exceedances of the water quality standards and violated the total maximum daily load limits in Malibu Creek. All of the Watershed Claims rest on the same premise: (1) the Permit incorporates water-quality limits for each receiving water body; (2) mass-emissions monitoring stations have recorded pollutant loads in the receiving water bodies that exceed those permitted under the relevant standards; (3) an exceedance constitutes non-compliance with the Permit and, thereby, the Clean Water Act; and (4) County Defendants, as holders of the Permit and joint operators of the LA MS4, are liable for these exceedances under the Act.

Early in the litigation, the district court bifurcated liability and remedy, and all proceedings related to remedy were stayed until liability was determined. On March 2, 2010, the district court denied all parties' cross-motions for summary judgment with regard to liability. *NRDC v. Cnty. of L.A.*, No. CV 08-1467-AHM, 2010 U.S. Dist. LEXIS 25083, 2010 WL 761287 (C.D. Cal. Mar. 2, 2010), *amended on other grounds*, 2011 U.S. Dist. LEXIS 11665, 2011 WL 666875 (C.D. Cal. Jan. 27, 2011). Although the district court accepted Plaintiffs' arguments that the Permit "clearly prohibits 'discharges from the [LA] [*20] MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives,'" 2010 U.S. Dist. LEXIS 25083, 2010 WL 761287, at *6, and that mass-monitoring stations "are the proper monitoring locations to determine if the [LA] MS4 is contributing to exceedances" of the Water Quality Standards or water quality objectives, *id.*, the district court held that Plaintiffs were improperly attempting to use the District's self-reported monitoring data to establish liability without presenting evidence that any individual defendant was discharging pollutants that "cause[d] or contribute[d] to the violation" of the water quality standards. *Id.* The district court observed that although "the District is responsible for the pollutants in the [LA] MS4" at the time they pass the Monitoring

Stations, "that does not necessarily determine the question of whether the water passing by these points is [*1202] 'discharge' within the meaning of the Permit and the Clean Water Act." 2010 U.S. Dist. LEXIS 25083, [WL] at *7. Unable to determine whether any of the County Defendants' upstream LA MS4 outflows were contributing polluted stormwater to navigable waters, the district court stated that "Plaintiffs would need to present some evidence (monitoring [**21] data or an admission) that some amount of a standards-exceeding pollutant is being discharged through at least one District outlet." 2010 U.S. Dist. LEXIS 25083, [WL] at *8.

Following supplemental briefing, the district court again determined that "Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' [LA] MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow." The district court thus entered summary judgment for the County Defendants on the Watershed Claims.

On June 9, 2010, the district court entered a partial final judgment on the Watershed Claims under Fed. R. Civ. P. 54(b). The court reasoned that an interlocutory appeal was appropriate because the Watershed Claims are "factually and legally severable" from the Plaintiffs' other claims and "[t]he parties and the Court would benefit from appellate resolution of the central legal question underlying the watershed claims: what level of proof is necessary to establish defendants' liability." The Plaintiffs timely appealed.

On appeal, the Plaintiffs pressed the same legal argument [**22] they advanced in the district court: that the data published in the County Defendants' annual monitoring reports--data which shows undisputed pollution exceedances at the mass-emissions monitoring stations--conclusively establishes the County Defendants' liability for Permit violations as a matter of law. Like the district court, we rejected this contention and held that the Plaintiffs must submit at least some additional proof of the County Defendants' *individual* contributions to the measured Permit violations. See *Natural Res. Def. Council*, 673 F.3d at 898 (noting that "the Clean Water Act does not prohibit 'undisputed' exceedances; it prohibits 'discharges' that are *not* in compliance with the Act. . . . While it may be undisputed that exceedances have been detected, responsibility for those exceedances

requires proof that some entity discharged a pollutant.").

Nonetheless, we held the District liable for CWA violations in the Los Angeles and San Gabriel Rivers because we concluded that the mass-emissions monitoring stations for each river are "located in a section of the [LA] MS4 owned and operated by the District" and that "when pollutants were detected, they had not yet exited the [**23] point source into navigable waters." *Id.* at 899. We further clarified that "[t]he [relevant] discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that [the LA] MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations." *Id.* at 900.

On October 11, 2011, the District filed a petition for writ of certiorari, 673 F.3d 880, 2011 WL 4874090, which was granted in part on June 25, 2012. *L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 23, 183 L. Ed. 2d 673 (2012). The Supreme Court granted review in order to answer a single question: "Under the CWA, does a discharge of pollutants occur when polluted water [*1203] flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river, and then into a lower portion of the same river?" *L.A. Cnty. Flood Control Dist.*, 133 S. Ct. at 712-13 (internal quotation [**24] marks omitted). The Court answered in the negative, and re-affirmed its holding in *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004), that "pumping polluted water from one part of a water body into another part of the same body is not a discharge of pollutants under the CWA." *L.A. Cnty. Flood Control Dist.*, 133 S. Ct. at 711. The Court did not address any other basis for the District's potential liability for Permit violations and instead reversed our prior judgment and remanded this case to us for additional proceedings. *Id.* at 713-14.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review the district court's grant of summary judgment *de novo*. *Assoc. to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002).

DISCUSSION

I.

Plaintiffs return from the Supreme Court with the same argument they have consistently advanced throughout this litigation--that the County Defendants' monitoring data establishes their liability for Permit violations as a matter of law. We previously rejected this argument, see *Natural Res. Def. Council*, 673 F.3d at 898, and the Supreme Court explicitly declined [**25] to address it.¹⁴

14 See *L.A. Cnty. Flood Control Dist.*, 133 S. Ct. at 713-14 ("Under the permit's terms, the NRDC and Baykeeper maintain, the exceedances detected at instream monitoring stations are by themselves sufficient to establish the District's liability under the CWA for its upstream discharges. This argument failed below. It is not embraced within, or even touched by, the narrow question on which we granted certiorari. We therefore do not address, and indicate no opinion on, the issue NRDC and Baykeeper seek to substitute for the question we took up for review.").

On remand, the County Defendants argue that we may not reconsider our earlier decision because it has become "final," and because "reconsideration of Appellants' monitoring argument would fly in the face of the finality given to decisions of this Court after denial of rehearing or expiration of the time in which to seek such further review." Alternatively, the County Defendants argue that our earlier disposition should be left undisturbed because it has become the law of the case. The County Defendants are mistaken on both counts.

"No opinion of this circuit becomes final until the mandate issues[.]" *Carver v. Lehman*, 558 F.3d 869, 878 (9th Cir. 2009); [**26] see also Fed R. App. P. 41(c), 1998 Adv. Comm. Note ("A court of appeals' judgment or order is not final until issuance of the mandate[.]"). Thus, we have explained that a "court of appeals may modify or revoke its judgment at any time prior to issuance of the mandate, sua sponte or by motion of the parties." *United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990). The mandate in this case has not issued. Consequently, our earlier judgment is not final. *Carver*, 558 F.3d at 878. Nor can it be considered the law of the case. See *id.* at 878 n.16 ("[U]ntil the mandate issues, an

opinion is not fixed as settled Ninth Circuit law, and reliance on the opinion is a gamble." (citation omitted)); see also *Key Enters. of Del., Inc. v. Venice Hosp.*, 9 F.3d 893, 898 (11th Cir. [*1204] 1993) ("[B]ecause the panel's mandate had not issued, the panel's decision was never the 'law of the case.'"). Put simply, we are free to reconsider the merits of Plaintiffs' argument, and we now do so.

II.

Where a permittee discharges pollutants in compliance with the terms of its NPDES permit, the permit acts to "shield" the permittee from liability under the CWA. 33 U.S.C. § 1342(k). The permit shield is a major benefit [**27] to a permittee because it protects the permittee from any obligation to meet more stringent limitations promulgated by the EPA unless and until the permit expires. See *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 266-69 (4th Cir. 2001); see also *The Clean Water Act Handbook* 67 (Mark A. Ryan ed., 3rd ed. 2011). Of course, with every benefit comes a cost: a permittee violates the CWA when it discharges pollutants in excess of the levels specified in the permit, or where the permittee otherwise violates the permit's terms. See *Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1138 (9th Cir. 1998); see also 40 C.F.R. § 122.41(a) ("Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for [an] enforcement action"); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) (noting that "[t]he plain language of [the CWA citizen suit provision] authorizes citizens to enforce all permit conditions"); *Environmental Law Handbook* 327 ("The primary purpose of NPDES permits is to establish enforceable effluent limitations.").

Plaintiffs allege that the County Defendants are violating the terms of the [**28] Permit by discharging pollutants into the Los Angeles and San Gabriel Rivers in excess of the permitted levels. County Defendants do not dispute that they are discharging pollutants from the LA MS4 into these rivers. Nor can the County Defendants dispute that their own monitoring reports demonstrate that pollution levels recorded at the Monitoring Stations are in excess of those allowed under the Permit. Rather, the County Defendants focus on their perception of the evidentiary burden Plaintiffs must satisfy in order to hold any individual defendant liable for these pollution exceedances. Plaintiffs contend that they may rely

exclusively on the District's monitoring reports to establish liability. County Defendants, however, argue that they cannot be held liable for Permit violations based solely on the data published in the District's monitoring reports because: (1) the mass-emissions monitoring required under the Permit was "neither designed nor intended" to measure the compliance of any Permittee; and (2) the monitoring data cannot parse out precisely *whose* discharge(s) contributed to any given exceedance because the Monitoring Stations sample pollution levels downstream from a [**29] legion of discharge points (e.g., LA MS4 outfalls) controlled by various Permittees and other non-party entities, as opposed to at the discharge points themselves.

To resolve the parties' contentions, we must interpret the language of the Permit. Although the NPDES permitting scheme can be complex, a court's task in interpreting and enforcing an NPDES permit is not--NPDES permits are treated like any other contract. *See Nw. Envtl. Advocates*, 56 F.3d at 982 ("We review the district court's interpretation of the 1984 permit as we would the interpretation of a contract or other legal document.").¹⁵ If the language of the permit, considered in light of the structure of the permit as a [*1205] whole, "is plain and capable of legal construction, the language alone must determine the permit's meaning." *Piney Run Pres. Ass'n*, 268 F.3d at 270 (citation omitted). If, however, the permit's language is ambiguous, we may turn to extrinsic evidence to interpret its terms. *Id.* Our sole task at this point of the case is to determine what Plaintiffs are required to show in order to establish *liability* under the terms of *this particular* NPDES permit.¹⁶

¹⁵ *See also Piney Run Pres. Ass'n*, 268 F.3d at 269-70; *Am. Canoe Ass'n, Inc. v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 42 (D.D.C. 2004).

¹⁶ The [**30] question before us is not whether the Clean Water Act mandates any particular result. An NPDES permitting authority has wide discretion concerning the terms of a permit. It could, for example, lawfully write an ms4 permit that provides that all permittees will share liability in some ratio for any measured exceedance of applicable pollutant limits. Or, as a further example, a permitting authority could lawfully write a permit providing that only the co-permittee(s) whose specific discharges are

connected to a particular pollutant exceedance may be held liable for the permit violation. *See* 33 U.S.C. § 1342(a)(2) ("The Administrator shall prescribe conditions for [NPDES] permits to assure compliance with the requirements of [33 U.S.C. § 1342(a)(1)], including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.").

A. The Plain Language of the Permit

"[NPDES permit] terms are to be given their ordinary meaning, and when the terms of a [permit] are clear, the intent of the parties must be ascertained from the [permit] itself." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999). Plaintiffs argue [**31] that the text of the County Defendants' Permit is clear, and provides that the District's mass-emissions monitoring data will be used to assess the County Defendants' compliance with the Permit, and particularly Part 2, which prohibits "discharges from the [LA] MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." The County Defendants dispute this notion, and first claim that the District's mass-emissions monitoring is intended to serve only a hortatory purpose. As County Defendants state, "the mass emission monitoring program . . . neither measures nor was designed to measure any individual permittee's compliance with the Permit." This argument is clearly belied by the text of the Permit and is rejected.

The Permit establishes a "Monitoring and Reporting Program" with the stated objectives of *both* characterizing stormwater discharges *and* assessing compliance with water-quality standards. The Permit language could not be more explicit in this regard, stating that "[a]ssessing compliance with this [Permit]" is one of the "primary objectives of the Monitoring Program." "The fact that the parties dispute a [permit's] meaning does not establish [**32] that the [permit] is ambiguous; it is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation." *Klamath Water Users Protective Ass'n*, 204 F.3d at 1210. No reasonable person could find even the slightest ambiguity in the phrase "[t]he primary objectives of the Monitoring Program include, but are not limited to: Assessing compliance with this [Permit]." Consequently, we decline to embrace the County Defendants' initial argument that "the mass-emission monitoring stations, as

a matter of fact, do not assess the compliance of any permittee with the Permit"

County Defendants' alternative argument, while more facially appealing, fares no better. Specifically, the County Defendants point to certain Permit language they claim shows that the Regional Board did not intend for the mass--emissions monitoring data to be used to establish liability for Permit violations. For instance, [*1206] the County Defendants note that the Permit provides that "[e]ach permittee is responsible only for a discharge for which it is the operator." County Defendants also cite language in Part 2 that reads: "Discharges from the [LA] MS4 of storm water, or non-storm water, [**33] for which a Permittee is responsible for [sic], shall not cause or contribute to a condition of nuisance." The County Defendants read this language as precluding a finding of liability against them--or any other Permittee--without independent monitoring data establishing that discharges from a particular entity's ms4 outfalls exceeded standards.

"[A] court must give effect to every word or term" in an NPDES permit "and reject none as meaningless or surplusage. . . ." *In re Crystal Props., Ltd., L.P.*, 268 F.3d 743, 748 (9th Cir. 2001) (quotations omitted); see also Restatement (Second) of Contracts § 203(a) (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."). "Therefore, we must interpret the [Permit] in a manner that gives full meaning and effect to all of the [Permit's] provisions and avoid a construction of the [Permit] that focuses only on" a few isolated provisions. *In re Crystal Props.*, 268 F.3d at 748.

The County Defendants' interpretation of the Permit ultimately must be rejected because it would create an unreasonable result. Reading [**34] the clause that "[e]ach permittee is responsible only for a discharge for which it is the operator" to preclude use of the mass--emission monitoring data to "assess[] compliance with this [Permit]" would render the monitoring provisions of the Permit largely meaningless. Under the County Defendants' reading of the Permit, individual Permittees could discharge an unlimited amount of pollutants from the LA MS4 but never be held liable for those discharges based on the results of the mass--emissions monitoring, even though that monitoring is explicitly intended to assess whether Permittees are in

compliance with Part 2's discharge limitations. We are unwilling to accept such a strained interpretation. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) (holding that courts should be guided by the "cardinal principle of contract construction: that a document should be read to give effect to all of its provisions and to render them consistent with each other"). A better reading of the Permit's putatively conflicting provisions, therefore, is the one proposed by Plaintiffs. Limiting a Permittee's responsibility to "discharge[s] for which it is the operator" applies to the [**35] appropriate *remedy* for Permit violations, not to *liability* for those violations. Indeed, Plaintiffs' reading is consistent with the remedial scheme of the Permit itself. If the LA MS4 is found to be contributing to water quality violations, each Permittee must take appropriate remedial measures with respect to its *own* discharges.¹⁷ Thus, a finding of *liability* against the County Defendants would not, as defendants argue, hold any County Defendant responsible for discharges for which they are not "the operator."

17 The relevant Permit provision states: "Each Permittee is required to comply with the requirements of this Order applicable to discharges within its boundaries . . . and not for the implementation of the provisions applicable to the Principal Permittee or other Permittees."

In sum, and contrary to the County Defendants' contentions, the language of the Permit is clear--the data collected at the Monitoring Stations is intended to determine whether the Permittees are in compliance with the Permit. If the District's [*1207] monitoring data shows that the level of pollutants in federally protected water bodies exceeds those allowed under the Permit, then, as a matter of permit construction, [**36] the monitoring data conclusively demonstrate that the County Defendants are not "in compliance" with the Permit conditions. Thus, the County Defendants are liable for Permit violations.

B. Extrinsic Considerations

Although we believe the plain language of the Permit clearly contemplates that the County Defendants' monitoring data will be used to assess Permit compliance (*i.e.*, establish liability for CWA violations), we note that numerous extrinsic considerations also undercut the County Defendants' position.

First and foremost, the Clean Water Act *requires* every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) ("[E]ach NPDES permit shall include conditions meeting the following . . . monitoring requirements . . . to assure compliance with permit limitations."). That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance. *See* 40 C.F.R. § 122.26(d)(2)(i)(F) ("Permit applications for discharges from large and medium municipal storm sewers . . . shall include [**37] . . . monitoring procedures necessary to determine compliance and noncompliance with permit conditions . . ."). As previously noted, the County Defendants contend that the mass--emissions monitoring program "neither measures nor was designed to measure any individual permittee's compliance with the Permit." But if the County Defendants are correct, the Permit would be unlawful under the CWA. We must interpret the provisions of the Permit like any other contract and reject an interpretation that would render the Permit unenforceable. *See Walsh v. Schlecht*, 429 U.S. 401, 408, 97 S. Ct. 679, 50 L. Ed. 2d 641 (1977) (noting that "contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable"); *see also Nw. Env'tl. Advocates*, 56 F.3d at 984; Restatement (Second) of Contracts § 203.

Second, the County Defendants' position has been explicitly rejected by the Regional Board, the entity that issued the Permit. This is important because one of our obligations in interpreting an NPDES permit is "to determine the intent of the permitting authority. . . ." *Piney Run Pres. Ass'n*, 268 F.3d at 270. Thus, we [**38] give significant weight to any extrinsic evidence that evinces the permitting authority's interpretation of the relevant permit. *See Nw. Env'tl. Advocates*, 56 F.3d at 985 (relying on "significant evidence from [the state permitting agency], the permit author," to determine the proper scope of an NPDES permit).

Here, the record contains an amicus brief filed by the Regional Board in a lawsuit nearly identical to this one.¹⁸ In that suit, these same Plaintiffs sued the City of Malibu, one of the County Defendants' co-permittees, for violating the NPDES Permit at issue in this case. In its brief, the Regional Board stated its position that:

The Permit recognizes that the inter-connected nature of the system means that it may be difficult to determine exactly where [pollutants] originated [**1208] within the [LA] MS4. This does not mean, however, that the Permit assumes only one permittee may be responsible. Instead, it recognizes that in such an integrated storm sewer system, one or more Permittees may have caused or contributed to violations. . . . Having constructed a joint sewer system that, by design, co-mingles the [Permittees'] discharges, they cannot avoid enforcement because one cannot determine [**39] the original source of pollutants in the waste stream.

18 *Santa Monica Baykeeper, et al. v. City of Malibu*, No. CV-08-01465 (AHM) (C.D. Cal. Mar. 3, 2008).

The Regional Board also noted that "the monitoring program that the permittees requested (and were granted) does not readily generate the permittee--by--permittee outfall data that the [County Defendants] would require as a precondition to enforcement." As a result, the Regional Board disagreed with any construction of the Permit that would require individualized proof of a Permittees' discharges in order to establish liability. Simply put, the Regional Board indicated that it "does not agree" that the "burden [of proving Permit violations] rests upon the enforcing entity." Although we do not defer to the Regional Board's interpretation of the Permit, *see Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997), its rejection of the County Defendants' position is clearly instructive.

Finally, the County Defendants' arguments run counter to the purposes of the CWA, and ignore the inherent complexity of ensuring an ms4's compliance with an NPDES permit that covers thousands of different point sources and outfalls. As we have previously [**40] recognized, "[t]he NPDES program fundamentally relies on self-monitoring." *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated and remanded on other grounds*, 485 U.S. 931, 108 S. Ct. 1102, 99 L. Ed. 2d 264 (1988), *and reinstated and*

amended by 853 F.2d 667 (9th Cir. 1988). Congress' purpose in adopting this self-monitoring mechanism was to promote straightforward enforcement of the Act. *See id.* at 1492 (noting that Congress wished to "avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay") (quoting S. Rep. No. 92-414, 92nd Cong., 1st Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3730)).¹⁹ Or, as one treatise writer has described enforcement of the Act:

The CWA is viewed by many as the easiest of the federal environmental statutes to enforce. This is because persons regulated under the act normally must report their own compliance and noncompliance to the regulating agency. For example, holders of NPDES permits must file periodic discharge monitoring reports [**41] (or DMRs), which must contain the results of all monitoring of discharges, and must indicate where those discharges exceed permit limitations. . . . Thus, enforcement actions may be brought based on little, if anything, more than the DMRs and other reports submitted by the permittee itself.

Environmental Law Handbook at 357-58.

¹⁹ *See also* 44 Fed. Reg. 32,854, 32,863 (June 7, 1979) ("Congress intended that prosecution for permit violations be swift and simple.").

Admittedly, regulating pollution from ms4s is substantially more complicated than regulating pollution from a few defined point sources. Like the LA MS4 at issue here, municipal separate storm sewer systems often cover many square miles and comprise numerous, geographically [**1209] scattered, and sometimes uncharted sources of pollution, including streets, catch basins, gutters, man-made channels, and storm drains. Faced with the difficult task of regulating millions of storm-sewer point sources, Congress amended the CWA in 1987 to grant the EPA the express authority to create a separate permitting program for ms4s. 33 U.S.C. § 1342(p)(2), (3). In enacting these amendments, Congress

recognized that for large urban areas like Los Angeles, [**42] ms4 permitting cannot be accomplished on a source-by-source basis. The amendments therefore give the EPA, or a state like California to which the EPA has delegated permitting authority, broad discretion to issue permits "on a system-wide or jurisdiction-wide basis," 40 C.F.R. § 122.26(a)(1)(v), rather than requiring cities and counties to obtain separate permits for millions of individual stormwater discharge points. This increased flexibility is crucial in easing the burden of issuing stormwater permits for both permitting authorities and permittees.²⁰

²⁰ *See* 55 Fed. Reg. 47,990, 48,046 (Nov. 16, 1990) (noting that issuing individual permits to cover all ms4 discharges to the waters of the United States is "unmanageable"); *id.* at 48,049-48,050 ("Given the complex, variable nature of storm water discharges from municipal systems, EPA favors a permit scheme where the . . . [p]ermit writers have the necessary flexibility to develop monitoring requirements that more accurately reflect the true nature of highly variable and complex discharges.").

But while otherwise more flexible than the traditional NPDES permitting system, nothing in the ms4 permitting scheme relieves permittees of the [**43] obligation to monitor their compliance with their NPDES permit in some fashion. *See* 33 U.S.C. § 1342(a)(2) ("The Administrator shall prescribe conditions for [NPDES] permits to assure compliance with the requirements of [the permit], including conditions on data and information collection, reporting, and such other requirements as he deems appropriate."); 40 C.F.R. § 122.44(i)(1) (establishing that every permit "shall include" monitoring "[t]o assure compliance with the permit limitations"). Rather, EPA regulations make clear that while ms4 NPDES permits need not require monitoring of each stormwater source at the precise point of discharge, they may instead establish a monitoring scheme "sufficient to yield data which are *representative of the monitored activity*. . . ." 40 C.F.R. § 122.48(b) (emphasis added). In fact, EPA regulations require permittees, like the County Defendants here, to propose a "monitoring program for *representative data collection* for the term of the permit that describes the location of outfalls or field screening points to be sampled (*or the location of instream stations*)" and explain "why the [chosen] location is *representative*. . . ." 40 C.F.R. §

122.26(d)(2)(iii)(D) [**44] (emphases added). Here, the County Defendants did just that. County Defendants themselves chose the locations of the Monitoring Stations, locations that are downstream from a significant number of their outfalls.²¹ And, as required by law, the County Defendants chose locations that they certified were necessarily "representative" of the monitored activity (*i.e.*, the Permittees' discharges of stormwater runoff into the navigable waters of the United States).²² Now, however, County Defendants claim [*1210] that their compliance with the Permit cannot be measured using the results of the representative monitoring they themselves agreed to, that the Regional Board approved, and that the Permit itself contemplates is to be used to assess compliance with its terms. We take this opportunity to reevaluate and reject County Defendants' arguments.

21 "Q: Does the County's ms4 outlet to any tributaries of the Los Angeles River? A: Yes. Q: Does it outlet to tributaries of the Los Angeles River upstream of the mass emissions station? A: Yes. . . . Q: Does [the County's ms4] outlet to the San Gabriel River upstream of the mass emissions station? A: Yes." Pestrella Dep. 697:7-698:6, June 2, 2009.

22 "Q: Who [**45] selected the location of those stations, do you know? A: The County selected those locations for a particular purpose.

And the purpose was [to be] far enough away from tidal influence *so that you would be characterizing the stormwater runoff as opposed to ocean waters*. Q: And the locations were then approved by Regional Board staff; is that correct? A: Correct." Wamikannu Dep. 130:13-130:19, July 1, 2009 (emphasis added).

CONCLUSION

Because the results of County Defendants' pollution monitoring conclusively demonstrate that pollution levels in the Los Angeles and San Gabriel Rivers are in excess of those allowed under the Permit, the County Defendants are *liable* for Permit violations as a matter of law. This case is remanded to the district court for further proceedings consistent with this opinion, including a determination of the appropriate *remedy* for the County Defendants' violations.

REVERSED and REMANDED.

[*1211] APPENDICES

Appendix A

[*1212] Appendix B

VOLUME III
TAB 5

LEXSEE

NATURAL RESOURCES DEFENSE COUNCIL, INC. Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent, BATTERY COUNCIL INTERNATIONAL, et al., Respondents-Intervenors.

Nos. 90-70671, 91-70200

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

966 F.2d 1292; 1992 U.S. App. LEXIS 12517; 34 ERC (BNA) 2017; 92 Cal. Daily Op. Service 4703; 92 Daily Journal DAR 7542; 22 ELR 20950

**October 9, 1991, Argued and Submitted, San Francisco, California
June 4, 1992, Filed**

PRIOR HISTORY: [**1] Petition for Review of a Rule Promulgated by the Environmental Protection Agency.

COUNSEL: Robert W. Adler, Natural Resources Defense Council, Washington, D.C., for the petitioner.

Daniel S. Goodman, United States Department of Justice, Washington, D.C., for the respondent.

Dennis J. Whittsley, Collier, Shannon & Scott, Washington, D.C., for intervenors-respondents American Association of Airport Executives, Chemical Specialties Manufacturers Association, Institute of Scrap Recycling Industries, Inc., Leather Industries of America, National Tank Truck Carriers, Inc., Rubber Manufacturers Association, and Specialty Steel Industry of the United States.

William T. O'Neil, Covington & Burling, Washington, D.C., for intervenors-respondents National Food Processors Association and Chemical Manufacturers Association.

Kurt J. Olson, Weinberg, Bergeson & Neuman, Washington, D.C., for intervenor-respondent Battery Council International.

Ellen Siegler, American Petroleum Institute, Washington, D.C., for intervenor-respondent American Petroleum Institute.

Kristy A. Niehaus, Hunton & Williams, Washington, D.C., for intervenor-respondent Electric Utilities.

Russell S. Frye, Chadbourne & Parke, [**2] Washington, D.C., for intervenors-respondents American Paper Institute and National Forest Products Association.

John H. Turner, National Solid Wastes Management Association, Washington, D.C., for intervenor-respondent National Solid Wastes Management Association.

R. Timothy McCrum, Crowell & Moring, Washington, D.C., for intervenors-respondents American Mining Congress, National Coal Association, National Council of Coal Lessors, National Aggregates Association and American Iron and Steel Institute.

Robert J. Saner, II, White, Fine & Verville, Washington, D.C., for intervenor-respondent National Association of Flood and Stormwater Management Agencies.

JUDGES: Before: Harry Pregerson, Warren J. Ferguson, and Diarmuid F. O'Scannlain, Circuit Judges. Opinion by Judge Ferguson; Partial Concurrence, Partial Dissent by Judge O'Scannlain.

OPINION BY: FERGUSON

OPINION

[*1295] OPINION

FERGUSON, Circuit Judge:

The Natural Resources Defense Council ("NRDC") challenges aspects of the Environmental Protection Agency's ("EPA") recent Clean Water Act storm water discharge rule. ¹ NRDC argues that the deadlines

contained in the rule and the scope of its coverage are unlawful under section 402(l), (p) of the Clean Water Act, [**3] 33 U.S.C. § 1342(l), (p). We grant partial relief.

1 National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (1990) (to be codified at 40 C.F.R. § 122.26); National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadline for Group Applications, 56 Fed. Reg. 12,098 (1991) (to be codified at 40 C.F.R. § 122.26(e)).

I. BACKGROUND

In 1972 Congress enacted significant amendments to the Clean Water Act ("CWA"), ² 33 U.S.C. §§ 1251-1387 (1988), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One major focus of the CWA is the control of "point source" pollution. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The CWA also established [**4] the National Pollutant Discharge Elimination System ("NPDES"), requiring permits for any discharge of pollutants from a point source pursuant to section 402 of the CWA, 33 U.S.C. § 1342. The CWA empowers EPA or an authorized state to conduct an NPDES permitting program. 33 U.S.C. § 1342(a)-(b). Under the program, as long as the permit issued contains conditions that implement the requirements of the CWA, the EPA may issue a permit for discharge of any pollutant. 33 U.S.C. § 1342(a)(1).

2 The Act is popularly known as the Clean Water Act or the Federal Water Pollution Control Act. 33 U.S.C. § 1251. For more background on the CWA, see *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 202-209, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976); *Sierra Club v. Union Oil of California*, 813 F.2d 1480, 1483 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931, 108 S. Ct. 1102, 99 L. Ed. 2d 264 (1988); and *Natural Resources Defense Council v. Train*, 166 App. D.C. 312, 510 F.2d 692, 695-97 (D.C. Cir. 1975).

This case involves runoff [**5] from diffuse sources that eventually passes through storm sewer systems and is thus subject to the NPDES permit program. *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines, 56 Fed. Reg. 56,548 (1991). One recent study concluded that pollution from such sources, including runoff from urban areas, construction sites, and agricultural land, is now a leading cause of water quality impairment. 55 Fed. Reg. at 47,991.³

3 The Nationwide Urban Runoff Program (NURP) conducted from 1978 through 1983 found that urban runoff from residential, commercial and industrial areas produces a quantity of suspended solids and chemical oxygen demand that is equal to or greater than that from secondary treatment sewage plants. 55 Fed. Reg. at 47,991. A significant number of samples tested exceeded water quality criteria for one or more pollutants. *Id.* at 47,992. Urban runoff is adversely affecting 39% to 59% of the harvest-limited shellfish beds in the waters off the East Coast, West Coast and in the Gulf of Mexico. 56 Fed. Reg. at 56,548.

[**6] *A. Efforts to Regulate Storm Water Discharge.*

Following the enactment of the CWA amendments in 1972, EPA promulgated NPDES permit regulations exempting a number of classes of point sources, including uncontaminated storm water discharge, on the basis of "administrative infeasibility," i.e., the extraordinary administrative burden imposed on EPA should it have to issue permits for possibly millions of point sources of runoff. *Natural Resources Defense Council v. Costle*, 186 App. D.C. 147, 568 F.2d 1369, 1372 & n.5, 1377 (D.C. Cir. 1977). NRDC [*1296] challenged the exemptions. Relying on the language of the statute, its legislative history and precedent, the D.C. Circuit held that the EPA Administrator did not have the authority to create categorical exemptions from regulation. *Id.* at 1379. However, the court acknowledged the agency's discretion to shape permits in ways "not inconsistent with the clear terms of the Act." *Id.* at 1382.

Following this litigation, EPA promulgated regulations covering storm water discharges in 1979, 1980 and 1984. 56 Fed. Reg. 56,548. NRDC challenged various aspects of these rules both at the administrative [**7] level as well as in the courts.

Recognizing both the environmental threat posed by storm water runoff⁴ and EPA's problems in implementing regulations,⁵ Congress passed the Water Quality Act of 1987⁶ containing amendments to the CWA ("the 1987 amendments"), portions of which set up a new scheme for regulation of storm water runoff. Section 402(p), as amended, established deadlines by which certain storm water dischargers must apply for permits, the EPA or states must act on permits and dischargers must implement their permits. *See* Appendix A. The Act also set up a moratorium on permitting requirements for most storm water discharges, which ends on October 1, 1992. There are five exceptions that are required to obtain permits before that date:

4 *See* 132 Cong. Rec. 32,381 (1986).

5 Senator Stafford, speaking in favor of the conference report for the Water Quality Act, noted that "EPA should have developed this program long ago. Unfortunately, it did not. The conference substitute provides a short grace period during which EPA and the States generally may not require permits for municipal separate storm sewers." 132 Cong. Rec. 32,381 (1986). Senator Chafee stated "the Agency has been unable to move forward with a [storm water discharge control] program, because the current law did not give enough guidance to the Agency. This provision provides such guidance, and I expect EPA to move rapidly to implement this control program." 133 Cong. Rec. 1,264 (1987).

[**8]

6 Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.).

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

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

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

(E) A discharge for which the Administrator or the State, . . . determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the

United States.

CWA § 402(p)(2); 33 U.S.C. § 1342(p)(2).

Section 402(p) also outlines an incremental or "phase-in" approach to issuance of storm water discharge permits. The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first. 133 Cong. Rec. 991 (1987). Section 402(p) requires EPA to promulgate rules regulating permit application [**9] procedures in a staggered fashion.

Responding to the 1987 amendments requiring the EPA to issue permit application requirements for storm water discharges associated with industrial activities and large municipalities, the EPA issued final rules on November 16, 1990, almost two years after its deadline ("the November 1990 rule"). 55 Fed. Reg. at 47,990c. EPA issued amended rules on March 21, 1991 ("the March 1991 rule"). 56 Fed. Reg. at 12,098. It is to portions of these rules that NRDC objects.

B. Jurisdiction.

We have jurisdiction pursuant to CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1). Section 509(b)(1) describes six types of actions by the EPA administrator that are subject to review in the court of appeals. Although the parties do not specify the section upon which they rely, § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) allows the court to review [*1297] the issuance or denial of a permit under CWA § 402, 33 U.S.C. § 1342. The court also has the power to review rules that regulate the underlying permit procedures. *NRDC v. EPA*, 211 App. D. C. 179, 656 F.2d 768, 775 (D.C. Cir. 1981); *cf. E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 136, 51 L. Ed. 2d 204, 97 S. Ct. 965 (1976). [**10] NRDC filed timely petitions for review of the final rules at issue here pursuant to CWA § 509(b)(1), 33 U.S.C. 1369(b)(1).

C. Standing.

Any "interested person" may seek review of designated actions of the EPA Administrator. 33 U.S.C. § 1369(b)(1). This court has held that the injury-in-fact rule for standing of *Sierra Club v. Morton*, 405 U.S. 727, 733, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) covers the "interested person" language. *Trustees for Alaska v. EPA*, 749 F.2d 549, 554 (9th Cir. 1984) (adopting the analysis in *Montgomery Environmental Coalition v.*

Costle, 207 App. D.C. 233, 646 F.2d 568, 578 (D.C. Cir. 1980)). A petitioner under *Sierra Club* must suffer adverse affects to her economic interests or "aesthetic and environmental well-being." *Sierra Club*, 405 U.S. at 734. Intervenor are various industry and trade groups subject to regulation under the rules at issue. NRDC claims, inter alia, that EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water contaminants. NRDC's allegations and the potential economic impact of the rules on the intervenors satisfy the [**11] broad standing requirement applicable here.

II. DISCUSSION

A. Standard of Review.

5 U.S.C. § 706(2)(A) (1988) authorizes the court to "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Under this standard a court must find a "rational connection between the facts found and the choice made." *Sierra Pacific Indus.*, 866 F.2d 1099, 1105 (9th Cir. 1989) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)). The court must decide whether the agency considered the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971).

On questions of statutory construction, courts must carry out the unambiguously expressed intent of Congress. If a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). [**12] Congress may leave an explicit gap, thus delegating legislative authority to an agency subject to the arbitrary and capricious standard. *Id.* at 843-44. If legislative delegation is implicit, courts must defer to an agency's

statutory interpretation as long as it is reasonable. *Id.* at 844. This is because an agency has technical expertise as well as the authority to reconcile conflicting policies. *See id.* Nevertheless, questions of congressional intent that can be answered with "traditional tools of statutory construction" are still firmly within the province of the courts. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987).

B. EPA's Extension of Statutory Deadlines.

1. Background.

NRDC challenges EPA's extension of certain statutory deadlines in the November 1990 and March 1991 rules. The statutory scheme calls for EPA to consider permit applications from the most serious sources of pollutants first: industrial dischargers and large municipal separate storm sewer systems ("large systems").⁷ The statute required EPA to establish regulations [**1298] for permit application requirements for these two groups by February [**13] 4, 1989; to receive applications for permits one year later, February 4, 1990; and to approve or deny the permits by February 4, 1991. Permittees may be given up to three years to comply with their permits. CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A). Medium sized municipal separate storm sewer systems ("medium systems") (those serving a population of 100,000 or more but less than 250,000) are on a similar schedule, except that the deadlines are two years later. CWA § 402(p)(4)(B), 33 U.S.C. § 1342(4)(B). The temporary statutory exemption for all storm water sources expires on October 1, 1992. CWA § 402(p)(1), 33 U.S.C. § 1342(p)(1). EPA states that discharges from municipal separate storm sewer systems serving a population of under 100,000 are to be regulated after that date.

⁷ Large municipal systems are those serving a population of 250,000 or more. § 402(p)(2)(C).

The EPA rules at issue changed the statutory deadlines as follows:

Deadlines pursuant to CWA § 402(p) ⁸		EPA Deadlines ⁹	
Discharge type	Deadline to issue rules	Deadline for application and approval of permits	Application deadlines

Industrial	2/4/89	2/4/90 - applications due	see below
		2/4/91 - approval due	
Large municipal systems	08/04/89	2/4/90 - applications due	Part 1 - 11/18/91
		2/4/91 - approval	Part 2 - 11/16/92
Medium municipal systems	08/04/91	2/4/92 - applications due	Part 1 - 5/18/92
		2/4/93 - approval due	Part 2 - 5/17/93
EPA Application Deadlines for "Industrial Activity" Dischargers			
Individual	Group		
due 11/18/91	Part 1 9/30/91; Part 2 - 10/1/92		

8 Since NRDC filed this action, Congress has passed certain legislation affecting some of the deadlines at issue. Congress ratified the date of September 30, 1991 for part 1 of group applications for industrial dischargers. *See* Dire Emergency Supplemental Appropriations Act of 1991, Pub. L. No. 102-27, § 307, 105 Stat. 130, 152 (1991).

Section 1068 of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA") clarifies the deadlines for storm water discharges associated with industrial activity from facilities owned or operated by a municipality. Pub. L. No. 102-240, § 1068, 105 Stat. 1914, 2007 (1991). ISTEA deadlines are being reviewed in a separate case. Nothing in this opinion should be viewed as requiring EPA to comply with deadlines that have been altered or superseded by the ISTEA.

9 *See* 55 Fed. Reg. at 48,071-72 (to be codified at 40 C.F.R. § 122.26(e)); 56 Fed. Reg. at 12,100 (to be codified at 40 C.F.R. § 122.26(e)(2)(iii)). EPA changed certain of these deadlines after this case was submitted. These changes are the subject of a separate case.

The EPA rules at issue set no date for final approval or denial of applications from municipal or industrial dischargers, nor for compliance by these regulated entities. *See* 55 Fed. Reg. at 48,072.

[**14] As the chart illustrates, EPA made other elaborations on the statutory scheme in addition to extending the deadlines. Medium and large municipal systems and industrial dischargers are now subject to a two-part application process. 55 Fed. Reg. at 48,072. The November 1990 rules allow industrial dischargers to apply for either individual or group permits. *Id.* at 48,066-67. [*1299] The March 1991 rules further extended the deadline for part 1 of the group industrial discharger permits to September 30, 1991. ¹⁰ 56 Fed. Reg. at 12,098. A final rule published on April 2, 1992 extended the deadline for the part 2 group application for industrial dischargers from May 18, 1992 to October 1, 1992. 57 Fed. Reg. at 11,394. The EPA rules at issue contain neither deadlines for final EPA or state approval of permits nor deadlines for compliance with the permit terms.

10 NRDC initially claimed that this extension was unlawful because it was granted without proper notice and comment. However, Congress approved this extended deadline in a supplemental appropriations bill. Dire Emergency Supplemental Appropriations Act of 1991, Pub.L. No. 102-27 § 307, 105 Stat. 130, 152 (1991). This Act moots the procedural and substantive challenge to this extended deadline.

[**15] Seeking to compel the EPA to conform to the statutory scheme, NRDC asks this court:

a) to declare unlawful EPA's failure to issue certain of the storm water permitting regulations by February 4, 1989 and EPA's extension of certain statutory deadlines;

b) to enjoin EPA from granting future extensions of the deadlines;

c) to compel EPA to include deadlines for permit approval or denial and permit compliance consistent with the statute; and

d) to compel EPA to require that medium and small municipal systems meet the same deadlines as large systems.

2. Discussion.

a. Request for Declaratory Relief.

NRDC asks the court to (1) declare unlawful EPA's failure to issue storm water permitting regulations by February 4, 1989; and (2) declare unlawful EPA's extension of deadlines for submission of permit applications by large and medium systems and individual industrial dischargers.

A request for declaratory relief in a challenge to an agency action is ripe for review if the action at issue is final and the questions involved are legal ones. *Public Util. Dist. No. 1 v. Bonneville Power Admin.*, 947 F.2d 386, 390 n. 1 (9th Cir. 1991) (citations omitted), *cert. denied*, [**16] ___U.S.___, 112 S. Ct. 1759, 118 L. Ed. 2d 422, 60 U.S.L.W. 3537 (1992). Here, the agency regulations are final. *See* 55 Fed. Reg. at 47,990, 56 Fed. Reg. at 12,096. The question of whether the EPA is bound by the statutory scheme set by Congress is a legal one. The request for declaratory relief is therefore ripe for consideration by this court.

The granting of declaratory relief "rests in the sound discretion of the [] court exercised in the public interest." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Civil Procedure* § 2759, at 645 (1983). The guiding principles are whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings. *McGraw Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342 (9th Cir.) (citing Borchar, *Declaratory Judgments* 299 (2d ed. 1941)), *cert. denied*, 385 U.S. 919, 87 S. Ct. 229, 17 L. Ed. 2d 143 (1966). A court

declaration delineates important rights and responsibilities and can be "a message not only to the parties but also to the public and has significant educational and lasting importance." [**17] *Bilbrey v. Brown*, 738 F.2d 1462, 1471 (9th Cir. 1984). Because of the importance of the interests and the principles at stake, we grant declaratory relief.

EPA does not have the authority to ignore unambiguous deadlines set by Congress. *Delaney v. EPA*, 898 F.2d 687, 691 (9th Cir.), *cert. denied*, 111 S. Ct. 556, 112 L. Ed. 2d 563 (1990). In arguing against injunctive relief, EPA points to cases recognizing factors indicating that equitable relief may be inappropriate. *See, e.g., In re Barr Laboratories, Inc.*, 289 App. D.C. 187, 930 F.2d 72, 74 (D.C. Cir.) (agency's choice of priorities is an important factor in considering whether to grant equitable relief), *cert. denied*, 116 L. Ed. 2d 241, 112 S. Ct. 297, 112 S. Ct. 298 (1991); *Natural Resources Defense Council v. Train*, 166 App. D.C. 312, 510 F.2d 692, 712 (D.C. Cir. 1975) (court may need to give [*1300] agency some leeway due to budgetary commitments or technological problems); *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 569-70 (D.D.C. 1986) (EPA's good faith is a factor). None of these factors militates against an award of declaratory relief. They do not grant an executive [**18] agency the authority to bypass explicit congressional deadlines. The deadlines are not aspirational - Congress set them and expected compliance. *See* 132 Cong. Rec. 32,381-82 (remarks of Senator Stafford, commenting on EPA delay and the establishment of statutory deadlines as "outside dates.") This court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to express statutory requirements. For these reasons, we grant NRDC's request for declaratory relief. EPA's failure to abide by the statutory deadlines is unlawful.

b. Request for Injunction.

NRDC asks the Court to enjoin the EPA from further extensions for permit applications from municipal and industrial dischargers. Injunctions are an extraordinary remedy issued at a court's discretion when there is a compelling need. 11 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2942, at 365, 368-69 (1973). We decline to enjoin the EPA on discretionary grounds.

Injunctive relief could involve extraordinary

supervision by this court. Injunctive relief may be inappropriate where it requires constant supervision. *Id.* at 376. At issue are deadlines for the three major [**19] categories of dischargers, each of which has a two-part application. The permitting process will go on for several years. While recognizing the importance of the interests involved, we nevertheless decline to engage in the active management of such a remedy.

In this situation, we must operate on the assumption that an agency will follow the dictates of Congress and the court. As noted above, the EPA does not have the authority to predicate future rules or deadlines in disagreement with this opinion. *See Allegheny General Hosp. v. NLRB*, 608 F.2d 965, 970 (3rd Cir. 1979). We presume that the EPA will duly perform its statutory duties. *See Upholstered Furniture Action Council v. California Bureau of Home Furnishings*, 442 F. Supp. 565, 568 (E.D. Cal. 1977) (three judge court). Because we decline to take on potentially extensive supervision of the EPA, Congress may need to find other ways to ensure compliance if the agency is recalcitrant.

c. Deadlines for Permit Approval and Compliance.

NRDC requests that the court compel EPA to revise the rules to include deadlines for permit approval or denial and permit compliance consistent with the statute. Section [**20] 402(p)(4)(A) calls for the EPA to issue or deny permits for industrial and large municipalities by February 4, 1991, which is one year after the applications are submitted, and states that "any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of the issuance of such permit." CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A). The statute sets out a similar schedule for medium municipalities, except that the deadlines are two years later. CWA § 402(p)(4)(B), 33 U.S.C. § 1342(p)(4)(B).

The regulations promulgated by the EPA contain neither final approval deadlines nor compliance deadlines for industrial dischargers or medium and large municipalities. 55 Fed. Reg. at 48,072. By failing to regulate final approval and compliance, EPA has omitted a key component of the statutory scheme. To ensure adherence to the statutory time frame, especially in the face of deadlines already missed, the regulated community must be informed of these deadlines. EPA's failure to include these important deadlines is an arbitrary and capricious exercise of its responsibility to issue

regulations pursuant to the statute.

[**21] We see no need for additional delay while supplemental regulations are issued. Given the extraordinary delays already encountered, EPA must avoid further delay. [*1301] The regulations should inform the regulated community of the statute's outside dates for compliance.¹¹ *See* CWA § 402(p)(4)(A)-(B), 33 U.S.C. § 1342(p)(4)(A)-(b).

11 In addition, pursuant to the statute, compliance deadlines applicable to each facility shall be contained in its permit.

d. Timeline for Small and Medium Systems.

The parties disagree on when small systems (those serving a population of less than 100,000) should be regulated. As noted above, the temporary statutory exemption for all storm water sources expires on October 1, 1992. The statute requires EPA to establish a comprehensive program to regulate point sources subject to the moratorium, such as small municipalities, by that date. CWA § 401(p)(1), (6), 33 U.S.C. § 1342(p)(1), (6).

Pointing to a perceived statutory gap, NRDC argues that small systems should be subject to the same permitting [**22] schedule applicable to medium systems, to assure that they are regulated when the permitting moratorium ends on October 1, 1992. However, the plain language of the statute prohibits this. Section 402(p)(1) forbids requiring a permit for entities not listed as exceptions (such as small municipalities) before October 1, 1992. Yet the deadline for part 1 of the application for medium systems is currently May 18, 1992. 55 Fed. Reg. at 48,072.

Even if NRDC is correct that EPA is not proceeding so that regulations will be in place on October 1, 1992, we cannot ignore the plain language of the statute by adopting NRDC's solution. The CWA does not require regulation of such systems prior to expiration of the moratorium. We therefore reject NRDC's proposal that small systems be put on the same schedule as medium ones.

NRDC asks the court to put the medium systems on the same schedule as the large systems, in order to achieve closer compliance with the timeline set out in § 402(p)(4)(B). However, EPA's current schedule for medium systems, although delayed, is still within the

statutory scheme in its relation to the schedule for large systems. That is, Congress placed the medium [**23] systems on a staggered permitting schedule to start two years after the large systems and industrial users. The EPA schedule now has medium municipal system applications due six months after the applications for the large municipal systems. 55 Fed. Reg. at 48,072. For this reason, the current deadline for medium municipalities does not appear to be unreasonable despite the unlawful delay.

C. Exclusion of Certain Sources from Regulation.

1. Definition of "Municipal Separate Storm Sewer System."

Section 402(p) refers to "municipal separate storm sewer systems serving a population" of a specified size. CWA § 402(p)(2)(C), (D), 33 U.S.C. § 1342 §§ 402(p)(2)(C), (D). NRDC contends that EPA's definition of this term violates the plain language of the statute, fails to take into account the statutory definition of the word "municipality" and is arbitrary and capricious because the agency considered improper factors when it defined the term. All of this, according to NRDC, results in an impermissible narrowing of the municipalities covered by the first two rounds of permitting.

The 1987 amendments to the CWA did not contain definitions of "municipal" or "separate storm [**24] sewer system," but the CWA amendments enacted in 1972 defined "municipality" as follows:

except as otherwise specifically provided, when used in this chapter: . . . (4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved [*1302] management agency under section 1288 of this title [33 U.S.C. § 1288].

33 U.S.C. § 1362.

In the November 1990 regulations, the EPA defined "municipal separate storm sewer" as: "a conveyance or system of conveyances . . . owned or operated by a State, city, town, borough, county, parish, district, association or other public body. . . ." 55 Fed. Reg. at 48,065 (to be codified at 40 C.F.R. § 122.26(b)(8)). This definition

echoes the language of 33 U.S.C. § 1362(4). However, when defining large and medium municipal separate storm sewer *systems serving a population* of a specified size, EPA brought in other factors. 55 Fed. Reg. at 48,064 (to be codified [**25] at 40 C.F.R. § 122.26(b)(4), (7)). EPA defines medium and large separate storm sewer systems using two main categories:

1) separate storm sewer systems located in an incorporated place with the requisite population, and

2) separate storm sewer systems located in unincorporated, urbanized portions of counties containing the requisite population (as listed in Appendices H and I to the rule), excluding those municipal separate sewers located in incorporated places, townships or towns within such counties. ¹² 55 Fed. Reg. at 48,064. NRDC opposes this definition for municipal separate storm sewer systems for the reasons explained below.

12 The rule also permits the Administrator to include certain other systems as part of a medium or large system due to the physical interconnections between the systems, their locations, or certain other factors. *See* 40 C.F.R. § 122.26(b)(4)(iii), (iv) and (b)(7)(iii), (iv).

First, NRDC argues that according to the definitional section cited above and principles of [**26] statutory construction, general definitions apply wherever the defined term appears elsewhere in the law. *See* 33 U.S.C. § 1362 ("except as otherwise specifically provided" the definitions apply throughout the act); *Sierra Club v. Clark*, 755 F.2d 608, 613 (8th Cir. 1985). NRDC argues that the scope of the statutory definition of "municipality" in 33 U.S.C. § 1362(4) and the scope of the phrase "municipal separate storm sewer system serving a population" are the same. NRDC thus proposes that the correct definition is a system of conveyances owned or operated by the full range of entities described at 33 U.S.C. § 1362(4), (cities, towns, etc.) with populations within the ranges designated at § 402(p)(2), i.e., 250,000 or more for large systems and between 100,000 and 250,000 for medium systems.

However, we do not believe that the entire phrase used in the act, "municipal separate storm sewer system serving a population of [a specified size]" can be equated with the term "municipality" in the manner that NRDC proposes. The act contains no definition of either "system" or "serving a population." The word "system" is

particularly ambiguous in the context of storm [**27] sewers.¹³ We therefore agree with EPA that there is no single, plain meaning for the disputed words.

13 Storm sewers located within the boundaries of a city might be part of a state highway system, a flood control district, or a system operated by the state or county. *See* 55 Fed. Reg. at 48,041.

Because the term is ambiguous, we must look first to whether Congress addressed the issue in another way. *See Abourezk v. Reagan*, 251 App. D.C. 355, 785 F.2d 1043, 1053 (D.C. Cir. 1986) ("if the court finds that Congress had a specific intent . . ., the court stops there and enforces that intent regardless of the agency's interpretation") (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 & n. 9 (1984)), *aff'd by an equally divided court*, 484 U.S. 1, 108 S. Ct. 252, 98 L. Ed. 2d 1 (1987). The legislative history is not illuminating. Although it explains that a purpose of the permitting scheme was to attack the most serious sources of discharge first,¹⁴ [**28] this general goal is not helpful in discerning the specific meaning of "municipal separate storm sewer system serving a population." Without clear guidance from Congress, we turn to the agency's justifications [**1303] for its choices in the face of NRDC's objections.

14 *See, e.g.*, 133 Cong. Rec. 991 (1987) (statement of Rep. Stangeland).

NRDC claims that EPA's definition is arbitrary and capricious because EPA considered improper factors, including its own work load, the incorporation status of municipalities, and urban density. "An agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). [**29]

EPA's final definition took into account many issues and concerns of the regulated community. *See* 55 Fed. Reg. at 48,039. EPA considered eight different options for defining large and medium municipal separate storm sewer systems. 55 Fed. Reg. at 48,038-43. EPA

considered focusing on ownership or operation of a system by an incorporated place, but found that this approach did not take into account systems operated by flood control districts, state transportation systems, or concerns relating to watershed management. It instead fashioned a multi-faceted approach. This choice of approach is not unreasonable.

NRDC challenges EPA's consideration of incorporation as a factor. It claims that limiting regulation to incorporated places of the appropriate size excludes portions of 378 counties that contain over 100,000 people. NRDC essentially contends that because counties are a type of municipality, storm water conveyances in all counties with populations over 100,000 should come within the definition of either medium or large municipal separate storm sewer systems. We have already rejected NRDC's claim that the definition of regulated "systems" must include [**30] conveyances in all "municipalities."

EPA's use of incorporation as a factor is not arbitrary and capricious or inconsistent with the statute. The agency proceeded on the reasonable assumption that cities possess the police powers needed effectively to control land use within their borders. *See* 55 Fed. Reg. at 48,039, 48,043. The first major category within the definition of regulated "systems," municipal separate storm sewers located within incorporated places having the requisite population, is reasonable.

NRDC questions EPA's second major category, which covers storm sewers located in unincorporated urbanized areas of counties with the designated population, but excludes conveyances located in incorporated places with populations under 100,000 within those counties. The exclusion, however, has a legitimate statutory basis. The statute prohibits EPA from requiring permits for systems serving under 100,000 persons prior to October 1, 1992. CWA § 402(p)(1), 33 U.S.C. § 1342(p)(1). EPA reasonably concluded that conveyances within small incorporated places should be considered parts of small systems limited to those incorporated places, rather than parts of larger [**31] systems serving whole counties. EPA's definition attempts to capture population centers of over 100,000 (by including urbanized, unincorporated areas) without violating the congressional stricture against regulation of areas with populations under 100,000 (thus excluding incorporated areas of less than 100,000 within a county).

In arriving at its definition of "municipal separate

storm sewer systems serving" a designated population, EPA investigated numerous options and considered comments from a range of viewpoints. We find "a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

NRDC objects to EPA's use of 1980 census data and EPA's definition of urban density. While it appears that NRDC has solid arguments as to why it would be preferable to use 1990 census figures and adopt its method of determining urban density, our role is not to determine whether EPA has chosen the best among all possible [*1304] methods. We can only determine if its choices are rational. EPA chose the 1980 census data because it was the most widely available decennial census data at the time of rule formulation and promulgation. Neither [**32] this choice nor its use of the Census Bureau's definition of urbanized area is arbitrary and capricious.

EPA took agency work load into account in arriving at its definition. 55 Fed. Reg. at 48,039. NRDC objects on the basis that Congress considered the issue of work load when it developed the "phase-in" approach and allowed permit applications on a system- or jurisdiction-wide basis. However, this broad congressional scheme does not prohibit further consideration of EPA's work load as one among many factors in its attempt to fashion a workable program.

In summary, NRDC's argument that the phrase "municipal separate storm sewer system serving a population" has the plain meaning NRDC proposes is not persuasive. Although EPA's definition in the face of the statute's ambiguity is complex, if not convoluted, it is not arbitrary and capricious, and we therefore reject NRDC's request that the definition be declared invalid.

2. EPA Exemption for Light Industry.

NRDC challenges the portion of the EPA rule excluding various types of "light industry" from the definition of "discharge associated with industrial activity."

Under CWA § 402(p)(2)(B), a "discharge associated with [**33] industrial activity" is an exception to the permit moratorium. In the November rule, EPA modified the statutory scheme by drawing distinctions among light and heavy industry and considering actual exposure to

industrial materials. Although the statute does not define "associated with industrial activity," the EPA definition excludes industries it considers more comparable to retail, commercial or service industries. The excluded categories are manufacturers of pharmaceuticals, paints, varnishes, lacquers, enamels, machinery, computers, electrical equipment, transportation equipment, glass products, fabrics, furniture, paper board, food processors, printers, jewelry, toys and tobacco products. 55 Fed. Reg. at 48,008. These types of facilities need apply for permits only if certain work areas or actual materials are exposed to storm water. *Id.* EPA justifies these exemptions on the assumption that most of the activity at these types of manufacturers takes place indoors, and that emissions from stacks, use of unhooded manufacturing equipment, outside material storage or disposal, and generation of large amounts of dust and particles will all be minimal. 55 Fed. Reg. at 48,008c. [**34]

Thus, EPA considers actual exposure to certain materials or stormwater for the light industry categories, but does not consider actual exposure for the other industrial categories. After careful review of the statutory language and the record, we conclude that this distinction is impermissible.

We note that the language "discharges associated with industrial activity" is very broad. The operative word is "associated." It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary.

There is a brief discussion of the issue in the legislative history: "[a] discharge is associated with industrial activity if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings." 133 Cong. Rec. 985 (1987); *see also* 132 Cong. Rec. 31,968 (1986) (same). EPA argues that the words "directly related" indicate Congress's intent to require permits for only those materials that come in contact with industrial materials. [**35] *See* 55 Fed. Reg. at 48,007. However, the examples given - parking lots and administrative buildings - indicate that the intent was to exclude only those facilities or parts of a facility that are completely non-industrial.

EPA's definition follows the language quoted above:

"Storm water discharge associated with industrial activity means the [*1305] discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). EPA applies this definition differently depending on type of industry. EPA bases its regulation of industrial activity on Standard Industrial Classification ("SIC") categories. For most of the industrial SIC categories (identified at 40 C.F.R. § 122.26(b)(i-x)), the EPA definition includes all stormwater discharges from plant yards, access roads and rail lines, material handling sites, storage and disposal sites, shipping and receiving areas, and manufacturing buildings. 40 C.F.R. § 122.26(b)(14). However, for the "light industry" categories identified in 40 C.F.R. § 122.26(b)(14)(xi), stormwater must [**36] be actually exposed to raw materials, by-products, waste, etc., before permitting is required.

EPA justifies this difference on the ground that for "light industry," industrial activity will take place indoors, and that generation of large amounts of particles and emissions will be minimal. There is nothing in the record submitted to the Court however, which supports this assumption. *See, e.g.*, 55 Fed. Reg. at 48,008. Without supportable facts, we are unable to rely on our usual assumption that the EPA has rationally exercised the duties delegated to it by Congress. To exempt these industries from the normal permitting process based on an unsubstantiated assumption about the this group of facilities is arbitrary and capricious.

In addition, by designating these light industries as a group that need only apply for permits if actual exposure occurs, EPA impermissibly alters the statutory scheme. The statute did set up a similar approach for oil, gas, and mining industries. However, no other classes of industrial activities are subject to the more lenient "actual exposure" test. To require actual exposure entirely shifts the burden in the permitting scheme. Most industrial [**37] facilities will have to apply for permits and show the EPA or state that they are in compliance. Light industries will be relieved from applying for permits unless actual exposure occurs. The permitting scheme then will work only if these facilities self-report, or the EPA searches out the sources and shows that exposure is occurring. We do not know the likelihood of either self-reporting or EPA inspection and monitoring of light industries, and the regulations appear to contemplate

neither for these industries. For this reason, the proposed regulation is also arbitrary and capricious.

In conclusion, we hold that the rule for light industries is arbitrary and capricious, vacate the rule, and remand for further proceedings.

3. *Exclusion of Construction Sites of Less than Five Acres.*

NRDC challenges the exemption for construction sites of less than five acres. EPA concedes that the construction industry should be subject to storm water permitting because at a high level of intensity, construction is equivalent to other regulated industrial activities. 55 Fed. Reg. at 48,033. Construction sites can pollute with soil sediments, phosphorus, nitrogen, nutrients from [**38] fertilizers, pesticides, petroleum products, construction chemicals and solid wastes. *Id.* EPA states that such substances can be toxic to aquatic organisms, and affect water used for drinking and recreation. *Id.*

Following its characterization of construction sites as suitable for regulation, EPA defined its task as determining "an acreage limit [] appropriate for identifying sites that amount are (sic) to industrial activity." 55 Fed. Reg. at 48,036. EPA originally proposed regulations that exempted operations that disturb less than one acre of land and are not part of a common plan of development or sale. 55 Fed. Reg. at 48,035-36. In response to comments by the regulated community about the administrative burden presented by the regulation, EPA increased the exemption to five acres. 55 Fed. Reg. at 48,036. EPA also noted that larger sites will involve heavier equipment for removing vegetation and bedrock than smaller sites. *Id.* at 48,036. [*1306]

We find that EPA's rationale for increasing the limit from one to five acres inadequate and therefore arbitrary and capricious. EPA cites no information to support its [**39] perception that construction activities on less than five acres are non-industrial in nature.

EPA also claims agency power, inherent in statutory schemes, to make categorical exemptions when the result is *de minimis*. *Alabama Power Co. v. Costle*, 204 App. D.C. 51, 636 F.2d 323, 360 (D.C. Cir. 1979). However, if construction activity is industrial in nature, and EPA concedes that it is, EPA is not free to create exemptions

from permitting requirements for such activity. *See Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d at 1369, 1377 (D.C. Cir. 1977) (once Congress has delineated an area that requires permits, EPA is not free to create exemptions).

Further, we find the *de minimis* principle inapplicable here. The *de minimis* exemption is only available where a regulation would "yield a gain of trivial or no value." *Alabama Power Co., supra*, at 361. Because of the lack of data, we cannot know whether exempting sites of less than five acres will indeed have only a *de minimis* effect.

The *de minimis* concept is based on the principle that the law does not concern itself with trifling matters. *Id.* at 360. [**40] We question its applicability in a situation such as this where the gains from application of the statute are being weighed against administrative burdens to the regulated community. *See id.* at 360-361 (implied authority to make cost-benefit decisions must derive from statute, and not general *de minimis* doctrine).

Further, EPA's claim that the five-acre exemption is *de minimis* is contradicted by the admission that even small construction sites can have a significant impact on local water quality. The EPA acknowledges that "over a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades." 55 Fed. Reg. at 48,033. Without data supporting the expanded exemption, we owe no deference to EPA's line-drawing. We thus hold that EPA's choice of a five-acre limit is arbitrary and capricious, invalidate that portion of the rule exempting construction sites of five acres or less from permitting requirements, and remand for further proceedings.

4. Exemption for oil and gas activities.

The 1987 amendments created an exemption from the permit requirement for uncontaminated runoff [**41] from mining, oil and gas facilities. *See* Appendix, CWA § 402(1)(2), 33 U.S.C. §§ 1342(l)(2). Section 402(1)(2) states that a permit is not required for discharges of storm water runoff from mining, oil or gas operations composed entirely of flows from conveyance systems used for collecting precipitation runoff and "which are not contaminated by contact with, or do not come into contact with any overburden, raw material, intermediate products, finished product, byproduct, or waste products". NRDC claims that the November 1990 rule

sets up an impermissible standard for determining contamination at oil and gas facilities. The relevant portion of the rule states that at these facilities, an operator is not required to submit a permit application unless the facility has had a discharge of a reportable quantity¹⁵ since November 1987, or contributes to a violation of a water quality standard. 55 Fed. Reg. 48,067 (to be codified at 40 C.F.R. § 122.26(c)(1)(iii)). A facility which has had a release of oil or a hazardous substance in excess of RQs since [*1307] 1987 must submit a permit application. *Id.*; 55 Fed. Reg. at 48,029-30.

15 "Reportable Quantities" (RQs) are not effluent guidelines setting up permissible limits for pollutants. Rather, they are quantities the discharge of which "may be harmful to the public health or welfare of the United States." CWA § 311(b)(4), 33 U.S.C. § 1321(b)(4). EPA has established RQs for a large number of substances, pursuant to both CWA section 311, 33 U.S.C. § 1321, and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") section 102, 42 U.S.C. § 9602. *See* 40 C.F.R. Parts 110, 117, 302. The operator of any vessel or facility which releases the RQ of any substance must immediately notify the National Response Center. *See, e.g.*, 40 C.F.R. § 110.10.

[**42] NRDC claims that oil and gas operations should be subject to the stricter standards which apply to mining operations.¹⁶ It also objects to EPA's use of RQs as the only test for contamination of runoff from oil and gas storm water dischargers, claiming it is inconsistent with the legislative history. We conclude that the legislative history does not support NRDC's position.

16 Operators of mines must submit permit applications whenever storm water discharges come into contact with overburden, waste products, etc. 40 C.F.R. § 122.26(c)(1)(iv).

The conference report states:

Permits are not required where stormwater runoff is diverted around mining operations or oil and gas operations and does not come in contact with overburden, raw material, product, or process wastes. In addition, where stormwater runoff is not contaminated by contact with such materials, *as determined by the administrator*,

permits are also not required. With respect to oil or grease or hazardous substances, the determination of whether stormwater [**43] is "contaminated by contact with" such materials, *as established by the Administrator*, shall take into consideration whether these materials are present in such stormwater runoff in excess of reportable quantities under section 311 of the Clean Water Act . . . , or in the case of mining operations, above natural background levels.

H.R. Rep. No. 1004, 99th Cong., 2d Sess., at 151 (emphasis added).

Thus, the EPA Administrator has discretion to determine whether or not storm water runoff at an oil, gas or mining operation is contaminated with two types of materials: (1) overburden, raw material, product, or process wastes and (2) oil, grease or hazardous substances. The report sets out factors for the Administrator to consider in determining contamination for the latter group of pollutants.

NRDC first claims that because section 402(1)(2) treats oil, gas and mining together, the EPA rule must do the same. NRDC's second objection is based on its interpretation of the language in the conference report. Because the conference report lists RQs as only one factor to be taken into consideration, NRDC insists EPA cannot make it the only factor to measure contamination for oil and gas [**44] facilities.

Both of these arguments must fail in light of the conference report, which gives the Administrator discretion to determine when contamination has occurred with respect to the substances listed in the statute, i.e., overburden, raw materials, waste products, etc. *See* CWA § 402(1)(2). The conference report states that the Administrator shall take certain factors into account, but the report is clear that the determination of whether storm water is contaminated is within the Administrator's discretion.

NRDC argues that the remarks of certain congressmen during congressional debate show that the mining, oil, and gas exemptions were to apply only if the discharges were entirely free of contaminants. We find these examples less persuasive than the clear language of the conference report. Moreover, in light of the discretion granted the Administrator in the conference report, we cannot say that the rule as promulgated is an arbitrary and capricious exercise of that discretion.

NRDC also contends that Congress intended that EPA consider reportable quantities only in determining if a discharge is contaminated with oil, grease, or hazardous substances. Other pollutants, according [**45] to NRDC, must be found to contaminate the discharge if they exceed background levels.

EPA did not, in fact, limit itself to reportable quantities in determining which oil or gas facilities must apply for a permit. The rule requires a permit for any facility which "contributes to a violation of a water quality standard." 40 C.F.R. § 122.26(c)(1)(iii)(C). This requirement addresses contamination with substances other than oil and hazardous substances. We find no support in the statute or the legislative history for NRDC's claim that, with respect [**1308] to these substances, levels above background must be considered "contamination." The conference report quoted above requires consideration of background levels of any pollutant only with respect to mining operations.

D. Lack of Controls for Municipal Storm Water Discharge.

NRDC contends that EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments. Because Congress gave the administrator discretion to determine what controls are necessary, NRDC's argument fails.

Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial [**46] and other types of storm water. In the 1987 amendments, Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge. CWA § 402(p)(3)(A), (B), 33 U.S.C. § 1342(p)(3)(A)-(B). The Act states that permits for discharges from municipal storm sewers:

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, *and such other provisions as the Administrator or the State determines*

appropriate for the control of such pollutants.

Section 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B) (emphasis added).

NRDC charges that the EPA regulations accomplish neither of the goals above, i.e., they do not effectively prohibit non-storm water discharges nor do they require the controls described in Par. (iii), above. NRDC argues that Congress granted the moratorium precisely to give EPA the opportunity to develop [*47] new, substantive standards for storm water control of municipal sources and instead EPA wrote vague regulations containing no minimum criteria or performance standards.¹⁷ However, the language in Par. (iii), above, requires the Administrator or a state to design controls. Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements. NRDC also claims that the testing requirements are inadequate because there is only limited sampling at a limited number of sites. However, we must defer to EPA on matters such as this, where EPA has supplied a reasoned explanation of its choices. *See* 55 Fed. Reg. at 48,049.

17 The requirements for permit applications are set forth at 40 C.F.R. § 122.26(d). Individual NPDES permit writers (EPA or state officials) will decide whether application proposals are adequate. Applicants must submit information on source control methods and estimate the annual pollutant load reduction to be achieved from their proposed management programs, but they are not required to achieve any specified level of reduction of any pollutants. *See* 55 Fed. Reg. at 48,070-71.

[**48] NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language and our standard of review. Congress could have written a statute requiring stricter standards, and it did not. We therefore reject NRDC's argument that EPA's storm water control regulations fail to comply with the statute.¹⁸

18 We base our holding on NRDC's challenge to the regulations at issue. Whether a specific permit complies with the requirements of section 402(p)(3)(B) would, of course, be another matter not controlled by this decision.

E. Lack of Notice and Comment on the Approval of Part 1 of Industrial Group Storm Water Applications.

NRDC objects to the lack of opportunity for notice and comment before EPA approval of part 1 of group applications for industrial dischargers. Each member of a proposed group must submit part 1 of the application.¹⁹ If EPA approves part 1, only [*1309] a small subset of the member facilities need submit part 2 of the application. 55 Fed. Reg. at 48,072 (to [*49] be codified at 40 C.F.R. 122.26(e)(2)). NRDC claims that because approval of part 1 waives the requirement of filing part 2 for most members of a group, EPA's decision on part 1 is equivalent to a "rule" requiring notice and comment from the public. The issue thus presented is whether EPA's decision on a part 1 group permit application is a "rule" as defined in 5 U.S.C. § 551(4) (1988)²⁰ requiring public notice and opportunity to comment under 5 U.S.C. § 553 (1988), or is otherwise subject to the notice and comment requirement.

19 Part 1 must include the identity of the group's participants, a description of the participants' industrial activities, a list of significant materials exposed to precipitation and the identity of the subset of the group's members who will submit quantitative data in part 2 of the application. 55 Fed. Reg. at 48,067.

20 A rule means "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4).

[**50] NRDC argues that approval or disapproval of a part 1 application requires public comment because it has "general applicability" pursuant to 5 U.S.C. § 551(4) and because it will have a "palpable effect" in that it will relieve the majority of entities in the group from submitting data in part 2 of the application. NRDC cites *NRDC v. EPA*, 683 F.2d 752 (3rd Cir. 1982) and *Council of Southern Mountains, Inc. v. Donovan*, 209 App. D.C. 318, 653 F.2d 573 (D.C. Cir. 1981) in support of its argument. Both cases involved the postponement of regulations. *See NRDC*, 683 F.2d at 753-54, 764 (indefinite postponement of effective date of final amendments to regulations dealing with the discharge of toxic pollutants requires notice and comment because it has a substantial impact on the public and the industry);

Council of Southern Mountains, Inc., 653 F.2d at 575, 580 n. 28 (deferral of implementation of regulations requiring coal operators to supply life-saving equipment ordinarily would require notice and comment because it has a "palpable effect" upon the industry and the public).

We find these cases to be distinguishable. Both involve [**51] the postponement of rules of general applicability to an entire industry, or to a large class of pollutants. In contrast, although the part 1 application process will relieve some entities from the need to furnish further data, the decision is specific to a particular permit application and approval of a preliminary application will not implement, interpret or prescribe any general law or policy pursuant to 5 U.S.C. § 551(4). Rulemaking ordinarily involves "broad judgments, legislative in nature rather than the resolution of a particular dispute of facts." *Washington Utilities & Transportation Com'n v. Federal Communication Commission*, 513 F.2d 1142, 1160 (9th Cir. 1975), *cert. denied*, 423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 2d 54 (1975). The decision to approve a part 1 permit application, although it may affect a large number of applicants, is nevertheless focused on a specific factual question: whether the application adequately designates a representative smaller group subject to the more extensive data gathering requirements in part 2 of the application *See* 55 Fed. Reg. at 48,028. Because the decision involves a discrete, factual issue, the better view [**52] is that it is neither a rule nor otherwise subject to the notice and comment requirement.

Because approval of a part 1 application is essentially a factual determination, we hold that EPA's group permit application process for industrial dischargers is not invalid by its failure to provide for notice and comment.

III. CONCLUSION

In summary, we grant and deny relief as follows:

1. *"Deadlines" issue.* We grant the request for declaratory relief and deny the request for injunctive relief. We deny the request to place small, medium and large municipalities on the same permitting schedule. We hold that EPA's failure to include deadlines for permit approval or denial and compliance consistent with CWA § 402(p) is arbitrary and capricious.

2. *Exclusion of Sources from Regulation.* We uphold the definition of "municipal [*1310] separate storm

sewers serving a population." We hold that the exemption for construction sites of less than five acres is arbitrary and capricious and remand for further proceedings. Based on the record before us, we vacate that portion of the rule regulating "light industry" and remand for further proceedings.

3. *Other issues.* We uphold the rule as to oil and [**53] gas operations and storm water control. We further hold that EPA approval of part 1 of a group application for an industrial discharger is not a rule requiring notice and comment from the public.

Petition for Review GRANTED IN PART and DENIED IN PART.

APPENDIX A

CWA § 402, 33 USCA § 1342

(1) *Limitation on permit requirement*

....

(2) *Stormwater runoff from oil, gas, and mining operations*

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

....

(p) *Municipal and industrial [**54] stormwater discharges*

(1) *General rule*

Prior to October 1, 1992, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section

for discharges composed entirely of stormwater.

(2) *Exceptions*

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

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

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

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

(3) *Permit requirements*

(A) *Industrial discharges*

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

[**55] (B) *Municipal discharge*

Permits for discharges from municipal storm sewers

-

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or [*1311] the State determines appropriate for the control of such pollutants.

(4) *Permit application requirements*

(A) *Industrial and large municipal discharges*

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but [**56] in no event later than 3 years after the date of issuance of such permit.

(B) *Other municipal discharges*

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) *Studies*

The Administrator, in consultation with the States, shall conduct a study for the purposes of -

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary [**57] to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) *Regulations*

Not later than October 1, 1992, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

CONCUR BY: O'SCANNLAIN (In Part)

DISSENT BY: O'SCANNLAIN (In Part)

DISSENT

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts [*58] I, II.A, II.C.1, II.C.4, II.E, and much of Part II.B of the majority opinion. I dissent from Part II.B.2.c, directing EPA to issue supplemental regulations. I dissent also from Parts II.C.2 and II.C.3, in which the court invalidates EPA's exclusion of storm water discharges from certain light industrial and small construction sites from the definition of "discharges associated with industrial activity." Finally, I concur in the result, but not the reasoning, of Part II.D, holding that EPA has not acted unlawfully by failing to include specific control requirements in the permit application regulations.

[*1312] I

The majority holds that EPA has violated statutory requirements by failing to set dates for approval of, and compliance with, permits as part of its permit application program. *Ante* at 6206. Despite the holding in Part II.B.2.b that injunctive relief is inappropriate (with which I agree), the majority in Part II.B.2.c orders EPA to issue supplemental regulations setting such deadlines immediately.

I am not convinced that the statute requires EPA to

set these deadlines as part of the permit application process. The provision at issue reads, in relevant part:

(4) Permit application [*59] requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously [*60] as practicable, but in no event later than 3 years after the date of issuance of such permit.

CWA § 402(p)(4); 33 U.S.C. § 1342(p)(4) (1988).

While the statute establishes a time line EPA must follow, it does not, in my view, require that EPA include the deadline for permit approval in the permit application regulations. I agree that, given EPA's past delays and the fact that the statutory dates for issuance or denial of permits are now long past, it is appropriate for this court to declare that the statute requires EPA to issue or deny permits within one year of the application deadline. I do not, however, see that any purpose is served by requiring EPA to issue supplemental regulations setting out these deadlines, and I doubt our authority to do so.

With respect to compliance deadlines, the statute contemplates that such deadlines will be set in individual permits as they are issued. *See* CWA § 402(p)(4)(A), (B)

("Any such permit shall provide for compliance. . ."). Each permit must contain a compliance deadline, which may not exceed three years from the date of issuance. Nothing in the statute requires EPA to establish compliance deadlines now, before any permits have [**61] been issued. Accordingly, in my view, NRDC's challenge to the lack of compliance deadlines in EPA's current regulations is premature. I therefore dissent from Part II.B.2.c of the majority opinion.

II

I dissent also from Parts II.C.2 and II.C.3. In my view, EPA's definition of "discharge associated with industrial activity" is a reasonable construction of an ambiguous statute, entitled to deference. While my colleagues acknowledge that we may not overturn an agency rule that represents a "permissible construction" of a statute, *ante* at 6200 (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)), they fail to apply that axiom.

A

EPA's rule excludes from the permitting requirement certain light industry facilities at which "areas where material handling equipment or activities, raw materials, intermediate [*1313] products, final products, waste materials, byproducts, or industrial machinery" are not exposed to storm water. *See* 40 C.F.R. § 122.26(b)(14). EPA determined that discharges from such facilities do not fall within the definition of "discharges associated with industrial activity." In my view, this determination was reasonable.

The majority concedes [**62] that the statute does not define "discharge associated with industrial activity." *Ante* at 6213. The operative phrase, as my colleagues note, is "associated with." *See id.* For purposes of evaluating the light industry exemption, I concede that manufacturing falls within the generally accepted meaning of "industrial activity," and that many of the facilities exempted by the EPA rule are manufacturers. Nonetheless, that concession does not compel the conclusion that discharges from such facilities are "associated with industrial activity."

The majority concludes, without explanation, that the phrase "discharges associated with industrial activity" is "very broad." *Ante* at 6214. Neither the plain meaning of the term "associated" nor the legislative history of the

statute support this conclusion. "Associated with" means closely related to or connected with. *See Webster's Ninth New Collegiate Dictionary* 110 (1986). To the extent it casts any light on the subject, the legislative history supports a narrow reading of the phrase "associated with." Four members of the House, in the course of floor debates on the measure both before and after President Reagan's veto, explained [**63] that:

[a] discharge is associated with industrial activity if it is *directly related to manufacturing, processing or raw materials storage areas* at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings.

133 Cong. Rec. 985 (1987) (statement of Rep. Hammerschmidt) (emphasis added).¹ The underscored language suggests that Congress intended to regulate only discharges directly related to certain activities at industrial facilities. EPA's interpretation, that discharges are "directly related" to these activities only if storm water may reasonably be expected to come into contact with them before its discharge, is eminently logical.

¹ This statement was repeated verbatim by Reps. Stangeland and Snyder. 133 Cong. Rec. at 991-92; 132 Cong. Rec. at 31,959, 31,964 (1986). Rep. Rowland offered a slight variation on the theme:

One of the discharge categories is "a discharge associated with an industrial activity." A discharge is not considered to be associated with industrial activity unless it is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. Such discharges include [sic] those from parking lots and administrative areas and employee buildings.

132 Cong. Rec. at 31,968. Rep. Rowland apparently misspoke; he probably meant, like the other legislators who addressed the topic, to say "such discharges *do not* include" those from parking lots.

[**64] The majority opinion interprets the exclusion of parking lots as an expression of congressional intent "to exclude only those facilities or parts of a facility that are completely non-industrial." *Ante* at 6215. My colleagues' reliance on the second

sentence of the statement quoted above to establish this intent, however, is misplaced. The sentence relied on cannot assist us in our search for the meaning of "associated with" because it employs that very term. Moreover, it does not pretend to establish an exhaustive list of areas excluded from regulation. Legislators listed discharges from parking lots and administrative and employee buildings as *among those* not directly related to industrial activity; no one suggested that *only* discharges associated with those structures were to be excluded.

EPA's definition is consistent with the plain words of the statute and, to the extent any intent is discernible, the congressional intent. EPA has defined the term "storm water discharge associated with industrial activity" to cover only those discharges reasonably expected to come into contact with industrial activities. A large number of facilities automatically fall within EPA's [**65] definition and are required to [*1314] apply for permits. Because facilities falling within certain specified classifications under the Standard Industrial Classification manual generally conduct their operations entirely indoors, minimizing the likelihood of contact with storm water, EPA has not automatically included them within the regulations. However, these facilities *are* required to apply for permits if "areas where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, byproducts, or industrial machinery at these facilities are exposed to storm water." 40 C.F.R. § 122.26(b)(14). If a storm water discharge is in fact directly related to or associated with the industrial activity carried on at a facility falling within the light industry category, the facility must obtain a permit.²

2 Thus, nothing turns on the assumption, attacked by my colleagues as unsupported by the record, *ante* at 6215, that industrial activities at this category of facilities will take place largely indoors. Where the assumption does not hold true, the permit requirement applies with full force. I also note that NRDC has pointed us to no evidence undermining EPA's assumption.

Unlike my colleagues, I decline to assume that EPA will not carry out its responsibility to identify and to require permits of facilities where industrial activities are in fact exposed to storm water, or that such facilities will ignore their statutory duty to apply for permits. Should that

occur, a lawsuit challenging EPA's failure to enforce its regulations might well be in order. An unsubstantiated suspicion that EPA may not vigorously enforce its regulations, however, does not make those regulations arbitrary or capricious.

[**66] In my view, the statute's treatment of oil and gas facilities supports EPA's reading of the term "associated with industrial activity." Congress specifically exempted from the permit requirement discharges from oil and gas facilities and mining operations which have not come in contact with raw materials, finished products, or waste products. CWA § 402(1)(2). This section indicates a congressional intent to exempt uncontaminated discharges which have not come into contact with "industrial activities" from regulation. For oil, gas, and mining operations, Congress in this section supplied a specific, and quite limited, definition of "industrial activities." For other facilities, that definition was left to the discretion of EPA, which has adopted a much broader definition, encompassing contact with such things as industrial machinery and materials handling equipment. *See* 40 C.F.R. § 122.26(b)(14).

I do not mean to suggest that the majority's construction of the statute is untenable. It may even be preferable to the reading chosen by the agency. Nonetheless, in my view the statute is ambiguous and the legislative history does not demonstrate any clear congressional intent. The question [**67] before this court, therefore, is not whether "the agency construction was the only one it permissibly could have adopted" or even whether it is the "reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 843, n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). We need only inquire if the agency's construction is a permissible one. *Id.* at 843. EPA's definition falls well within permissible bounds, and should be upheld.

B

Although the issue is closer, I also am not persuaded that EPA's exemption for construction sites under five acres should be struck down. EPA has not conceded that "construction activity is industrial in nature." *Ante* at 6217-18. In the preamble to its final rule, EPA noted that "Construction activity *at a high level of intensity is comparable to other activity that is traditionally viewed as industrial*, such as natural resource extraction."³ 55 Fed. Reg. 48,033 (1990) (emphasis added). EPA

explained that it was "attempting to focus [regulation] only on those construction activities [*1315] that resemble industrial activity." 55 Fed. Reg. at 48,035 [**68] (emphasis added).

3 EPA did admit that "even small construction sites may have a significant negative impact on water quality in localized areas," 55 Fed. Reg. at 48,033. In the absence of any indication of what EPA meant by "small," however, that statement does not undermine EPA's exemption of sites under five acres.

Neither NRDC nor the majority point to anything in the statute or the legislative history that would require the agency to define "industrial activity" as including all construction operations. Accordingly, I believe deference is due EPA's definition, provided it is not arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A.*, 467 U.S. at 844.

In trying to determine when construction should be treated as industrial activity, EPA considered a number of possible approaches. See 55 Fed. Reg. at 48,035. Exempting construction that would be completed within a certain designated time frame was deemed inappropriate, because the work [**69] could be both intensive and expansive but nonetheless take place over a short period of time. Basing the limit on quantity of soil removed was also rejected as not relating to the amount of land surface disturbed. EPA finally settled on the surface area disturbed by the construction project as a feasible and appropriate mechanism for "identifying sites that are [sic] amount to industrial activity." 55 Fed. Reg. at 48,036.

Having determined that not all construction amounts to industrial activity, and that the appropriate basis for differentiation is land area disturbed, EPA then had to determine where to draw the line. Initially, EPA proposed to exempt all construction operations disturbing less than one acre of land, as well as single family residential projects disturbing less than five acres. 53 Fed. Reg. 49,431 (1988). In the final rule, however, EPA adopted a five-acre minimum for all construction projects. 55 Fed. Reg. 48,066 (1990); 40 C.F.R. § 122.26(b)(14)(x).

Admittedly, the final rule contains little in the way of justification for treating two-acre sites differently than five-acre ones, but that does not necessarily make [**70] it arbitrary and capricious. Line-drawing is often difficult. NRDC was apparently willing to accept EPA's proposed

one-acre/five-acre rule. Although NRDC now challenges the blanket five-acre rule, it offers no evidence that sites excluded from the permitting requirement constitute "industrial activity." In such absence of any evidence in the record undermining EPA's conclusion on an issue squarely within its expertise, I believe the rule must be upheld. 4

4 Because I conclude that the rule falls within the permissible bounds of the statutory definition of "discharges associated with industrial activity," I need not consider the applicability of the *de minimis* exception.

III

Finally, while I concur in the result reached by the majority in Part II.D, rejecting NRDC's claim that EPA has unlawfully failed to require substantive controls on municipal discharges, I disagree with the majority's reasoning. In my view, NRDC's claim is premature, and we should decline to address its merits.

NRDC contends that the 1987 amendments [**71] require EPA to establish substantive controls for municipal storm water discharges. In support of this argument, NRDC relies on CWA § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B), which provides:

Permits for discharges from municipal storm sewers

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* * *

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . . .

This section refers only to *permits*, and says nothing about permit applications. Because EPA has yet to issue any permits, NRDC's claim on this point is premature. In the absence of any indication to the contrary, we must assume that any permit issued will comply with all applicable statutory requirements. The statute does not require that EPA detail the substantive controls to be imposed when establishing permit application requirements. Accordingly, I would reject NRDC's claim without [*1316] reaching the issue of the Administrator's discretion in selecting those controls.

IV

In sum, I join much of my colleagues' opinion. However, I would not require EPA to issue supplemental regulations detailing the time line for [**72] issuance of and compliance with permits, and I would uphold EPA's

definition of "discharge associated with industrial activity." Finally, I would reject NRDC's claim that EPA is required to detail control measures in the permit application regulations on the grounds that the statute requires control measures only in the permits themselves.

VOLUME III
TAB 6

LEXSEE

**NATIONAL FEDERATION OF INDEPENDENT BUSINESS, et al., Petitioners
(No. 11-393) v. KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND
HUMAN SERVICES, et al. DEPARTMENT OF HEALTH AND HUMAN
SERVICES, et al., Petitioners (No. 11-398) v. FLORIDA et al. FLORIDA, et al.,
Petitioners (No. 11-400) v. DEPARTMENT OF HEALTH AND HUMAN
SERVICES et al.**

Nos. 11-393, 11-398 and 11-400

SUPREME COURT OF THE UNITED STATES

**132 S. Ct. 2566; 183 L. Ed. 2d 450; 2012 U.S. LEXIS 4876; 80 U.S.L.W. 4579; 2012-2
U.S. Tax Cas. (CCH) P50,423; 109 A.F.T.R.2d (RIA) 2563; 53 Employee Benefits
Cas. (BNA) 1513; 80 A.L.R. Fed. 2d 501; 23 Fla. L. Weekly Fed. S 480**

**March 26, 2012, Argued. March 27, 2012, Argued. March 28, 2012, Argued
June 28, 2012, Decided**

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [***1]

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

Florida v. United States HHS, 648 F.3d 1235, 2011 U.S. App. LEXIS 16806 (11th Cir. Fla., 2011)

DISPOSITION: The court of appeals' judgment was reversed insofar as it struck down § 5000A and permitted withdrawal of all Medicaid funding under § 1396c. The judgment was otherwise affirmed. 5-4 Decision; 3 opinions; 1 concurrence in part and dissent in part; 2 dissents.

COUNSEL: **Robert A. Long** argued the cause, as amicus curiae appointed by the court, in No. 11-398.

Donald B. Verrilli, Jr. argued the cause for petitioners in No. 11-398 and respondents in No. 11-400.

Gregory G. Katsas argued the cause for respondents in No. 11-398.

Paul D. Clement argued the cause for petitioners in Nos.

11-393 and 11-400 and respondents Florida, et al. in No. 11-398.

Michael A. Carvin argued the cause for respondents National Federation of Independent Business, et al. in No. 11-398.

Edwin S. Kneedler argued the cause for respondents in Nos. 11-393 and 11-400.

H. Bartow Farr, III argued the cause, as amicus curiae appointed by the court, in Nos. 11-393 and 11-400.

JUDGES: Roberts, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-C, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined; an opinion with respect to Part IV, in which Breyer and Kagan, JJ., joined; and an opinion with respect to Parts III-A, III-B, and III-D. Ginsburg, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Sotomayor, J., joined, and in which Breyer and Kagan, JJ., joined [***13] as to Parts I, II, III, and IV. Scalia, Kennedy, Thomas, and Alito, JJ., filed a dissenting opinion. Thomas, J., filed a dissenting opinion.

OPINION BY: ROBERTS, GINSBURG

OPINION

[*2577] Chief Justice **Roberts** announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-C, an opinion with respect to Part IV, in which Justice **Breyer** and Justice **Kagan** join, and an opinion with respect to Parts III-A, III-B, and III-D.

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

In our federal system, the National Government possesses only limited powers; the States and the people retain the [***14] remainder. Nearly two centuries ago, Chief Justice Marshall observed that "the question respecting the extent of the powers actually granted" to the Federal Government "is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch v. [**465] Maryland*, 17 U.S. 316, 4 Wheat. 316, 405, 4 L. Ed. 579 (1819). In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.

The Federal Government "is acknowledged by all to be one of enumerated powers." *Ibid.* That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. Congress may, for example, "coin Money," "establish Post Offices," and "raise and support Armies." Art. I, § 8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 195, 6 L. Ed. 23 (1824). [***15] The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal

Government "can exercise only the powers granted to it." *McCulloch, supra*, at 405, 4 Wheat. 316, 4 L. Ed. 579 .

Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

Indeed, the Constitution did not initially include a Bill of Rights at least partly [*2578] because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The Federalist No. 84, p. 515 (C. Rossiter ed. 1961). And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: "The powers [***16] not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See, e.g., *United States v. Comstock*, 560 U.S. 126, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010).

The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments--as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government--punishing street crime, running public schools, and zoning property for development, to name but a few--even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power." See, e.g., *United States v. Morrison*, 529 U.S. 598, 618-619, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).

[**466] "State [***17] sovereignty is not just an end in itself: Rather, federalism secures to citizens the

liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. ___, ___, 131 S. Ct. 2355, 2364, 180 L. Ed. 2d 269, 280 (2011)).

This case concerns two powers that the Constitution does grant [***18] the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Our precedents read that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Morrison, supra*, at 609, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (internal quotation marks omitted). The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his [*2579] livestock, and a loan shark's extortionate collections from a neighborhood butcher shop. See *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942); *Perez v. United States*, 402 U.S. 146, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971).

Congress may also "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and [***19] general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may

enact a tax on an activity that it cannot authorize, forbid, or otherwise control. See, e.g., *License Tax Cases*, 72 U.S. 462, 5 Wall. 462, 471, 18 L. Ed. 497 (1867). And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. See, e.g., *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999). These offers may well induce the States to adopt policies that the Federal Government itself could not impose. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 205-206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (conditioning federal highway funds on States raising their drinking age to 21).

The reach of the Federal Government's enumerated powers is broader [**467] still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution [***20] the foregoing Powers." Art. I, § 8, cl. 18. We have long read this provision to give Congress great latitude in exercising its powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, at 421, 4 L. Ed. 579 .

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. "Proper respect for a coordinate branch of the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *United States v. Harris*, 106 U.S. 629, 635, 1 S. Ct. 601, 27 L. Ed. 290, 4 Ky. L. Rptr. 739 (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from [***21] the consequences of their political choices.

Our deference in matters of policy cannot, however, become abdication in matters of law. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 176, 2 L. Ed. 60 (1803). Our respect for Congress's

policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." Chief Justice John Marshall, *A Friend of the Constitution* No. V, *Alexandria Gazette*, July 5, 1819, in *John Marshall's Defense of McCulloch v. Maryland* 190-191 (G. Gunther ed. 1969). And there can be no question that it is the responsibility of this Court to enforce the limits on federal power [*2580] by striking down acts of Congress that transgress those limits. *Marbury v. Madison*, *supra*, at 175-176, 2 L. Ed. 60.

The questions before us must be considered against the background of these basic principles.

I

In 2010, Congress enacted the Patient Protection and Affordable Care Act, 124 Stat. 119. [***22] The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The Act's 10 titles stretch over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion.

[**LEdHR1] [1] The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage. 26 U.S.C. §5000A. The mandate does not apply to some individuals, such as prisoners and undocumented aliens. §5000A(d). Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. See §5000A(f). But for individuals who are not exempt and do not receive health insurance [**468] through a third party, the means of satisfying the requirement is to purchase insurance from a private company.

[**LEdHR2] [2] Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. §5000A(b)(1). That payment, which the Act describes as a "penalty," is calculated as a percentage of household income, subject to a floor based on a specified dollar amount [***23] and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. §5000A(c). In 2016, for example, the penalty will be 2.5 percent of an

individual's household income, but no less than \$695 and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services (*e.g.*, prescription drugs and hospitalization). *Ibid.*; 42 U.S.C. §18022. [**LEdHR3] [3] The Act provides that the penalty will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties, such as the penalty for claiming too large an income tax refund. 26 U.S.C. §5000A(g)(1). The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. §5000A(g)(2). And some individuals who are subject to the mandate are nonetheless exempt from the penalty--for example, those with income below a certain threshold and members of Indian tribes. §5000A(e).

On the day the President signed the Act into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida. [***24] Those plaintiffs--who are both respondents and petitioners here, depending on the issue--were subsequently joined by 13 more States, several individuals, and the National Federation of Independent Business. The plaintiffs alleged, among other things, that the individual mandate provisions of the Act exceeded Congress's powers under Article I of the Constitution. The District Court agreed, holding that Congress lacked constitutional power to enact the individual mandate. 780 F. Supp. 2d 1256 (ND Fla. 2011). The District Court determined that the individual mandate could not be severed from the remainder of the Act, and therefore struck down the Act in its entirety. *Id.*, at 1305-1306.

The Court of Appeals for the Eleventh Circuit affirmed in part and reversed in [*2581] part. The court affirmed the District Court's holding that the individual mandate exceeds Congress's power. 648 F.3d 1235 (2011). The panel unanimously agreed that the individual mandate did not impose a tax, and thus could not be authorized by Congress's power to "lay and collect Taxes." U.S. Const., Art. I, § 8, cl. 1. A majority also held that the individual mandate was not supported by Congress's power to "regulate Commerce [***25] . . . among the several States." *Id.*, cl. 3. According to the majority, the Commerce Clause does not empower the Federal Government to order individuals to engage in commerce, and the Government's efforts to cast the individual mandate in a different light were unpersuasive.

Judge Marcus dissented, reasoning that the individual mandate regulates economic activity that has a clear effect on interstate commerce.

Having held the individual mandate to be unconstitutional, the majority examined whether that provision [**469] could be severed from the remainder of the Act. The majority determined that, contrary to the District Court's view, it could. The court thus struck down only the individual mandate, leaving the Act's other provisions intact. 648 F.3d, at 1328.

Other Courts of Appeals have also heard challenges to the individual mandate. The Sixth Circuit and the D. C. Circuit upheld the mandate as a valid exercise of Congress's commerce power. See *Thomas More Law Center v. Obama*, 651 F.3d 529 (CA6 2011); *Seven-Sky v. Holder*, 661 F.3d 1, 398 U.S. App. D.C. 134 (CADC 2011). The Fourth Circuit determined that the Anti-Injunction Act prevents courts from considering the merits of that question. [***26] See *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391 (2011). That statute bars suits "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. §7421(a). A majority of the Fourth Circuit panel reasoned that the individual mandate's penalty is a tax within the meaning of the Anti-Injunction Act, because it is a financial assessment collected by the IRS through the normal means of taxation. The majority therefore determined that the plaintiffs could not challenge the individual mandate until after they paid the penalty.¹

1 The Eleventh Circuit did not consider whether the Anti-Injunction Act bars challenges to the individual mandate. The District Court had determined that it did not, and neither side challenged that holding on appeal. The same was true in the Fourth Circuit, but that court examined the question *sua sponte* because it viewed the Anti-Injunction Act as a limit on its subject matter jurisdiction. See *Liberty Univ.*, 671 F.3d, at 400-401. The Sixth Circuit and the D. C. Circuit considered the question but determined that the Anti-Injunction Act did not apply. See *Thomas More*, 651 F.3d, at 539-540 (CA6); *Seven-Sky*, 661 F.3d, at 5-14 (CADC).

The second [***27] provision of the Affordable Care Act directly challenged here is the Medicaid expansion. Enacted in 1965, [**LEdHR4] [4] Medicaid offers federal funding to States to assist pregnant women,

children, needy families, the blind, the elderly, and the disabled in obtaining medical care. See 42 U.S.C. §1396a(a)(10). In order to receive that funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. By 1982 every State had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States' total revenue.

The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act [**2582] requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. See §1396a(a)(10)(A)(i)(VIII). The Act increases federal funding to cover the States' costs in expanding [***28] Medicaid coverage, although States will bear a portion of the costs on their own. §1396d(y)(1). If a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds. See §1396c.

Along with their challenge to the individual mandate, the state plaintiffs in the Eleventh Circuit argued that the Medicaid expansion exceeds Congress's constitutional powers. The [**470] Court of Appeals unanimously held that the Medicaid expansion is a valid exercise of Congress's power under the Spending Clause. U.S. Const., Art. I, § 8, cl. 1. And the court rejected the States' claim that the threatened loss of all federal Medicaid funding violates the Tenth Amendment by coercing them into complying with the Medicaid expansion. 648 F.3d, at 1264, 1268.

We granted certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit with respect to both the individual mandate and the Medicaid expansion. 565 U.S. ___, 132 S. Ct. 603, 181 L. Ed. 2d 420 (2011). Because no party supports the Eleventh Circuit's holding that the individual mandate can be completely severed from the remainder of the Affordable [***29] Care Act, we appointed an *amicus curiae* to defend that aspect of the judgment below. And because there is a reasonable argument that the Anti-Injunction Act deprives us of jurisdiction to hear challenges to the individual mandate,

but no party supports that proposition, we appointed an *amicus curiae* to advance it.²

2 We appointed H. Bartow Farr III to brief and argue in support of the Eleventh Circuit's judgment with respect to severability, and Robert A. Long to brief and argue the proposition that the Anti-Injunction Act bars the current challenges to the individual mandate. 565 U.S. ___, 132 S. Ct. 603, 181 L. Ed. 2d 420 (2011). Both *amici* have ably discharged their assigned responsibilities.

II

Before turning to the merits, we need to be sure we have the authority to do so. The Anti-Injunction Act provides that [**LEdHR5] [5] "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. §7421(a). [**LEdHR6] [6] This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct [***30] the collection of taxes. Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund. See *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7-8, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962).

The penalty for not complying with the Affordable Care Act's individual mandate first becomes enforceable in 2014. The present challenge to the mandate thus seeks to restrain the penalty's future collection. *Amicus* contends that the Internal Revenue Code treats the penalty as a tax, and that the Anti-Injunction Act therefore bars this suit.

The text of the pertinent statutes suggests otherwise. [**LEdHR7] [7] The Anti-Injunction Act applies to suits "for the purpose of restraining the assessment or collection of any tax." §7421(a) (emphasis added). [**2583] Congress, however, chose to describe the "[s]hared responsibility payment" imposed on those who forgo health insurance not as a "tax," but as a "penalty." §§5000A(b), (g)(2). There is no immediate reason to think that a statute applying to "any tax" would apply to a "penalty."

Congress's decision to label this exaction a "penalty" rather than a "tax" is significant because the Affordable

Care Act describes many other [***31] exactions it creates as "taxes." See *Thomas More*, 651 F.3d, at 551. [**LEdHR8] [8] Where Congress uses certain language in one part of a statute and different language in another, it is [**471] generally presumed that Congress acts intentionally. See *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983).

Amicus argues that even though Congress did not label the shared responsibility payment a tax, we should treat it as such under the Anti-Injunction Act because it functions like a tax. [**LEdHR9] [9] It is true that Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other. Congress may not, for example, expand its power under the Taxing Clause, or escape the Double Jeopardy Clause's constraint on criminal sanctions, by labeling a severe financial punishment a "tax." See *Child Labor Tax Case*, 259 U.S. 20, 36-37, 42 S. Ct. 449, 66 L. Ed. 817 (1922); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 779, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994).

The Anti-Injunction Act and the Affordable Care Act, however, are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence [***32] of Congress's intent is the statutory text. We have thus applied the Anti-Injunction Act to statutorily described "taxes" even where that label was inaccurate. See *Bailey v. George*, 259 U.S. 16, 42 S. Ct. 419, 66 L. Ed. 816, 1922-2 C.B. 342, T.D. 3347 (1922) (Anti-Injunction Act applies to "Child Labor Tax" struck down as exceeding Congress's taxing power in *Drexel Furniture*).

[**LEdHR10] [10] Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti-Injunction Act. For example, 26 U.S.C. §6671(a) provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by" subchapter 68B of the Internal Revenue Code. Penalties in subchapter 68B are thus treated as taxes under Title 26, which includes the Anti-Injunction Act. The individual mandate, however, is not in subchapter 68B of the Code. Nor does any other provision state that references to taxes in Title 26 shall also be "deemed" to apply to the individual mandate.

Amicus attempts to show that Congress did render the Anti-Injunction Act applicable to the individual

mandate, albeit by a more circuitous [***33] route. [**LEdHR11] [11] Section 5000A(g)(1) specifies that the penalty for not complying with the mandate "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." Assessable penalties in subchapter 68B, in turn, "shall be assessed and collected in the same manner as taxes." §6671(a). According to *amicus*, by directing that the penalty be "assessed and collected in the same manner as taxes," §5000A(g)(1) made the Anti-Injunction Act applicable to this penalty.

The Government disagrees. It argues that §5000A(g)(1) does not direct courts to apply the Anti-Injunction Act, because §5000A(g) is a directive only to the Secretary of the Treasury to use the same "methodology and procedures" to collect the penalty that he uses to collect taxes. [*2584] Brief for United States 32-33 (quoting *Seven-Sky*, 661 F.3d, at 11).

We think the Government has the better reading. As it observes, [**LEdHR12] [12] "Assessment" and "Collection" are chapters of the Internal Revenue Code providing the Secretary authority [**472] to assess and collect taxes, and generally specifying the means by which he shall do so. See §6201 (assessment authority); §6301 (collection authority). Section 5000A(g)(1)'s command [***34] that the penalty be "assessed and collected in the same manner" as taxes is best read as referring to those chapters and giving the Secretary the same authority and guidance with respect to the penalty. That interpretation is consistent with the remainder of §5000A(g), which instructs the Secretary on the tools he may use to collect the penalty. See §5000A(g)(2)(A) (barring criminal prosecutions); §5000A(g)(2)(B) (prohibiting the Secretary from using notices of lien and levies). The Anti-Injunction Act, by contrast, says nothing about the procedures to be used in assessing and collecting taxes.

Amicus argues in the alternative that a different section of the Internal Revenue Code requires courts to treat the penalty as a tax under the Anti-Injunction Act. Section 6201(a) authorizes the Secretary to make "assessments of all taxes (including interest, additional amounts, additions to the tax, and *assessable penalties*)." (Emphasis added.) *Amicus* contends that the penalty must be a tax, because it is an assessable penalty and §6201(a) says that taxes include assessable penalties.

That argument has force only if §6201(a) is read in

isolation. [**LEdHR13] [13] The Code contains many provisions treating taxes [***35] and assessable penalties as distinct terms. See, *e.g.*, §§860(h)(1), 6324A(a), 6601(e)(1)-(2), 6602, 7122(b). There would, for example, be no need for §6671(a) to deem "tax" to refer to certain assessable penalties if the Code already included all such penalties in the term "tax." Indeed, *amicus*'s earlier observation that the Code requires assessable penalties to be assessed and collected "in the same manner as taxes" makes little sense if assessable penalties are themselves taxes. [**LEdHR14] [14] In light of the Code's consistent distinction between the terms "tax" and "assessable penalty," we must accept the Government's interpretation: §6201(a) instructs the Secretary that his authority to assess taxes includes the authority to assess penalties, but it does not equate assessable penalties to taxes for other purposes.

[**LEdHR15] [15] The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed to the merits.

III

The Government advances two theories for the proposition that Congress had constitutional authority to enact the individual [***36] mandate. First, the Government argues that Congress had the power to enact the mandate under the Commerce Clause. Under that theory, Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce, and could undercut the Affordable Care Act's other reforms. Second, the Government argues that if the commerce power does not support the mandate, we should nonetheless uphold it as an exercise of Congress's power to tax. According to the Government, even if Congress lacks the power to direct individuals to buy insurance, the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax.

[*2585] [**473] A

The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant

cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals [***37] to provide a certain degree of care to individuals without regard to their ability to pay, see, e.g., 42 U.S.C. §1395dd; Fla. Stat. Ann. §395.1041, hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over \$1,000 per year. 42 U.S.C. §18091(2)(F).

In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues. It did so through the Act's "guaranteed-issue" and "community-rating" provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals. See §§300gg, 300gg-1, 300gg-3, 300gg-4.

The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy individuals who choose not to purchase insurance to cover potential [***38] health care needs. In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage. The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on everyone. See Brief for America's Health Insurance Plans et al. as *Amici Curiae* in No. 11-393 etc. 8-9.

The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals

the reforms require them to accept. The Government claims that Congress has power under the Commerce and Necessary and Proper Clauses to enact this solution.

1

The [***39] Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem. Brief for United States 34. The path of our Commerce Clause decisions has not always run [**474] smooth, see *United States v. Lopez*, 514 U.S. 549, 552-559, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), but it is now well established that Congress has broad authority under the Clause. We have recognized, for example, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce." [*2586] *United States v. Darby*, 312 U.S. 100, 118-119, 61 S. Ct. 451, 85 L. Ed. 609 (1941). Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others. See *Wickard*, 317 U.S., at 127-128, 63 S. Ct. 82, 87 L. Ed. 122.

Given its expansive scope, it is no surprise that Congress has employed the commerce power [***40] in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.³ Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for Congress's action. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 130 S. Ct. 3138, 3159, 177 L. Ed. 2d 706, 731 (2010) (internal quotation marks omitted). At the very least, we should "pause to consider the implications of the Government's arguments" when confronted with such new conceptions of federal power. *Lopez*, *supra*, at 564, 115 S. Ct. 1624, 131 L. Ed. 2d 626.

3 The examples of other congressional mandates cited by Justice Ginsburg, *post*, at ___, n. 10, 183 L. Ed. 2d, at 519 (opinion concurring in part, concurring in judgment in part, and dissenting in part), are not to the contrary. Each of those

mandates--to report for jury duty, to register for the draft, to purchase firearms in anticipation of militia service, to exchange gold currency for paper currency, and to [***41] file a tax return--are based on constitutional provisions other than the Commerce Clause. See Art. I, § 8, cl. 9 (to "constitute Tribunals inferior to the supreme Court"); *id.*, cl. 12 (to "raise and support Armies"); *id.*, cl. 16 (to "provide for organizing, arming, and disciplining, the Militia"); *id.*, cl. 5 (to "coin Money"); *id.*, cl. 1 (to "lay and collect Taxes").

The Constitution grants Congress the power to "regulate Commerce." Art. I, § 8, cl. 3 (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." *Id.*, cl. 5. And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation of the land and naval Forces." *Id.*, cls. 12-14. If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, [***42] the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. See *Gibbons*, 22 U.S., at 188, 9 Wheat., at 188, 6 L. Ed. 23 ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their [**475] natural sense, and to have intended what they have said").⁴

4 Justice Ginsburg suggests that "at the time the Constitution was framed, to 'regulate' meant, among other things, to require action." *Post*, at ___, 183 L. Ed. 2d, at 512 (citing *Seven-Sky v. Holder*, 661 F.3d 1, 16, 398 U.S. App. D.C. 134 (CADC 2011); brackets and some internal quotation marks omitted). But to reach this conclusion, the case cited by Justice Ginsburg relied on a dictionary in which "[t]o order; to command" was the fifth-alternative definition of "to direct," which was itself the second-alternative

definition of "to regulate." See *Seven-Sky*, *supra*, at 16 (citing S. Johnson, *Dictionary of the English Language* (4th ed. 1773) (reprinted 1978)). It is unlikely that the Framers had such an obscure meaning in mind when they used the [***43] word "regulate." Far more commonly, "[t]o regulate" meant "[t]o adjust by rule or method," which presupposes something to adjust. 2 Johnson, *supra*, at 1619; see also *Gibbons*, 22 U.S., at 196, 9 Wheat., at 196, 6 L. Ed. 23 (defining the commerce power as the power "to prescribe the rule by which commerce is to be governed").

[*2587] Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." It is nearly impossible to avoid the word when quoting them. See, e.g., *Lopez*, *supra*, at 560, 115 S. Ct. 1624, 131 L. Ed. 2d 626 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained"); *Perez*, 402 U.S., at 154, 91 S. Ct. 1357, 28 L. Ed. 2d 686 ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class" (emphasis in original; internal quotation marks omitted)); *Wickard*, *supra*, at 125, 63 S. Ct. 82, 87 L. Ed. 122 ("[E]ven if appellee's activity be local and though [***44] it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S. Ct. 615, 81 L. Ed. 893 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control"); see also *post*, at ___, ___ - ___, ___, ___, 183 L. Ed. 2d, at 507, 513-514, 515, 517 (Ginsburg, J., concurring in part, concurring in judgment in part, and dissenting in part).⁵

5 Justice Ginsburg cites two eminent domain cases from the 1890s to support the proposition that our case law does not "toe the activity versus inactivity line." *Post*, at ___ - ___, 183 L. Ed. 2d, at 512-513 (citing *Monongahela Nav. Co. v.*

United States, 148 U.S. 312, 335-337, 13 S. Ct. 622, 37 L. Ed. 463 (1893), and *Cherokee Nation v. Southern K. R. Co.*, 135 U.S. 641, 657-659, 10 S. Ct. 965, 34 L. Ed. 295 (1890)). The fact that the Fifth Amendment requires the payment of just compensation when the Government exercises its [***45] power of eminent domain does not turn the taking into a commercial transaction between the landowner and the Government, let alone a government-compelled transaction between the landowner and a third party.

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in [**476] others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and--under the Government's theory--empower Congress to make those decisions for him.

Applying the Government's logic to the familiar case of *Wickard v. Filburn* shows how far that logic would carry us from the notion of [***46] a government of limited powers. In *Wickard*, the Court famously upheld a federal penalty imposed on a farmer for growing wheat for consumption on his own farm. 317 U.S., at 114-115, 128-129, 63 S. Ct. 82, 87 L. Ed. 122. That amount of wheat caused the farmer to exceed his quota under a [*2588] program designed to support the price of wheat by limiting supply. The Court rejected the farmer's argument that growing wheat for home consumption was beyond the reach of the commerce power. It did so on the ground that the farmer's decision to grow wheat for his own use allowed him to avoid purchasing wheat in the market. That decision, when considered in the aggregate along with similar decisions of others, would have had a substantial effect on the interstate market for wheat. *Id.*, at 127-129, 63 S. Ct. 82, 87 L. Ed. 122.

Wickard has long been regarded as "perhaps the most

far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S., at 560, 115 S. Ct. 1624, 131 L. Ed. 2d 626, but the Government's theory in this case would go much further. Under *Wickard* it is within Congress's power to regulate the market for wheat by supporting its price. But price can be supported [***47] by increasing demand as well as by decreasing supply. The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance. Congress can therefore command that those not buying wheat do so, just as it argues here that it may command that those not buying health insurance do so. The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.

Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem. See *Seven-Sky*, 661 F.3d, at 14-15 (noting the Government's inability to "identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional" under its theory of the commerce power). To consider a different example in the health care market, many Americans do not [***48] eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. See, e.g., Dept. of Agriculture and Dept. of Health and Human Services, *Dietary Guidelines for Americans 1* (2010). The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. See, e.g., Finkelstein, Trogdon, Cohen, & Dietz, *Annual Medical Spending Attributable to Obesity: Payer-and [**477] Service-Specific Estimates*, 28 *Health Affairs* w822 (2009) (detailing the "undeniable link between rising rates of obesity and rising medical spending," and estimating that "the annual medical burden of obesity has risen to almost 10 percent of all medical spending and could amount to \$147 billion per year in 2008"). Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. See Center for Applied Ethics, *Voluntary Health Risks: Who Should Pay?*, 6 *Issues in Ethics* 6 (1993) (noting "overwhelming evidence that individuals with

unhealthy habits pay only a fraction of the costs associated with their behaviors; most of the expense [***49] is borne by the rest of society in the form of higher insurance premiums, government expenditures for health care, and disability benefits"). Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables. See Dietary Guidelines, *supra*, at 19 ("Improved nutrition, appropriate eating behaviors, and increased [*2589] physical activity have tremendous potential to . . . reduce health care costs").

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures--joined with the similar failures of others--can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was "an addition which few oppose and from which no apprehensions are entertained." The Federalist No. 45, at 293. While Congress's authority under the Commerce Clause has of course expanded with [***50] the growth of the national economy, our cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." *Maryland v. Wirtz*, 392 U.S. 183, 196, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968). The Government's theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist No. 48, at 309 (J. Madison). Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.⁶

6 In an attempt to recast the individual mandate as a regulation of commercial activity, Justice Ginsburg suggests that "[a]n individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance." *Post*, at ___, 183 L. Ed. 2d, at 514. But "self-insurance" is, in this

context, nothing more than a description of the failure to purchase insurance. Individuals are no more "activ[e] [***51] in the self-insurance market" when they fail to purchase insurance, *ibid.*, than they are active in the "rest" market when doing nothing.

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have [**478] been lost on the Framers, who were "practical statesmen," not metaphysical philosophers. *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 673, 100 S. Ct. 2844, 65 L. Ed. 2d 1010 (1980) (Rehnquist, J., concurring in judgment). As we have explained, "the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take." *South Carolina v. United States*, 199 U.S. 437, 449, 26 S. Ct. 110, 50 L. Ed. 261, 41 Ct. Cl. 503, T.D. 961 (1905). The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's [***52] actions have reflected this understanding. There is no reason to depart from that understanding now.

The Government sees things differently. It argues that because sickness and injury are unpredictable but unavoidable, "the uninsured as a class are active in the market for health care, which they regularly seek and obtain." Brief for United States 50. The individual mandate "merely regulates how individuals finance and pay for that active participation--requiring that they do so through insurance, rather than through attempted self-insurance with the [*2590] back-stop of shifting costs to others." *Ibid.*

The Government repeats the phrase "active in the market for health care" throughout its brief, see *id.*, at 7, 18, 34, 50, but that concept has no constitutional significance. An individual who bought a car two years ago and may buy another in the future is not "active in the car market" in any pertinent sense. The phrase "active in the market" cannot obscure the fact that most of those regulated by the individual mandate are not currently

engaged in any commercial activity involving health care, and that fact is fatal to the Government's effort to "regulate the uninsured as a class." *Id.*, at 42. [***53] Our precedents recognize Congress's power to regulate "class[es] of activities," *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (emphasis added), not classes of *individuals*, apart from any activity in which they are engaged, see, e.g., *Perez*, 402 U.S., at 153, 91 S. Ct. 1357, 28 L. Ed. 2d 686 ("Petitioner is clearly a member of the class which engages in 'extortionate credit transactions' . . ." (emphasis deleted)).

The individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity. The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money. It is precisely because these individuals, as an actuarial class, incur relatively low health care costs that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect. See 42 U.S.C. §18091(2)(I) (recognizing that the mandate would "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums"). [***54] If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.

The Government, however, claims that this does not matter. The Government [**479] regards it as sufficient to trigger Congress's authority that almost all those who are uninsured will, at some unknown point in the future, engage in a health care transaction. Asserting that "[t]here is no temporal limitation in the Commerce Clause," the Government argues that because "[e]veryone subject to this regulation is in or will be in the health care market," they can be "regulated in advance." Tr. of Oral Arg. 109 (Mar. 27, 2012).

The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the *effects* on commerce of an economic activity. See, e.g., *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 59 S. Ct. 206, 83 L. Ed. 126 (1938) (regulating the labor practices of utility companies); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) (prohibiting discrimination by hotel operators);

Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964) [***55] (prohibiting discrimination by restaurant owners). But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce. Each one of our cases, including those cited by Justice Ginsburg, *post*, at ___ - ___, 183 L. Ed. 2d, at 510-511, involved preexisting economic activity. See, e.g., *Wickard*, 317 U.S., at 127-129, 63 S. Ct. 82, 87 L. Ed. 122 (producing wheat); *Raich, supra*, at 25, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (growing marijuana).

Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize [*2591] Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.

The Government argues that the individual mandate can be sustained as a sort of exception to this rule, because health insurance is a unique product. According to the Government, upholding the individual mandate would not justify mandatory [***56] purchases of items such as cars or broccoli because, as the Government puts it, "[h]ealth insurance is not purchased for its own sake like a car or broccoli; it is a means of financing health-care consumption and covering universal risks." Reply Brief for United States 19. But cars and broccoli are no more purchased for their "own sake" than health insurance. They are purchased to cover the need for transportation and food.

The Government says that health insurance and health care financing are "inherently integrated." Brief for United States 41. But that does not mean the compelled purchase of the first is properly regarded as a regulation of the second. No matter how "inherently integrated" health insurance and health care consumption may be, they are not the same thing: They involve different transactions, entered into at different times, with different providers. And for most of those targeted by the mandate, significant health care needs will be years, or even decades, away. The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking [**480] to justify an exception of

the sort urged by the Government. The individual mandate forces individuals [***57] into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to "regulate Commerce."

2

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an "integral part of a comprehensive scheme of economic regulation"--the guaranteed-issue and community-rating insurance reforms. Brief for United States 24. Under this argument, it is not necessary to consider the effect that an individual's inactivity may have on interstate commerce; it is enough that Congress regulate commercial activity in a way that requires regulation of inactivity to be effective.

The power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers enumerated in the Constitution, Art. I, § 8, cl. 18, vests Congress with authority to enact provisions "incidental to the [enumerated] power, and conducive to its beneficial exercise," *McCulloch*, 17 U.S., at 418, 4 Wheat., at 418, 4 L. Ed. 579. Although the Clause gives Congress authority to "legislate on that vast mass of incidental powers which must be involved in [***58] the constitution," it does not license the exercise of any "great substantive and independent power[s]" beyond those specifically enumerated. *Id.*, 17 U.S., at 411, 421, 4 Wheat., at 411, 421, 4 L. Ed. 579. Instead, the Clause is "merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant." *Kinsella v. United States*, 361 U.S. 234, 247, 80 S. Ct. 297, 4 L. Ed. 2d 268 (1960) (quoting VI Writings of James Madison 383 (G. Hunt ed. 1906)).

As our jurisprudence under the Necessary and Proper Clause has developed, we [*2592] have been very deferential to Congress's determination that a regulation is "necessary." We have thus upheld laws that are "convenient, or useful" or 'conducive' to the authority's 'beneficial exercise.' *Comstock*, 560 U.S., at ___, 130 S. Ct. 1949, 1956, 176 L. Ed. 2d 878, 888 (quoting *McCulloch*, *supra*, at 413, 418, 4 Wheat., at 413, 418, 4 L. Ed. 579). But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not "consist[ent] with

the letter and [***59] spirit of the constitution," *McCulloch*, *supra*, at 421, 4 Wheat., at 421, 4 L. Ed. 579, are not "proper [means] for carrying into Execution" Congress's enumerated powers. Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.' *Printz v. United States*, 521 U.S. 898, 924, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) (alterations omitted) (quoting The Federalist No. 33, at 204 (A. Hamilton)); see also *New York*, 505 U.S., at 177, 112 S. Ct. 2408, 120 L. Ed. 2d 120; *Comstock*, *supra*, at ___, 130 S. Ct. 1949, 1967, 176 L. Ed. 2d 878, 902 (Kennedy, J., concurring in judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause . . .").

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of [**481] the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement [***60] of those *already in federal custody* when they could not be safely released, *Comstock*, *supra*, at ___, 130 S. Ct. 1949, 176 L. Ed. 2d 878, 894; criminalizing bribes involving organizations *receiving federal funds*, *Sabri v. United States*, 541 U.S. 600, 602, 605, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004); and tolling state statutes of limitations while cases are *pending in federal court*, *Jinks v. Richland County*, 538 U.S. 456, 459, 462, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003). The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

This is in no way an authority that is "narrow in scope," *Comstock*, *supra*, at ___, 130 S. Ct. 1949, 1964, 176 L. Ed. 2d 878, 898, or "incidental" to the exercise of the commerce power, *McCulloch*, *supra*, at 418, 4 Wheat., at 418, 4 L. Ed. 579. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could [***61] reach beyond the natural limit of its authority and draw within

its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.

The Government relies primarily on our decision in *Gonzales v. Raich*. In *Raich*, we considered "comprehensive legislation to regulate the interstate market" in marijuana. 545 U.S., at 22, 125 S. Ct. 2195, 162 L. Ed. 2d 1. Certain individuals sought an exemption from that regulation on the ground that they engaged in only intrastate possession and consumption. We denied any exemption, on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market. Congress's attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption. *Id.*, at [*2593] 19, 125 S. Ct. 2195, 162 L. Ed. 2d 1. Accordingly, we recognized that "Congress was acting well within its authority" under the Necessary and Proper Clause even though its "regulation ensnare[d] [***62] some purely intrastate activity." *Id.*, at 22, 125 S. Ct. 2195, 162 L. Ed. 2d 1; see also *Perez*, 402 U.S., at 154, 91 S. Ct. 1357, 28 L. Ed. 2d 686. *Raich* thus did not involve the exercise of any "great substantive and independent power," *McCulloch*, *supra*, at 411, 4 L. Ed. 579, of the sort at issue here. Instead, it concerned only the constitutionality of "individual *applications* of a concededly valid statutory scheme." *Raich*, *supra*, at 23, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (emphasis added).

Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a "necessary and proper" component of the insurance reforms. The commerce power thus does not authorize the mandate. Accord, *post*, at ___ - ___, 183 L. Ed. [**482] 2d, at 537-544 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

B

That is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument: that the mandate may be upheld as within Congress's enumerated power to "lay and collect Taxes." Art. I, § 8, cl. 1.

The Government's tax power argument asks us to [***63] view the statute differently than we did in considering its commerce power theory. In making its Commerce Clause argument, the Government defended the mandate as a regulation requiring individuals to purchase health insurance. The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product.

The text of a statute can sometimes have more than one possible meaning. To take a familiar example, a law that reads "no vehicles in the park" might, or might not, ban bicycles in the park. And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so. Justice Story said that 180 years ago: "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons v. Bedford*, 28 U.S. 433, 3 Pet. 433, 448-449, 7 L. Ed. 732 (1830). Justice Holmes made the same point a century later: "[T]he rule is settled [***64] that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S. Ct. 105, 72 L. Ed. 206, 1928-1 C.B. 324 (1927) (concurring opinion).

The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals "shall" maintain health insurance. 26 U.S.C. §5000A(a). Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis. But, for the reasons explained above, the Commerce Clause does not give Congress that power. Under our precedent, it is therefore necessary to ask whether the Government's alternative reading of the statute--that it only imposes a tax on those without insurance--is a reasonable one.

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he [*2594] pays his taxes. See §5000A(b). That, according to the Government, means the mandate can be regarded

as establishing a condition--not [***65] owning health insurance--that triggers a tax--the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.

[**483] The question is not whether that is the most natural interpretation of the mandate, but only whether it is a "fairly possible" one. *Crowell v. Benson*, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932). As we have explained, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297 (1895). The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below.

C

[**LEdHR16] [16] The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The [***66] "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayer[s]" when they file their tax returns. 26 U.S.C. §5000A(b). It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. §5000A(e)(2). For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. §§5000A(b)(3), (c)(2), (c)(4). The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which--as we previously explained--must assess and collect it "in the same manner as taxes." *Supra*, at ___ - ___, 183 L. Ed. 2d, at 472. This process yields the essential feature of any tax: it produces at least some revenue for the Government. *United States v. Kahriger*, 345 U.S. 22, 28, n. 4, 73 S. Ct. 510, 97 L. Ed. 754, 1953-1 C.B. 456 (1953). Indeed, the payment is expected to raise about \$4 billion per year by 2017. Congressional Budget Office, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act* (Apr. 30,

2010), in *Selected CBO Publications Related to Health [***67] Care Legislation, 2009-2010*, p. 71 (rev. 2010).

It is of course true that the Act describes the payment as a "penalty," not a "tax." But while that label is fatal to the application of the Anti-Injunction Act, *supra*, at ___ - ___, 183 L. Ed. 2d, at 470-471, it does not determine whether the payment may be viewed as an exercise of Congress's taxing power. [**LEdHR17] [17] It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question. That choice does not, however, control whether an exaction is within Congress's constitutional power to tax.

Our precedent reflects this: In 1922, we decided two challenges to the "Child Labor Tax" on the same day. In the first, we held that a suit to enjoin collection of the so-called tax was barred by the Anti-Injunction Act. *George*, 259 U.S., at 20, 42 S. Ct. 419, 66 L. Ed. 816. Congress knew that suits to obstruct taxes had to await payment under the Anti-Injunction Act; Congress called the child labor tax a tax; Congress therefore [*2595] intended the Anti-Injunction Act to apply. In the second case, however, we held that the same exaction, although labeled a tax, was not in fact authorized by Congress's [***68] taxing power. *Drexel Furniture*, 259 U.S., at 38, 42 S. Ct. 449, 66 L. Ed. 817. That constitutional question was not controlled by Congress's choice of label.

We have similarly held that exactions [**484] not labeled taxes nonetheless were authorized by Congress's power to tax. In the *License Tax Cases*, for example, we held that federal licenses to sell liquor and lottery tickets--for which the licensee had to pay a fee--could be sustained as exercises of the taxing power. 5 Wall., at 471, 18 L. Ed. 497. And in *New York v. United States* we upheld as a tax a "surcharge" on out-of-state nuclear waste shipments, a portion of which was paid to the Federal Treasury. 505 U.S., at 171, 112 S. Ct. 2408, 120 L. Ed. 2d 120. [**LEdHR18] [18] We thus ask whether the shared responsibility payment falls within Congress's taxing power, "[d]isregarding the designation of the exaction, and viewing its substance and application." *United States v. Constantine*, 296 U.S. 287, 294, 56 S. Ct. 223, 80 L. Ed. 233 (1935); cf. *Quill Corp. v. North Dakota*, 504 U.S. 298, 310, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) ("[M]agic words or labels" should not "disable an otherwise constitutional levy" (internal quotation marks omitted)); *Nelson v. Sears, Roebuck &*

Co., 312 U.S. 359, 363, 61 S. Ct. 586, 85 L. Ed. 888 (1941) [***69] ("In passing on the constitutionality of a tax law, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it" (internal quotation marks omitted)); *United States v. Sotelo*, 436 U.S. 268, 275, 98 S. Ct. 1795, 56 L. Ed. 2d 275 (1978) ("That the funds due are referred to as a 'penalty' . . . does not alter their essential character as taxes").⁷

7 *Sotelo*, in particular, would seem to refute the joint dissent's contention that we have "never" treated an exaction as a tax if it was denominated a penalty. *Post*, at ___, 183 L. Ed. 2d, at 546. We are not persuaded by the dissent's attempt to distinguish *Sotelo* as a statutory construction case from the bankruptcy context. *Post*, at ___, n. 5, 183 L. Ed. 2d, at 544. The dissent itself treats the question here as one of statutory interpretation, and indeed also relies on a statutory interpretation case from the bankruptcy context. *Post*, at ___, 183 L. Ed. 2d, at 548 (citing *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224, 116 S. Ct. 2106, 135 L. Ed. 2d 506 (1996)).

Our cases confirm this functional approach. For example, in *Drexel Furniture*, we focused on three practical characteristics of the so-called [***70] tax on employing child laborers that convinced us the "tax" was actually a penalty. First, the tax imposed an exceedingly heavy burden--10 percent of a company's net income--on those who employed children, no matter how small their infraction. Second, it imposed that exaction only on those who knowingly employed underage laborers. Such [**LEdHR19] [19] scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law. Third, this "tax" was enforced in part by the Department of Labor, an agency responsible for punishing violations of labor laws, not collecting revenue. 259 U.S., at 36-37, 42 S. Ct. 449, 66 L. Ed. 817; see also, e.g., *Kurth Ranch*, 511 U.S., at 780-782, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (considering, *inter alia*, the amount of the exaction, and the fact that it was imposed for violation of a separate criminal law); *Constantine*, *supra*, at 295, 56 S. Ct. 223, 80 L. Ed. 233 (same).

The same analysis here suggests that [**LEdHR20] [20] the shared responsibility payment may for

constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the [**485] price of insurance, and, by statute, [***71] it [*2596] can never be more.⁸ It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the "prohibitory" financial punishment in *Drexel Furniture*. 259 U.S., at 37, 42 S. Ct. 449, 66 L. Ed. 817. Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation--except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. See §5000A(g)(2). The reasons the Court in *Drexel Furniture* held that what was called a "tax" there was a penalty support the conclusion that what is called a "penalty" here may be viewed as a tax.⁹

8 In 2016, for example, individuals making \$35,000 a year are expected to owe the IRS about \$60 for any month in which they do not have health insurance. Someone with an annual income of \$100,000 a year would likely owe about \$200. The price of a qualifying insurance policy is projected to be around \$400 per month. See D. Newman, CRS Report for Congress, Individual Mandate and Related Information Requirements Under PPACA 7, and n. 25 (2011).

9 [**LEdHR21] [21] We do not suggest that any exaction [***72] lacking a scienter requirement and enforced by the IRS is within the taxing power. See *post*, at ___ - ___, 183 L. Ed. 2d, at 548-549 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Congress could not, for example, expand its authority to impose criminal fines by creating strict liability offenses enforced by the IRS rather than the FBI. But the fact the exaction here is paid like a tax, to the agency that collects taxes--rather than, for example, exacted by Department of Labor inspectors after ferreting out willful malfeasance--suggests that this exaction may be viewed as a tax.

None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of

imported manufactured goods in order to foster the growth of domestic industry. See W. Brownlee, *Federal Taxation in America* 22 (2d ed. 2004); cf. 2 J. Story, *Commentaries on the Constitution of the United States* § 962, p. 434 (1833) ([**LEdHR22] [22] "the taxing power is often, very often, applied for other purposes, [***73] than revenue"). Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns. See *United States v. Sanchez*, 340 U.S. 42, 44-45, 71 S. Ct. 108, 95 L. Ed. 47, 1950-2 C.B. 139 (1950); *Sonzinsky v. United States*, 300 U.S. 506, 513, 57 S. Ct. 554, 81 L. Ed. 772, 1937-1 C.B. 351 (1937). Indeed, [**LEdHR23] [23] "[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky*, *supra*, at 513, 57 S. Ct. 554, 81 L. Ed. 772. That §5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

[**LEdHR24] [24] In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224, 116 S. Ct. 2106, 135 L. Ed. 2d 506 (1996); see also *United States v. La Franca*, 282 U.S. 568, 572, 51 S. Ct. 278, 75 L. Ed. 551 (1931) [***74] ("[A] penalty, [**486] as the word is here used, is an exaction imposed by statute as punishment for an unlawful act"). [**LEdHR25] [25] While the individual mandate clearly aims to induce the purchase of health [*2597] insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law. Brief for United States 60-61; Tr. of Oral Arg. 49-50 (Mar. 26, 2012).

Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. See Congressional Budget Office, *supra*, at [***75] 71. We would expect Congress to be troubled by that prospect if such conduct were unlawful. [**LEdHR26] [26] That Congress apparently regards such extensive

failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.

The plaintiffs contend that Congress's choice of language--stating that individuals "shall" obtain insurance or pay a "penalty"--requires reading §5000A as punishing unlawful conduct, even if that interpretation would render the law unconstitutional. We have rejected a similar argument before. In *New York v. United States* we examined a statute providing that "[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste." 505 U.S., at 169, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (quoting 42 U.S.C. §2021c(a)(1)(A)). A State that shipped its waste to another State was exposed to surcharges by the receiving State, a portion of which would be paid over to the Federal Government. And a State that did not adhere to the statutory scheme [***76] faced "[p]enalties for failure to comply," including increases in the surcharge. §2021e(e)(2); *New York*, 505 U.S., at 152-153, 112 S. Ct. 2408, 120 L. Ed. 2d 120. *New York* urged us to read the statute as a federal command that the state legislature enact legislation to dispose of its waste, which would have violated the Constitution. To avoid that outcome, we interpreted the statute to impose only "a series of incentives" for the State to take responsibility for its waste. We then sustained the charge paid to the Federal Government as an exercise of the taxing power. *Id.*, at 169-174, 112 S. Ct. 2408, 120 L. Ed. 2d 120. We see no insurmountable obstacle to a similar approach here.¹⁰

10 The joint dissent attempts to distinguish *New York v. United States* on the ground that the seemingly imperative language in that case was in an "introductory provision" that had "no legal consequences." *Post*, at ___, 183 L. Ed. 2d, at 546. We did not rely on that reasoning in *New York*. See 505 U.S., at 169-170, 112 S. Ct. 2408, 120 L. Ed. 2d 120. Nor could we have. While the Court quoted only the broad statement that "[e]ach State shall be responsible" for its waste, that language was implemented through operative provisions [***77] that also use the words on which the dissent relies. See 42 U.S.C. §2021e(e)(1) (entitled "Requirements for non-sited compact regions and non-member States" and directing that those entities "shall

comply with the following requirements"); §2021e(e)(2) (describing "Penalties for failure to comply"). The Court upheld those provisions not as lawful commands, but as "incentives." See 505 U.S., at 152-153, 171-173, 112 S. Ct. 2408, 120 L. Ed. 2d 120.

[**487] The joint dissenters argue that we cannot uphold §5000A as a tax because Congress did not "frame" it as such. *Post*, at ___, 183 L. Ed. 2d, at 545. In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without [*2598] energy efficient windows must pay \$50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment [***78] is not called a "tax," a "penalty," or anything else. No one would doubt that this law imposed a tax, and was within Congress's power to tax. That conclusion should not change simply because Congress used the word "penalty" to describe the payment. Interpreting such a law to be a tax would hardly "[i]mpos[e] a tax through judicial legislation." *Post*, at ___, 183 L. Ed. 2d, at 549. Rather, it would give practical effect to the Legislature's enactment.

Our precedent demonstrates that [**LEdHR27] [27] Congress had the power to impose the exaction in §5000A under the taxing power, and that §5000A need not be read to do more than impose a tax. That is sufficient to sustain it. [**LEdHR28] [28] The "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S. Ct. 421, 92 L. Ed. 596, 1948 U.S. LEXIS 2530 (1948).

[**LEdHR29] [29] Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution. Plaintiffs argue that the shared responsibility payment does not do so, citing [**LEdHR30] [30] Article I, § 9, clause 4. That clause provides: "No Capitation, or other [***79] direct, Tax shall be laid, unless in Proportion to the Census or

Enumeration herein before directed to be taken." This requirement means that any "direct Tax" must be apportioned so that each State pays in proportion to its population. According to the plaintiffs, if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the States.

Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a "head tax" or a "poll tax"), might be a direct tax. See *Springer v. United States*, 102 U.S. 586, 596-598, 26 L. Ed. 253 (1881). Soon after the framing, Congress passed a tax on ownership of carriages, over James Madison's objection that it was an unapportioned direct tax. *Id.*, at 597, 26 L. Ed. 253. This Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State. See *Hylton v. United States*, 3 Dall. 171, 174, 3 U.S. 171, 1 L. Ed. 556 (1796) (opinion of Chase, J.). The Court was unanimous, [***80] and those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were direct: capitations and land taxes. See *id.*, at 175, 1 L. Ed. 556; *id.*, at 177, 1 L. Ed. [**488] 556 (opinion of Paterson, J.); *id.*, at 183, 1 L. Ed. 556 (opinion of Iredell, J.).

That narrow view of what a direct tax might be persisted for a century. [**LEdHR31] [31] In 1880, for example, we explained that "*direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." *Springer, supra*, at 602, 26 L. Ed. 253. In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618, 15 S. Ct. 912, 39 L. Ed. 1108 (1895). That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes. See *Eisner v. Macomber*, 252 U.S. 189, 218-219, 40 S. Ct. 189, 64 L. Ed. 521, 1920-3 C.B. 25, T.D. 3010 (1920).

[*2599] [**LEdHR32] [32] A tax on going without health insurance does not fall within any recognized category of direct [***81] tax. It is not a capitation. Capitations are taxes paid by every person, "without

regard to property, profession, or *any other circumstance.*" *Hylton, supra*, at 175, 1 L. Ed. 556 (opinion of Chase, J.) (emphasis altered). The whole point of the shared responsibility payment is that it is triggered by specific circumstances--earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.

There may, however, be a more fundamental objection to a tax on those who lack health insurance. Even if only a tax, the payment under §5000A(b) remains a burden that the Federal Government imposes for an omission, not an act. If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.

Three considerations allay this concern. First, and most importantly, it is abundantly clear [**LEdHR33] [33] the Constitution does not guarantee that individuals may avoid taxation [***82] through inactivity. A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution. The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But from its creation, the Constitution has made no such promise with respect to taxes. See Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789) ("Our new Constitution is now established . . . but in this world nothing can be said to be certain, except death and taxes").

Whether the mandate can be upheld under the Commerce Clause is a question about the scope of federal authority. Its answer depends on whether Congress can exercise what all acknowledge to be the novel course of directing individuals to purchase insurance. Congress's use of the Taxing Clause to encourage buying something is, by contrast, not new. Tax incentives already promote, for example, purchasing homes and professional educations. See 26 U.S.C. §§163(h), 25A. Sustaining the mandate as a tax depends only on whether Congress *has* properly exercised its taxing power to encourage purchasing health [***83] insurance, [**489] not whether it *can*. Upholding the individual mandate under

the Taxing Clause thus does not recognize any new federal power. It determines that Congress has used an existing one.

Second, Congress's ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority. See, e.g., *United States v. Butler*, 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 1936-1 C.B. 421 (1936); *Drexel Furniture*, 259 U.S. 20, 42 S. Ct. 449, 66 L. Ed. 817. More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures. See *Kahriger*, 345 U.S., at 27-31, 73 S. Ct. 510, 97 L. Ed. 754 (collecting cases). We have nonetheless maintained that " 'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.' *Kurth Ranch*, 511 U.S., at 779, 114 S. Ct. [**2600] 1937, 128 L. Ed. 2d 767 (quoting *Drexel Furniture, supra*, at 38, 42 S. Ct. 449, 66 L. Ed. 817).

We [***84] have already explained that [**LEdHR34] [34] the shared responsibility payment's practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power. *Supra*, at 35-36, 42 S. Ct. 449, 66 L. Ed. 817. Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it. [**LEdHR35] [35] It remains true, however, that the " 'power to tax is not the power to destroy while this Court sits.' *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 364, 69 S. Ct. 561, 93 L. Ed. 721 (1949) (quoting *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223, 48 S. Ct. 451, 72 L. Ed. 857(1928) (Holmes, J., dissenting)).

Third, [**LEdHR36] [36] although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. [***85] Those sanctions can include

not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.

By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation--especially taxation motivated by a regulatory purpose--can impose. But [**LEdHR37] [37] imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a [**490] certain act, so long as he is willing to pay a tax levied on that choice.¹¹

11 Of course, individuals do not have a lawful choice not to pay a tax due, and may sometimes face prosecution for failing to do so (although not for declining to make the shared responsibility payment, see 26 U.S.C. §5000A(g)(2)). But that does not show that the tax restricts the lawful choice [***86] whether to undertake or forgo the activity on which the tax is predicated. Those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.

[**LEdHR38] [38] The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.

D

Justice Ginsburg questions the necessity of rejecting the Government's commerce power argument, given that §5000A can be upheld under the taxing power. *Post*, at ___, 183 L. Ed. 2d, at 521. But the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to

reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that [*2601] §5000A can be interpreted as a tax. Without deciding the Commerce Clause [***87] question, I would find no basis to adopt such a saving construction.

The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.

IV

A

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S., at 188, 112 S. Ct. 2408, 120 L. Ed. 2d 120.

There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals--pregnant women, children, [***88] needy families, the blind, the elderly, and the disabled. 42 U.S.C. §1396a(a)(10). There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage. The States also enjoy considerable flexibility with respect to the coverage levels for parents of needy families. §1396a(a)(10)(A)(ii). On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty [**491] line. Kaiser Comm'n on Medicaid and the Uninsured, *Performing Under Pressure* 11, and fig. 11 (2012).

The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover *all* individuals under the age

of 65 with incomes below 133 percent of the federal poverty line. §1396a(a)(10)(A)(i)(VIII). The Act also establishes a new "[e]ssential health benefits" package, which States must provide to all new Medicaid recipients--a level sufficient to satisfy a recipient's obligations under the individual mandate. §§1396a(k)(1), 1396u-7(b)(5), 18022(b). The Affordable Care Act provides that the Federal Government will [***89] pay 100 percent of the costs of covering these newly eligible individuals through 2016. §1396d(y)(1). In the following years, the federal payment level gradually decreases, to a minimum of 90 percent. *Ibid.* In light of the expansion in coverage mandated by the Act, the Federal Government estimates that its Medicaid spending will increase by approximately \$100 billion per year, nearly 40 percent above current levels. Statement of Douglas W. Elmendorf, CBO's Analysis of the Major Health Care Legislation Enacted in March 2010, p. 14, Table 2 (Mar. 30, 2011).

The Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' "taking certain actions that Congress could not require them to take." *College Savings Bank*, 527 U.S., at 686, 119 S. Ct. 2219, 144 L. Ed. 2d 605. Such measures "encourage [*2602] a State to regulate in a particular way, [and] influenc[e] a State's policy choices." *New York, supra*, at 166, 112 S. Ct. 2408, 120 L. Ed. 2d 120. The conditions [***90] imposed by Congress ensure that the funds are used by the States to "provide for the . . . general Welfare" in the manner Congress intended.

At the same time, our cases have recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives. "We have repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a contract.' *Barnes v. Gorman*, 536 U.S. 181, 186, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981)). The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' *Pennhurst, supra*, at 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694. Respecting this limitation is critical to ensuring that Spending Clause legislation does not

undermine the status of the States as independent sovereigns in our federal system. That system "rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' *Bond*, 564 U.S., at ___ , 131 S. Ct. 2355, 180 L. Ed. 2d 269 [***91] (quoting *Alden v. Maine*, 527 U.S. 706, 758, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)). For this reason, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York, supra*, at 162, 112 S. Ct. 2408, 120 L. Ed. 120. Otherwise [***492] the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.

That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes. See, e.g., *Printz*, 521 U.S., at 933, 117 S. Ct. 2365, 138 L. Ed. 2d 814 (striking down federal legislation compelling state law enforcement officers to perform federally mandated background checks on handgun purchasers); *New York, supra*, at 174-175, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (invalidating provisions of an Act that would compel a State to either take title to nuclear waste or enact particular state waste regulations). It has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements [***92] to exert a "power akin to undue influence." *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S. Ct. 883, 81 L. Ed. 1279, 1937-1 C.B. 444 (1937). Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure turns into compulsion," *ibid.*, the legislation runs contrary to our system of federalism. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." *New York*, 505 U.S., at 178, 112 S. Ct. 2408, 120 L. Ed. 2d 120. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated

from the electoral ramifications of their decision." *Id.*, at 169, 112 S. Ct. 2408, 120 L. Ed. 2d 120. Spending Clause programs do not pose this [***93] danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal [*2603] funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.

We addressed such concerns in *Steward Machine*. That case involved a federal tax on employers that was abated if the businesses paid into a state unemployment plan that met certain federally specified conditions. An employer sued, alleging that the tax was impermissibly "driv[ing] the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government." 301 U.S., at 587, 57 S. Ct. 883, 81 L. Ed. 1279. We acknowledged the danger that the Federal Government might employ its taxing power to exert a "power akin to undue influence" [***94] upon the States. *Id.*, at 590, 57 S. Ct. 883, 81 L. Ed. 1279. But we observed that Congress adopted the challenged tax and abatement program to channel money to the States that would [**493] otherwise have gone into the Federal Treasury for use in providing national unemployment services. Congress was willing to direct businesses to instead pay the money into state programs only on the condition that the money be used for the same purposes. Predicating tax abatement on a State's adoption of a particular type of unemployment legislation was therefore a means to "safeguard [the Federal Government's] own treasury." *Id.*, at 591, 57 S. Ct. 883, 81 L. Ed. 1279. We held that "[i]n such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power." *Ibid.*

In rejecting the argument that the federal law was a "weapon[] of coercion, destroying or impairing the autonomy of the states," the Court noted that there was no reason to suppose that the State in that case acted other than through "her unfettered will." *Id.*, at 586, 590, 57 S. Ct. 883, 81 L. Ed. 1279. Indeed, the State itself did "not [***95] offer a suggestion that in passing the

unemployment law she was affected by duress." *Id.*, at 589, 57 S. Ct. 883, 81 L. Ed. 1279.

As our decision in *Steward Machine* confirms, Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting "the simple expedient of not yielding" to federal blandishments when they do not want to embrace the federal policies as their own. *Massachusetts v. Mellon*, 262 U.S. 447, 482, 43 S. Ct. 597, 67 L. Ed. 1078 (1923). The States are separate and independent sovereigns. Sometimes they have to act like it.

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has "crossed the line distinguishing encouragement from coercion," *New York, supra*, at 175, 112 S. Ct. 2408, 120 L. Ed. 2d 120, in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing Medicaid funds. The States claim that this threat serves no [***96] purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress's authority to condition the receipt of funds on the [*2604] States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.

In *South Dakota v. Dole*, we considered a challenge to a federal law that threatened to withhold five percent of a State's federal highway funds if the State did not raise its drinking age to 21. The Court found that the condition was "directly related to one of the main purposes for which highway funds are expended--safe interstate travel." 483 U.S., at 208, 107 S. Ct. 2793, 97 L. Ed. 2d 171. At the same time, the condition [***97] was not a restriction on how the highway funds--set [**494] aside for specific highway improvement and maintenance

efforts--were to be used.

We accordingly asked whether "the financial inducement offered by Congress" was "so coercive as to pass the point at which 'pressure turns into compulsion.' *Id.*, at 211, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (quoting *Steward Machine, supra*, at 590, 57 S. Ct. 883, 81 L. Ed. 1279). By "financial inducement" the Court meant the threat of losing five percent of highway funds; no new money was offered to the States to raise their drinking ages. We found that the inducement was not impermissibly coercive, because Congress was offering only "relatively mild encouragement to the States." *Dole*, 483 U.S., at 211, 107 S. Ct. 2793, 97 L. Ed. 2d 171. We observed that "all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5%" of her highway funds. *Ibid.* In fact, the federal funds at stake constituted less than half of one percent of South Dakota's budget at the time. See Nat. Assn. of State Budget Officers, *The State Expenditure Report* 59 (1987); *South Dakota v. Dole*, 791 F.2d 628, 630 (CA8 1986). In consequence, "we conclude[d] [***98] that [the] encouragement to state action [was] a valid use of the spending power." *Dole*, 483 U.S., at 212, 107 S. Ct. 2793, 97 L. Ed. 2d 171. Whether to accept the drinking age change "remain[ed] the prerogative of the States not merely in theory but in fact." *Id.*, at 211-212, 107 S. Ct. 2793, 97 L. Ed. 2d 171.

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"--it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to the State." 42 U.S.C. §1396c. A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but *all* of it. *Dole, supra*, at 211, 107 S. Ct. 2793, 97 L. Ed. 2d 171. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. See Nat. Assn. of State Budget Officers, *Fiscal Year 2010 State Expenditure Report*, p. 11, Table 5 (2011); [***99] 42 U.S.C. §1396d(b). The Federal Government estimates that it will pay out approximately \$3.3 trillion between 2010 and 2019 in order to cover the costs of *pre*-expansion Medicaid. Brief for United States 10, n. 6. In addition, the States have

developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid. It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with [*2605] a "prerogative" to reject Congress's desired policy, "not merely in theory but in fact." 483 U.S., at 211-212, 107 S. Ct. 2793, 97 L. Ed. 2d 171. The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.¹²

12 Justice Ginsburg observes that state Medicaid spending will increase by only 0.8 percent after the expansion. *Post*, at ___, 183 L. Ed. 2d, at 524. That not only ignores increased state administrative expenses, but also assumes that the Federal Government will continue to fund the expansion at the current statutorily specified levels. It [***100] is not unheard of, however, for the Federal Government to increase requirements in such a manner as to impose unfunded mandates on the States. More importantly, the size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. "Your money or your life" is a coercive proposition, whether you have a single dollar in your pocket or \$500.

[**495] Justice Ginsburg claims that *Dole* is distinguishable because here "Congress has not threatened to withhold funds earmarked for any other program." *Post*, at ___, 183 L. Ed. 2d, at 527. But that begs the question: The States contend that the expansion is in reality a new program and that Congress is forcing them to accept it by threatening the funds for the existing Medicaid program. We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because "Congress styled" them as such. *Post*, at ___, 183 L. Ed. 2d, at 528. If the expansion is not properly viewed as a modification of the existing Medicaid program, Congress's decision to so title it is irrelevant.¹³

13 Nor, of course, can the number of pages the amendment occupies, or the extent to which the change preserves [***101] and works within the existing program, be dispositive. Cf. *post*, at ___ - ___, 183 L. Ed. 2d, at 528 (opinion of Ginsburg,

J.). Take, for example, the following hypothetical amendment: "All of a State's citizens are now eligible for Medicaid." That change would take up a single line and would not alter any "operational aspect[] of the program" beyond the eligibility requirements. *Post*, at ___, 183 L. Ed. 2d, at 528. Yet it could hardly be argued that such an amendment was a permissible modification of Medicaid, rather than an attempt to foist an entirely new health care system upon the States.

Here, the Government claims that the Medicaid expansion is properly viewed merely as a modification of the existing program because the States agreed that Congress could change the terms of Medicaid when they signed on in the first place. The Government observes that the Social Security Act, which includes the original Medicaid provisions, contains a clause expressly reserving "[t]he right to alter, amend, or repeal any provision" of that statute. 42 U.S.C. §1304. So it does. But "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S., at 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694. [***102] A State confronted with statutory language reserving the right to "alter" or "amend" the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed. Congress has in fact done so, sometimes conditioning only the new funding, other times both old and new. See, e.g., Social Security Amendments of 1972, 86 Stat. 1381-1382, 1465 (extending Medicaid eligibility, but partly conditioning only the new funding); Omnibus Budget Reconciliation Act of 1990, §4601, 104 Stat. 1388-166 (extending eligibility, and conditioning old and new funds).

The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, [*2606] the blind, the elderly, and needy families with dependent children. See 42 U.S.C. §1396a(a)(10). Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 [***103] percent of [**496] the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a

comprehensive national plan to provide universal health insurance coverage.¹⁴

14 Justice Ginsburg suggests that the States can have no objection to the Medicaid expansion, because "Congress could have repealed Medicaid [and,] [t]hereafter, . . . could have enacted Medicaid II, a new program combining the pre-2010 coverage with the expanded coverage required by the ACA." *Post*, at ___, 183 L. Ed. 2d, at 529; see also *post*, at ___, 183 L. Ed. 2d, at 521. But it would certainly not be that easy. Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration. Such a massive undertaking would hardly be "ritualistic." *Ibid*. The same is true of Justice Ginsburg's suggestion that Congress could establish Medicaid as an exclusively federal program. *Post*, at ___, 183 L. Ed. 2d, at 525.

Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program. Congress [***104] created a separate funding provision to cover the costs of providing services to any person made newly eligible by the expansion. While Congress pays 50 to 83 percent of the costs of covering individuals currently enrolled in Medicaid, §1396d(b), once the expansion is fully implemented Congress will pay 90 percent of the costs for newly eligible persons, §1396d(y)(1). The conditions on use of the different funds are also distinct. Congress mandated that newly eligible persons receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package. §1396a(k)(1); see Brief for United States 9.

As we have explained, "[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or 'retroactive' conditions." *Pennhurst*, *supra*, at 25, 101 S. Ct. 1531, 67 L. Ed. 2d 694. A State could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically.

Justice Ginsburg claims that in fact this expansion is no different from the previous changes to Medicaid, such

that "a State would be hard put to complain [***105] that it lacked fair notice." *Post*, at ___, 183 L. Ed. 2d, at 532. But the prior change she discusses--presumably the most dramatic alteration she could find--does not come close to working the transformation the expansion accomplishes. She highlights an amendment requiring States to cover pregnant women and increasing the number of eligible children. *Ibid.* But this modification can hardly be described as a major change in a program that--from its inception--provided health care for "families with dependent children." Previous Medicaid amendments simply do not fall into the same category as the one at stake here.

The Court in *Steward Machine* did not attempt to "fix the outermost line" where persuasion gives way to coercion. 301 U.S., at 591, 57 S. Ct. 883, 81 L. Ed. 1279. The Court found it "[e]nough for present purposes that wherever the line may be, this statute is within it." *Ibid.* We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply [*2607] "conscript state [agencies] into the national bureaucratic army," *FERC v. Mississippi*, 456 U.S. 742, 775, 102 S. Ct. 2126, 72 L. Ed. 2d 532 (1982) (O'Connor, J., concurring [**497] in judgment [***106] in part and dissenting in part), and that is what it is attempting to do with the Medicaid expansion.

B

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold *all* "further [Medicaid] payments . . . to the State" if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. 42 U.S.C. §1396c. In light of the Court's holding, the Secretary cannot apply §1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.

That fully remedies the constitutional violation we have identified. The chapter of the United States Code that contains §1396c includes a severability clause

confirming that we need go no further. That clause specifies that "[i]f [***107] any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." §1303. Today's holding does not affect the continued application of §1396c to the existing Medicaid program. Nor does it affect the Secretary's ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act.

This is not to say, as the joint dissent suggests, that we are "rewriting the Medicaid Expansion." *Post*, at ___, 183 L. Ed. 2d, at 563. Instead, we determine, first, that §1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion. We then follow Congress's explicit textual instruction to leave unaffected "the remainder of the chapter, and the application of [the challenged] provision to other persons or circumstances." §1303. When we invalidate an application of a statute because that application is unconstitutional, we are not "rewriting" the [***108] statute; we are merely enforcing the Constitution.

The question remains whether today's holding affects other provisions of the Affordable Care Act. In considering that question, "[w]e seek to determine what Congress would have intended in light of the Court's constitutional holding." *United States v. Booker*, 543 U.S. 220, 246, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (internal quotation marks omitted). Our "touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 330, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006) (internal quotation marks omitted). The question here is whether Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the new Medicaid expansion. Unless it is "evident" that the answer is [**498] no, we must leave the rest of the Act intact. *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234, 52 S. Ct. 559, 76 L. Ed. 1062 (1932).

[*2608] We are confident that Congress would have wanted to preserve the rest of the Act. It is fair to

[***109] say that Congress assumed that every State would participate in the Medicaid expansion, given that States had no real choice but to do so. The States contend that Congress enacted the rest of the Act with such full participation in mind; they point out that Congress made Medicaid a means for satisfying the mandate, 26 U.S.C. §5000A(f)(1)(A)(ii), and enacted no other plan for providing coverage to many low-income individuals. According to the States, this means that the entire Act must fall.

We disagree. The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will. Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion. Other States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding [***110] the Act offers at the outset.

We have no way of knowing how many States will accept the terms of the expansion, but we do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate. The other reforms Congress enacted, after all, will remain "fully operative as a law," *Champlin, supra*, at 234, 52 S. Ct. 559, 76 L. Ed. 1062, and will still function in a way "consistent with Congress' basic objectives in enacting the statute," *Booker, supra*, at 259, 125 S. Ct. 738, 160 L. Ed. 2d 621. Confident that Congress would not have intended anything different, we conclude that the rest of the Act need not fall in light of our constitutional holding.

* * *

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within [***111] Congress's power to tax.

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional [**499] violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.

[*2609] The judgment of the Court of Appeals for the Eleventh Circuit is affirmed in part and reversed in part.

It is so ordered.

CONCUR BY: GINSBURG [***112] (In Part)

DISSENT BY: THOMAS; GINSBURG (In Part)

DISSENT

Justice **Ginsburg**, with whom Justice **Sotomayor** joins, and with whom Justice **Breyer** and Justice **Kagan** join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with The Chief Justice that the Anti-Injunction Act does not bar the Court's consideration of this case, and that the minimum coverage provision is a proper exercise of Congress' taxing power. I therefore join Parts I, II, and III-C of The Chief Justice's opinion. Unlike The Chief Justice, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.

I

The provision of health care is today a concern of national dimension, just as the provision of old-age and survivors' benefits was in the 1930's. In the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors. Beyond question, Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central [***113] role for private insurers and state governments. According to The Chief Justice, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive.

Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm. See *United States v. Darby*, 312 U.S. 100, 115, 61 S. Ct. 451, 85 L. Ed. 609 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918), and recognizing that "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S. Ct. 615, 81 L. Ed. 893 (1937) ("[The commerce] power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it." (internal quotation marks omitted)). The Chief Justice's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it. See, [***114] e.g., *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362, 368, 55 S. Ct. 758, 79 L. [**500] Ed. 1468 (1935) (invalidating compulsory retirement and pension plan for employees of carriers subject to the Interstate Commerce Act; Court found law related essentially "to the social welfare of the worker, and therefore remote from any regulation of commerce as such"). It is a reading that should not have staying power.

A

In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for healthcare products and services. By any measure, that market is immense. Collectively, Americans spent \$2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy. 42 U.S.C.

§18091(2)(B) (2006 ed., Supp. IV). Within the next decade, it is anticipated, spending on health care will nearly double. *Ibid.*

[*2610] The healthcare market's size is not its only distinctive feature. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional. [***115] See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for U.S. Adults: National Health Interview Survey 2009, Ser. 10, No. 249, p. 124, Table 37 (Dec. 2010) (Over 99.5% of adults above 65 have visited a health-care professional.). Most people will do so repeatedly. See *id.*, at 115, Table 34 (In 2009 alone, 64% of adults made two or more visits to a doctor's office.).

When individuals make those visits, they face another reality of the current market for medical care: its high cost. In 2010, on average, an individual in the United States incurred over \$7,000 in health-care expenses. Dept. of Health and Human Services, Centers for Medicare and Medicaid Services, Historic National Health Expenditure Data, National Health Expenditures: Selected Calendar Years 1960-2010 (Table 1). Over a lifetime, costs mount to hundreds of thousands of dollars. See Alemyahu & Warner, *The Lifetime Distribution of Health Care Costs*, in 39 *Health Service Research* 627, 635 (June 2004). When a person requires nonroutine care, the cost will generally exceed what he or she can afford to pay. A single hospital stay, for instance, typically costs upwards of \$10,000. [***116] See Dept. of Health and Human Services, Office of Health Policy, ASPE Research Brief: *The Value of Health Insurance* 5 (May 2011). Treatments for many serious, though not uncommon, conditions similarly cost a substantial sum. Brief for Economic Scholars as *Amici Curiae* in No. 11-398, p. 10 (citing a study indicating that, in 1998, the cost of treating a heart attack for the first 90 days exceeded \$20,000, while the annual cost of treating certain cancers was more than \$50,000).

Although every U.S. domiciliary will incur significant medical expenses during his or her lifetime, the time when care will be needed is often unpredictable. An accident, a heart attack, or a cancer diagnosis commonly occurs without warning. Inescapably, we are

all at peril of needing medical care without a moment's notice. See, *e.g.*, Campbell, *Down the Insurance Rabbit Hole*, N. Y. Times, Apr. 5, 2012, p. A23 (telling of an uninsured 32-year-old woman who, healthy one day, became a quadriplegic the next due to an auto accident).

[**501] To manage the risks associated with medical care--its high cost, its unpredictability, and its inevitability--most people in the United States obtain health insurance. Many (approximately [***117] 170 million in 2009) are insured by private insurance companies. Others, including those over 65 and certain poor and disabled persons, rely on government-funded insurance programs, notably Medicare and Medicaid. Combined, private health insurers and State and Federal Governments finance almost 85% of the medical care administered to U.S. residents. See Congressional Budget Office, *CBO's 2011 Long-Term Budget Outlook 37* (June 2011).

Not all U.S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. See Dept. of Commerce, Census Bureau, C. DeNavas-Walt, B. Proctor, & J. Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2009*, p. 23, Table 8 (Sept. 2010). As a group, uninsured individuals [*2611] annually consume more than \$100 billion in health-care services, nearly 5% of the Nation's total. *Hidden Health Tax: Americans Pay a Premium 2* (2009), available at <http://www.familiesusa.org> (all Internet material as visited June 25, 2012, and included in Clerk of Court's case file). Over 60% of those without [***118] insurance visit a doctor's office or emergency room in a given year. See Dept. of Health and Human Services, National Center for Health Statistics, *Health--United States--2010*, p. 282, Table 79 (Feb. 2011).

B

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. See 42 U.S.C. §18091(2). As just noted, the cost of emergency care or treatment for a serious illness generally exceeds what an individual can afford to pay on her own. Unlike markets for most products, however, the inability to pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations

and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay. See, *e.g.*, 42 U.S.C. §1395dd; Fla. Stat. §395.1041(3)(f) (2010); Tex. Health & Safety Code Ann. §§311.022(a) and (b) (West 2010); American Medical Association, Council on Ethical and Judicial Affairs, *Code of Medical Ethics, Current Opinions: Opinion 8.11--Neglect of Patient*, p. 70 (1998-1999 ed.).

As a consequence, medical-care providers deliver significant [***119] amounts of care to the uninsured for which the providers receive no payment. In 2008, for example, hospitals, physicians, and other health-care professionals received no compensation for \$43 billion worth of the \$116 billion in care they administered to those without insurance. 42 U.S.C. §18091(2)(F) (2006 ed., Supp. IV).

Health-care providers do not absorb these bad debts. Instead, they raise their prices, passing along the cost of uncompensated care to those who do pay reliably: the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those [*502] without it. As economists would describe what happens, the uninsured "free ride" on those who pay for health insurance.

The size of this subsidy is considerable. Congress found that the cost-shifting just described "increases family [insurance] premiums by on average over \$1,000 a year." *Ibid.* Higher premiums, in turn, render health insurance less affordable, forcing more people to go without insurance and leading to further cost-shifting.

And [***120] it is hardly just the currently sick or injured among the uninsured who prompt elevation of the price of health care and health insurance. Insurance companies and health-care providers know that some percentage of healthy, uninsured people will suffer sickness or injury each year and will receive medical care despite their inability to pay. In anticipation of this uncompensated care, health-care companies raise their prices, and insurers their premiums. In other words, because any uninsured person may need medical care at any moment and because health-care companies must account for that risk, every uninsured person impacts the market price of medical care and medical insurance.

The failure of individuals to acquire insurance has other deleterious effects on the health-care market. Because those without insurance generally lack access to [*2612] preventative care, they do not receive treatment for conditions--like hypertension and diabetes--that can be successfully and affordably treated if diagnosed early on. See Institute of Medicine, National Academies, *Insuring America's Health: Principles and Recommendations* 43 (2004). When sickness finally drives the uninsured to seek care, once treatable [***121] conditions have escalated into grave health problems, requiring more costly and extensive intervention. *Id.*, at 43-44. The extra time and resources providers spend serving the uninsured lessens the providers' ability to care for those who do have insurance. See Kliff, *High Uninsured Rates Can Kill You--Even if You Have Coverage*, *Washington Post* (May 7, 2012) (describing a study of California's health-care market which found that, when hospitals divert time and resources to provide uncompensated care, the quality of care the hospitals deliver to those with insurance drops significantly), available at http://www.washingtonpost.com/blogs/ezra-klein/post/high-uninsured-rates-can-kill-you-even-if-you-have-coverage/2012/05/07/gIQALNHN8T_print.html.

C

States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be "bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose." *Helvering v. Davis*, 301 U.S. 619, 644, 57 S. Ct. 904, 81 L. Ed. 1307, 1937-1 C.B. 360 (1937). See also Brief for Commonwealth of Massachusetts as *Amicus Curiae* in No. 11-398, [***122] p. 15 (noting that, in 2009, Massachusetts' emergency rooms served thousands of uninsured, out-of-state residents). An influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and [**503] increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State.

States that undertake health-care reforms on their own thus risk "placing themselves in a position of

economic disadvantage as compared with neighbors or competitors." *Davis*, 301 U.S., at 644, 57 S. Ct. 904, 81 L. Ed. 1307. See also Brief for Health Care for All, Inc., et al. as *Amici Curiae* in No. 11-398, p. 4 ("[O]ut-of-state residents continue to seek and receive millions of dollars in uncompensated care in Massachusetts hospitals, limiting the State's efforts to improve its health care system through the elimination of uncompensated care."). Facing that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that [***123] problem is in all States' best interests. Congress' intervention was needed to overcome this collective-action impasse.

D

Aware that a national solution was required, Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise or the States. Instead of going this route, Congress enacted the ACA, a solution that retains a robust role for private insurers and state governments. To make its chosen approach work, however, Congress had to use some new tools, including a requirement that most individuals obtain private health insurance coverage. See 26 U.S.C. §5000A (2006 ed., Supp. IV) [*2613] (the minimum coverage provision). As explained below, by employing these tools, Congress was able to achieve a practical, altogether reasonable, solution.

A central aim of the ACA is to reduce the number of uninsured U.S. residents. See 42 U.S.C. §18091(2)(C) and (I) (2006 ed., Supp. IV). The minimum coverage provision advances this objective by giving potential recipients [***124] of health care a financial incentive to acquire insurance. Per the minimum coverage provision, an individual must either obtain insurance or pay a toll constructed as a tax penalty. See 26 U.S.C. §5000A.

The minimum coverage provision serves a further purpose vital to Congress' plan to reduce the number of uninsured. Congress knew that encouraging individuals to purchase insurance would not suffice to solve the problem, because most of the uninsured are not uninsured by choice.¹ Of particular concern to Congress were people who, though desperately in need of insurance, often cannot acquire it: persons who suffer from preexisting medical conditions.

1 [***125] According to one study conducted by the National Center for Health Statistics, the high cost of insurance is the most common reason why individuals lack coverage, followed by loss of one's job, an employer's unwillingness to offer insurance or an insurer's unwillingness to cover those with preexisting medical conditions, and loss of Medicaid coverage. See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for the U.S. Population: National Health Interview Survey--2009, Ser. 10, No. 248, p. 71, Table 25 (Dec. 2010). "[D]id not want or need coverage" received too few responses to warrant its own category. See *ibid.*, n. 2.

Before the ACA's enactment, private insurance companies took an applicant's medical history into account [**504] when setting insurance rates or deciding whether to insure an individual. Because individuals with preexisting medical conditions cost insurance companies significantly more than those without such conditions, insurers routinely refused to insure these individuals, charged them substantially higher premiums, or offered only limited coverage that did not include the preexisting illness. See Dept. of Health and Human Services, Coverage Denied: How the Current Health Insurance System Leaves Millions Behind 1 (2009) (Over the past three years, 12.6 million nonelderly adults were denied insurance coverage or charged higher premiums due to a preexisting condition.).

To ensure that individuals with medical histories have access to affordable insurance, Congress devised a three-part solution. First, Congress imposed a "guaranteed issue" requirement, which bars insurers from denying coverage to any [***126] person on account of that person's medical condition or history. See 42 U.S.C. §§300gg-1, 300gg-3, 300gg-4(a) (2006 ed., Supp. IV). Second, Congress required insurers to use "community rating" to price their insurance policies. See §300gg. Community rating, in effect, bars insurance companies from charging higher premiums to those with preexisting conditions.

But these two provisions, Congress comprehended, could not work effectively unless individuals were given a powerful incentive to obtain insurance. See Hearings before the House Ways and Means Committee, 111th Cong., 1st Sess., 10, 13 (2009) (statement of Uwe

Reinhardt) ("[I]mposition of *community-rated premiums* and *guaranteed* issue on a market of competing private health insurers will inexorably drive that market into extinction, unless these two features are coupled with . . . a [**2614] *mandate on individual[s] to be insured.*" (emphasis in original)).

In the 1990's, several States--including New York, New Jersey, Washington, Kentucky, Maine, New Hampshire, and Vermont--enacted guaranteed-issue and community-rating laws without requiring universal acquisition of insurance coverage. The results were disastrous. "All seven states suffered [***127] from skyrocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers." Brief for American Association of People with Disabilities et al. as *Amici Curiae* in No. 11-398, p. 9 (hereinafter AAPD Brief). See also Brief for Governor of Washington Christine Gregoire as *Amicus Curiae* in No. 11-398, pp. 11-14 (describing the "death spiral" in the insurance market Washington experienced when the State passed a law requiring coverage for preexisting conditions).

Congress comprehended that guaranteed-issue and community-rating laws alone will not work. When insurance companies are required to insure the sick at affordable prices, individuals can wait until they become ill to buy insurance. Pretty soon, those in need of immediate medical care--*i.e.*, those who cost insurers the most--become the insurance companies' main customers. This "adverse selection" problem leaves insurers with two choices: They can either raise premiums dramatically to cover their ever-increasing costs or they can exit the market. In the seven States that tried guaranteed-issue and community-rating requirements without a minimum coverage provision, that is precisely [***128] what insurance companies [**505] did. See, *e.g.*, AAPD Brief 10 ("[In Maine,] [m]any insurance providers doubled their premiums in just three years or less."); *id.*, at 12 ("Like New York, Vermont saw substantial increases in premiums after its . . . insurance reform measures took effect in 1993."); Hall, An Evaluation of New York's Reform Law, 25 J. Health Pol. Pol'y & L. 71, 91-92 (2000) (Guaranteed-issue and community-rating laws resulted in a "dramatic exodus of indemnity insurers from New York's individual [insurance] market."); Brief for Barry Friedman et al. as *Amici Curiae* in No. 11-398, p. 17 ("In Kentucky, all but two insurers (one State-run) abandoned the State.").

Massachusetts, Congress was told, cracked the adverse selection problem. By requiring most residents to obtain insurance, see Mass. Gen. Laws, ch. 111M, §2 (West 2011), the Commonwealth ensured that insurers would not be left with only the sick as customers. As a result, federal lawmakers observed, Massachusetts succeeded where other States had failed. See Brief for Commonwealth of Massachusetts as *Amicus Curiae* in No. 11-398, p. 3 (noting that the Commonwealth's reforms reduced the number of uninsured residents to less [***129] than 2%, the lowest rate in the Nation, and cut the amount of uncompensated care by a third); 42 U.S.C. §18091(2)(D) (2006 ed., Supp. IV) (noting the success of Massachusetts' reforms).² In coupling the minimum coverage provision with guaranteed-issue and community-rating prescriptions, Congress followed Massachusetts' lead.

2 Despite its success, Massachusetts' medical-care providers still administer substantial amounts of uncompensated care, much of that to uninsured patients from out-of-state. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 502-503.

* * *

In sum, Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social problem that has plagued the Nation for decades: the large number of U.S. residents [*2615] who are unable or unwilling to obtain health insurance. Whatever one thinks of the policy decision Congress made, it was Congress' prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community-rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses.

II

A

The Commerce Clause, it is widely acknowledged, "was the Framers' response to the central problem [***130] that gave rise to the Constitution itself." *EEOC v. Wyoming*, 460 U.S. 226, 244, 245, n. 1, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983) (Stevens, J., concurring) (citing sources). Under the Articles of Confederation, the Constitution's precursor, the regulation of commerce was left to the States. This scheme proved unworkable,

because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole. See Vices of the Political System of the United States, in James Madison: Writings 69, 71, P5 (J. Rakove ed. 1999) (As a result of the "want of concert in matters where common [**506] interest requires it," the "national dignity, interest, and revenue [have] suffered.").³

3 Alexander Hamilton described the problem this way: "[Often] it would be beneficial to all the states to encourage, or suppress[,] a particular branch of trade, while it would be detrimental . . . to attempt it without the concurrence of the rest." The *Continentalist* No. V, in 3 Papers of Alexander Hamilton 75, 78 (H. Syrett ed. 1962). Because the concurrence of all States was exceedingly difficult to obtain, Hamilton observed, "the experiment [***131] would probably be left untried." *Ibid.*

What was needed was a "national Government . . . armed with a positive & compleat authority in all cases where uniform measures are necessary." See Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 Papers of James Madison 368, 370 (R. Rutland ed. 1975). See also Letter from George Washington to James Madison (Nov. 30, 1785), in 8 *id.*, at 428, 429 ("We are either a United people, or we are not. If the former, let us, in all matters of general concern act as a nation, which ha[s] national objects to promote, and a national character to support."). The Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation "in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent." 2 Records of the Federal Convention of 1787, pp. 131-132, P8 (M. Farrand rev. 1966). See also *North American Co. v. SEC*, 327 U.S. 686, 705, 66 S. Ct. 785, 90 L. Ed. 945 (1946) ("[The commerce power] is an affirmative power commensurate with the national needs.").

The Framers understood that the "general Interests of the Union" would [***132] change over time, in ways they could not anticipate. Accordingly, they recognized that the Constitution was of necessity a "great outlin[e]," not a detailed blueprint, see *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 407, 4 L. Ed. 579 (1819), and that its provisions included broad concepts, to be "explained by the context or by the facts of the case,"

Letter from James Madison to N. P. Trist (Dec. 1831), in 9 Writings of James Madison 471, 475 (G. Hunt ed. 1910). "Nothing . . . can be more fallacious," Alexander Hamilton emphasized, "than to infer the extent of any power, proper to be lodged in the national government, from . . . its immediate necessities. [*2616] There ought to be a CAPACITY to provide for future contingencies[,] as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity." The Federalist No. 34, pp. 205, 206 (John Harvard Library ed. 2009). See also *McCulloch*, 4 Wheat., at 415, 4 L. Ed. 579 (The Necessary and Proper Clause is lodged "in a constitution[,] intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.").

B

Consistent with the Framers' intent, we have repeatedly [***133] emphasized that Congress' authority under the Commerce Clause is dependent upon "practical" considerations, including "actual experience." *Jones & Laughlin Steel Corp.*, 301 U.S., at 41-42, 57 S. Ct. 615, 81 L. Ed. 893; see *Wickard v. Filburn*, 317 U.S. 111, 122, 63 S. Ct. 82, 87 L. Ed. 122 (1942); *United States v. Lopez*, 514 U.S. 549, 573, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (Kennedy, J., concurring) (emphasizing "the Court's definitive commitment to the practical conception of the commerce power"). See also *North American [**507] Co.*, 327 U.S., at 705, 66 S. Ct. 785, 90 L. Ed. 945 ("Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities." (citation omitted)). We afford Congress the leeway "to undertake to solve national problems directly and realistically." *American Power & Light Co. v. SEC*, 329 U.S. 90, 103, 67 S. Ct. 133, 91 L. Ed. 103 (1946).

Until today, this Court's pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities "that substantially affect interstate [***134] commerce." *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. See *ibid.* See also *Wickard*, 317 U.S., at 125, 63 S. Ct. 82, 87 L. Ed. 122 ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, *whatever*

its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." (emphasis added)); *Jones & Laughlin Steel Corp.*, 301 U.S., at 37, 57 S. Ct. 615, 81 L. Ed. 893.

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. See *Raich*, 545 U.S., at 17, 125 S. Ct. 2195, 162 L. Ed. 2d 1. See also *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, 467 U.S. 717, 729, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984) ("[S]trong deference [is] accorded legislation in the field of national economic policy."); *Hodel v. Indiana*, 452 U.S. 314, 326, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981) ("This [C]ourt will certainly not substitute its judgment for that of Congress unless the relation of the subject to [***135] interstate commerce and its effect upon it are clearly non-existent." (internal quotation marks omitted)). When appraising such legislation, we ask only (1) whether Congress had a "rational basis" for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a "reasonable connection between the regulatory means selected and the asserted ends." *Id.*, at 323-324, 101 S. Ct. 2376, 69 L. Ed. 2d 40. See also *Raich*, 545 U.S., at 22, 125 S. Ct. 2195, 162 L. Ed. 2d 1; *Lopez*, 514 U.S., at 557, 115 S. Ct. 1624, 131 L. Ed. 2d 626; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 277, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981); *Katzenbach v. McClung*, 379 U.S. 294, 303, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258, 85 S. Ct. 348, 13 L. Ed. 2d 258 [*2617] (1964); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). In answering these questions, we presume the statute under review is constitutional and may strike it down only on a "plain showing" that Congress acted irrationally. *United States v. Morrison*, 529 U.S. 598, 607, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).

C

Straightforward [***136] application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions [**508] of dollars of health-care products and services each year. See *supra*, at ___, 183 L.

Ed. 2d, at 501. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 502-503.

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 501-502. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent [***137] to "doing nothing," *ante*, at ___, 183 L. Ed. 2d, at 475; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 506-507. See also *Wickard*, 317 U.S., at 128, 63 S. Ct. 82, 87 L. Ed. 122 ("It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and *practices affecting such prices*." (emphasis added)).

The minimum coverage provision, furthermore, bears a "reasonable connection" to Congress' goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market.

Congress also acted reasonably in requiring uninsured individuals, whether sick or healthy, either to obtain insurance or to pay the specified penalty. As earlier observed, because every person is at risk [***138] of needing care at any moment, all those who lack insurance, regardless of their current health status, adversely affect the price of health care and health insurance. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 501-502. Moreover, an insurance-purchase requirement

limited to those in need of immediate care simply could not work. Insurance companies would either charge these individuals prohibitively expensive premiums, or, if community-rating regulations were in place, close up shop. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 503-505. See also Brief for State of Maryland and 10 Other States et al. as *Amici Curiae* in No. 11-398, p. 28 (hereinafter Maryland Brief) ("No insurance regime can survive if people can opt out when the risk insured against is only a risk, but opt in when the risk materializes.").

[*2618] "[W]here we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Katzenbach*, 379 U.S., at 303-304, 85 S. Ct. 377, 13 L. Ed. 2d 290. Congress' enactment of the minimum coverage provision, which addresses a specific [**509] interstate problem in a practical, experience-informed manner, easily meets this criterion.

D

Rather than evaluating the constitutionality of the minimum coverage [***139] provision in the manner established by our precedents, The Chief Justice relies on a newly minted constitutional doctrine. The commerce power does not, The Chief Justice announces, permit Congress to "compe[l] individuals to become active in commerce by purchasing a product." *Ante*, at ___, 183 L. Ed. 2d, at 475 (emphasis deleted).

1

a

The Chief Justice's novel constraint on Congress' commerce power gains no force from our precedent and for that reason alone warrants disapprobation. See *infra*, at ___ - ___, 183 L. Ed. 2d, at 512-514. But even assuming, for the moment, that Congress lacks authority under the Commerce Clause to "compel individuals not engaged in commerce to purchase an unwanted product," *ante*, at ___, 183 L. Ed. 2d, at 474, such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. See *supra*, at ___, 183 L. Ed. 2d, at 500. Thus, if The Chief Justice is correct that an insurance-purchase requirement can be applied only to those who "actively" consume health care, the minimum coverage provision fits the bill.

The Chief Justice does not dispute that all U.S. residents participate in the market for health services over the course of their lives. See *ante*, at ___, 183 L. Ed. 2d, at 473 ("Everyone will eventually need health care at a time and [***140] to an extent they cannot predict."). But, The Chief Justice insists, the uninsured cannot be considered active in the market for health care, because "[t]he proximity and degree of connection between the [uninsured today] and [their] subsequent commercial activity is too lacking." *Ante*, at ___, 183 L. Ed. 2d, at 479.

This argument has multiple flaws. First, more than 60% of those without insurance visit a hospital or doctor's office each year. See *supra*, at ___, 183 L. Ed. 2d, at 501. Nearly 90% will within five years.⁴ An uninsured's consumption of health care is thus quite proximate: It is virtually certain to occur in the next five years and more likely than not to occur this year.

4 See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for U.S. Adults: National Health Interview Survey 2009, Ser. 10, No. 249, p. 124, Table 37 (Dec. 2010).

Equally evident, Congress has no way of separating those uninsured individuals who will need emergency medical care today (surely their consumption of medical care is sufficiently imminent) from those who will not need medical services for years to come. No one knows when an emergency will occur, yet emergencies involving the uninsured arise daily. To capture individuals who unexpectedly will obtain medical care in the very near future, then, Congress needed to include individuals who will not go to a doctor anytime soon. Congress, our decisions instruct, [***141] has authority to cast its net that wide. See *Perez v. United States*, 402 U.S. 146, 154, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971) ("[W]hen it is necessary in order to [**510] prevent an evil to make the law embrace more than the precise [*2619] thing to be prevented it may do so." (internal quotation marks omitted)).⁵

5 Echoing The Chief Justice, the joint dissenters urge that the minimum coverage provision impermissibly regulates young people who "have no intention of purchasing [medical care]" and are too far "removed from the [health-care] market." See *post*, at ___, ___, 183 L. Ed. 2d, at 539, 541. This criticism ignores the reality that a healthy

young person may be a day away from needing health care. See *supra*, at ___, 183 L. Ed. 2d, at 500. A victim of an accident or unforeseen illness will consume extensive medical care immediately, though scarcely expecting to do so.

Second, it is Congress' role, not the Court's, to delineate the boundaries of the market the Legislature seeks to regulate. The Chief Justice defines the health-care market as [***142] including only those transactions that will occur either in the next instant or within some (unspecified) proximity to the next instant. But Congress could reasonably have viewed the market from a long-term perspective, encompassing all transactions virtually certain to occur over the next decade, see *supra*, at ___, 183 L. Ed. 2d, at 509, not just those occurring here and now.

Third, contrary to The Chief Justice's contention, our precedent does indeed support "[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity." *Ante*, at ___, 183 L. Ed. 2d, at 479. In *Wickard*, the Court upheld a penalty the Federal Government imposed on a farmer who grew more wheat than he was permitted to grow under the Agricultural Adjustment Act of 1938 (AAA). 317 U.S., at 114-115, 63 S. Ct. 82, 87 L. Ed. 122. He could not be penalized, the farmer argued, as he was growing the wheat for home consumption, not for sale on the open market. *Id.*, 317 U.S. at 119, 63 S. Ct. 82, 87 L. Ed. 122. The Court rejected this argument. *Id.*, 317 U.S. at 127-129, 63 S. Ct. 82, 87 L. Ed. 122. Wheat intended for home consumption, the Court noted, "overhangs the market, and if induced by rising prices, tends to flow [***143] into the market and check price increases [intended by the AAA]." *Id.*, 317 U.S. at 128, 63 S. Ct. 82, 87 L. Ed. 122.

Similar reasoning supported the Court's judgment in *Raich*, which upheld Congress' authority to regulate marijuana grown for personal use. 545 U.S., at 19, 125 S. Ct. 2195, 16 L. Ed. 2d 1. Home-grown marijuana substantially affects the interstate market for marijuana, we observed, for "the high demand in the interstate market will [likely] draw such marijuana into that market." *Ibid.*

Our decisions thus acknowledge Congress' authority, under the Commerce Clause, to direct the conduct of an individual today (the farmer in *Wickard*, stopped from growing excess wheat; the plaintiff in *Raich*, ordered to

cease cultivating marijuana) because of a prophesied future transaction (the eventual sale of that wheat or marijuana in the interstate market). Congress' actions are even more rational in this case, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place.

Maintaining that the uninsured are not active in the health-care market, The Chief Justice draws an analogy to the car market. An individual [***144] "is not 'active in the car market,' " The Chief Justice observes, simply because he or she may someday buy a car. *Ante*, at ___, 183 L. Ed. 2d, at 478. The analogy is inapt. The inevitable yet unpredictable need for medical care and the [**511] guarantee that emergency care will be provided when required are conditions nonexistent in other markets. That is so of the market for cars, and of the market for broccoli as well. Although an individual *might* buy a car or a crown of broccoli one day, there is no certainty she [*2620] will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price. See *Thomas More Law Center v. Obama*, 651 F.3d 529, 565 (CA6 2011) (Sutton, J., concurring in part) ("Regulating how citizens pay for what they already receive (health care), never quite know when they will need, and in the case of severe illnesses or emergencies generally will not be able to afford, has few (if any) parallels in modern life."). Upholding the minimum coverage provision on the ground that all are participants or will be [***145] participants in the health-care market would therefore carry no implication that Congress may justify under the Commerce Clause a mandate to buy other products and services.

Nor is it accurate to say that the minimum coverage provision "compel[s] individuals . . . to purchase an unwanted product," *ante*, at ___, 183 L. Ed. 2d, at 474, or "suite of products," *post*, at ___, n. 2, 183 L. Ed. 2d, at 541 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.). If unwanted today, medical service secured by insurance may be desperately needed tomorrow. Virtually everyone, I reiterate, consumes health care at some point in his or her life. See *supra*, at ___, 183 L. Ed. 2d, at 500. Health insurance is a means of paying for this care, nothing more. In requiring individuals to obtain insurance, Congress is therefore not mandating the

purchase of a discrete, unwanted product. Rather, Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or affecting interstate commerce is quintessential economic regulation well within Congress' [***146] domain. See, e.g., *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118, 62 S. Ct. 523, 86 L. Ed. 726 (1942). Cf. *post*, at ___, 183 L. Ed. 2d, at 542 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) (recognizing that "the Federal Government can prescribe [a commodity's] quality . . . and even [its price]").

The Chief Justice also calls the minimum coverage provision an illegitimate effort to make young, healthy individuals subsidize insurance premiums paid by the less hale and hardy. See *ante*, at ___, ___ - ___, 183 L. Ed. 2d, at 473, 478-479. This complaint, too, is spurious. Under the current health-care system, healthy persons who lack insurance receive a benefit for which they do not pay: They are assured that, if they need it, emergency medical care will be available, although they cannot afford it. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 501-502. Those who have insurance bear the cost of this guarantee. See *ibid*. By requiring the healthy uninsured to obtain insurance or pay a penalty structured as a tax, the minimum coverage provision ends the free ride these individuals currently enjoy.

In the fullness of time, moreover, [**512] today's young and healthy will become society's old and infirm. Viewed over a lifespan, the costs and benefits even out: The young who [***147] pay more than their fair share currently will pay less than their fair share when they become senior citizens. And even if, as undoubtedly will be the case, some individuals, over their lifespans, will pay more for health insurance than they receive in health services, they have little to complain about, for that is how insurance works. Every insured person receives protection against a catastrophic loss, even though only a subset of the covered class will ultimately need that protection.

[*2621] b

In any event, The Chief Justice's limitation of the commerce power to the regulation of those actively engaged in commerce finds no home in the text of the

Constitution or our decisions. Article I, § 8, of the Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." Nothing in this language implies that Congress' commerce power is limited to regulating those actively engaged in commercial transactions. Indeed, as the D. C. Circuit observed, "[a]t the time the Constitution was [framed], to 'regulate' meant," among other things, "to require action." See *Seven-Sky v. Holder*, 661 F.3d 1, 16, 398 U.S. App. D.C. 134 (2011).

Arguing to the contrary, The Chief Justice notes [***148] that "the Constitution gives Congress the power to 'coin Money,' in addition to the power to 'regulate the Value thereof,'" and similarly "gives Congress the power to 'raise and support Armies' and to 'provide and maintain a Navy,' in addition to the power to 'make Rules for the Government and Regulation of the land and naval Forces.'" *Ante*, at ___ - ___, 183 L. Ed. 2d, at 474 (citing Art. I, § 8, cls. 5, 12-14). In separating the power to regulate from the power to bring the subject of the regulation into existence, The Chief Justice asserts, "[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated." *Ante*, at ___, 183 L. Ed. 2d, at 474.

This argument is difficult to fathom. Requiring individuals to obtain insurance unquestionably regulates the interstate health-insurance and health-care markets, both of them in existence well before the enactment of the ACA. See *Wickard*, 317 U.S., at 128, 63 S. Ct. 82, 87 L. Ed. 122 ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."). Thus, the "something to be regulated" was surely there when Congress created the minimum coverage provision. [***149]⁶

6 The Chief Justice's reliance on the quoted passages of the Constitution, see *ante*, at ___ - ___, 183 L. Ed. 2d, at 474-475, is also dubious on other grounds. The power to "regulate the Value" of the national currency presumably includes the power to increase the currency's worth--*i.e.*, to create value where none previously existed. And if the power to "[r]egulat[e] . . . the land and naval Forces" presupposes "there is already [in existence] something to be regulated," *i.e.*, an Army and a Navy, does Congress lack authority to create an Air Force?

Nor does our case law toe the activity versus inactivity line. In *Wickard*, for example, we upheld the penalty imposed on a farmer who grew too much wheat, even though the regulation had the effect of compelling farmers to purchase wheat in the open market. *Id.*, at 127-129, 63 S. Ct. 82, 87 L. Ed. 122. "[F]orcing some farmers [**513] into the market to buy what they could provide for themselves" was, the Court held, a valid means of regulating commerce. *Id.*, at 128-129, 63 S. Ct. 82, 87 L. Ed. 122. In another context, this Court similarly upheld Congress' authority under the commerce power to compel an "inactive" land-holder to submit to an unwanted sale. See *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 335-337, 13 S. Ct. 622, 37 L. Ed. 463 (1893) [***150] ("[U]pon the [great] power to regulate commerce[,] Congress has the authority to mandate the sale of real property to the Government, where the sale is essential to the improvement of a navigable waterway (emphasis added)); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 657-659, 10 S. Ct. 965, 34 L. Ed. 295 (1890) (similar reliance on the commerce power regarding mandated sale of private property for railroad construction).

[*2622] In concluding that the Commerce Clause does not permit Congress to regulate commercial "inactivity," and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, The Chief Justice views the Clause as a "technical legal conception," precisely what our case law tells us not to do. *Wickard*, 317 U.S., at 122, 63 S. Ct. 82, 87 L. Ed. 122 (internal quotation marks omitted). See also *supra*, at ___ - ___, 183 L. Ed. 2d, at 506-507. This Court's former endeavors to impose categorical limits on the commerce power have not fared well. In several pre-New Deal cases, the Court attempted to cabin Congress' Commerce Clause authority by distinguishing "commerce" from activity once conceived to be noncommercial, notably, "production," "mining," and "manufacturing." [***151] See, *e.g.*, *United States v. E. C. Knight Co.*, 156 U.S. 1, 12, 15 S. Ct. 249, 39 L. Ed. 325 (1895) ("Commerce succeeds to manufacture, and is not a part of it."); *Carter v. Carter Coal Co.*, 298 U.S. 238, 304, 56 S. Ct. 855, 80 L. Ed. 1160 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it."). The Court also sought to distinguish activities having a "direct" effect on interstate commerce, and for that reason, subject to federal regulation, from those having only an "indirect" effect, and therefore not amenable to federal control. See, *e.g.*,

A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548, 55 S. Ct. 837, 79 L. Ed. 1570 (1935) ("[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one.").

These line-drawing exercises were untenable, and the Court long ago abandoned them. "[Q]uestions of the power of Congress [under the Commerce Clause]," we held in *Wickard*, "are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual [***152] effects of the activity in question upon interstate commerce." 317 U.S., at 120, 63 S. Ct. 82, 87 L. Ed. 122. See also *Morrison*, 529 U.S., at 641-644, 120 S. Ct. 1740, 146 L. Ed. 658 (Souter, J., dissenting) (recounting the Court's "nearly disastrous experiment" with formalistic limits on Congress' commerce power). Failing to learn from this history, The Chief Justice plows ahead with his formalistic distinction between those who are "active in commerce," *ante*, at ___, 183 L. Ed. 2d, at 475, and those who are not.

[**514] It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate "activity" from those that regulate "inactivity." As Judge Easterbrook noted, "it is possible to restate most actions as corresponding inactions with the same effect." *Archie v. Racine*, 847 F.2d 1211, 1213 (CA7 1988) (en banc). Take this case as an example. An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance. See *Thomas More Law Center*, 651 F.3d, at 561 (Sutton, J., concurring in part) ("No one is inactive when deciding how to pay for health care, as self-insurance and private insurance [***153] are two forms of action for addressing the same risk."). The minimum coverage provision could therefore be described as regulating activists in the self-insurance market.⁷ *Wickard* is another example. Did the statute there at issue [*2623] target activity (the growing of too much wheat) or inactivity (the farmer's failure to purchase wheat in the marketplace)? If anything, the Court's analysis suggested the latter. See 317 U.S., at 127-129, 63 S. Ct. 82, 87 L. Ed. 122.

7 The Chief Justice's characterization of individuals who choose not to purchase private insurance as "doing nothing," *ante*, at ___, 183 L.

Ed. 2d, at 475, is similarly questionable. A person who self-insures opts against prepayment for a product the person will in time consume. When aggregated, exercise of that option has a substantial impact on the health-care market. See *supra*, at ___ - ___, ___ - ___, 183 L. Ed. 2d, at 501-502, 507-508.

At bottom, The Chief Justice's and the joint dissenters' "view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that [is] more redolent of Due Process Clause arguments." *Seven-Sky*, 661 F.3d, at 19. See also [***154] *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion) ("The [Due Process] Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." (internal quotation marks omitted)). Plaintiffs have abandoned any argument pinned to substantive due process, however, see 648 F.3d 1235, 1291, n. 93 (CA11 2011), and now concede that the provisions here at issue do not offend the Due Process Clause.⁸

8 Some adherents to the joint dissent have questioned the existence of substantive due process rights. See *McDonald v. City of Chicago*, 561 U.S. ___, ___, 130 S. Ct. 3020, 3062, 177 L. Ed. 2d 894, 941 (2010) (Thomas, J., concurring) (The notion that the Due Process Clause "could define the substance of th[e] righ[t to liberty] strains credulity."); *Albright v. Oliver*, 510 U.S. 266, 275, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (Scalia, J., concurring) ("I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties[.]"). Given these Justices' reluctance to interpret the Due Process Clause as guaranteeing liberty [***155] interests, their willingness to plant such protections in the Commerce Clause is striking.

2

Underlying The Chief Justice's view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits. See, e.g., *ante*, at ___, 183 L. Ed. 2d, at 477 (Allowing

Congress to compel an individual not engaged in commerce to purchase a product would "permi[t] Congress to reach beyond the natural extent of its authority, everywhere extending the sphere of its activity, [**515] and drawing all power into its impetuous vortex." (internal quotation marks omitted)). The joint dissenters express a similar apprehension. See *post*, at ___, 183 L. Ed. 2d, at 539 (If the minimum coverage provision is upheld under the commerce power then "the Commerce Clause becomes a font of unlimited power, . . . the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane." (internal quotation marks omitted)). This concern is unfounded.

First, The Chief Justice could certainly uphold the individual mandate without giving Congress *carte blanche* to enact any and all purchase mandates. As several times noted, the unique attributes [***156] of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets. See *supra*, at ___ - ___, ___ - ___, ___, 183 L. Ed. 2d, at 507-508, 507-509, 510.

Nor would the commerce power be unbridled, absent The Chief Justice's "activity" limitation. Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law. See *Lopez*, 514 U.S., at 567, 115 S. Ct. 1624, 131 L. Ed. 2d 626; *Morrison*, 529 U.S., at 617-619, 120 S. Ct. 1740, 146 L. Ed. 2d 658. In *Lopez*, for example, the Court held that the Federal Government lacked power, under the Commerce Clause, to criminalize the possession of a gun in a local school zone. Possessing [*2624] a gun near a school, the Court reasoned, "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." 514 U.S., at 567, 115 S. Ct. 1624, 131 L. Ed. 2d 626; *ibid.* (noting that the Court would have "to pile inference upon inference" to conclude that gun possession has a substantial effect on commerce). Relying on similar logic, the Court concluded in *Morrison* that Congress [***157] could not regulate gender-motivated violence, which the Court deemed to have too "attenuated [an] effect upon interstate commerce." 529 U.S., at 615, 120 S. Ct. 1740, 146 L. Ed. 658.

An individual's decision to self-insure, I have explained, is an economic act with the requisite

connection to interstate commerce. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 507-508. Other choices individuals make are unlikely to fit the same or similar description. As an example of the type of regulation he fears, The Chief Justice cites a Government mandate to purchase green vegetables. *Ante*, at ___ - ___, 183 L. Ed. 2d, at 476-477. One could call this concern "the broccoli horrible." Congress, The Chief Justice posits, might adopt such a mandate, reasoning that an individual's failure to eat a healthy diet, like the failure to purchase health insurance, imposes costs on others. See *ibid.*

Consider the chain of inferences the Court would have to accept to conclude that a vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans. The Court would have to believe that individuals forced to buy vegetables would then eat them (instead of throwing or giving them away), would prepare the vegetables in a healthy [***158] way (steamed or raw, not deep-fried), would cut back on unhealthy foods, and would not allow other factors (such as lack of exercise or little sleep) to trump the [**516] improved diet.⁹ Such "pil[ing of] inference upon inference" is just what the Court refused to do in *Lopez* and *Morrison*.

9 The failure to purchase vegetables in The Chief Justice's hypothetical, then, is *not* what leads to higher health-care costs for others; rather, it is the failure of individuals to maintain a healthy diet, and the resulting obesity, that creates the cost-shifting problem. See *ante*, at ___ - ___, 183 L. Ed. 2d, at 476-477. Requiring individuals to purchase vegetables is thus several steps removed from solving the problem. The failure to obtain health insurance, by contrast, is the *immediate cause* of the cost-shifting Congress sought to address through the ACA. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 501-502. Requiring individuals to obtain insurance attacks the source of the problem directly, in a single step.

Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, [***159] or infringed on a liberty interest protected by the Due Process Clause.

Supplementing these legal restraints is a formidable

check on congressional power: the democratic process. See *Raich*, 545 U.S., at 33, 125 S. Ct. 2195, 162 L. Ed. 2d 1; *Wickard*, 317 U.S., at 120, 63 S. Ct. 82, 87 L. Ed. 122 (repeating Chief Justice Marshall's "warning that effective restraints on [the commerce power's] exercise must proceed from political rather than judicial processes" (citing *Gibbons v. Ogden*, 9 Wheat. 1, 197, 6 L. Ed. 23 (1824))). As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so. See Hall, *Commerce Clause Challenges to Health [*2625] Care Reform*, 159 U. Pa. L. Rev. 1825, 1838 (2011).

When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. [***160] Cf. *Raich*, 545 U.S., at 9, 125 S. Ct. 2195, 162 L. Ed. 2d 1; *Wickard*, 317 U.S., at 127-129, 63 S. Ct. 82, 87 L. Ed. 122. Yet no one would offer the "hypothetical and unreal possibilit[y]," *Pullman Co. v. Knott*, 235 U.S. 23, 26, 35 S. Ct. 2, 59 L. Ed. 105 (1914), of a vegetarian state as a credible reason to deny Congress the authority ever to ban the possession and sale of goods. The Chief Justice accepts just such specious logic when he cites the broccoli horrible as a reason to deny Congress the power to pass the individual mandate. Cf. R. Bork, *The Tempting of America* 169 (1990) ("Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom."). But see, e.g., *post*, at ___, 183 L. Ed. 2d, at 536 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) (asserting, outlandishly, that if the minimum coverage provision is sustained, then Congress could make "breathing in and out the basis for federal prescription").

3

To bolster his argument that the minimum coverage provision is not valid Commerce Clause legislation, The Chief Justice emphasizes the provision's novelty. See *ante*, at ___, 183 L. Ed. 2d, at 474 (asserting that [**517] "sometimes the most telling indication of [a] severe constitutional [***161] problem . . . is the lack of historical precedent for Congress's action" (internal

quotation marks omitted)). While an insurance-purchase mandate may be novel, The Chief Justice's argument certainly is not. "[I]n almost every instance of the exercise of the [commerce] power differences are asserted from previous exercises of it and made a ground of attack." *Hoke v. United States*, 227 U.S. 308, 320, 33 S. Ct. 281, 57 L. Ed. 523 (1913). See, e.g., Brief for Petitioner in *Perez v. United States*, O. T. 1970, No. 600, p. 5 ("unprecedented exercise of power"); Supplemental Brief for Appellees in *Katzenbach v. McClung*, O. T. 1964, No. 543, p. 40 ("novel assertion of federal power"); Brief for Appellee in *Wickard v. Filburn*, O. T. 1941, No. 59, p. 6 ("complete departure"). For decades, the Court has declined to override legislation because of its novelty, and for good reason. As our national economy grows and changes, we have recognized, Congress must adapt to the changing "economic and financial realities." See *supra*, at ___ - ___, 183 L. Ed. 2d, at 506-507. Hindering Congress' ability to do so is shortsighted; if history is any guide, today's constriction of the Commerce Clause will not endure. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 513.

III

A

For [***162] the reasons explained above, the minimum coverage provision is valid Commerce Clause legislation. See *supra*, Part II. When viewed as a component of the entire ACA, the provision's constitutionality becomes even plainer.

The Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its [commerce] powe[r] that are not within its authority to enact in isolation." *Raich*, 545 U.S., at 39, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (Scalia, J., concurring in judgment). Hence, "[a] complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal." *Indiana*, 452 U.S., at 329, n. 17, [*2626] 101 S. Ct. 2376, 69 L. Ed. 2d 40. "It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." *Ibid.* (collecting cases). See also *Raich*, 545 U.S., at 24-25, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (A challenged statutory provision fits within Congress' commerce authority if it is an "essential par[t] of a larger regulation of economic activity," such that, in the absence [***163] of the provision, "the regulatory scheme could be undercut."

(quoting *Lopez*, 514 U.S., at 561, 115 S. Ct. 1624, 131 L. Ed. 2d 626)); *Raich*, 545 U.S., at 37, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (Scalia, J., concurring in judgment) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." (citation omitted)).

Recall that one of Congress' goals in enacting the Affordable Care Act was to eliminate the insurance industry's practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 503-504. The commerce power allows [**518] Congress to ban this practice, a point no one disputes. See *United States v. SouthEastern Underwriters Assn.*, 322 U.S. 533, 545, 552-553, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944) (Congress may regulate "the methods by which interstate insurance companies do business.").

Congress knew, however, that simply barring insurance companies from relying on an applicant's medical history would not work [***164] in practice. Without the individual mandate, Congress learned, guaranteed-issue and community-rating requirements would trigger an adverse-selection death-spiral in the health-insurance market: Insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 504. When complemented by an insurance mandate, on the other hand, guaranteed issue and community rating would work as intended, increasing access to insurance and reducing uncompensated care. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 504-505. The minimum coverage provision is thus an "essential par[t] of a larger regulation of economic activity"; without the provision, "the regulatory scheme [w]ould be undercut." *Raich*, 545 U.S., at 24-25, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (internal quotation marks omitted). Put differently, the minimum coverage provision, together with the guaranteed-issue and community-rating requirements, is " 'reasonably adapted' to the attainment of a legitimate end under the commerce power": the elimination of pricing and sales practices that take an applicant's medical history into account. See *id.*, 545 U.S. at 37, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (Scalia, J., [***165] concurring in judgment).

B

Asserting that the Necessary and Proper Clause does not authorize the minimum coverage provision, The Chief Justice focuses on the word "proper." A mandate to purchase health insurance is not "proper" legislation, The Chief Justice urges, because the command "undermine[s] the structure of government established by the Constitution." *Ante*, at ___, 183 L. Ed. 2d, at 480. If long on rhetoric, The Chief Justice's argument is short on substance.

The Chief Justice cites only two cases in which this Court concluded that a federal statute impermissibly transgressed the Constitution's boundary between state and federal authority: *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), and *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). See *ante*, at ___, 183 L. Ed. 2d, at 480. The statutes at issue in both cases, however, compelled *state officials* to act on the Federal Government's behalf. 521 U.S., at 925-933, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (holding unconstitutional a statute obligating state law enforcement officers to implement a federal gun-control law); *New York*, 505 U.S., at 176-177, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (striking down a statute [***166] requiring state legislators to pass regulations pursuant to Congress' instructions). "[Federal] laws conscripting state officers," the Court reasoned, "violate state sovereignty and are thus not in accord with the Constitution." *Printz*, 521 U.S., at 925, 935, 117 S. Ct. 2365, 138 L. Ed. 2d 914; *New York*, 505 U.S., at 176, 112 S. Ct. 2408, 120 L. Ed. 2d 120.

The minimum coverage provision, in contrast, acts "directly upon individuals, [**519] without employing the States as intermediaries." *New York*, 505 U.S., at 164, 112 S. Ct. 2408, 120 L. Ed. 2d 120. The provision is thus entirely consistent with the Constitution's design. See *Printz*, 521 U.S., at 920, 117 S. Ct. 2365, 138 L. Ed. 914 ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." (internal quotation marks omitted)).

Lacking case law support for his holding, The Chief Justice nevertheless declares the minimum coverage provision not "proper" because it is less "narrow in scope" than other laws this Court has upheld under the Necessary and Proper Clause. *Ante*, at ___, 183 L. Ed. 2d, at 481 (citing *United States v. Comstock*, 560 U.S. 126,

130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010); *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004); [***167] *Jinks v. Richland County*, 538 U.S. 456, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003)). The Chief Justice's reliance on cases in which this Court has affirmed Congress' "broad authority to enact federal legislation" under the Necessary and Proper Clause, *Comstock*, 560 U.S., at ___, 130 S. Ct. 1949, 1956, 176 L. Ed. 2d 878, 888, is underwhelming.

Nor does The Chief Justice pause to explain *why* the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. These powers include the power to enact criminal laws, see, e.g., *United States v. Fox*, 95 U.S. 670, 672, 24 L. Ed. 538 (1878); the power to imprison, including civil imprisonment, see, e.g., *Comstock*, 560 U.S., at ___, 130 S. Ct. 1949, 176 L. Ed. 2d 878; and the power to create a national bank, see *McCulloch*, 4 Wheat., at 425, 4 L. Ed. 579. See also *Jinks*, 538 U.S., at 463, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (affirming Congress' power to alter the way a state law is applied in state court, where the alteration "promotes fair and efficient operation [***168] of the federal courts").¹⁰

10 Indeed, Congress regularly and uncontroversially requires individuals who are "doing nothing," see *ante*, at ___, 183 L. Ed. 2d, at 475, to take action. Examples include federal requirements to report for jury duty, 28 U.S.C. §1866(g) (2006 ed., Supp. IV); to register for selective service, 50 U.S.C. App. §453; to purchase firearms and gear in anticipation of service in the Militia, 1 Stat. 271 (Uniform Militia Act of 1792); to turn gold currency over to the Federal Government in exchange for paper currency, see *Nortz v. United States*, 294 U.S. 317, 328, 55 S. Ct. 428, 79 L. Ed. 907, 80 Ct. Cl. 859 (1935); and to file a tax return, 26 U.S.C. §6012 (2006 ed., Supp. IV).

In failing to explain why the individual mandate threatens our constitutional order, The Chief Justice deserves future courts. How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an "independent power," *ante*, at ___, 183 L. Ed. 2d, at 480, or merely a "derivative" one, *ante*, at ___, 183 L. Ed. 2d, at 481.

Whether the power used is "substantive," *ante*, at ___, 183 L. Ed. 2d, at 481, or just "incidental," [*2628] *ante*, at ___, 183 L. Ed. 2d, at 481? The instruction The Chief Justice, in effect, provides lower courts: You will know it when you see it.

It [***169] is more than exaggeration to suggest that the minimum coverage provision improperly intrudes on "essential attributes of state sovereignty." *Ibid.* (internal quotation marks omitted). First, the Affordable Care Act does not operate "in [an] are[a] such [**520] as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U.S., at 564, 115 S. Ct. 1624, 131 L. Ed. 2d 626. As evidenced by Medicare, Medicaid, the Employee Retirement Income Security Act of 1974 (ERISA), and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Federal Government plays a lead role in the health-care sector, both as a direct payer and as a regulator.

Second, and perhaps most important, the minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problem that made the commerce power essential in our federal system. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 505-506. The crisis created by the large number of U.S. residents who lack health insurance is one of national dimension that States are "separately incompetent" to handle. See *supra*, at ___ - ___, ___, 183 L. Ed. 2d, at 502-503, 506. See also Maryland Brief 15-26 (describing "the impediments to effective state policymaking [***170] that flow from the interconnectedness of each state's healthcare economy" and emphasizing that "state-level reforms cannot fully address the problems associated with uncompensated care"). Far from trampling on States' sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need. Notably, the ACA serves the general welfare of the people of the United States while retaining a prominent role for the States. See *id.*, at 31-36 (explaining and illustrating how the ACA affords States wide latitude in implementing key elements of the Act's reforms).¹¹

11 In a separate argument, the joint dissenters contend that the minimum coverage provision is not necessary and proper because it was not the "only . . . way" Congress could have made the guaranteed-issue and community-rating reforms work. *Post*, at ___ - ___, 183 L. Ed. 2d, at 540.

Congress could also have avoided an insurance-market death spiral, the dissenters maintain, by imposing a surcharge on those who did not previously purchase insurance when those individuals eventually enter the health-insurance system. *Post*, at ___, 183 L. Ed. 2d, at 540. Or Congress could "den[y] a full income tax credit" to those who do not purchase [***171] insurance. *Ibid.* Neither a surcharge on those who purchase insurance nor the denial of a tax credit to those who do not would solve the problem created by guaranteed-issue and community-rating requirements. Neither would prompt the purchase of insurance before sickness or injury occurred. But even assuming there were "practicable" alternatives to the minimum coverage provision, "we long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be 'absolutely necessary' to the exercise of an enumerated power." *Jinks v. Richland County*, 538 U.S. 456, 462, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 414-415, 4 L. Ed. 579 (1819)). Rather, the statutory provision at issue need only be "conducive" and "[reasonably] adapted" to the goal Congress seeks to achieve. *Jinks*, 538 U.S., at 462, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (internal quotation marks omitted). The minimum coverage provision meets this requirement. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 517-518.

IV

In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples' representatives in both the States and the Federal Government. See, [***172] *e.g.*, *Carter Coal Co.*, 298 U.S., at 303-304, 309-310, 56 S. Ct. 855, 80 L. Ed. 1160; *Dagenhart*, 247 U.S., at 276-277, 38 S. Ct. 529, 62 L. Ed. 1101; [*2629] *Lochner v. New York*, 198 U.S. 45, 64, 25 S. Ct. 539, 49 L. Ed. 937 (1905). The Chief Justice's Commerce Clause opinion, and even more so the joint dissenters' reasoning, see *post*, at ___ - ___, 183 L. Ed. 2d, at 537-544, [**521] bear a disquieting resemblance to those long-overruled decisions.

Ultimately, the Court upholds the individual mandate as a proper exercise of Congress' power to tax and spend "for the . . . general Welfare of the United States." Art. I,

§ 8, cl. 1; *ante*, at ___ - ___, 183 L. Ed. 2d, at 489-490. I concur in that determination, which makes The Chief Justice's Commerce Clause essay all the more puzzling. Why should The Chief Justice strive so mightily to hem in Congress' capacity to meet the new problems arising constantly in our everdeveloping modern economy? I find no satisfying response to that question in his opinion.¹²

12 The Chief Justice states that he must evaluate the constitutionality of the minimum coverage provision under the Commerce Clause because the provision "reads more naturally as a command to buy insurance than as a tax." *Ante*, at ___, 183 L. Ed. 2d, at 490. The Chief Justice ultimately [***173] concludes, however, that interpreting the provision as a tax is a "fairly possible" construction. *Ante*, at ___, 183 L. Ed. 2d, at 483 (internal quotation marks omitted). That being so, I see no reason to undertake a Commerce Clause analysis that is not outcome determinative.

V

Through Medicaid, Congress has offered the States an opportunity to furnish health care to the poor with the aid of federal financing. To receive federal Medicaid funds, States must provide health benefits to specified categories of needy persons, including pregnant women, children, parents, and adults with disabilities. Guaranteed eligibility varies by category: for some it is tied to the federal poverty level (incomes up to 100% or 133%); for others it depends on criteria such as eligibility for designated state or federal assistance programs. The ACA enlarges the population of needy people States must cover to include adults under age 65 with incomes up to 133% of the federal poverty level. The spending power conferred by the Constitution, the Court has never doubted, permits Congress to define the contours of programs financed with federal funds. See, *e.g.*, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). [***174] And to expand coverage, Congress could have recalled the existing legislation, and replaced it with a new law making Medicaid as embracive of the poor as Congress chose.

The question posed by the 2010 Medicaid expansion, then, is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing

law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism. To the contrary, such a requirement would rigidify Congress' efforts to empower States by partnering with them in the implementation of federal programs.

Medicaid is a prototypical example of federal-state cooperation in serving the Nation's general welfare. Rather than authorizing a federal agency to administer a uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular [***175] needs, so long as they remain within bounds set by federal law. In shaping [*2630] Medicaid, Congress did not endeavor [**522] to fix permanently the terms participating states must meet; instead, Congress reserved the "right to alter, amend, or repeal" any provision of the Medicaid Act. 42 U.S.C. §1304. States, for their part, agreed to amend their own Medicaid plans consistent with changes from time to time made in the federal law. See 42 CFR §430.12(c)(1)(i) (2011) . And from 1965 to the present, States have regularly conformed to Congress' alterations of the Medicaid Act.

The Chief Justice acknowledges that Congress may "condition the receipt of [federal] funds on the States' complying with restrictions on the use of those funds," *ante*, at ___, 183 L. Ed. 2d, at 493, but nevertheless concludes that the 2010 expansion is unduly coercive. His conclusion rests on three premises, each of them essential to his theory. First, the Medicaid expansion is, in The Chief Justice's view, a new grant program, not an addition to the Medicaid program existing before the ACA's enactment. Congress, The Chief Justice maintains, has threatened States with the loss of funds from an old program in an effort to get them to adopt a new one. Second, [***176] the expansion was unforeseeable by the States when they first signed on to Medicaid. Third, the threatened loss of funding is so large that the States have no real choice but to participate in the Medicaid expansion. The Chief Justice therefore--*for the first time ever*--finds an exercise of Congress' spending power unconstitutionally coercive.

Medicaid, as amended by the ACA, however, is not

two spending programs; it is a single program with a constant aim--to enable poor persons to receive basic health care when they need it. Given past expansions, plus express statutory warning that Congress may change the requirements participating States must meet, there can be no tenable claim that the ACA fails for lack of notice. Moreover, States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress' terms. Future Congresses are not bound by their predecessors' dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as The Chief Justice charges, threatening States with the loss of "existing" funds from one spending program in order to induce them to opt into another program. Congress [***177] is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.

A majority of the Court, however, buys the argument that prospective withholding of funds formerly available exceeds Congress' spending power. Given that holding, I entirely agree with The Chief Justice as to the appropriate remedy. It is to bar the withholding found impermissible--not, as the joint dissenters would have it, to scrap the expansion altogether, see *post*, at ___ - ___, 183 L. Ed. 2d, at 561-563. The dissenters' view that the ACA must fall in its entirety is a radical departure from the Court's normal course. When a constitutional infirmity mars a statute, the Court ordinarily removes the infirmity. It undertakes a salvage operation; it does not demolish the legislation. See, *e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985) (Court's normal course is to declare a statute invalid "to the extent that it reaches too far, but otherwise [to leave the statute] intact"). That course is [**523] plainly in order where, as in this case, Congress has expressly instructed courts to leave untouched every [***178] provision not found invalid. See 42 U.S.C. §1303. Because The Chief Justice finds the withholding--[*2631] not the granting--of federal funds incompatible with the Spending Clause, Congress' extension of Medicaid remains available to any State that affirms its willingness to participate.

A

Expansion has been characteristic of the Medicaid program. Akin to the ACA in 2010, the Medicaid Act as

passed in 1965 augmented existing federal grant programs jointly administered with the States.¹³ States were not required to participate in Medicaid. But if they did, the Federal Government paid at least half the costs. To qualify for these grants, States had to offer a minimum level of health coverage to beneficiaries of four federally funded, state-administered welfare programs: Aid to Families with Dependent Children; Old Age Assistance; Aid to the Blind; and Aid to the Permanently and Totally Disabled. See Social Security Amendments of 1965, §121(a), 79 Stat. 343; *Schweiker v. Gray Panthers*, 453 U.S. 34, 37, 101 S. Ct. 2633, 69 L. Ed. 2d 460 (1981). At their option, States could enroll additional "medically needy" individuals; these costs, too, were partially borne by the Federal Government at the [***179] same, at least 50%, rate. *Ibid.*

13 Medicaid was "plainly an extension of the existing Kerr-Mills" grant program. Huberfeld, *Federalizing Medicaid*, 14 U. Pa. J. Const. L. 431, 444-445 (2011). Indeed, the "section of the Senate report dealing with Title XIX"--the title establishing Medicaid--"was entitled, 'Improvement and Extension of Kerr-Mills Medical Assistance Program.' " Stevens & Stevens, *Welfare Medicine in America* 51 (1974) (quoting S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 9 (1965)). Setting the pattern for Medicaid, Kerr-Mills reimbursed States for a portion of the cost of health care provided to welfare recipients if States met conditions specified in the federal law, e.g., participating States were obliged to offer minimum coverage for hospitalization and physician services. See Huberfeld, *supra*, at 443-444.

Since 1965, Congress has amended the Medicaid program on more than 50 occasions, sometimes quite sizably. Most relevant here, between 1988 and 1990, Congress required participating States to include among their beneficiaries pregnant women with family incomes up to 133% of the federal poverty level, children up to age 6 at the same income levels, and children ages [***180] 6 to 18 with family incomes up to 100% of the poverty level. See 42 U.S.C. §§1396a(a)(10)(A)(i), 1396a(l); Medicare Catastrophic Coverage Act of 1988, §302, 102 Stat. 750; Omnibus Budget Reconciliation Act of 1989, §6401, 103 Stat. 2258; Omnibus Budget Reconciliation Act of 1990, §4601, 104 Stat. 1388-166. These amendments added millions to the

Medicaid-eligible population. Dubay & Kenney, *Lessons from the Medicaid Expansions for Children and Pregnant Women* 5 (Apr. 1997).

Between 1966 and 1990, annual federal Medicaid spending grew from \$631.6 million to \$42.6 billion; state spending rose to \$31 billion over the same period. See Dept. of Health and Human Services, *National Health Expenditures by Type of Service and Source of Funds: Calendar Years 1960 to 2010* (table).¹⁴ And between 1990 and 2010, federal spending increased to \$269.5 billion. *Ibid.* Enlargement of [**524] the population and services covered by Medicaid, in short, has been the trend.

14 Available online at <http://www.cms.gov/Research-Statistics-D ata-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html>.

Compared to past alterations, the ACA is notable for the extent to which [***181] the Federal Government will pick up the tab. Medicaid's 2010 expansion is financed [*2632] largely by federal outlays. In 2014, federal funds will cover 100% of the costs for newly eligible beneficiaries; that rate will gradually decrease before settling at 90% in 2020. 42 U.S.C. §1396d(y) (2006 ed., Supp. IV). By comparison, federal contributions toward the care of beneficiaries eligible pre-ACA range from 50% to 83%, and averaged 57% between 2005 and 2008. §1396d(b) (2006 ed., Supp. IV); Dept. of Health and Human Services, Centers for Medicare and Medicaid Services, C. Truffer et al., 2010 Actuarial Report on the Financial Outlook for Medicaid, p. 20.

Nor will the expansion exorbitantly increase state Medicaid spending. The Congressional Budget Office (CBO) projects that States will spend 0.8% more than they would have, absent the ACA. See CBO, *Spending & Enrollment Detail for CBO's March 2009 Baseline*. But see *ante*, at ___ - ___, 183 L. Ed. 2d, at 490-491 ("[T]he Act dramatically increases state obligations under Medicaid."); *post*, at ___, 183 L. Ed. 2d, at 561 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) ("[A]cceptance of the [ACA expansion] will impose very substantial costs on participating States."). Whatever the increase [***182] in state obligations after the ACA, it will pale in comparison to the increase in federal funding.¹⁵

15 Even the study on which the plaintiffs rely, see Brief for Petitioners 10, concludes that "[w]hile most states will experience some increase in spending, this is quite small relative to the federal matching payments and low relative to the costs of uncompensated care that [the states] would bear if the[re] were no health reform." See Kaiser Commission on Medicaid & the Uninsured, *Medicaid Coverage & Spending in Health Reform* 16 (May 2010). Thus there can be no objection to the ACA's expansion of Medicaid as an "unfunded mandate." Quite the contrary, the program is impressively well funded.

Finally, any fair appraisal of Medicaid would require acknowledgment of the considerable autonomy States enjoy under the Act. Far from "conscript[ing] state agencies into the national bureaucratic army," *ante*, at ___, 183 L. Ed. 2d, at 496 (citing *FERC v. Mississippi*, 456 U.S. 742, 775, 102 S. Ct. 2126, 72 L. Ed. 2d 532 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part) (brackets in original and internal quotation marks omitted)), Medicaid "is designed to advance cooperative federalism." *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002), 122 S. Ct. 962, 151 L. Ed. 2d 935 [***183] (citing *Harris v. McRae*, 448 U.S. 297, 308, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980)). Subject to its basic requirements, the Medicaid Act empowers States to "select dramatically different levels of funding and coverage, alter and experiment with different financing and delivery modes, and opt to cover (or not to cover) a range of particular procedures and therapies. States have leveraged this policy discretion to generate a myriad of dramatically different Medicaid programs over the past several decades." Ruger, *Of Icebergs and Glaciers*, 75 *Law & Contemp. Probs.* 215, 233 (2012) (footnote omitted). The ACA does not jettison this approach. States, as first-line administrators, will continue to guide the distribution of substantial resources among their needy populations.

[**525] The alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization.¹⁶ In 1965, Congress elected to nationalize health coverage for seniors through Medicare. [*2633] It could similarly have established Medicaid as an exclusively federal program. Instead, Congress gave the States the opportunity to partner in the program's administration and development. Absent from the nationalized [***184] model, of course, is the state-level

policy discretion and experimentation that is Medicaid's hallmark; undoubtedly the interests of federalism are better served when States retain a meaningful role in the implementation of a program of such importance. See Caminker, *State Sovereignty and Subordinacy*, 95 *Colum. L. Rev.* 1001, 1002-1003 (1995) (cooperative federalism can preserve "a significant role for state discretion in achieving specified federal goals, where the alternative is complete federal preemption of any state regulatory role"); Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 *Yale L. J.* 1344, 1346 (1983) ("If the federal government begins to take full responsibility for social welfare spending and preempts the states, the result is likely to be weaker . . . state governments.").¹⁷

16 In 1972, for example, Congress ended the federal cash-assistance program for the aged, blind, and disabled. That program previously had been operated jointly by the Federal and State Governments, as is the case with Medicaid today. Congress replaced the cooperative federal program with the nationalized Supplemental Security Income (SSI) program. See *Schweiker v. Gray Panthers*, 453 U.S. 34, 38, 101 S. Ct. 2633, 69 L. Ed. 2d 460 (1981). [***185]

17 The Chief Justice and the joint dissenters perceive in cooperative federalism a "threa[t]" to "political accountability." *Ante*, at ___, 183 L. Ed. 2d, at 492; see *post*, at ___ - ___, 183 L. Ed. 2d, at 554-555. By that, they mean voter confusion: Citizens upset by unpopular government action, they posit, may ascribe to state officials blame more appropriately laid at Congress' door. But no such confusion is apparent in this case: Medicaid's status as a federally funded, state-administered program is hardly hidden from view.

Although Congress "has no obligation to use its Spending Clause power to disburse funds to the States," *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686 (1999), 119 S. Ct. 2219, 144 L. Ed. 2d 605, it has provided Medicaid grants notable for their generosity and flexibility. "[S]uch funds," we once observed, "are gifts," *id.*, 527 U.S. at 686-687, 119 S. Ct. 2219, 144 L. Ed. 2d 605, and so they have remained through decades of expansion in their size and scope.

B

The Spending Clause authorizes Congress "to pay the Debts and provide for the . . . general Welfare of the United States." Art. I, § 8, cl. 1. To ensure that federal funds granted to the States are spent "to 'provide for the [***186] . . . general Welfare' in the manner Congress intended," *ante*, at ___, 183 L. Ed. 2d, at 491, Congress must of course have authority to impose limitations on the States' use of the federal dollars. This Court, time and again, has respected Congress' prescription of spending conditions, and has required States to abide by them. See, e.g., *Pennhurst*, 451 U.S., at 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 ("[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States."). In particular, we have recognized Congress' prerogative to condition a State's receipt of Medicaid funding on compliance with the terms Congress set for participation in the program. See, e.g., *Harris*, 448 U.S., at 301, 100 S. Ct. 2671, 65 L. Ed. 2d [**526] 784 ("[O]nce a State elects to participate [in Medicaid], it must comply with the requirements of [the Medicaid Act]."); *Arkansas Dept. of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 275, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006); *Frew v. Hawkins*, 540 U.S. 431, 433, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004); *Atkins v. Rivera*, 477 U.S. 154, 156-157, 106 S. Ct. 2456, 91 L. Ed. 2d 131 (1986).

Congress' authority to condition the use of federal [***187] funds is not confined to spending programs as first launched. The legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds. See *infra*, at ___, 183 L. Ed. 2d, at 530 (describing *Bennett v. Kentucky Dep't of Education*, [*2634] 470 U.S. 656, 659-660, 105 S. Ct. 1544, 84 L. Ed. 2d 590 (1985) (enforcing restriction added five years after adoption of educational program)).

Yes, there are federalism-based limits on the use of Congress' conditional spending power. In the leading decision in this area, *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987), the Court identified four criteria. The conditions placed on federal grants to States must (a) promote the "general welfare," (b) "unambiguously" inform States what is demanded of them, (c) be germane "to the federal interest in particular national projects or programs," and (d) not "induce the States to engage in activities that would themselves be unconstitutional." *Id.*, at 207-208, 210, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (internal quotation marks omitted).¹⁸

18 Although the plaintiffs, in the proceedings below, did not contest the ACA's satisfaction of these [***188] criteria, see 648 F.3d 1235, 1263 (CA11 2011), The Chief Justice appears to rely heavily on the second criterion. Compare *ante*, at ___, ___, 183 L. Ed. 2d, at 494, 496, with *infra*, at ___ - ___, 183 L. Ed. 2d, at 529-531.

The Court in *Dole* mentioned, but did not adopt, a further limitation, one hypothetically raised a half-century earlier: In "some circumstances," Congress might be prohibited from offering a "financial inducement . . . so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.*, 483 U.S. at 211, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S. Ct. 883, 81 L. Ed. 1279, 1937-1 C.B. 444 (1937)). Prior to today's decision, however, the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.

Dole involved the National Minimum Drinking Age Act, 23 U.S.C. §158, enacted in 1984. That Act directed the Secretary of Transportation to withhold 5% of the federal highway funds otherwise payable to a State if the State permitted purchase of alcoholic beverages by persons less than 21 years old. Drinking age was not within the authority of Congress to regulate, South Dakota argued, because the Twenty-First Amendment [***189] gave the States exclusive power to control the manufacture, transportation, and consumption of alcoholic beverages. The small percentage of highway-construction funds South Dakota stood to lose by adhering to 19 as the age of eligibility to purchase 3.2% beer, however, was not enough to qualify as coercion, the Court concluded.

[**527] This case does not present the concerns that led the Court in *Dole* even to consider the prospect of coercion. In *Dole*, the condition--set 21 as the minimum drinking age--did not tell the States how to use funds Congress provided for highway construction. Further, in view of the Twenty-First Amendment, it was an open question whether Congress could directly impose a national minimum drinking age.

The ACA, in contrast, relates solely to the federally funded Medicaid program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the ACA use Medicaid funding to induce States to take action

Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons, just as it operates Medicare for seniors' health care. See *supra*, at ___, 183 L. Ed. 2d, at 525.

That is what [***190] makes this such a simple case, and the Court's decision so unsettling. Congress, aiming to assist the needy, has appropriated federal money to subsidize state health-insurance programs that meet federal standards. The principal standard the ACA sets is that the state program cover adults earning no more [*2635] than 133% of the federal poverty line. Enforcing that prescription ensures that federal funds will be spent on health care for the poor in furtherance of Congress' present perception of the general welfare.

C

The Chief Justice asserts that the Medicaid expansion creates a "new health care program." *Ante*, at ___, 183 L. Ed. 2d, at 496. Moreover, States could "hardly anticipate" that Congress would "transform [the program] so dramatically." *Ante*, at ___, 183 L. Ed. 2d, at 496. Therefore, The Chief Justice maintains, Congress' threat to withhold "old" Medicaid funds based on a State's refusal to participate in the "new" program is a "threa[t] to terminate [an]other . . . independent gran[t]." *Ante*, at ___, ___ - ___, 183 L. Ed. 2d, at 493, 495. And because the threat to withhold a large amount of funds from one program "leaves the States with no real option but to acquiesce [in a newly created program]," The Chief Justice concludes, the Medicaid expansion is unconstitutionally [***191] coercive. *Ante*, at ___, 183 L. Ed. 2d, at 494.

1

The starting premise on which The Chief Justice's coercion analysis rests is that the ACA did not really "extend" Medicaid; instead, Congress created an entirely new program to co-exist with the old. The Chief Justice calls the ACA new, but in truth, it simply reaches more of America's poor than Congress originally covered.

Medicaid was created to enable States to provide medical assistance to "needy persons." See S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 9 (1965). See also §121(a), 79 Stat. 343 (The purpose of Medicaid is to enable States "to furnish . . . medical assistance on behalf of [certain persons] whose income and resources are

insufficient to meet the costs of necessary medical services."). By bringing health care within the reach of a larger population of Americans unable to afford it, the Medicaid expansion is an extension of that basic aim.

The Medicaid Act contains hundreds of provisions governing operation [**528] of the program, setting conditions ranging from "Limitation on payments to States for expenditures attributable to taxes," 42 U.S.C. §1396a(t) (2006 ed.), to "Medical assistance to aliens not lawfully admitted for permanent residence," [***192] §1396b(v) (2006 ed. and Supp. IV). The Medicaid expansion leaves unchanged the vast majority of these provisions; it adds beneficiaries to the existing program and specifies the rate at which States will be reimbursed for services provided to the added beneficiaries. See ACA §§2001(a)(1), (3), 124 Stat. 271-272. The ACA does not describe operational aspects of the program for these newly eligible persons; for that information, one must read the existing Medicaid Act. See 42 U.S.C. §§1396-1396v(b) (2006 ed. and Supp. IV).

Congress styled and clearly viewed the Medicaid expansion as an amendment to the Medicaid Act, not as a "new" health-care program. To the four categories of beneficiaries for whom coverage became mandatory in 1965, and the three mandatory classes added in the late 1980's, see *supra*, at ___ - ___, 183 L. Ed. 2d, at 523-524, the ACA adds an eighth: individuals under 65 with incomes not exceeding 133% of the federal poverty level. The expansion is effectuated by § 2001 of the ACA, aptly titled: "Medicaid Coverage for the Lowest Income Populations." 124 Stat. 271. That section amends Title 42, Chapter 7, Subchapter XIX: Grants to States for Medical Assistance Programs. Commonly known as the Medicaid [***193] Act, Subchapter XIX filled some 278 pages in 2006. Section 2001 of the ACA [*2636] would add approximately three pages.¹⁹

19 Compare Subchapter XIX, 42 U.S.C. §§1396-1396v(b) (2006 ed. and Supp. IV) with §§1396a(a) (10)(A)(i)(VIII) (2006 ed. and Supp. IV); 1396a(a)(10)(A)(ii)(XX), 1396a(a)(75), 1396a(k), 1396a(gg) to (hh), 1396d(y), 1396r-1(e), 1396u-7(b)(5) to (6).

Congress has broad authority to construct or adjust spending programs to meet its contemporary understanding of "the general Welfare." *Helvering v. Davis*, 301 U.S. 619, 640-641, 57 S. Ct. 904, 81 L. Ed. 1307, 1937-1 C.B. 360 (1937). Courts owe a large

measure of respect to Congress' characterization of the grant programs it establishes. See *Steward Machine*, 301 U.S., at 594, 57 S. Ct. 883, 81 L. Ed. 1279. Even if courts were inclined to second-guess Congress' conception of the character of its legislation, how would reviewing judges divine whether an Act of Congress, purporting to amend a law, is in reality not an amendment, but a new creation? At what point does an extension become so large that it "transforms" the basic law?

Endeavoring to show that Congress created a new program, The Chief Justice cites three aspects of the [***194] expansion. First, he asserts that, in covering those earning no more than 133% of the federal poverty line, the Medicaid expansion, unlike pre-ACA Medicaid, does not "care for the neediest among us." *Ante*, at ___, 183 L. Ed. 2d, at 496. What makes that so? Single adults earning no more than \$14,856 per year--133% of the current federal poverty level--surely rank among the Nation's poor. Second, according to The Chief Justice, "Congress mandated that newly eligible persons receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package." *Ibid*. That less comprehensive benefit package, however, is not an [***529] innovation introduced by the ACA; since 2006, States have been free to use it for many of their Medicaid beneficiaries.²⁰ The level of benefits offered therefore does not set apart post-ACA Medicaid recipients from all those entitled to benefits pre-ACA.

20 The Deficit Reduction Act of 2005 authorized States to provide "benchmark coverage" or "benchmark equivalent coverage" to certain Medicaid populations. See § 6044, 120 Stat. 88, 42 U.S.C. §1396u-7 (2006 ed. and Supp. IV). States may offer the same level of coverage to persons newly eligible under the ACA. See §1396a(k).

Third, [***195] The Chief Justice correctly notes that the reimbursement rate for participating States is different regarding individuals who became Medicaid-eligible through the ACA. *Ibid*. But the rate differs only in its generosity to participating States. Under pre-ACA Medicaid, the Federal Government pays up to 83% of the costs of coverage for current enrollees, §1396d(b) (2006 ed. and Supp. IV); under the ACA, the federal contribution starts at 100% and will eventually settle at 90%, §1396d(y). Even if one agreed that a change of as little as 7 percentage points carries

constitutional significance, is it not passing strange to suggest that the purported incursion on state sovereignty might have been averted, or at least mitigated, had Congress offered States *less* money to carry out the same obligations?

Consider also that Congress could have repealed Medicaid. See *supra*, at ___ - ___, 183 L. Ed. 2d, at 521-522 (citing 42 U.S.C. §1304); Brief for Petitioners in No. 11-400, p. 41. Thereafter, Congress could have enacted Medicaid II, a new program combining the pre-2010 coverage with the expanded coverage required by the ACA. By what right does a court stop Congress from building up without first tearing down?

2

The Chief Justice [***196] finds the Medicaid expansion vulnerable because it took [*2637] participating States by surprise. *Ante*, at ___, 183 L. Ed. 2d, at 496. "A State could hardly anticipate that Congress[s]" would endeavor to "transform [the Medicaid program] so dramatically," he states. *Ante*, at ___ - ___, 183 L. Ed. 2d, at 496. For the notion that States must be able to foresee, when they sign up, alterations Congress might make later on, The Chief Justice cites only one case: *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694.

In *Pennhurst*, residents of a state-run, federally funded institution for the mentally disabled complained of abusive treatment and inhumane conditions in alleged violation of the Developmentally Disabled Assistance and Bill of Rights Act. 451 U.S., at 5-6, 101 S. Ct. 1531, 67 L. Ed. 2d 694. We held that the State was not answerable in damages for violating conditions it did not "voluntarily and knowingly accep[t]." *Id.*, 451 U.S. at 17, 27, 101 S. Ct. 1531, 67 L. Ed. 2d 694. Inspecting the statutory language and legislative history, we found that the Act did not "unambiguously" impose the requirement on which the plaintiffs relied: that they receive appropriate treatment in the least restrictive [***197] environment. *Id.*, 451 U.S. at 17-18, 101 S. Ct. 1531, 67 L. Ed. 2d 694. Satisfied that Congress had not clearly conditioned the States' receipt of federal funds on the States' provision of such treatment, we declined to read such a requirement into the Act. Congress' spending power, we concluded, "does [**530] not include surprising participating States with postacceptance or 'retroactive' conditions." *Id.*, 451 U.S. at 24-25, 101 S. Ct. 1531, 67 L. Ed. 2d 694.

Pennhurst thus instructs that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Ante*, at ___, 183 L. Ed. 2d, at 495 (quoting *Pennhurst*, 451 U.S., at 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694). That requirement is met in this case. Section 2001 does not take effect until 2014. The ACA makes perfectly clear what will be required of States that accept Medicaid funding after that date: They must extend eligibility to adults with incomes no more than 133% of the federal poverty line. See 42 U.S.C. §1396a(a)(10)(A) (i)(VIII) (2006 ed. and Supp. IV).

The Chief Justice appears to find in *Pennhurst* a requirement that, when spending legislation is first passed, or when States first enlist in the federal program, Congress [***198] must provide clear notice of conditions it might later impose. If I understand his point correctly, it was incumbent on Congress, in 1965, to warn the States clearly of the size and shape potential changes to Medicaid might take. And absent such notice, sizable changes could not be made mandatory. Our decisions do not support such a requirement.²¹

21 The Chief Justice observes that "Spending Clause legislation [i]s much in the nature of a *contract*." *Ante*, at ___, 183 L. Ed. 2d, at 491 (internal quotation marks omitted). See also *post*, at ___, 183 L. Ed. 2d, at 554 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) (same). But the Court previously has recognized that "[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Bennett v. Kentucky Dep't of Education*, 470 U.S. 656, 669, 105 S. Ct. 1544, 84 L. Ed. 2d 590 (1985).

In *Bennett v. New Jersey*, 470 U.S. 632, 105 S. Ct. 1555, 84 L. Ed. 2d 572 (1985), the Secretary of Education sought to recoup Title I funds²² based on the State's noncompliance, from 1970 to 1972, with a 1978 amendment to Title I. Relying on *Pennhurst*, [*2638] we rejected the [***199] Secretary's attempt to recover funds based on the States' alleged violation of a rule that did not exist when the State accepted and spent the funds. See 470 U.S., at 640, 105 S. Ct. 1555, 84 L. Ed. 2d 572 ("New Jersey[,] when it applied for and received Title I funds for the years 1970-1972[,] had no basis to believe that the propriety of the expenditures would be judged by

any standards other than the ones in effect *at the time*." (citing *Pennhurst*, 451 U.S., at 17, 24-25, 101 S. Ct. 1531, 67 L. Ed. 2d 694; emphasis added)).

22 Title I of the Elementary and Secondary Education Act of 1965 provided federal grants to finance supplemental educational programs in school districts with high concentrations of children from low-income families. See *Bennett v. New Jersey*, 470 U.S. 632, 634-635, 105 S. Ct. 1555, 84 L. Ed. 2d 572 (1985) (citing Pub. L. No. 89-10, 79 Stat. 27).

When amendment of an existing grant program has no such retroactive effect, however, we have upheld Congress' instruction. In *Bennett v. Kentucky Dep't of Education*, 470 U.S. 656, 105 S. Ct. 1544, 84 L. Ed. 2d 590 (1985), the Secretary sued to recapture Title I funds based on the Commonwealth's 1974 violation of a spending [***200] condition Congress added to Title I in 1970. Rejecting Kentucky's argument pinned to *Pennhurst*, we held that the Commonwealth suffered no surprise after accepting the federal funds. Kentucky was therefore obliged to return the money. 470 U.S., at 665-666, 673-674, 105 S. Ct. 1544, 84 L. Ed. 2d 590. The conditions imposed [**531] were to be assessed as of 1974, in light of "the legal requirements in place when the grants were made," *id.*, 470 U.S., at 670, 105 S. Ct. 1544, 84 L. Ed. 2d 590, not as of 1965, when Title I was originally enacted.

As these decisions show, *Pennhurst's* rule demands that conditions on federal funds be unambiguously clear at the time a State receives and uses the money--not at the time, perhaps years earlier, when Congress passed the law establishing the program. See also *Dole*, 483 U.S., at 208, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (finding *Pennhurst* satisfied based on the clarity of the Federal Aid Highway Act as amended in 1984, without looking back to 1956, the year of the Act's adoption).

In any event, from the start, the Medicaid Act put States on notice that the program could be changed: "The right to alter, amend, or repeal any provision of [Medicaid]," the statute [***201] has read since 1965, "is hereby reserved to the Congress." 42 U.S.C. §1304. The "effect of these few simple words" has long been settled. See *National Railroad Passenger Corporation v. Atchison, T. & S. F. R. Co.*, 470 U.S. 451, 467-468, n. 22, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985) (citing *Sinking Fund Cases*, 99 U.S. 700, 720, 25 L. Ed. 496, 25 L. Ed.

504, 14 Ct. Cl. 594 (1879)). By reserving the right to "alter, amend, [or] repeal" a spending program, Congress "has given special notice of its intention to retain . . . full and complete power to make such alterations and amendments . . . as come within the just scope of legislative power." *Id.*, at 720, 25 L. Ed. 504, 14 Ct. Cl. 594.

Our decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 51-52, 106 S. Ct. 2390, 91 L. Ed. 2d 35 (1986), is guiding here. As enacted in 1935, the Social Security Act did not cover state employees. *Id.*, at 44, 106 S. Ct. 2390, 91 L. Ed. 2d 35. In response to pressure from States that wanted coverage for their employees, Congress, in 1950, amended the Act to allow States to opt into the program. *Id.*, at 45, 106 S. Ct. 2390, 91 L. Ed. 2d 35. The statutory provision [***202] giving States this option expressly permitted them to withdraw from the program. *Ibid.*

Beginning in the late 1970's, States increasingly exercised the option to withdraw. *Id.*, at 46, 106 S. Ct. 2390, 91 L. Ed. 2d 35. Concerned that withdrawals were threatening the integrity of Social Security, Congress repealed the termination provision. Congress thereby changed Social Security from a program voluntary for the States to one from which they could not escape. *Id.*, at 48, 106 S. Ct. 2390, 91 L. Ed. 2d 35. California objected, arguing that the change impermissibly deprived it of a right to withdraw [*2639] from Social Security. *Id.*, at 49-50, 106 S. Ct. 2390, 91 L. Ed. 2d 35. We unanimously rejected California's argument. *Id.*, at 51-53, 106 S. Ct. 2390, 91 L. Ed. 2d 35. By including in the Act "a clause expressly reserving to it '[t]he right to alter, amend, or repeal any provision' of the Act," we held, Congress put States on notice that the Act "created no contractual rights." *Id.*, at 51-52, 106 S. Ct. 2390, 91 L. Ed. 2d 35. The States therefore had no law-based ground on which to complain about the amendment, despite the significant character of the change.

The Chief Justice nevertheless would [***203] rewrite §1304 to countenance only the "right to alter somewhat," or "amend, but not too much." Congress, however, did not so qualify §1304. [**532] Indeed, Congress retained discretion to "repeal" Medicaid, wiping it out entirely. Cf. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 368, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981) (Rehnquist, J., dissenting) (invoking "the common-sense maxim that the greater includes the

lesser"). As *Bowen* indicates, no State could reasonably have read §1304 as reserving to Congress authority to make adjustments only if modestly sized.

In fact, no State proceeded on that understanding. In compliance with Medicaid regulations, each State expressly undertook to abide by future Medicaid changes. See 42 CFR §430.12(c)(1) (2011) ("The [state Medicaid] plan must provide that it will be amended whenever necessary to reflect . . . [c]hanges in Federal law, regulations, policy interpretations, or court decisions."). Whenever a State notifies the Federal Government of a change in its own Medicaid program, the State certifies both that it knows the federally set terms of participation may change, and that it will abide by those changes as a condition of continued participation. [***204] See, e.g., Florida Agency for Health Care Admin., State Plan Under Title XIX of the Social Security Act Medical Assistance Program § 7.1, p. 86 (Oct. 6, 1992).

The Chief Justice insists that the most recent expansion, in contrast to its predecessors, "accomplishes a shift in kind, not merely degree." *Ante*, at ___, 183 L. Ed. 2d, at 495. But why was Medicaid altered only in degree, not in kind, when Congress required States to cover millions of children and pregnant women? See *supra*, at ___ - ___, 183 L. Ed. 2d, at 523-524. Congress did not "merely alte[r] and expan[d] the boundaries of" the Aid to Families with Dependent Children program. But see *ante*, at ___ - ___, 183 L. Ed. 2d, at 495-497. Rather, Congress required participating States to provide coverage tied to the federal poverty level (as it later did in the ACA), rather than to the AFDC program. See Brief for National Health Law Program et al. as *Amici Curiae* 16-18. In short, given §1304, this Court's construction of §1304's language in *Bowen*, and the enlargement of Medicaid in the years since 1965,²³ a State would be hard put to complain that it lacked fair notice when, in 2010, Congress altered Medicaid to embrace a larger portion of the Nation's poor.

23 Note, in this regard, the extension of Social Security, [***205] which began in 1935 as an old-age pension program, then expanded to include survivor benefits in 1939 and disability benefits in 1956. See Social Security Act, ch. 531, 49 Stat. 622-625; Social Security Act Amendments of 1939, 53 Stat. 1364-1365; Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815-816.

3

The Chief Justice ultimately asks whether "the financial inducement offered by Congress . . . pass[ed] the point at which pressure turns into compulsion." *Ante*, at ___, 183 L. Ed. 2d, at 494 (internal quotation marks omitted). The financial inducement Congress employed here, he concludes, crosses [*2640] that threshold: The threatened withholding of "existing Medicaid funds" is "a gun to the head" that forces States to acquiesce. *Ante*, at ___ - ___, 183 L. Ed. 2d, at 494 (citing 42 U.S.C. §1396c).²⁴

24 The joint dissenters, for their part, would make this the entire inquiry. "[I]f States really have no choice other than to accept the package," they assert, "the offer is coercive." *Post*, at ___, 183 L. Ed. 2d, at 555. The Chief Justice recognizes Congress' authority to construct a single federal program and "condition the receipt of funds on the States' complying with restrictions on the use of those funds." *Ante*, at ___, 183 L. Ed. 2d, at 493. For the joint dissenters, however, [***206] all that matters, it appears, is whether States can resist the temptation of a given federal grant. *Post*, at ___, 183 L. Ed. 2d, at 555. On this logic, any federal spending program, sufficiently large and well-funded, would be unconstitutional. The joint dissenters point to smaller programs States might have the will to refuse. See *post*, at ___ - ___, 183 L. Ed. 2d, at 558 (elementary and secondary education). But how is a court to judge whether "only 6.6% of all state expenditures," *post*, at ___, 183 L. Ed. 2d, at 558, is an amount States could or would do without? Speculations of this genre are characteristic of the joint dissent. See, e.g., *post*, at ___, 183 L. Ed. 2d, at 555 ("it may be state officials who will bear the brunt of public disapproval" for joint federal-state endeavors); *ibid.*, ("federal officials . . . may remain insulated from the electoral ramifications of their decision"); *post*, at ___, 183 L. Ed. 2d, at 555 ("a heavy federal tax . . . levied to support a federal program that offers large grants to the States . . . may, as a practical matter, [leave States] unable to refuse to participate"); *ibid.* (withdrawal from a federal program "would likely force the State to impose a huge tax increase"); *post*, at ___, 183 L. Ed. 2d, at 556 (state share of ACA expansion costs "may increase in the

future") (all emphasis [***207] added; some internal quotation marks omitted). The joint dissenters are long on conjecture and short on real-world examples.

[**533] The Chief Justice sees no need to "fix the outermost line," *Steward Machine*, 301 U.S., at 591, 57 S. Ct. 883, 81 L. Ed. 1279, "where persuasion gives way to coercion," *ante*, at ___, 183 L. Ed. 2d, at 496. Neither do the joint dissenters. See *post*, at ___, ___, 183 L. Ed. 2d, at 556, 557.²⁵ Notably, the decision on which they rely, *Steward Machine*, found the statute at issue inside the line, "wherever the line may be." 301 U.S., at 591, 57 S. Ct. 883, 81 L. Ed. 1279.

25 The joint dissenters also rely heavily on Congress' perceived intent to coerce the States. *Post*, at ___ - ___, 183 L. Ed. 2d, at 559-561; see, e.g., *post*, at ___, 183 L. Ed. 2d, at 559 ("In crafting the ACA, Congress clearly expressed its informed view that no State could possibly refuse the offer that the ACA extends."). We should not lightly ascribe to Congress an intent to violate the Constitution (at least as my colleagues read it). This is particularly true when the ACA could just as well be comprehended as demonstrating Congress' mere expectation, in light of the uniformity of past participation and the generosity of the federal contribution, that States would not withdraw. Cf. *South Dakota v. Dole*, 483 U.S. 203, 211, 107 S. Ct. 2793, 97 L. Ed. 2d 171 [***208] (1987) ("We cannot conclude . . . that a conditional grant of federal money . . . is unconstitutional simply by reason of its success in achieving the congressional objective.").

When future Spending Clause challenges arrive, as they likely will in the wake of today's decision, how will litigants and judges assess whether "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds"? *Ante*, at ___, 183 L. Ed. 2d, at 492. Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State's--or States'--budget is determinative: the lead plaintiff, all challenging States (26 in this case, many with quite different fiscal situations), or some national median? Does it matter that Florida, unlike most States, imposes no state income tax, and therefore might be able to replace foregone federal

funds with new state revenue?²⁶ Or that the [*2641] coercion state officials in fact fear is punishment at [**534] the ballot box for turning down a politically popular federal grant?

26 Federal taxation of a State's citizens, according to the joint dissenters, may diminish a State's ability to raise new revenue. [***209] This, in turn, could limit a State's capacity to replace a federal program with an "equivalent" state-funded analog. *Post*, at ___, 183 L. Ed. 2d, at 558. But it cannot be true that "the amount of the federal taxes extracted from the taxpayers of a State to pay for the program in question is relevant in determining whether there is impermissible coercion." *Post*, at ___, 183 L. Ed. 2d, at 556. When the United States Government taxes United States citizens, it taxes them "in their individual capacities" as "the people of America"--not as residents of a particular State. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 839, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995) (Kennedy, J., concurring). That is because the "Framers split the atom of sovereignty[,] . . . establishing two orders of government"--"one state and one federal"--"each with its own direct relationship" to the people. *Id.*, at 838, 115 S. Ct. 1842, 131 L. Ed. 2d 881. A State therefore has no claim on the money its residents pay in federal taxes, and federal "spending programs need not help people in all states in the same measure." See Brief for David Satcher et al. as Amici Curiae 19. In 2004, for example, New Jersey received 55 cents in federal spending for every dollar [***210] its residents paid to the Federal Government in taxes, while Mississippi received \$1.77 per tax dollar paid. C. Dubay, Tax Foundation, Federal Tax Burdens and Expenditures by State: Which States Gain Most from Federal Fiscal Operations? 2 (Mar. 2006). Thus no constitutional problem was created when Arizona declined for 16 years to participate in Medicaid, even though its residents' tax dollars financed Medicaid programs in every other State.

The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation. See *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Even commentators sympathetic to robust enforcement of *Dole's* limitations, see *supra*, at ___, 183

L. Ed. 2d, at 526, have concluded that conceptions of "impermissible coercion" premised on States' perceived inability to decline federal funds "are just too amorphous to be judicially administrable." Baker & Berman, Getting off the *Dole*, 78 Ind. L. J. 459, 521, 522, n. 307 (2003) (citing, e.g., Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989)).

At bottom, my colleagues' position is that the States' reliance on federal funds limits Congress' authority to alter its spending [***211] programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. When the 110th Congress reached a conclusion about Medicaid funds that differed from its predecessors' view, it abridged no State's right to "existing," or "pre-existing," funds. But see *ante*, at ___ - ___, 183 L. Ed. 2d, at 494; *post*, at ___ - ___, 183 L. Ed. 2d, at 562-563 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.). For, in fact, there are no such funds. There is only money States *anticipate* receiving from future Congresses.

D

Congress has delegated to the Secretary of Health and Human Services the authority to withhold, in whole or in part, federal Medicaid funds from States that fail to comply with the Medicaid Act as originally composed and as subsequently amended. 42 U.S.C. §1396c.²⁷ The Chief Justice, however, holds that the Constitution precludes the Secretary from withholding "existing" Medicaid funds based on [*2642] States' refusal to comply with the expanded Medicaid program. *Ante*, at ___, 183 L. Ed. 2d, at 497. For the foregoing reasons, I disagree that any such withholding would violate the Spending Clause. Accordingly, I would [***212] affirm the decision of [**535] the Court of Appeals for the Eleventh Circuit in this regard.

27 As The Chief Justice observes, the Secretary is authorized to withhold all of a State's Medicaid funding. See *ante*, at ___, 183 L. Ed. 2d, at 494. But total withdrawal is what the Secretary *may*, not must, do. She has discretion to withhold only a portion of the Medicaid funds otherwise due a noncompliant State. See §1396c; cf. 45 CFR §80.10(f) (2011) (Secretary may enforce Title VI's nondiscrimination requirement through "refusal to grant or continue Federal financial

assistance, *in whole or in part.*" (emphasis added)). The Secretary, it is worth noting, may herself experience political pressures, which would make her all the more reluctant to cut off funds Congress has appropriated for a State's needy citizens.

But in view of The Chief Justice's disposition, I agree with him that the Medicaid Act's severability clause determines the appropriate remedy. That clause provides that "[i]f any provision of [the Medicaid Act], or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." 42 U.S.C. §1303.

The Court does not strike down any provision of the ACA. It prohibits only the "application" of the Secretary's authority to withhold Medicaid funds from States that decline to conform their Medicaid plans to the ACA's requirements. Thus the ACA's authorization of funds to finance the expansion remains intact, and the Secretary's authority to withhold funds for reasons other than noncompliance with the expansion remains unaffected.

[***213] Even absent §1303's command, we would have no warrant to invalidate the Medicaid expansion, *contra post*, at ___ - ___, 183 L. Ed. 2d, at 561-563 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.), not to mention the entire ACA, *post*, at ___ - ___, 183 L. Ed. 2d, at 563-572 (same). For when a court confronts an unconstitutional statute, its endeavor must be to conserve, not destroy, the legislature's dominant objective. See, e.g., *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328-330, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006). In this case, that objective was to increase access to health care for the poor by increasing the States' access to federal funds. The Chief Justice is undoubtedly right to conclude that Congress may offer States funds "to expand the availability of health [***214] care, and requir[e] that States accepting such funds comply with the conditions on their use." *Ante*, at ___, 183 L. Ed. 2d, at 497. I therefore concur in the judgment with respect to Part IV-B of The Chief Justice's opinion.

* * *

For the reasons stated, I agree with The Chief Justice that, as to the validity of the minimum coverage provision, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed. In my view, the

provision encounters no constitutional obstruction. Further, I would uphold the Eleventh Circuit's decision that the Medicaid expansion is within Congress' spending power.

Justice **Scalia**, Justice **Kennedy**, Justice **Thomas**, and Justice **Alito**, dissenting.

Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) go beyond those powers. We conclude that they do.

This case is in one respect difficult: it presents [***215] two questions of first impression. The first of those is whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause. Failure to act does result in an effect on commerce, and hence might be said to come under [**536] this Court's "affecting commerce" criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far. [*2643] The second question is whether the congressional power to tax and spend, U.S. Const., Art. I, § 8, cl. 1, permits the conditioning of a State's continued receipt of all funds under a massive state-administered federal welfare program upon its acceptance of an expansion to that program. Several of our opinions have suggested that the power to tax and spend cannot be used to coerce state administration of a federal program, but we have never found a law enacted under the spending power to be coercive. Those questions are difficult.

The case is easy and straightforward, however, in another respect. What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years [***216] since, is that there are structural limits upon federal power--upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as

administrators of federal programs.

That clear principle carries the day here. The striking case of *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), which held that the economic activity of growing wheat, even for one's own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the *failure* to grow wheat (which is *not* an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.

As for the constitutional power to tax and spend for the general welfare: [***217] The Court has long since expanded that beyond (what Madison thought it meant) taxing and spending for those aspects of the general welfare that were within the Federal Government's enumerated powers, see *United States v. Butler*, 297 U.S. 1, 65-66, 56 S. Ct. 312, 80 L. Ed. 477, 1936-1 C.B. 421 (1936). Thus, we now have sizable federal Departments devoted to subjects not mentioned among Congress' enumerated powers, and only marginally related to commerce: the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development. The principal practical obstacle that prevents Congress from using the tax-and-spend power to assume all the general-welfare responsibilities traditionally exercised by the States is the sheer impossibility of managing a Federal Government large enough to administer such a system. That obstacle can be overcome by granting funds to the States, allowing them to administer the program. That is fair and constitutional enough when the States freely agree to have their powers employed and their employees enlisted in the federal scheme. But it is a blatant violation of the constitutional structure when the States have [***218] no choice.

The Act before us here exceeds federal power both in mandating the purchase of health insurance and in [**537] denying nonconsenting States all Medicaid funding. These parts of the Act are central to its design and operation, and all the Act's other provisions would not have been enacted without them. In our view it must follow that the entire statute is inoperative.

[*2644] I

The Individual Mandate

Article I, § 8, of the Constitution gives Congress the power to "regulate Commerce . . . among the several States." The Individual Mandate in the Act commands that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage." 26 U.S.C. §5000A(a) (2006 ed., Supp. IV). If this provision "regulates" anything, it is the *failure* to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure--that abstention from commerce--is not "Commerce." To be sure, *purchasing* insurance is "Commerce"; but one does not regulate commerce that does not exist by compelling [***219] its existence.

In *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 196, 6 L. Ed. 23 (1824), Chief Justice Marshall wrote that the power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed." That understanding is consistent with the original meaning of "regulate" at the time of the Constitution's ratification, when "to regulate" meant "[t]o adjust by rule, method or established mode," 2 N. Webster, *An American Dictionary of the English Language* (1828); "[t]o adjust by rule or method," 2 S. Johnson, *A Dictionary of the English Language* (7th ed. 1785); "[t]o adjust, to direct according to rule," 2 J. Ash, *New and Complete Dictionary of the English Language* (1775); "to put in order, set to rights, govern or keep in order," T. Dyche & W. Pardon, *A New General English Dictionary* (16th ed. 1777).¹ It can mean to direct the manner of something but not to direct that something come into being. There is no instance in which this Court or Congress (or anyone else, to our knowledge) has used "regulate" in that peculiar fashion. If the word bore that meaning, Congress' authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const., Art. I, § 8, cl. 14, [***220] would have made superfluous the later provision for authority "[t]o raise and support Armies," *id.*, § 8, cl. 12, and "[t]o provide and maintain a Navy," *id.*, § 8, cl. 13.

1 The most authoritative legal dictionaries of the founding era lack any definition for "regulate" or "regulation," suggesting that the term bears its ordinary meaning (rather than some specialized

legal meaning) in the constitutional text. See R. Burn, *A New Law Dictionary* 281 (1792); G. Jacob, *A New Law Dictionary* (10th ed. 1782); 2 T. Cunningham, *A New and Complete Law Dictionary* (2d ed. 1771).

We do not doubt that the buying and selling of health insurance contracts is commerce generally subject to federal regulation. But when Congress provides that (nearly) all citizens must buy an insurance contract, it goes beyond "adjust[ing] by rule or method," Johnson, *supra*, or "direct[ing] according to rule," Ash, *supra*, it directs the creation of commerce.

In response, the Government offers two theories as to why the Individual [**538] Mandate is nevertheless constitutional. Neither theory suffices to sustain its validity.

A

First, the Government submits that §5000A is "integral to the Affordable Care Act's insurance reforms" and "necessary [***221] to make effective the Act's core reforms." Brief for Petitioners in No. 11-398 (Minimum Coverage Provision) 24 (hereinafter Petitioners' Minimum Coverage Brief). Congress included a "finding" to similar effect in the Act itself. See 42 U.S.C. §18091(2)(H).

[*2645] As discussed in more detail in Part V, *infra*, the Act contains numerous health insurance reforms, but most notable for present purposes are the "guaranteed issue" and "community rating" provisions, §§300gg to 300gg-4. The former provides that, with a few exceptions, "each health insurance issuer that offers health insurance coverage in the individual or group market in a State must accept every employer and individual in the State that applies for such coverage." §300gg-1(a). That is, an insurer may not deny coverage on the basis of, among other things, any pre-existing medical condition that the applicant may have, and the resulting insurance must cover that condition. See §300gg-3.

Under ordinary circumstances, of course, insurers would respond by charging high premiums to individuals with pre-existing conditions. The Act seeks to prevent this through the community-rating provision. Simply put, the community-rating provision requires [***222] insurers to calculate an individual's insurance premium

based on only four factors: (i) whether the individual's plan covers just the individual or his family also, (ii) the "rating area" in which the individual lives, (iii) the individual's age, and (iv) whether the individual uses tobacco. §300gg(a)(1)(A). Aside from the rough proxies of age and tobacco use (and possibly rating area), the Act does not allow an insurer to factor the individual's health characteristics into the price of his insurance premium. This creates a new incentive for young and healthy individuals without pre-existing conditions. The insurance premiums for those in this group will not reflect their own low actuarial risks but will subsidize insurance for others in the pool. Many of them may decide that purchasing health insurance is not an economically sound decision--especially since the guaranteed-issue provision will enable them to purchase it at the same cost in later years and even if they have developed a pre-existing condition. But without the contribution of above-risk premiums from the young and healthy, the community-rating provision will not enable insurers to take on high-risk individuals without [***223] a massive increase in premiums.

The Government presents the Individual Mandate as a unique feature of a complicated regulatory scheme governing many parties with countervailing incentives that must be carefully balanced. Congress has imposed an extensive set of regulations on the health insurance industry, and compliance with those regulations will likely cost the industry a great deal. If the industry does not respond by increasing premiums, it is not likely to survive. And if the industry does increase premiums, then there is a serious risk that its products--insurance plans--will become economically [**539] undesirable for many and prohibitively expensive for the rest.

This is not a dilemma unique to regulation of the health-insurance industry. Government regulation typically imposes costs on the regulated industry--especially regulation that prohibits economic behavior in which most market participants are already engaging, such as "piecing out" the market by selling the product to different classes of people at different prices (in the present context, providing much lower insurance rates to young and healthy buyers). And many industries so regulated face the reality that, without an artificial [***224] increase in demand, they cannot continue on. When Congress is regulating these industries directly, it enjoys the broad power to enact " 'all appropriate legislation' " to " 'protec[t]' " and " 'advanc[e]' "

commerce, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37, 57 S. Ct. 615, 81 L. Ed. 893 (1937) (quoting *The Daniel Ball*, 77 U.S. 557, 10 Wall. 557, 564, 19 L. Ed. 999 (1871)) . Thus, Congress might protect the [*2646] imperiled industry by prohibiting low-cost competition, or by according it preferential tax treatment, or even by granting it a direct subsidy.

Here, however, Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation. Congress' desire to force these individuals to purchase insurance is motivated by the fact that they are further removed from the market than unhealthy individuals with pre-existing conditions, because they are less likely to need extensive care in the near future. If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited [***225] power, or in Hamilton's words, "the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane." *The Federalist* No. 33, p. 202 (C. Rossiter ed. 1961).

At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants. In *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), we held that Congress could not, in an effort to regulate the disposal of radioactive waste produced in several different industries, order the States to take title to that waste. *Id.*, at 174-177, 112 S. Ct. 2408, 120 L. Ed. 2d 120. In *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), we held that Congress could not, in an effort to regulate the distribution of firearms in the interstate market, compel state law-enforcement officials to perform background checks. *Id.*, at 933-935, 117 S. Ct. 2365, 138 L. Ed. 2d 914. In *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), we held that Congress could not, as a means of fostering an educated interstate labor market through the [***226] protection of schools, ban the possession of a firearm within a school zone. *Id.*, at 559-563, 115 S. Ct. 1624, 131 L. Ed. 2d 626. And in *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000), we held that Congress could not, in an effort to ensure the full participation of women in the interstate economy, subject private individuals and companies to suit for

gender-motivated violent torts. *Id.*, at 609-619, 120 S. Ct. 1740, 146 L. Ed. 2d 658. The lesson of these [***540] cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. And the last two of these cases show that the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.

The case upon which the Government principally relies to sustain the Individual Mandate under the Necessary and Proper Clause is *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). That case [***227] held that Congress could, in an effort to restrain the interstate market in marijuana, ban the local cultivation and possession of that drug. *Id.*, at 15-22, 125 S. Ct. 2195, 162 L. Ed. 2d 1. *Raich* is no precedent for what Congress has done here. That case's prohibition of growing (cf. *Wickard*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122), and of possession (cf. innumerable federal statutes) did not represent the expansion of the federal power to direct into a broad new field. The mandating of economic activity does, and since it is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy, that mandating is not "consist[ent] with the letter and spirit of the [*2647] constitution." *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 421, 4 L. Ed. 579 (1819).

Moreover, *Raich* is far different from the Individual Mandate in another respect. The Court's opinion in *Raich* pointed out that the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced. 545 U.S., at 22, 125 S. Ct. 2195, 162 L. Ed. 2d 1. See also *Shreveport Rate Cases*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914) [***228] (Necessary and Proper Clause allows regulations of intrastate transactions if necessary to the regulation of an interstate market). Intrastate marijuana could no more be distinguished from interstate marijuana than, for example, endangered-species trophies obtained before the species was federally protected can be distinguished from trophies obtained afterwards--which made it necessary and proper to prohibit the sale of all such trophies, see *Andrus v. Allard*, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed.

2d 210 (1979).

With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied a full income tax credit given to those who do purchase the insurance.

The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could *not* be justified [***229] as necessary and proper for the carrying out of a general regulatory scheme. See Tr. of Oral Arg. 27-30, 43-45 (Mar. 27, 2012). It was unable to name any. As we said at the outset, whereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government [**541] cannot do everything is a fundamental precept. See *Lopez*, 514 U.S., at 564, 115 S. Ct. 1624, 131 L. Ed. 2d 626 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate"). Section 5000A is defeated by that proposition.

B

The Government's second theory in support of the Individual Mandate is that §5000A is valid because it is actually a "regulat[ion of] activities having a substantial relation to interstate commerce, . . . *i.e.*, . . . activities that substantially affect interstate commerce." *Id.*, at 558-559, 115 S. Ct. 1624, 131 L. Ed. 2d 626. See also *Shreveport Rate Cases*, *supra*. This argument takes a few different forms, but the basic idea is that §5000A regulates "the way in which individuals finance their participation in the health-care market." Petitioners' Minimum [***230] Coverage Brief 33 (emphasis added). That is, the provision directs the manner in which individuals purchase health care services and related goods (directing that they be purchased through insurance) and is therefore a straightforward exercise of the commerce power.

The primary problem with this argument is that §5000A does not apply only to persons who purchase all, or most, or even any, of the health care services or goods that the mandated insurance covers. Indeed, the main

objection many have to the Mandate is that they have no intention of purchasing most or even any of such goods or services and thus no need to buy insurance for those purchases. The Government responds that the health-care market involves "essentially universal participation," [*2648] *id.*, at 35. The principal difficulty with this response is that it is, in the only relevant sense, not true. It is true enough that everyone consumes "health care," if the term is taken to include the purchase of a bottle of aspirin. But the health care "market" that is the object of the Individual Mandate not only includes but principally consists of goods and services that the young people primarily affected by the Mandate *do* [***231] *not purchase*. They are quite simply not participants in that market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance.² Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits.

2 Justice Ginsburg is therefore right to note that Congress is "not mandating the purchase of a discrete, unwanted product." *Ante*, at ___, 183 L. Ed. 2d, at 511 (opinion concurring in part, concurring in judgment in part, and dissenting in part). Instead, it is mandating the purchase of an unwanted suite of products--*e.g.*, physician office visits, emergency room visits, hospital room and board, physical therapy, durable medical equipment, mental health care, and substance abuse detoxification. See Selected Medical Benefits: A Report from the Dept. of Labor to the Dept. of Health & Human Services (April 15, 2011) (reporting that over two-thirds of private industry health plans cover these goods and services), [online at http://www.bls.gov/ncs/ebs/sp/selmedbensreport.pdf](http://www.bls.gov/ncs/ebs/sp/selmedbensreport.pdf) [***232] (all Internet materials as visited June 26, 2012, and available in Clerk of Court's case file).

In a variation on this attempted exercise of federal power, the Government points out that Congress in this Act has purported to regulate "economic and financial decision[s] to [**542] forego [*sic*] health insurance coverage and [to] attempt to self-insure," 42 U.S.C. §18091(2)(A), since those decisions have "a substantial

and deleterious effect on interstate commerce," Petitioners' Minimum Coverage Brief 34. But as the discussion above makes clear, the decision to forgo participation in an interstate market is not itself commercial activity (or indeed any activity at all) within Congress' power to regulate. It is true that, at the end of the day, it is inevitable that each American will affect commerce and become a part of it, even if not by choice. But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.

Wickard v. Filburn has been regarded as the most expansive assertion of the commerce power in our history. A close second is *Perez v. United States*, 402 U.S. 146, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971), [***233] which upheld a statute criminalizing the eminently local activity of loan-sharking. Both of those cases, however, involved commercial *activity*. To go beyond that, and to say that the failure to grow wheat or the refusal to make loans affects commerce, so that growing and lending can be federally compelled, is to extend federal power to virtually everything. All of us consume food, and when we do so the Federal Government can prescribe what its quality must be and even how much we must pay. But the mere fact that we all consume food and are thus, sooner or later, participants in the "market" for food, does not empower the Government to say when and what we will buy. That is essentially what this Act seeks to do with respect to the purchase of health care. It exceeds federal power.

C

A few respectful responses to Justice Ginsburg's dissent on the issue of the Mandate are in order. That dissent duly [*2649] recites the test of Commerce Clause power that our opinions have applied, but disregards the premise the test contains. It is true enough that Congress needs only a " 'rational basis' for concluding that the *regulated activity* substantially affects interstate commerce," *ante*, at ___, 183 L. Ed. 2d, at 507 (emphasis [***234] added). But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce. And one is not now purchasing the health care covered by the insurance mandate simply because one is likely to be purchasing it in the future. Our test's premise of regulated activity is not invented out of whole cloth, but rests upon the Constitution's requirement

that it be commerce which is regulated. If all inactivity affecting commerce is commerce, commerce is everything. Ultimately the dissent is driven to saying that there is really no difference between action and inaction, *ante*, at ___, 183 L. Ed. 2d, at 514, a proposition that has never recommended itself, neither to the law nor to common sense. To say, for example, that the inaction here consists of activity in "the self-insurance market," *ibid.*, seems to us wordplay. By parity of reasoning the failure to buy a car can be called participation in the non-private-car-transportation market. Commerce becomes everything.

The dissent claims that we "fai[l] to explain why the individual mandate threatens our constitutional order." *Ante*, at ___, 183 L. Ed. 2d, at 519. [**543] But we have done so. It threatens that order because it gives such an expansive meaning to the [***235] Commerce Clause that *all* private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers. Thus the dissent, on the theories proposed for the validity of the Mandate, would alter the accepted constitutional relation between the individual and the National Government. The dissent protests that the Necessary and Proper Clause has been held to include "the power to enact criminal laws, . . . the power to imprison, . . . and the power to create a national bank," *ante*, at ___ - ___, 183 L. Ed. 2d, at 519. Is not the power to compel purchase of health insurance much lesser? No, not if (unlike those other dispositions) its application rests upon a theory that everything is within federal control simply because it exists.

The dissent's exposition of the wonderful things the Federal Government has achieved through exercise of its assigned powers, such as "the provision of old-age and survivors' benefits" in the Social Security Act, *ante*, at ___, 183 L. Ed. 2d, at 499, is quite beside the point. The issue here is whether the federal government can impose the Individual Mandate through the Commerce Clause. And the relevant history is not that Congress has achieved [***236] wide and wonderful results through the proper exercise of its assigned powers in the past, but that it has never before used the Commerce Clause to compel entry into commerce.³ The dissent [*2650] treats the Constitution as though it is an enumeration of those problems that the Federal Government can address--among which, it finds, is "the Nation's course in the economic and social welfare realm," *ibid.*, and more

specifically "the problem of the uninsured," *ante*, at ___, 183 L. Ed. 2d, at 503. The Constitution is not that. It enumerates not federally soluble *problems*, but federally available *powers*. The Federal Government can address whatever problems it wants but can bring to their solution only those powers that the Constitution confers, among which is the power to regulate commerce. None of our cases say anything else. Article I contains no whatever-it-takes-to-solve-a-national-pr oblem power.

3 In its effort to show the contrary, Justice Ginsburg's dissent comes up with nothing more than two condemnation cases, which it says demonstrate "Congress' authority under the commerce power to compel an 'inactive' landholder to submit to an unwanted sale." *Ante*, at ___, 183 L. Ed. 2d, at 513. Wrong on both scores. As its name suggests, the condemnation [***237] power does not "compel" anyone to do anything. It acts *in rem*, against the property that is condemned, and is effective with or without a transfer of title from the former owner. More important, the power to condemn for public use is a separate sovereign power, explicitly acknowledged in the Fifth Amendment, which provides that "private property [shall not] be taken for public use, without just compensation." Thus, the power to condemn tends to refute rather than support the power to compel purchase of unwanted goods at a prescribed price: The latter is rather like the power to condemn cash for public use. If it existed, why would it not (like the condemnation power) be accompanied by a requirement of fair compensation for the portion of the exacted price that exceeds the goods' fair market value (here, the difference between what the free market would charge for a health-insurance policy on a young, healthy person with no pre-existing conditions, and the government-exacted community-rated premium)?

The dissent dismisses the conclusion that the power to compel entry into the health-insurance market would include the power to compel entry into the new-car or broccoli markets. The latter [***238] purchasers, it says, "will be obliged to pay at the [**544] counter before receiving the vehicle or nourishment," whereas those refusing to purchase health-insurance will ultimately get treated anyway, at others' expense. *Ante*, at ___, 183 L. Ed. 2d, at 511. "[T]he unique attributes of the health-care

market . . . give rise to a significant free-riding problem that does not occur in other markets." *Ante*, at ___, 183 L. Ed. 2d, at 515. And "a vegetable-purchase mandate" (or a car-purchase mandate) is not "likely to have a substantial effect on the health-care costs" borne by other Americans. *Ante*, at ___, 183 L. Ed. 2d, at 515. Those differences make a very good argument by the dissent's own lights, since they show that the failure to purchase health insurance, unlike the failure to purchase cars or broccoli, creates a national, social-welfare problem that is (in the dissent's view) included among the unenumerated "problems" that the Constitution authorizes the Federal Government to solve. But those differences do not show that the failure to enter the health-insurance market, unlike the failure to buy cars and broccoli, is an *activity* that Congress can "regulate." (Of course one day the failure of some of the public to purchase American cars may endanger the [***239] existence of domestic automobile manufacturers; or the failure of some to eat broccoli may be found to deprive them of a newly discovered cancer-fighting chemical which only that food contains, producing health-care costs that are a burden on the rest of us--in which case, under the theory of Justice Ginsburg's dissent, moving against those inactivities will also come within the Federal Government's unenumerated problem-solving powers.)

II

The Taxing Power

As far as §5000A is concerned, we would stop there. Congress has attempted to regulate beyond the scope of its Commerce Clause authority,⁴ and §5000A is therefore invalid. The Government contends, however, as expressed in the caption to Part II of its brief, that "THE MINIMUM COVERAGE PROVISION IS INDEPENDENTLY AUTHORIZED BY CONGRESS'S TAXING POWER." Petitioners' Minimum Coverage Brief 52. The phrase "independently authorized" suggests the existence of a creature never hitherto seen in the United States Reports: [*2651] A penalty for constitutional purposes that is *also* a tax for constitutional purposes. In all our cases the two are mutually exclusive. The provision challenged under the Constitution is either a penalty or else a tax. Of course [***240] in many cases what was a regulatory mandate enforced by a penalty *could have been* imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action *could have been* a regulatory mandate enforced by

a penalty. But we know of no case, and the Government cites none, in which the imposition was, for constitutional purposes, both.⁵ The two are mutually exclusive. Thus, what the [**545] Government's caption should have read was "ALTERNATIVELY, THE MINIMUM COVERAGE PROVISION IS NOT A MANDATE-WITH-PENALTY BUT A TAX." It is important to bear this in mind in evaluating the tax argument of the Government and of those who support it: The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so.

4 No one seriously contends that any of Congress' other enumerated powers gives it the authority to enact §5000A *as a regulation*.

5 Of course it can be both for statutory purposes, since Congress can define "tax" and "penalty" in its enactments any way it wishes. That is why *United States v. Sotelo*, 436 U.S. 268, 98 S. Ct. 1795, 56 L. Ed. 2d 275 (1978), does not disprove our statement. That case held that a "penalty" for willful [***241] failure to pay one's taxes was included among the "taxes" made non-dischargeable under the Bankruptcy Code. 436 U.S., at 273-275, 98 S. Ct. 1795, 56 L. Ed. 2d 275. Whether the "penalty" was a "tax" within the meaning of the Bankruptcy Code had absolutely no bearing on whether it escaped the constitutional limitations on penalties.

In answering that question we must, if "fairly possible," *Crowell v. Benson*, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932), construe the provision to be a tax rather than a mandate-with-penalty, since that would render it constitutional rather than unconstitutional (*ut res magis valeat quam pereat*). But we cannot rewrite the statute to be what it is not. "[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . ." or judicially rewriting it.' *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964), in turn quoting *Scales v. United States*, 367 U.S. 203, 211, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961)). [***242] In this case, there is simply no way, "without doing violence to the fair meaning of the words used," *Grenada County Supervisors v. Brogden*, 112 U.S. 261,

269, 5 S. Ct. 125, 28 L. Ed. 704 (1884), to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty.

Our cases establish a clear line between a tax and a penalty: "[A] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.' *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224, 116 S. Ct. 2106, 135 L. Ed. 2d 506 (1996) (quoting *United States v. La Franca*, 282 U.S. 568, 572, 51 S. Ct. 278, 75 L. Ed. 551 (1931)). In a few cases, this Court has held that a "tax" imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held--*never*--that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that *any* exaction imposed for violation of the law is an exercise of Congress' taxing power--even when the statute *calls* it a tax, much less when (as here) the statute repeatedly [***243] calls it a penalty. When an act "adopt[s] the criteria of wrongdoing" and then imposes a monetary penalty as the "principal consequence on those who transgress [*2652] its standard," it creates a regulatory penalty, not a tax. *Child Labor Tax Case*, 259 U.S. 20, 38, 42 S. Ct. 449, 66 L. Ed. 817, 1922-2 C.B. 337, T.D. 3346 (1922).

So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is. The minimum-coverage provision is found in 26 U.S.C. §5000A, entitled "*Requirement to maintain minimum essential coverage*." (Emphasis added.) It commands that every "applicable individual *shall* . . . ensure that the individual . . . is covered under minimum essential coverage." *Ibid.* (emphasis added). And the immediately following provision [**546] states that, "[i]f . . . an applicable individual . . . fails to meet the *requirement* of subsection (a) . . . there is hereby imposed . . . a *penalty*." §5000A(b) (emphasis added). And several of Congress' legislative "findings" with regard to §5000A confirm that it sets forth a legal requirement and constitutes the assertion of regulatory power, not mere taxing power. See 42 U.S.C. §18091(2)(A) ("The requirement [***244] regulates activity . . ."); §18091(2)(C) ("The requirement . . . will add millions of new consumers to the health insurance market . . ."); §18091(2)(D) ("The requirement achieves near-universal coverage"); §18091(2)(H) ("The requirement is an essential part of this larger regulation of economic

activity, and the absence of the requirement would undercut Federal regulation of the health insurance market"); §18091(3) ("[T]he Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation").

The Government and those who support its view on the tax point rely on *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120, to justify reading "shall" to mean "may." The "shall" in that case was contained in an introductory provision--a recital that provided for no legal consequences--which said that "[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste." 42 U.S.C. §2021c(a)(1)(A). The Court did not hold that "shall" could be construed to mean "may," but rather that this preliminary provision could not impose upon the operative provisions of the Act a mandate that they did not ***245] contain: "We . . . decline petitioners' invitation to construe §2021c(a)(1)(A), alone and in isolation, as a command to the States independent of the remainder of the Act." *New York*, 505 U.S., at 170, 112 S. Ct. 2408, 120 L. Ed. 2d 120. Our opinion then proceeded to "consider each [of the three operative provisions] in turn." *Ibid.* Here the mandate--the "shall"--is contained not in an inoperative preliminary recital, but in the dispositive operative provision itself. *New York* provides no support for reading it to be permissive.

Quite separately, the fact that Congress (in its own words) "imposed . . . a penalty," 26 U.S.C. §5000A(b)(1), for failure to buy insurance is alone sufficient to render that failure unlawful. It is one of the canons of interpretation that a statute that penalizes an act makes it unlawful: "[W]here the statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the Legislature intended that a penalty should be inflicted for a lawful act." *Powhatan Steamboat Co. v. Appomattox R. Co.*, 65 U.S. 247, 24 How. 247, 252, 16 L. Ed. 682 (1861). Or in the words of Chancellor ***246] Kent: "If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful, though there be no prohibitory words in the statute." 1 J. Kent, *Commentaries on American Law* 436 (1826).

[*2653] We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the

legislation itself as a penalty. To be sure, we have sometimes treated as a tax a statutory exaction (imposed for something other than a violation of law) which bore an agnostic label that does not entail the significant constitutional consequences of a penalty--such as "license" (*License Tax* ***547] *Cases*, 72 U.S. 462, 5 Wall. 462, 18 L. Ed. 497 (1867)) or "surcharge" (*New York v. United States*, *supra.*). But we have never--never--treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a "penalty." Eighteen times in §5000A itself and elsewhere throughout the Act, Congress called the exaction in §5000A(b) a "penalty."

That §5000A imposes not a simple tax but a mandate to which a penalty is attached is demonstrated by the fact that some are ***247] exempt from the tax who are not exempt from the mandate--a distinction that would make no sense if the mandate were not a mandate. Section 5000A(d) exempts three classes of people from the definition of "applicable individual" subject to the minimum coverage requirement: Those with religious objections or who participate in a "health care sharing ministry," §5000A(d)(2); those who are "not lawfully present" in the United States, §5000A(d)(3); and those who are incarcerated, §5000A(d)(4). Section 5000A(e) then creates a separate set of exemptions, excusing from liability for the penalty certain individuals who are subject to the minimum coverage requirement: Those who cannot afford coverage, §5000A(e)(1); who earn too little income to require filing a tax return, §5000A(e)(2); who are members of an Indian tribe, §5000A(e)(3); who experience only short gaps in coverage, §5000A(e)(4); and who, in the judgment of the Secretary of Health and Human Services, "have suffered a hardship with respect to the capability to obtain coverage," §5000A(e)(5). If §5000A were a tax, these two classes of exemption would make no sense; there being no requirement, *all* the exemptions would attach to the penalty ***248] (renamed tax) alone.

In the face of all these indications of a regulatory requirement accompanied by a penalty, the Solicitor General assures us that "neither the Treasury Department nor the Department of Health and Human Services interprets Section 5000A as imposing a legal obligation," *Petitioners' Minimum Coverage Brief* 61, and that "[i]f [those subject to the Act] pay the tax penalty, they're in compliance with the law," *Tr. of Oral Arg.* 50 (Mar. 26, 2012). These self-serving litigating positions are entitled

to no weight. What counts is what the statute says, and that is entirely clear. It is worth noting, moreover, that these assurances contradict the Government's position in related litigation. Shortly before the Affordable Care Act was passed, the Commonwealth of Virginia enacted Va. Code Ann. §38.2-3430.1:1 (Lexis Supp. 2011), which states, "No resident of [the] Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services" In opposing Virginia's assertion of standing to challenge §5000A based on this statute, the Government said that "if the minimum coverage provision [***249] is unconstitutional, the [Virginia] statute is unnecessary, and if the minimum coverage provision is upheld, the state statute is void under the Supremacy Clause." Brief for Appellant in No. 11-1057 etc. (CA4), p. 29. But it would be void under the Supremacy Clause only if it was contradicted by a federal "require[ment] [*2654] to obtain or maintain a policy of individual insurance coverage."

[**548] Against the mountain of evidence that the minimum coverage requirement is what the statute calls it--a requirement--and that the penalty for its violation is what the statute calls it--a penalty--the Government brings forward the flimsiest of indications to the contrary. It notes that "[t]he minimum coverage provision amends the Internal Revenue Code to provide that a non-exempted individual . . . will owe a monetary penalty, in addition to the income tax itself," and that "[t]he [Internal Revenue Service (IRS)] will assess and collect the penalty in the same manner as assessable penalties under the Internal Revenue Code." Petitioners' Minimum Coverage Brief 53. The manner of collection could perhaps suggest a tax if IRS penalty-collection were unheard-of or rare. It is not. See, e.g., 26 U.S.C. §527(j) (2006 ed.) [***250] (IRS-collectible penalty for failure to make campaign finance disclosures); §5761(c) (IRS-collectible penalty for domestic sales of tobacco products labeled for export); §9707 (IRS-collectible penalty for failure to make required health-insurance premium payments on behalf of mining employees). In *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 116 S. Ct. 2106, 135 L. Ed. 2d 506, we held that an exaction not only *enforced* by the Commissioner of Internal Revenue but even *called* a "tax" was in fact a penalty. "[I]f the concept of penalty means anything," we said, "it means punishment for an unlawful act or omission." *Id.*, at 224, 116 S. Ct. 2106, 135 L. Ed. 2d

506. See also *Lipke v. Lederer*, 259 U.S. 557, 42 S. Ct. 549, 66 L. Ed. 1061, T.D. 3354 (1922) (same). Moreover, while the penalty is assessed and collected by the IRS, §5000A is administered both by that agency and by the Department of Health and Human Services (and also the Secretary of Veteran Affairs), see §5000A(e)(1)(D), (e)(5), (f)(1)(A)(v), (f)(1)(E) (2006 ed., Supp. IV), which is responsible for defining its substantive scope--a feature that would be quite extraordinary for taxes.

The Government points out that [***251] "[t]he amount of the penalty will be calculated as a percentage of household income for federal income tax purposes, subject to a floor and [a] ca[p]," and that individuals who earn so little money that they "are not required to file income tax returns for the taxable year are not subject to the penalty" (though they are, as we discussed earlier, subject to the mandate). Petitioners' Minimum Coverage Brief 12, 53. But varying a penalty according to ability to pay is an utterly familiar practice. See, e.g., 33 U.S.C. §1319(d) (2006 ed., Supp. IV) ("In determining the amount of a civil penalty the court shall consider . . . the economic impact of the penalty on the violator"); see also 6 U.S.C. §488e(c); 7 U.S.C. §§7734(b)(2), 8313(b)(2); 12 U.S.C. §§1701q-1(d)(3), 1723i(c)(3), 1735f-14(c)(3), 1735f-15(d)(3), 4585(c)(2); 15 U.S.C. §§45(m)(1)(C), 77h-1(g)(3), 78u-2(d), 80a-9(d)(4), 80b-3(i)(4), 1681s(a)(2)(B), 1717a(b)(3), 1825(b)(1), 2615(a) (2)(B), 5408(b)(2); 33 U.S.C. §2716a(a).

The last of the feeble arguments in favor of petitioners that we will address is the contention that what this statute repeatedly calls a penalty is in fact a tax because it contains no scienter [***252] requirement. The *presence* of such a requirement suggests a penalty--though one can imagine a tax imposed only on willful action; but the *absence* of such a requirement does not suggest a tax. Penalties for absolute-liability offenses are commonplace. [**549] And where a statute is silent as to scienter, we traditionally presume a *mens rea* requirement if the statute imposes a "severe penalty." *Staples v. United States*, 511 U.S. 600, 618, 114 S. Ct. 1793, 128 L. Ed. 2d 608 [*2655] (1994). Since we have an entire jurisprudence addressing when it is that a scienter requirement should be inferred from a penalty, it is quite illogical to suggest that a penalty is not a penalty for want of an express scienter requirement.

And the nail in the coffin is that the mandate and penalty are located in Title I of the Act, its operative core,

rather than where a tax would be found--in Title IX, containing the Act's "Revenue Provisions." In sum, "the terms of [the] act rende[r] it unavoidable," *Parsons v. Bedford*, 28 U.S. 433, 3 Pet. 433, 448, 7 L. Ed. 732 (1830), that Congress imposed a regulatory penalty, not a tax.

For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the [***253] statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, e.g., Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, § 7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 "defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue." *United States v. Munoz-Flores*, 495 U.S. 385, 395, 110 S. Ct. 1964, 109 L. Ed. 2d 384 (1990). We have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. See Affordable Health Care for America Act, H. R. 3962, 111th Cong., 1st Sess., § 501 (2009); America's Healthy Future Act of 2009, S. 1796, 111th Cong., 1st Sess., § 1301. Imposing a tax through judicial [***254] legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.

Finally, we must observe that rewriting §5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Art. I, § 9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. The Government's opening brief did not even address the question--perhaps because, until today, no federal court has accepted the implausible argument that §5000A is an exercise of the tax power. And once respondents raised the issue, the Government

devoted a mere 21 lines of its reply brief to the issue. Petitioners' Minimum Coverage Reply Brief 25. At oral argument, the most prolonged statement about the issue was just over 50 words. Tr. of Oral Arg. 79 (Mar. 27, 2012). One would [***255] expect this Court to demand more than fly-by-night briefing [**550] and argument before deciding a difficult constitutional question of first impression.

III

The Anti-Injunction Act

There is another point related to the Individual Mandate that we must discuss--a point that logically should have been discussed first: Whether jurisdiction over the challenges to the minimum-coverage provision is precluded by the Anti-Injunction Act, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be [*2656] maintained in any court by any person," 26 U.S.C. §7421(a) (2006 ed.).

We have left the question to this point because it seemed to us that the dispositive question whether the minimum-coverage provision is a tax is more appropriately addressed in the significant constitutional context of whether it is an exercise of Congress' taxing power. Having found that it is not, we have no difficulty in deciding that these suits do not have "the purpose of restraining the assessment or collection of any tax."⁶

6 The *amicus* appointed to defend the proposition that the Anti-Injunction Act deprives us of jurisdiction stresses that the penalty for failing to comply with the [***256] mandate "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68," 26 U.S.C. §5000A(g)(1) (2006 ed., Supp. IV), and that such penalties "shall be assessed and collected in the same manner as taxes," §6671(a) (2006 ed.). But that point seems to us to confirm the *inapplicability* of the Anti-Injunction Act. That the penalty is to be "assessed and collected *in the same manner as taxes*" refutes the proposition that it *is* a tax for all statutory purposes, including with respect to the Anti-Injunction Act. Moreover, elsewhere in the Internal Revenue Code, Congress has provided *both* that a particular payment shall be "assessed and collected" in the same manner as a tax *and* that no suit shall be maintained to restrain the

assessment or collection of the payment. See, e.g., §§7421(b)(1), §6901(a); §6305(a), (b). The latter directive would be superfluous if the former invoked the Anti-Injunction Act. Amicus also suggests that the penalty should be treated as a tax because it is an assessable penalty, and the Code's assessment provision authorizes the Secretary of the Treasury to assess "all taxes (including interest, additional amounts, additions [***257] to the tax, and assessable penalties) imposed by this title." §6201(a) (2006 ed., Supp. IV). But the fact that such items are included as "taxes" for purposes of assessment does not establish that they are included as "taxes" for purposes of other sections of the Code, such as the Anti-Injunction Act, that do not contain similar "including" language.

The Government and those who support its position on this point make the remarkable argument that §5000A is not a tax for purposes of the Anti-Injunction Act, see Brief for Petitioners in No. 11-398 (Anti-Injunction Act), but is a tax for constitutional purposes, see Petitioners' Minimum Coverage Brief 52-62. The rhetorical device that tries to cloak this argument in superficial plausibility is the same device employed in arguing that for constitutional purposes the minimum-coverage provision is a tax: confusing the question of what Congress *did* with the question of what Congress *could have done*. What qualifies as a tax for purposes of the Anti-Injunction Act, unlike what qualifies as a tax for purposes of the Constitution, is entirely within the control of Congress. Compare *Bailey v. George*, 259 U.S. 16, 20, 42 S. Ct. 419, 66 L. Ed. 816, 1922-2 C.B. 342, T.D. 3347 (1922) [***258] (Anti-Injunction Act barred suit to restrain collections under the Child Labor Tax Law), with *Child Labor Tax Case*, 259 U.S., at 36-41, 42 S. Ct. 449, 66 L. Ed. 817 (holding the same law unconstitutional as exceeding Congress' taxing power). Congress could have defined "tax" for purposes of that statute in such fashion as to exclude some exactions that in fact are "taxes." It [**551] might have prescribed, for example, that a particular exercise of the taxing power "shall not be regarded as a tax for purposes of the Anti-Injunction Act." But there is no such prescription here. What the Government would have us believe in these cases is that the very same textual indications that show this is *not* a tax under the Anti-Injunction Act show that it *is* a tax under the Constitution. That carries verbal wizardry too far, deep into the forbidden land of the sophists.

IV

The Medicaid Expansion

We now consider respondents' second challenge to the constitutionality of the [*2657] ACA, namely, that the Act's dramatic expansion of the Medicaid program exceeds Congress' power to attach conditions to federal grants to the States.

The ACA does not legally compel the States to participate in the expanded Medicaid program, [***259] but the Act authorizes a severe sanction for any State that refuses to go along: termination of all the State's Medicaid funding. For the average State, the annual federal Medicaid subsidy is equal to more than one-fifth of the State's expenditures.⁷ A State forced out of the program would not only lose this huge sum but would almost certainly find it necessary to increase its own health-care expenditures substantially, requiring either a drastic reduction in funding for other programs or a large increase in state taxes. And these new taxes would come on top of the federal taxes already paid by the State's citizens to fund the Medicaid program in other States.

7 "State expenditures" is used here to mean annual expenditures from the States' own funding sources, and it excludes federal grants unless otherwise noted.

The States challenging the constitutionality of the ACA's Medicaid Expansion contend that, for these practical reasons, the Act really does not give them any choice at all. As proof of this, they point to the goal and the structure of the ACA. The goal of the Act is to provide near-universal medical coverage, 42 U.S.C. §18091(2)(D), and without 100% State participation in the Medicaid program, attainment of this goal would be thwarted. Even if States could elect to remain in the old Medicaid program, while declining to participate [***260] in the Expansion, there would be a gaping hole in coverage. And if a substantial number of States were entirely expelled from the program, the number of persons without coverage would be even higher.

In light of the ACA's goal of near-universal coverage, petitioners argue, if Congress had thought that anything less than 100% state participation was a realistic possibility, Congress would have provided a backup scheme. But no such scheme is to be found anywhere in the more than 900 pages of the Act. This shows, they

maintain, that Congress was certain that the ACA's Medicaid offer was one that no State could refuse.

In response to this argument, the Government contends that any congressional assumption about uniform state participation was based on the simple fact that the offer of federal funds associated with the expanded coverage is such a generous gift that no State would want to turn it down.

To evaluate these arguments, we consider the extent of the Federal Government's power to spend money and to attach conditions to money granted [***261] to the States.

[**552] A

No one has ever doubted that the Constitution authorizes the Federal Government to spend money, but for many years the scope of this power was unsettled. The Constitution grants Congress the power to collect taxes "to . . . provide for the . . . general Welfare of the United States," Art. I, § 8, cl. 1, and from "the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase" "the general welfare." *Butler*, 297 U.S., at 65, 56 S. Ct. 312, 80 L. Ed. 477. Madison, it has been said, thought that the phrase "amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section," while Hamilton "maintained the clause confers a power separate and distinct from those later enumerated [and] [*2658] is not restricted in meaning by the grant of them." *Ibid*.

The Court resolved this dispute in *Butler*. Writing for the Court, Justice Roberts opined that the Madisonian view would make Article I's grant of the spending power a "mere tautology." *Ibid*. To avoid that, he adopted Hamilton's approach and found that "the power of Congress to authorize expenditure of public moneys for public purposes is [***262] not limited by the direct grants of legislative power found in the Constitution." *Id.*, at 66, 56 S. Ct. 312, 80 L. Ed. 477. Instead, he wrote, the spending power's "confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress." *Ibid.*; see also *Steward Machine Co. v. Davis*, 301 U.S.548, 586-587, 57 S. Ct. 883, 81 L. Ed. 1279, 1937-1 C.B. 444 (1937); *Helvering v. Davis*, 301 U.S. 619, 640, 57 S. Ct. 904, 81 L. Ed. 1307, 1937-1 C.B. 360 (1937).

The power to make any expenditure that furthers "the general welfare" is obviously very broad, and shortly after *Butler* was decided the Court gave Congress wide leeway to decide whether an expenditure qualifies. See *Helvering*, 301 U.S., at 640-641, 57 S. Ct. 904, 81 L. Ed. 1307. "The discretion belongs to Congress," the Court wrote, "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.*, at 640, 57 S. Ct. 904, 81 L. Ed. 1307. Since that time, the Court has never held that a federal expenditure was not for "the general welfare."

B

One way in which Congress may spend to promote the general welfare is by making grants to the States. Monetary grants, so-called [***263] grants-in-aid, became more frequent during the 1930's, G. Stephens & N. Wikstrom, *American Intergovernmental Relations--A Fragmented Federal Polity* 83 (2007), and by 1950 they had reached \$20 billion⁸ or 11.6% of state and local government expenditures from their own sources.⁹ By 1970 this number had grown to \$123.7 billion¹⁰ or 29.1% of state and local government expenditures from their own [**553] sources.¹¹ As of 2010, federal outlays to state and local governments came to over \$608 billion or 37.5% of state and local government expenditures.¹²

8 This number is expressed in billions of Fiscal Year 2005 dollars.

9 See Office of Management and Budget, Historical Tables, Budget of the U.S. Government, Fiscal Year 2013, Table 12.1--Summary Comparison of Total Outlays for Grants to State and Local Governments: 1940-2017 (hereinafter Table 12.1), <http://www.whitehouse.gov/omb/budget/HistoricalTables>; *id.*, Table 15.2--Total Government Expenditures: 1948-2011 (hereinafter Table 15.2).

10 This number is expressed in billions of Fiscal Year 2005 dollars.

11 See Table 12.1; Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2001, p. 262 (Table 419, Federal Grants-in-Aid Summary: [***264] 1970 to 2001).

12 See Statistical Abstract of the United States: 2012, p. 268 (Table 431, Federal Grants-in-Aid to State and Local Governments: 1990 to 2011).

When Congress makes grants to the States, it

customarily attaches conditions, and this Court has long held that the Constitution generally permits Congress to do this. See *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981); *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980) (opinion of Burger, C. J.); *Steward Machine, supra*, at 593, 57 S. Ct. 883, 81 L. Ed. 1279.

[*2659] C

This practice of attaching conditions to federal funds greatly increases federal power. "[O]bjectives not thought to be within Article I's enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Dole, supra*, at 207, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (internal quotation marks and citation omitted); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) [***265] (by attaching conditions to federal funds, Congress may induce the States to "tak[e] certain actions that Congress could not require them to take").

This formidable power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution. If Congress' "Spending Clause power to pursue objectives outside of Article I's enumerated legislative fields," *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 654, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) (Kennedy, J., dissenting) (internal quotation marks omitted), is "limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed,' *Dole, supra*, at 217, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (O'Connor, J., dissenting) (quoting *Butler*, 297 U.S., at 78, 56 S. Ct. 312, 80 L. Ed. 477). "[T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between [***266] national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis, supra*, at 654-655, 119 S. Ct. 1661, 143 L. Ed. 2d 839

(Kennedy, J., dissenting).

Recognizing this potential for abuse, our cases have long held that the power to attach conditions to grants to the States has limits. See, e.g., *Dole, supra*, at 207-208, 107 S. Ct. 2793, 97 L. Ed. 2d 171; *id.*, at 207, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (spending power is "subject to several general restrictions articulated in our cases"). For one thing, any such conditions [**554] must be unambiguous so that a State at least knows what it is getting into. See *Pennhurst, supra*, at 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694. Conditions must also be related "to the federal interest in particular national projects or programs," *Massachusetts v. United States*, 435 U.S. 444, 461, 98 S. Ct. 1153, 55 L. Ed. 2d 403 (1978), and the conditional grant of federal funds may not "induce the States to engage in activities that would themselves be unconstitutional," *Dole, supra*, at 210, 107 S. Ct. 2793, 97 L. Ed. 2d 171; [***267] see *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256, 269-270, 105 S. Ct. 695, 83 L. Ed. 2d 635 (1985). Finally, while Congress may seek to induce States to accept conditional grants, Congress may not cross the "point at which pressure turns into compulsion, and ceases to be inducement." *Steward Machine*, 301 U.S., at 590, 57 S. Ct. 883, 81 L. Ed. 1279. Accord, *College Savings Bank, supra*, at 687, 119 S. Ct. 2219, 144 L. Ed. 2d 605; *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 285, 111 S. Ct. 2298, 115 L. Ed. 2d 236 (1991) (White, J., dissenting); *Dole, supra*, at 211, 107 S. Ct. 2793, 97 L. Ed. 2d 171.

When federal legislation gives the States a real choice whether to accept or decline a federal aid package, the federal-state relationship is in the nature of a contractual relationship. See *Barnes v. Gorman*, 536 U.S. 181, 186, 122 S. Ct. 2097, 153 L. Ed. 2d [*2660] 230 (2002); *Pennhurst*, 451 U.S., at 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694. And just as a contract is voidable if coerced, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and [***268] knowingly accepts the terms of the 'contract.'" *Ibid.* (emphasis added). If a federal spending program coerces participation the States have not "exercise[d] their choice"--let alone made an "informed choice." *Id.*, at 17, 25, 101 S. Ct. 1531, 67 L. Ed. 2d 694.

Coercing States to accept conditions risks the

destruction of the "unique role of the States in our system." *Davis, supra*, at 685, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (Kennedy, J., dissenting). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S., at 162, 112 S. Ct. 2408, 120 L. Ed. 2d 120. Congress may not "simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.*, at 161, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (internal quotation marks and brackets omitted). Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory.

Where all Congress has done is to "encourag[e] [***269] state regulation rather than compe[l] it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. [But] where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *New York, supra*, at 168, 112 S. Ct. 2408, 120 L. Ed. 2d 120.

Amici who support the Government argue that forcing state employees to implement a federal program is more [**555] respectful of federalism than using federal workers to implement that program. See, e.g., Brief for Service Employees International Union et al. as *Amici Curiae* in No. 11-398, pp. 25-26. They note that Congress, instead of expanding Medicaid, could have established an entirely federal program to provide coverage for the same group of people. By choosing to structure Medicaid as a cooperative federal-state program, they contend, Congress allows for more state control. *Ibid.*

This argument reflects a view of federalism that our cases have rejected--and with good reason. When Congress compels the States to do its bidding, it blurs the lines of political accountability. If the Federal Government makes a controversial decision while [***270] acting on its own, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U.S., at 168, 112 S. Ct. 2408, 120 L. Ed. 2d 120. But when the Federal Government compels the

States to take unpopular actions, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.*, at 169, 112 S. Ct. 2408, 120 L. Ed. 2d 120; see *Printz, supra*, at 930, 117 S. Ct. 2365, 138 L. Ed. 2d 914. For this reason, federal officeholders may view this "departur[e] from the federal structure to be in their personal interests . . . as a means of shifting responsibility for the eventual decision." *New York*, 505 U.S., at 182-183, 112 S. Ct. 2408, 120 L. Ed. 2d 120. And even state officials may favor such a "departure from the constitutional plan," since uncertainty concerning responsibility may also permit them to escape accountability. *Id.*, at 182, 112 S. Ct. 2408, 120 L. Ed. 2d 120. If a program is popular, [***271] state officials may claim credit; if it is unpopular, [*2661] they may protest that they were merely responding to a federal directive.

Once it is recognized that spending-power legislation cannot coerce state participation, two questions remain: (1) What is the meaning of coercion in this context? (2) Is the ACA's expanded Medicaid coverage coercive? We now turn to those questions.

D

1

The answer to the first of these questions--the meaning of coercion in the present context--is straightforward. As we have explained, the legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States' choice to accept or decline the offered package. Therefore, if States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power. And as our decision in *South Dakota v. Dole* makes clear, theoretical voluntariness is not enough.

In *South Dakota v. Dole*, we considered whether the spending power permitted Congress to condition 5% of the State's federal highway funds on the State's adoption of a minimum drinking age of 21 years. South Dakota argued that the program was impermissibly coercive, [***272] but we disagreed, reasoning that "Congress ha[d] directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively [**556] small percentage of certain federal highway funds." 483 U.S., at 211, 107 S. Ct. 2793, 97 L. Ed. 2d

171. Because "all South Dakota would lose if she adhere[d] to her chosen course as to a suitable minimum drinking age [was] 5% of the funds otherwise obtainable under specified highway grant programs," we found that "Congress ha[d] offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose." *Ibid.* Thus, the decision whether to comply with the federal condition "remain[ed] the prerogative of the States *not merely in theory but in fact*," and so the program at issue did not exceed Congress' power. *Id.*, at 211-212, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (emphasis added).

The question whether a law enacted under the spending power is coercive in fact will sometimes be difficult, but where Congress has plainly "crossed the line distinguishing encouragement from coercion," *New York, supra*, at 175, 112 S. Ct. 2408, 120 L. Ed. 2d 120, a federal program that coopts the States' political [***273] processes must be declared unconstitutional. "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene." *Lopez*, 514 U.S., at 578, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (Kennedy, J., concurring).

2

The Federal Government's argument in this case at best pays lip service to the anticoercion principle. The Federal Government suggests that it is sufficient if States are "free, *as a matter of law*, to turn down" federal funds. Brief for Respondents in No. 11-400, p. 17 (emphasis added); see also *id.*, at 25. According to the Federal Government, neither the amount of the offered federal funds nor the amount of the federal taxes extracted from the taxpayers of a State to pay for the program in question is relevant in determining whether there is impermissible coercion. *Id.*, at 41-46.

This argument ignores reality. When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative. Even if a State believes that the federal program [***274] is ineffective and [*2662] inefficient, withdrawal would likely force the State to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States.¹³

13 Justice Ginsburg argues that "[a] State . . . has no claim on the money its residents pay in federal taxes." *Ante*, at ___, n. 26, 183 L. Ed. 2d, at 534. This is true as a formal matter. "When the United States Government taxes United States citizens, it taxes them 'in their individual capacities' as 'the people of America'--not as residents of a particular State." *Ante*, at ___, n. 26, 183 L. Ed. 2d, at 533 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 839, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995) (Kennedy, J., concurring)). But unless Justice Ginsburg thinks that there is no limit to the amount of money that can be squeezed out of taxpayers, heavy federal taxation diminishes the practical ability of States to collect their own taxes.

Acceptance of the Federal Government's interpretation of the anticoercion rule would permit Congress to dictate policy in areas traditionally governed primarily at the state or local level. Suppose, for example, that Congress enacted [***275] legislation offering each State a grant equal to the State's [**557] entire annual expenditures for primary and secondary education. Suppose also that this funding came with conditions governing such things as school curriculum, the hiring and tenure of teachers, the drawing of school districts, the length and hours of the school day, the school calendar, a dress code for students, and rules for student discipline. *As a matter of law*, a State could turn down that offer, but if it did so, its residents would not only be required to pay the federal taxes needed to support this expensive new program, but they would also be forced to pay an equivalent amount in state taxes. And if the State gave in to the federal law, the State and its subdivisions would surrender their traditional authority in the field of education. Asked at oral argument whether such a law would be allowed under the spending power, the Solicitor General responded that it would. Tr. of Oral Arg. 44-45 (Mar. 28, 2012).

E

Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive [***276] nature of an offer is unmistakably clear. In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that

every State would have no real choice but to go along with the Medicaid Expansion. If the anticoercion rule does not apply in this case, then there is no such rule.

1

The dimensions of the Medicaid program lend strong support to the petitioner States' argument that refusing to accede to the conditions set out in the ACA is not a realistic option. Before the ACA's enactment, Medicaid funded medical care for pregnant women, families with dependents, children, the blind, the elderly, and the disabled. See 42 U.S.C. §1396a(a)(10) (2006 ed., Supp. IV). The ACA greatly expands the program's reach, making new funds available to States that agree to extend coverage to all individuals who are under age 65 and have incomes below 133% of the federal poverty line. See §1396a(a)(10)(A)(i)(VIII). Any State that refuses to expand its Medicaid programs in this way is threatened with a severe sanction: the loss of all its federal Medicaid funds. See §1396c (2006 ed.).

Medicaid has long been the largest federal program of grants to the States. [***277] See Brief for Respondents in No. 11-400, at 37. In 2010, the Federal Government directed [*2663] more than \$552 billion in federal funds to the States. See Nat. Assn. of State Budget Officers, 2010 State Expenditure Report: Examining Fiscal 2009-2011 State Spending, p. 7 (2011) (NASBO Report). Of this, more than \$233 billion went to pre-expansion Medicaid. See *id.*, at 47.¹⁴ *This amount equals nearly 22% of all state expenditures combined.* See *id.*, at 7.

14 The Federal Government has a higher number for federal spending on Medicaid. According to the Office of Management and Budget, federal grants to the States for Medicaid amounted to nearly \$273 billion in Fiscal Year 2010. See Office of Management and Budget, Historical Tables, Budget of the U.S. Government, Fiscal Year 2013, Table 12.3--Total Outlays for Grants to State and Local Governments by Function, Agency, and Program: 1940-2013, <http://www.whitehouse.gov/omb/budget/Historical>. In that Fiscal Year, total federal outlays for grants to state and local governments amounted to over \$608 billion, see Table 12.1, and state and local government expenditures from their own sources amounted to \$1.6 trillion, see Table 15.2. Using these numbers, [***278]

44.8% of all federal outlays to both state and local governments was allocated to Medicaid, amounting to 16.8% of all state and local expenditures from their own sources.

[**558] The States devote a larger percentage of their budgets to Medicaid than to any other item. *Id.*, at 5. Federal funds account for anywhere from 50% to 83% of each State's total Medicaid expenditures, see §1396d(b) (2006 ed., Supp. IV); most States receive more than \$1 billion in federal Medicaid funding; and a quarter receive more than \$5 billion, NASBO Report 47. These federal dollars total nearly two thirds--64.6%--of all Medicaid expenditures nationwide.¹⁵ *Id.*, at 46.

15 The Federal Government reports a higher percentage. According to Medicaid.gov, in Fiscal Year 2010, the Federal Government made Medicaid payments in the amount of nearly \$260 billion, representing 67.79% of total Medicaid payments of \$383 billion. See www.medicaid.gov/Medicaid-CHIP-Program-Information/By-State/By-State.html.

The Court of Appeals concluded that the States failed to establish coercion in this case in part because the "states have the power to tax and raise revenue, and therefore can create and fund programs of their own if they do not [***279] like Congress's terms." 648 F.3d 1235, 1268 (CA11 2011); see Brief for Sen. Harry Reid et al. as *Amici Curiae* in No. 11-400, p. 21 ("States may always choose to decrease expenditures on other programs or to raise revenues"). But the sheer size of this federal spending program in relation to state expenditures means that a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue. Arizona, for example, commits 12% of its state expenditures to Medicaid, and relies on the Federal Government to provide the rest: \$5.6 billion, equaling roughly one-third of Arizona's annual state expenditures of \$17 billion. See NASBO Report 7, 47. Therefore, if Arizona lost federal Medicaid funding, the State would have to commit an additional 33% of all its state expenditures to fund an equivalent state program along the lines of pre-expansion Medicaid. This means that the State would have to allocate 45% of its annual expenditures for that one purpose. See *ibid.*

The States are far less reliant on federal funding for any other program. After Medicaid, the next biggest

federal funding item is aid to support elementary and secondary [***280] education, which amounts to 12.8% of total federal outlays to the States, see *id.*, at 7, 16, and equals only 6.6% of all state expenditures combined. See *ibid.* In Arizona, for example, although federal Medicaid expenditures are equal to 33% of all state expenditures, federal education funds amount to only 9.8% of all state [*2664] expenditures. See *ibid.* And even in States with less than average federal Medicaid funding, that funding is at least twice the size of federal education funding as a percentage of state expenditures. *Id.*, at 7, 16, 47.

A State forced out of the Medicaid program would face burdens in addition to the loss of federal Medicaid funding. For example, a nonparticipating State might be found to be ineligible for other major federal funding sources, such as Temporary Assistance for Needy Families (TANF), which is premised on the expectation that States will participate in Medicaid. See 42 U.S.C. §602(a)(3) (2006 ed.) (requiring that certain beneficiaries of TANF funds be "eligible for medical assistance under the State[']s Medicaid] plan"). And withdrawal or expulsion [**559] from the Medicaid program would not relieve a State's hospitals of their obligation under federal law to [***281] provide care for patients who are unable to pay for medical services. The Emergency Medical Treatment and Active Labor Act, §1395dd, requires hospitals that receive any federal funding to provide stabilization care for indigent patients but does not offer federal funding to assist facilities in carrying out its mandate. Many of these patients are now covered by Medicaid. If providers could not look to the Medicaid program to pay for this care, they would find it exceedingly difficult to comply with federal law unless they were given substantial state support. See, e.g., Brief for Economists as *Amici Curiae* in No 11-400, p. 11.

For these reasons, the offer that the ACA makes to the States--go along with a dramatic expansion of Medicaid or potentially lose all federal Medicaid funding--is quite unlike anything that we have seen in a prior spending-power case. In *South Dakota v. Dole*, the total amount that the States would have lost if every single State had refused to comply with the 21-year-old drinking age was approximately \$614 million--or about 0.19% of all state expenditures combined. See Nat. Assn. of State Budget Officers, 1989 (Fiscal Years 1987-1989 Data) State Expenditure Report [***282] 10, (1989), <http://www.nasbo.org/publications-data/state-expenditure-report/archives>. South Dakota stood to

lose, at most, funding that amounted to less than 1% of its annual state expenditures. See *ibid.* Under the ACA, by contrast, the Federal Government has threatened to withhold 42.3% of all federal outlays to the states, or approximately \$233 billion. See NASBO Report 7, 10, 47. South Dakota stands to lose federal funding equaling 28.9% of its annual state expenditures. See *id.*, at 7, 47. Withholding \$614.7 million, equaling only 0.19% of all state expenditures combined, is aptly characterized as "relatively mild encouragement," but threatening to withhold \$233 billion, equaling 21.86% of all state expenditures combined, is a different matter.

2

What the statistics suggest is confirmed by the goal and structure of the ACA. In crafting the ACA, Congress clearly expressed its informed view that no State could possibly refuse the offer that the ACA extends.

The stated goal of the ACA is near-universal health care coverage. To achieve this goal, the ACA mandates that every person obtain a minimum level of coverage. It attempts to reach this goal in several different ways. The guaranteed [***283] issue and community-rating provisions are designed to make qualifying insurance available and affordable for persons with medical conditions that may require expensive care. Other ACA provisions seek to make such policies more affordable for people of modest means. Finally, for low-income individuals who are simply not able [*2665] to obtain insurance, Congress expanded Medicaid, transforming it from a program covering only members of a limited list of vulnerable groups into a program that provides at least the requisite minimum level of coverage for the poor. See 42 U.S.C. §§1396a(a) (10)(A)(i)(VIII) (2006 ed., Supp. IV), 1396u-7(a), (b)(5), 18022(a). This design was intended to provide at least a specified minimum level of coverage for all Americans, but the achievement of that goal obviously depends on participation by every single State. If any State--not to [**560] mention all of the 26 States that brought this suit--chose to decline the federal offer, there would be a gaping hole in the ACA's coverage.

It is true that some persons who are eligible for Medicaid coverage under the ACA may be able to secure private insurance, either through their employers or by obtaining subsidized insurance through [***284] an exchange. See 26 U.S.C. §36B(a) (2006 ed., Supp. IV); Brief for Respondents in No. 11-400, at 12. But the new

federal subsidies are not available to those whose income is below the federal poverty level, and the ACA provides no means, other than Medicaid, for these individuals to obtain coverage and comply with the Mandate. The Government counters that these people will not have to pay the penalty, see, *e.g.*, Tr. of Oral Arg. 68 (Mar. 28, 2012); Brief for Respondents in No. 11-400, at 49-50, but that argument misses the point: Without Medicaid, these individuals will not have coverage and the ACA's goal of near-universal coverage will be severely frustrated.

If Congress had thought that States might actually refuse to go along with the expansion of Medicaid, Congress would surely have devised a backup scheme so that the most vulnerable groups in our society, those previously eligible for Medicaid, would not be left out in the cold. But nowhere in the over 900-page Act is such a scheme to be found. By contrast, because Congress thought that some States might decline federal funding for the operation of a "health benefit exchange," Congress provided a backup scheme; if a State declines [***285] to participate in the operation of an exchange, the Federal Government will step in and operate an exchange in that State. See 42 U.S.C. §18041(c)(1). Likewise, knowing that States would not necessarily provide affordable health insurance for aliens lawfully present in the United States--because Medicaid does not require States to provide such coverage--Congress extended the availability of the new federal insurance subsidies to all aliens. See 26 U.S.C. §36B(c) (1)(B)(ii) (excepting from the income limit individuals who are "not eligible for the medicaid program . . . by reason of [their] alien status"). Congress did not make these subsidies available for citizens with incomes below the poverty level because Congress obviously assumed that they would be covered by Medicaid. If Congress had contemplated that some of these citizens would be left without Medicaid coverage as a result of a State's withdrawal or expulsion from the program, Congress surely would have made them eligible for the tax subsidies provided for low-income aliens.

These features of the ACA convey an unmistakable message: Congress never dreamed that any State would refuse to go along with the expansion of Medicaid. [***286] Congress well understood that refusal was not a practical option.

The Federal Government does not dispute the inference that Congress anticipated 100% state

participation, but it argues that this assumption was based on the fact that ACA's offer was an "exceedingly generous" gift. Brief for Respondents in No. 11-400, at 50. As the Federal Government sees things, Congress is like the [*2666] generous benefactor who offers \$1 million with few strings attached to 50 randomly selected individuals. Just as this benefactor might assume that all of these 50 individuals would snap up his offer, so Congress assumed that every State would gratefully accept [**561] the federal funds (and conditions) to go with the expansion of Medicaid.

This characterization of the ACA's offer raises obvious questions. If that offer is "exceedingly generous," as the Federal Government maintains, why have more than half the States brought this lawsuit, contending that the offer is coercive? And why did Congress find it necessary to threaten that any State refusing to accept this "exceedingly generous" gift would risk losing all Medicaid funds? Congress could have made just the *new* funding provided under the ACA contingent on acceptance [***287] of the terms of the Medicaid Expansion. Congress took such an approach in some earlier amendments to Medicaid, separating new coverage requirements and funding from the rest of the program so that only new funding was conditioned on new eligibility extensions. See, *e.g.*, Social Security Amendments of 1972, 86 Stat. 1465.

Congress' decision to do otherwise here reflects its understanding that the ACA offer is not an "exceedingly generous" gift that no State in its right mind would decline. Instead, acceptance of the offer will impose very substantial costs on participating States. It is true that the Federal Government will bear most of the initial costs associated with the Medicaid Expansion, first paying 100% of the costs of covering newly eligible individuals between 2014 and 2016. 42 U.S.C. §1396d(y). But that is just part of the picture. Participating States will be forced to shoulder substantial costs as well, because after 2019 the Federal Government will cover only 90% of the costs associated with the Expansion, see *ibid.*, with state spending projected to increase by at least \$20 billion by 2020 as a consequence. Statement of Douglas W. Elmendorf, CBO's Analysis of the Major [***288] Health Care Legislation Enacted in March 2010, p. 24 (Mar. 30, 2011); see also R. Bovbjerg, B. Ormond, & V. Chen, Kaiser Commission on Medicaid and the Uninsured, State Budgets under Federal Health Reform: The Extent and Causes of Variations in Estimated

Impacts 4, n. 27 (Feb. 2011) (estimating new state spending at \$43.2 billion through 2019). After 2019, state spending is expected to increase at a faster rate; the CBO estimates new state spending at \$60 billion through 2021. Statement of Douglas W. Elmendorf, *supra*, at 24. And these costs may increase in the future because of the very real possibility that the Federal Government will change funding terms and reduce the percentage of funds it will cover. This would leave the States to bear an increasingly large percentage of the bill. See Tr. of Oral Arg. 74-76 (Mar. 28, 2012). Finally, after 2015, the States will have to pick up the tab for 50% of all administrative costs associated with implementing the new program, see §§1396b(a)(2)-(5), (7) (2006 ed., Supp. IV), costs that could approach \$12 billion between fiscal years 2014 and 2020, see Dept. of Health and Human Services, Center for Medicaid and Medicare Services, 2010 Actuarial [***289] Report on the Financial Outlook for Medicaid 30.

In sum, it is perfectly clear from the goal and structure of the ACA that the offer of the Medicaid Expansion was one that Congress understood no State could refuse. The Medicaid Expansion therefore exceeds Congress' spending power and cannot be implemented.

F

Seven Members of the Court agree that the Medicaid Expansion, as enacted [**562] by [*2667] Congress, is unconstitutional. See Part IV-A to IV-E, *supra*; Part IV-A, *ante*, at ___ - ___, 183 L. Ed. 2d, at 490-497 (opinion of Roberts, C. J., joined by Breyer and Kagan, JJ.). Because the Medicaid Expansion is unconstitutional, the question of remedy arises. The most natural remedy would be to invalidate the Medicaid Expansion. However, the Government proposes--in two cursory sentences at the very end of its brief--preserving the Expansion. Under its proposal, States would receive the additional Medicaid funds if they expand eligibility, but States would keep their pre-existing Medicaid funds if they do not expand eligibility. We cannot accept the Government's suggestion.

The reality that States were given no real choice but to expand Medicaid was not an accident. Congress assumed States would have no choice, and the ACA depends on States' [***290] having no choice, because its Mandate requires low-income individuals to obtain insurance many of them can afford only through the Medicaid Expansion. Furthermore, a State's withdrawal

might subject everyone in the State to much higher insurance premiums. That is because the Medicaid Expansion will no longer offset the cost to the insurance industry imposed by the ACA's insurance regulations and taxes, a point that is explained in more detail in the severability section below. To make the Medicaid Expansion optional despite the ACA's structure and design " 'would be to make a new law, not to enforce an old one. This is no part of our duty.' *Trade-Mark Cases*, 100 U.S. 82, 99, 25 L. Ed. 550, 1879 Dec. Comm'r Pat. 619 (1879).

Worse, the Government's proposed remedy introduces a new dynamic: States must choose between expanding Medicaid or paying huge tax sums to the federal fisc for the sole benefit of expanding Medicaid in other States. If this divisive dynamic between and among States can be introduced at all, it should be by conscious congressional choice, not by Court-invented interpretation. We do not doubt that States are capable of making decisions when put in a tight spot. We [***291] do doubt the authority of this Court to put them there.

The Government cites a severability clause codified with Medicaid in Chapter 7 of the United States Code stating that if "any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." 42 U.S.C. §1303 (2006 ed.). But that clause tells us only that other provisions in Chapter 7 should not be invalidated if §1396c, the authorization for the cut-off of all Medicaid funds, is unconstitutional. It does not tell us that §1396c can be judicially revised, to say what it does not say. Such a judicial power would not be called the doctrine of severability but perhaps the doctrine of amendatory invalidation--similar to the amendatory veto that permits the Governors of some States to reduce the amounts appropriated in legislation. The proof that such a power does not exist is the fact that it would not preserve other congressional dispositions, but would leave it up to the Court what the "validated" legislation will contain. The Court today opts for permitting the [***292] cut-off of only incremental Medicaid funding, but it might just as well have permitted, say, the cut-off of funds that represent no more than *x* percent of the State's budget. The [**563] Court severs nothing, but simply revises §1396c to read as the Court would desire.

We should not accept the Government's invitation to attempt to solve a constitutional problem by rewriting the Medicaid Expansion so as to allow States that reject it to retain their pre-existing Medicaid funds. Worse, the Government's remedy, [*2668] now adopted by the Court, takes the ACA and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen; but under the Constitution, that power and authority do not rest with this Court.

V

Severability

The Affordable Care Act seeks to achieve "near-universal" health insurance coverage. §18091(2)(D) (2006 ed., Supp. IV). The two pillars of the Act are the Individual Mandate and the expansion of coverage under Medicaid. In our view, both these central provisions of the Act--the Individual Mandate and Medicaid Expansion--are invalid. It follows, as some of the parties urge, that all other provisions of the Act must fall as well. The following section [***293] explains the severability principles that require this conclusion. This analysis also shows how closely interrelated the Act is, and this is all the more reason why it is judicial usurpation to impose an entirely new mechanism for withdrawal of Medicaid funding, see Part IV-F, *supra*, which is one of many examples of how rewriting the Act alters its dynamics.

A

When an unconstitutional provision is but a part of a more comprehensive statute, the question arises as to the validity of the remaining provisions. The Court's authority to declare a statute partially unconstitutional has been well established since *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), when the Court severed an unconstitutional provision from the Judiciary Act of 1789. And while the Court has sometimes applied "at least a modest presumption in favor of . . . severability," C. Nelson, *Statutory Interpretation* 144 (2010), it has not always done so, see, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 190-195, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).

An automatic or too cursory severance of statutory provisions risks "rewrit[ing] a statute and giv[ing] it an effect altogether [***294] different from that sought by the measure viewed as a whole." *Railroad Retirement Bd.*

v. Alton R. Co., 295 U.S. 330, 362, 55 S. Ct. 758, 79 L. Ed. 1468 (1935). The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court's decree, its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact. That can be a more extreme exercise of the judicial power than striking the whole statute and allowing Congress to address the conditions that pertained when the statute was considered at the outset.

The Court has applied a two-part guide as the framework for severability analysis. The test has been deemed "well established." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987). First, if the Court holds a statutory provision unconstitutional, it then determines whether the now truncated statute will operate in the [**564] manner Congress intended. If not, the remaining provisions must be invalidated. See *id.*, at 685, 107 S. Ct. 1476, 94 L. Ed. 2d 661. In *Alaska Airlines*, the Court clarified that this first inquiry requires more than asking whether "the [***295] balance of the legislation is incapable of functioning independently." *Id.*, at 684, 107 S. Ct. 1476, 94 L. Ed. 2d 661. Even if the remaining provisions will operate in some coherent way, that alone does not save the statute. The question is whether the provisions will work as Congress intended. The "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." *Id.*, at 685, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (emphasis [*2669] in original). See also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010) (the Act "remains fully operative as a law with these tenure restrictions excised") (internal quotation marks omitted); *United States v. Booker*, 543 U.S. 220, 227, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) ("[T]wo provisions . . . must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent"); *Mille Lacs, supra*, at 194, 119 S. Ct. 1187, 143 L. Ed. 2d 270 ("[E]mbodiment as it did one coherent policy, [the entire order] is inseverable").

Second, even if the remaining provisions can operate [***296] as Congress designed them to operate, the Court must determine if Congress would have enacted them standing alone and without the unconstitutional portion. If Congress would not, those provisions, too, must be invalidated. See *Alaska Airlines, supra*, at 685,

107 S. Ct. 1476, 94 L. Ed. 2d 661 ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted"); see also *Free Enterprise Fund*, *supra*, at ___, 130 S. Ct. 3138, 177 L. Ed. 2d 706 ("[N]othing in the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will"); *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 330, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006) ("Would the legislature have preferred what is left of its statute to no statute at all"); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 767, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996) (plurality opinion) ("Would Congress still have passed § 10(a) had it known that the remaining provisions [***297] were invalid" (internal quotation marks and brackets omitted)).

The two inquiries--whether the remaining provisions will operate as Congress designed them, and whether Congress would have enacted the remaining provisions standing alone--often are interrelated. In the ordinary course, if the remaining provisions cannot operate according to the congressional design (the first inquiry), it almost necessarily follows that Congress would not have enacted them (the second inquiry). This close interaction may explain why the Court has not always been precise in distinguishing between the two. There are, however, occasions in which the severability standard's first inquiry (statutory functionality) is not a proxy for the second inquiry (whether the Legislature intended the remaining provisions to stand alone).

[**565] B

The Act was passed to enable affordable, "near-universal" health insurance coverage. 42 U.S.C. §18091(2)(D). The resulting, complex statute consists of mandates and other requirements; comprehensive regulation and penalties; some undoubted taxes; and increases in some governmental expenditures, decreases in others. Under the severability test set out above, it must be determined if those [***298] provisions function in a coherent way and as Congress would have intended, even when the major provisions establishing the Individual Mandate and Medicaid Expansion are themselves invalid.

Congress did not intend to establish the goal of

near-universal coverage without regard to fiscal consequences. See, *e.g.*, ACA § 1563, 124 Stat. 270 ("[T]his Act will reduce the Federal deficit between 2010 and 2019"). And it did not intend to impose the inevitable costs on any one industry or group of individuals. The whole design of the Act is to balance the costs and benefits affecting each set of regulated [*2670] parties. Thus, individuals are required to obtain health insurance. See 26 U.S.C. §5000A(a). Insurance companies are required to sell them insurance regardless of patients' pre-existing conditions and to comply with a host of other regulations. And the companies must pay new taxes. See §4980I (high-cost insurance plans); 42 U.S.C. §§300gg(a)(1), 300gg-4(b) (community rating); §§300gg-1, 300gg-3, 300gg-4(a) (guaranteed issue); §300gg-11 (elimination of coverage limits); §300gg-14(a) (dependent children up to age 26); ACA §§9010, 10905, 124 Stat. 865, 1017 (excise tax); Health Care and Education [***299] Reconciliation Act of 2010 (HCERA) §1401, 124 Stat. 1059 (excise tax). States are expected to expand Medicaid eligibility and to create regulated marketplaces called exchanges where individuals can purchase insurance. See 42 U.S.C. §§1396a(a)(10)(A)(i)(VIII) (2006 ed., Supp. IV) (Medicaid Expansion), 18031 (exchanges). Some persons who cannot afford insurance are provided it through the Medicaid Expansion, and others are aided in their purchase of insurance through federal subsidies available on health-insurance exchanges. See 26 U.S.C. §36B (2006 ed., Supp. IV), 42 U.S.C. §18071 (2006 ed., Supp. IV) (federal subsidies). The Federal Government's increased spending is offset by new taxes and cuts in other federal expenditures, including reductions in Medicare and in federal payments to hospitals. See, *e.g.*, §1395ww(r) (Medicare cuts); ACA Title IX, Subtitle A, 124 Stat. 847 ("Revenue Offset Provisions"). Employers with at least 50 employees must either provide employees with adequate health benefits or pay a financial exaction if an employee who qualifies for federal subsidies purchases insurance through an exchange. See 26 U.S.C. §4980H (2006 ed., Supp. IV).

In short, the Act [***300] attempts to achieve near-universal health insurance coverage by spreading its costs to individuals, insurers, governments, hospitals, and employers--while, at the same time, offsetting significant portions of those costs with new benefits to each group. For example, the Federal Government bears the burden of paying billions for the new entitlements mandated by the Medicaid Expansion and federal subsidies for insurance

purchases on the exchanges; but it benefits from reductions in the reimbursements it pays to [*566] hospitals. Hospitals lose those reimbursements; but they benefit from the decrease in uncompensated care, for under the insurance regulations it is easier for individuals with pre-existing conditions to purchase coverage that increases payments to hospitals. Insurance companies bear new costs imposed by a collection of insurance regulations and taxes, including "guaranteed issue" and "community rating" requirements to give coverage regardless of the insured's pre-existing conditions; but the insurers benefit from the new, healthy purchasers who are forced by the Individual Mandate to buy the insurers' product and from the new low-income Medicaid recipients who will enroll in [***301] insurance companies' Medicaid-funded managed care programs. In summary, the Individual Mandate and Medicaid Expansion offset insurance regulations and taxes, which offset reduced reimbursements to hospitals, which offset increases in federal spending. So, the Act's major provisions are interdependent.

The Act then refers to these interdependencies as "shared responsibility." See ACA Subtitle F, Title I, 124 Stat. 242 ("Shared Responsibility"); ACA §1501, *ibid.* (same); ACA §1513, *id.*, at 253 (same); ACA §4980H, *ibid.* (same). In at least six places, the Act describes the Individual Mandate as working "together with the other provisions of this Act." 42 U.S.C. §18091(2)(C) (2006 ed., Supp. IV) [*2671] (working "together" to "add millions of new consumers to the health insurance market"); §18091(2)(E) (working "together" to "significantly reduce" the economic cost of the poorer health and shorter lifespan of the uninsured); §18091(2)(F) (working "together" to "lower health insurance premiums"); §18091(2)(G) (working "together" to "improve financial security for families"); §18091(2)(I) (working "together" to minimize "adverse selection and broaden the health insurance risk pool to include healthy [***302] individuals"); §18091(2)(J) (working "together" to "significantly reduce administrative costs and lower health insurance premiums"). The Act calls the Individual Mandate "an essential part" of federal regulation of health insurance and warns that "the absence of the requirement would undercut Federal regulation of the health insurance market." §18091(2)(H).

C

One preliminary point should be noted before applying severability principles to the Act. To be sure, an argument can be made that those portions of the Act that none of the parties has standing to challenge cannot be held nonseverable. The response to this argument is that our cases do not support it. See, *e.g.*, *Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 242-244, 49 S. Ct. 115, 73 L. Ed. 287 (1929) (holding nonseverable statutory provisions that did not burden the parties). It would be particularly destructive of sound government to apply such a rule with regard to a multifaceted piece of legislation like the ACA. It would take years, perhaps decades, for each of its provisions to be adjudicated separately--and for some of them (those simply expending federal funds) no one may have separate standing. The Federal Government, [***303] the States, and private parties ought to know at once whether the entire legislation fails.

The opinion now explains in Part V-C-1, *infra*, why the Act's major provisions are not severable from the Mandate and Medicaid Expansion. It [*567] proceeds from the insurance regulations and taxes (C-1-a), to the reductions in reimbursements to hospitals and other Medicare reductions (C-1-b), the exchanges and their federal subsidies (C-1-c), and the employer responsibility assessment (C-1-d). Part V-C-2, *infra*, explains why the Act's minor provisions also are not severable.

1

The Act's Major Provisions

Major provisions of the Affordable Care Act--*i.e.*, the insurance regulations and taxes, the reductions in federal reimbursements to hospitals and other Medicare spending reductions, the exchanges and their federal subsidies, and the employer responsibility assessment--cannot remain once the Individual Mandate and Medicaid Expansion are invalid. That result follows from the undoubted inability of the other major provisions to operate as Congress intended without the Individual Mandate and Medicaid Expansion. Absent the invalid portions, the other major provisions could impose enormous risks of unexpected burdens [***304] on patients, the health-care community, and the federal budget. That consequence would be in absolute conflict with the ACA's design of "shared responsibility," and would pose a threat to the Nation that Congress did not intend.

a

Insurance Regulations and Taxes

Without the Individual Mandate and Medicaid Expansion, the Affordable Care Act's insurance regulations and insurance taxes impose risks on insurance companies and their customers that this Court cannot measure. Those risks would undermine Congress' scheme of "shared responsibility." [*2672] See 26 U.S.C. §4980I (2006 ed., Supp. IV) (high-cost insurance plans); 42 U.S.C. §§300gg(a)(1) (2006 ed., Supp. IV), 300gg-4(b) (community rating); §§300gg-1, 300gg-3, 300gg-4(a) (guaranteed issue); §300gg-11 (elimination of coverage limits); §300gg-14(a) (dependent children up to age 26); ACA §§9010, 10905, 124 Stat. 865, 1017 (excise tax); HCERA §1401, 124 Stat. 1059 (excise tax).

The Court has been informed by distinguished economists that the Act's Individual Mandate and Medicaid Expansion would each increase revenues to the insurance industry by about \$350 billion over 10 years; that this combined figure of \$700 billion is necessary to offset [***305] the approximately \$700 billion in new costs to the insurance industry imposed by the Act's insurance regulations and taxes; and that the new \$700-billion burden would otherwise dwarf the industry's current profit margin. See Brief for Economists as *Amici Curiae* in No. 11-393 etc. (Severability), pp. 9-16, 10a.

If that analysis is correct, the regulations and taxes will mean higher costs for insurance companies. Higher costs may mean higher premiums for consumers, despite the Act's goal of "lower[ing] health insurance premiums." 42 U.S.C. §18091(2)(F) (2006 ed., Supp. IV). Higher costs also could threaten the survival of health-insurance companies, despite the Act's goal of "effective health insurance markets." §18091(2)(J).

The actual cost of the regulations and taxes may be more or less than predicted. What is known, however, is that severing other provisions from the Individual Mandate and Medicaid [**568] Expansion necessarily would impose significant risks and real uncertainties on insurance companies, their customers, all other major actors in the system, and the government treasury. And what also is known is this: Unnecessary risks and avoidable uncertainties are hostile to economic [***306] progress and fiscal stability and thus to the safety and welfare of the Nation and the Nation's freedom. If those risks and uncertainties are to be imposed, it must not be

by the Judiciary.

b

Reductions in Reimbursements to Hospitals and Other Reductions in Medicare Expenditures

The Affordable Care Act reduces payments by the Federal Government to hospitals by more than \$200 billion over 10 years. See 42 U.S.C. §1395ww(b)(3)(B)(xi)-(xii) (2006 ed., Supp. IV); §1395ww(q); §1395ww(r); §1396r-4(f)(7).

The concept is straightforward: Near-universal coverage will reduce uncompensated care, which will increase hospitals' revenues, which will offset the government's reductions in Medicare and Medicaid reimbursements to hospitals. Responsibility will be shared, as burdens and benefits balance each other. This is typical of the whole dynamic of the Act.

Invalidating the key mechanisms for expanding insurance coverage, such as community rating and the Medicaid Expansion, without invalidating the reductions in Medicare and Medicaid, distorts the ACA's design of "shared responsibility." Some hospitals may be forced to raise the cost of care in order to offset the reductions in reimbursements, which [***307] could raise the cost of insurance premiums, in contravention of the Act's goal of "lower[ing] health insurance premiums." 42 U.S.C. §18091(2)(F) (2006 ed., Supp. IV). See also §18091(2)(I) (goal of "lower[ing] health insurance premiums"); §18091(2)(J) (same). Other hospitals, particularly safety-net hospitals that serve a large number of uninsured patients, may be forced to shut down. Cf. National Assn. of Public [*2673] Hospitals, 2009 Annual Survey: Safety Net Hospitals and Health Systems Fulfill Mission in Uncertain Times 5-6 (Feb. 2011). Like the effect of preserving the insurance regulations and taxes, the precise degree of risk to hospitals is unknowable. It is not the proper role of the Court, by severing part of a statute and allowing the rest to stand, to impose unknowable risks that Congress could neither measure nor predict. And Congress could not have intended that result in any event.

There is a second, independent reason why the reductions in reimbursements to hospitals and the ACA's other Medicare cuts must be invalidated. The ACA's \$455 billion in Medicare and Medicaid savings offset the \$434-billion cost of the Medicaid Expansion. See CBO

Estimate, Table 2 (Mar. 20, 2010) [***308] . The reductions allowed Congress to find that the ACA "will reduce the Federal deficit between 2010 and 2019" and "will continue to reduce budget deficits after 2019." ACA §§1563(a)(1), (2), 124 Stat. 270.

That finding was critical to the ACA. The Act's "shared responsibility" concept extends to the federal budget. Congress chose to offset new federal expenditures with budget cuts and tax increases. That is why the United States has explained in the course of this litigation that "[w]hen Congress passed the ACA, it was careful to ensure that any increased [**569] spending, including on Medicaid, was offset by other revenue-raising and cost-saving provisions." Memorandum in Support of Government's Motion for Summary Judgment in No. 3-10-cv-91, p. 41.

If the Medicare and Medicaid reductions would no longer be needed to offset the costs of the Medicaid Expansion, the reductions would no longer operate in the manner Congress intended. They would lose their justification and foundation. In addition, to preserve them would be "to eliminate a significant *quid pro quo* of the legislative compromise" and create a statute Congress did not enact. *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 561, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) [***309] (Scalia, J., dissenting). It is no secret that cutting Medicare is unpopular; and it is most improbable Congress would have done so without at least the assurance that it would render the ACA deficit-neutral. See ACA §§1563(a)(1), (2), 124 Stat. 270.

c

Health Insurance Exchanges and Their Federal Subsidies

The ACA requires each State to establish a health-insurance "exchange." Each exchange is a one-stop marketplace for individuals and small businesses to compare community-rated health insurance and purchase the policy of their choice. The exchanges cannot operate in the manner Congress intended if the Individual Mandate, Medicaid Expansion, and insurance regulations cannot remain in force.

The Act's design is to allocate billions of federal dollars to subsidize individuals' purchases on the exchanges. Individuals with incomes between 100 and 400 percent of the poverty level receive tax credits to

offset the cost of insurance to the individual purchaser. 26 U.S.C. §36B (2006 ed., Supp. IV); 42 U.S.C. §18071 (2006 ed., Supp. IV). By 2019, 20 million of the 24 million people who will obtain insurance through an exchange are expected to receive an average federal subsidy of \$6,460 per [***310] person. See CBO, *Analysis of the Major Health Care Legislation Enacted in March 2010*, pp. 18-19 (Mar. 30, 2011). Without the community-rating insurance regulation, however, the average federal subsidy could be much higher; for community rating greatly lowers the enormous [*2674] premiums unhealthy individuals would otherwise pay. Federal subsidies would make up much of the difference.

The result would be an unintended boon to insurance companies, an unintended harm to the federal fisc, and a corresponding breakdown of the "shared responsibility" between the industry and the federal budget that Congress intended. Thus, the federal subsidies must be invalidated.

In the absence of federal subsidies to purchasers, insurance companies will have little incentive to sell insurance on the exchanges. Under the ACA's scheme, few, if any, individuals would want to buy individual insurance policies outside of an exchange, because federal subsidies would be unavailable outside of an exchange. Difficulty in attracting individuals outside of the exchange would in turn motivate insurers to enter exchanges, despite the exchanges' onerous regulations. See 42 U.S.C. §18031. That system of incentives collapses [***311] if the federal subsidies are invalidated. Without the federal subsidies, individuals would lose the main incentive to purchase insurance inside the exchanges, [**570] and some insurers may be unwilling to offer insurance inside of exchanges. With fewer buyers and even fewer sellers, the exchanges would not operate as Congress intended and may not operate at all.

There is a second reason why, if community rating is invalidated by the Mandate and Medicaid Expansion's invalidity, exchanges cannot be implemented in a manner consistent with the Act's design. A key purpose of an exchange is to provide a marketplace of insurance options where prices are standardized regardless of the buyer's pre-existing conditions. See *ibid.* An individual who shops for insurance through an exchange will evaluate different insurance products. The products will offer different benefits and prices. Congress designed the exchanges so the shopper can compare benefits and

prices. But the comparison cannot be made in the way Congress designed if the prices depend on the shopper's pre-existing health conditions. The prices would vary from person to person. So without community rating--which prohibits insurers from basing [***312] the price of insurance on pre-existing conditions--the exchanges cannot operate in the manner Congress intended.

d

Employer-Responsibility Assessment

The employer responsibility assessment provides an incentive for employers with at least 50 employees to provide their employees with health insurance options that meet minimum criteria. See 26 U.S.C. §4980H (2006 ed., Supp. IV). Unlike the Individual Mandate, the employer-responsibility assessment does not require employers to provide an insurance option. Instead, it requires them to make a payment to the Federal Government if they do not offer insurance to employees and if insurance is bought on an exchange by an employee who qualifies for the exchange's federal subsidies. See *ibid.*

For two reasons, the employer-responsibility assessment must be invalidated. First, the ACA makes a direct link between the employer-responsibility assessment and the exchanges. The financial assessment against employers occurs only under certain conditions. One of them is the purchase of insurance by an employee on an exchange. With no exchanges, there are no purchases on the exchanges; and with no purchases on the exchanges, there is nothing to trigger the [***313] employer-responsibility assessment.

Second, after the invalidation of burdens on individuals (the Individual Mandate), insurers (the insurance regulations and taxes), States (the Medicaid Expansion), the Federal Government (the federal subsidies [*2675] for exchanges and for the Medicaid Expansion), and hospitals (the reductions in reimbursements), the preservation of the employer-responsibility assessment would upset the ACA's design of "shared responsibility." It would leave employers as the only parties bearing any significant responsibility. That was not the congressional intent.

2

The Act's Minor Provisions

The next question is whether the invalidation of the ACA's major provisions requires the Court to invalidate the ACA's other provisions. It does.

The ACA is over 900 pages long. Its regulations include requirements [**571] ranging from a break time and secluded place at work for nursing mothers, see 29 U.S.C. §207(r)(1) (2006 ed., Supp. IV), to displays of nutritional content at chain restaurants, see 21 U.S.C. §343(q)(5)(H). The Act raises billions of dollars in taxes and fees, including exactions imposed on high-income taxpayers, see ACA §§9015, 10906; HCERA §1402, medical devices, see 26 U.S.C. §4191 (2006 ed., Supp. IV), [***314] and tanning booths, see §5000B. It spends government money on, among other things, the study of how to spend less government money. 42 U.S.C. §1315a. And it includes a number of provisions that provide benefits to the State of a particular legislator. For example, §10323, 124 Stat. 954, extends Medicare coverage to individuals exposed to asbestos from a mine in Libby, Montana. Another provision, §2006, *id.*, at 284, increases Medicaid payments only in Louisiana.

Such provisions validate the Senate Majority Leader's statement, " I don't know if there is a senator that doesn't have something in this bill that was important to them. . . . [And] if they don't have something in it important to them, then it doesn't speak well of them. That's what this legislation is all about: It's the art of compromise." Pear, In Health Bill for Everyone, Provisions for a Few, N. Y. Times, Jan. 4, 2010, p. A10 (quoting Sen. Reid). Often, a minor provision will be the price paid for support of a major provision. So, if the major provision were unconstitutional, Congress would not have passed the minor one.

Without the ACA's major provisions, many of these minor provisions will not operate in the manner [***315] Congress intended. For example, the tax increases are "Revenue Offset Provisions" designed to help offset the cost to the Federal Government of programs like the Medicaid Expansion and the exchanges' federal subsidies. See Title IX, Subtitle A-Revenue Offset Provisions, 124 Stat. 847. With the Medicaid Expansion and the exchanges invalidated, the tax increases no longer operate to offset costs, and they no longer serve the purpose in the Act's scheme of "shared responsibility" that Congress intended.

Some provisions, such as requiring chain restaurants to display nutritional content, appear likely to operate as Congress intended, but they fail the second test for severability. There is no reason to believe that Congress would have enacted them independently. The Court has not previously had occasion to consider severability in the context of an omnibus enactment like the ACA, which includes not only many provisions that are ancillary to its central provisions but also many that are entirely unrelated--hitched on because it was a quick way to get them passed despite opposition, or because their proponents could exact their enactment as the *quid pro quo* for their needed support. When we [***316] are confronted with such a so-called "Christmas tree," a law to which many nongermane ornaments have been attached, we think the proper rule must be [*2676] that when the tree no longer exists the ornaments are superfluous. We have no reliable basis for knowing which pieces of the Act would have passed on their own. It is certain that many of them would not have, and it is not a proper function of this Court to guess which. To sever the statute in that manner " 'would be to make a new law, not to enforce an old one. This is not part of our duty.' *Trade-Mark Cases*, 100 U.S., at 99, 25 L. Ed. 550.

[**572] This Court must not impose risks unintended by Congress or produce legislation Congress may have lacked the support to enact. For those reasons, the unconstitutionality of both the Individual Mandate and the Medicaid Expansion requires the invalidation of the Affordable Care Act's other provisions.

* * *

The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cut-off of Medicaid funds to a supposedly noncoercive cut-off [***317] of only the incremental funds that the Act makes available.

The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible health-care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court's

new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.

The Court's disposition, invented and atextual as it is, does not even have the merit of avoiding constitutional difficulties. It creates them. The holding that the Individual Mandate is a tax raises a difficult constitutional question (what is a direct tax?) that the Court resolves with inadequate deliberation. And the judgment on the Medicaid Expansion issue ushers in new federalism concerns and places an unaccustomed strain upon the Union. [***318] Those States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion. If that destabilizing political dynamic, so antagonistic to a harmonious Union, is to be introduced at all, it should be by Congress, not by the Judiciary.

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

The Constitution, though it dates from the founding of the Republic, has powerful meaning and vital relevance to our own times. The constitutional protections that this case involves are protections of structure. Structural protections--notably, the restraints imposed by federalism and separation of powers--are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. [***319] Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections [*2677] of freedom the most important ones, for which reason they alone were embodied [**573] in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril. Today's decision should have vindicated, should have taught, this truth; instead, our judgment today has disregarded it.

For the reasons here stated, we would find the Act invalid in its entirety. We respectfully dissent.

Justice **Thomas**, dissenting.

I dissent for the reasons stated in our joint opinion, but I write separately to say a word about the Commerce Clause. The joint dissent and The Chief Justice correctly apply our precedents to conclude that the Individual Mandate is beyond the power granted to Congress under the Commerce Clause and the Necessary and Proper Clause. Under those precedents, Congress may regulate "economic activity [that] substantially affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 560, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995). [***320] I adhere to my view that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." *United States v. Morrison*, 529 U.S. 598, 627, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (Thomas, J., concurring); see also *Lopez, supra*, at 584-602, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (Thomas, J., concurring); *Gonzales v. Raich*, 545 U.S. 1, 67-69, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (Thomas, J., dissenting). As I have explained, the Court's continued use of that test "has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits." *Morrison, supra*, 529 U.S. at 627, 120 S. Ct. 1740, 146 L. Ed. 2d 658. The Government's unprecedented claim in this suit that it may regulate not only economic activity but also *inactivity* that substantially affects interstate commerce is a case in point.

REFERENCES

U.S.C.S., Constitution, Art. I, § 8, cl. 1; 26 U.S.C.S. §§5000A, 7421(a); 42 U.S.C.S. § 1396 et seq.

3 Law of Life and Health Insurance § 6A.000 (Matthew Bender)

17A Moore's Federal Practice §§121.42, 121.45 (Matthew Bender 3d ed.)

L Ed Digest, Injunction § 92.5; Internal Revenue § 4; Poverty and Welfare Laws § 8

L Ed Index, Accident and Health Insurance; Anti-Injunction Act; Medicaid; Taxes

Supreme Court's views as to Congress' power under spending clause in Federal Constitution's Art. I, § 8, cl. 1. 158 L. Ed. 2d 1131.

Conviction or acquittal in criminal prosecution as bar to particular actions for forfeiture of property or for statutory damages or penalties--Supreme Court cases. 135 L. Ed. 2d 1133.

Supreme Court's views as to construction and application of Medicaid Act (42 U.S.C.S. §§1396-1396s. 85 L. Ed. 2d 935.

Supreme Court's views of Fifth Amendment's double jeopardy clause pertinent [***321] to or applied in federal criminal cases. 50 L. Ed. 2d 830.

Supreme Court's construction and application of Anti-Injunction Act (26 U.S.C.S. § 7421(a)) prohibiting suits to restrain assessment or collection of federal taxes. 46 L. Ed. 2d 932.

Constitutionality of state welfare programs, including those which are federally assisted--Supreme Court cases. 25 L. Ed. 2d 907.

VOLUME III
TAB 7

LEXSEE

CITY OF BURBANK, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants. CITY OF LOS ANGELES, Plaintiff and Respondent, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.

S119248

SUPREME COURT OF CALIFORNIA

35 Cal. 4th 613; 108 P.3d 862; 26 Cal. Rptr. 3d 304; 2005 Cal. LEXIS 3486; 60 ERC (BNA) 1470; 2005 Cal. Daily Op. Service 2861; 2005 Daily Journal DAR 3870; 35 ELR 20071

April 4, 2005, Filed

SUBSEQUENT HISTORY: Time for Granting or Denying Rehearing Extended Burbank, City of v. State Water Resources Control Board, 2005 Cal. LEXIS 4271 (Cal., Apr. 21, 2005)
Rehearing denied by, Request denied by City of Burbank v. State Water Res. Control Bd., 2005 Cal. LEXIS 7185 (Cal., June 29, 2005)

PRIOR HISTORY: Superior Court of Los Angeles County, Nos. BS060960, BS060957, Dzintra I. Janavs, Judge. Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 & B152562.
City of Burbank v. State Water Resources Control Bd., 111 Cal. App. 4th 245, 4 Cal. Rptr. 3d 27, 2003 Cal. App. LEXIS 1236 (Cal. App. 2d Dist., 2003)

DISPOSITION: Judgment affirmed in part and remanded in part..

COUNSEL: Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Richard M. Frank and Tom Greene, Chief Assistant Attorneys General, Mary E. Hackenbracht, Assistant Attorney General, Marilyn H. Levin and Gregory J. Newmark, Deputy Attorneys General, for Defendants and Appellants.

David S. Beckman and Dan L. Gildor for Natural Resources Defense Counsel, Butte Environmental Council, California Coastkeeper Alliance, CalTrout, Clean Water Action, Clean Water Fund, Coalition on the Environment and Jewish Life of Southern California,

Coast Action Group, Defend the Bay, Ecological Rights Foundation, Environment in the Public Interest, Environmental Defense Center, Heal the Bay, Los Angeles Interfaith Environment Council, Ocean Conservancy, Orange County Coastkeeper, San Diego Baykeeper, Santa Barbara Channelkeeper, Santa Monica Baykeeper, Southern California Watershed Alliance, Ventura Coastkeeper, Waterkeeper Alliance, Waterkeepers Northern California, Westside Aquatics, Inc., and Wishtoyo Foundation as Amici Curiae on behalf of Defendants and Appellants.

Downey, Brand, Seymour & Rohwer, Downey Brand, Melissa A. Thorme, Jeffrey S. Galvin, Nicole E. Granquist and Cassandra M. Ferrannini for Plaintiffs and Appellants.

Dennis A. Barlow, City Attorney, and Carolyn A. Barnes, Assistant City Attorney, for Defendant and Appellant City of Burbank.

Rockard J. Delgadillo, City Attorney, and Christopher M. Westhoff, Assistant City Attorney, for Plaintiff and Appellant City of Los Angeles.

Rutan & Tucker and Richard Montevideo for Cities of Baldwin Park, Bell, Cerritos, Diamond Bar, Downey, Gardena, Montebello, Monterey Park, Paramount, Pico Rivera, Rosemead, San Gabriel, San Marino, Santa Fe Springs, Sierra Madre, Signal Hill, Temple City and West Covina, the California Building Industry Association and the Building Industry Legal Defense Foundation as

Amici Curiae on behalf of Plaintiffs and Appellants.

Stoel Rives and Lawrence S. Bazel for Western Coalition of Arid States as Amicus Curiae on behalf of Plaintiffs and Appellants.

Richards, Watson & Gershon and John J. Harris for the League of California Cities as Amicus Curiae on behalf of Plaintiffs and Appellants.

[*618] Squire, Sanders & Dempsey, Joseph A. Meckes; David W. Burchmore; and Alexandra Dapolito Dunn for Association of Metropolitan Sewerage Agencies as Amicus Curiae on behalf of Plaintiffs and Appellants.

Lewis, Brisbois, Bisgaard & Smith and B. Richard Marsh for County Sanitation Districts of Los Angeles County as Amicus Curiae on behalf of Plaintiffs and Appellants.

Fulbright & Jaworski, Colin Lennard, Patricia Chen; Archer Norris and Peter W. McGaw for California Association of Sanitation Agencies as Amicus Curiae on behalf of Plaintiffs and Appellants. [***306]

JUDGES: Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J.

OPINION BY: KENNARD [**864]

OPINION

KENNARD, J.--Federal law establishes national water quality standards but allows the states to enforce their own water quality laws so long as they comply with federal standards. Operating within this federal-state framework, California's nine Regional Water Quality Control Boards establish water quality policy. They also issue permits for the discharge of treated wastewater; these permits specify the maximum allowable concentration of chemical pollutants in the discharged wastewater.

The question here is this: When a regional board issues a permit to a wastewater treatment facility, must the board take into account the facility's costs of complying with the board's restrictions on pollutants in the wastewater to be discharged? The trial court ruled that California law required a regional board to weigh the economic burden on the facility against the expected

environmental benefits of reducing pollutants in the wastewater discharge. The Court of Appeal disagreed. On petitions by the municipal operators of three wastewater treatment facilities, we granted review.

We reach the following conclusions: Because both California law and federal law require regional boards to comply with federal clean water standards, and because the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit *more stringent* than federal law requires, California law allows the board to take into account economic [**865] factors, including the wastewater discharger's cost of compliance. We remand this case for further proceedings to determine whether the pollutant limitations in the permits challenged here meet or exceed federal standards.

[*619] I. Statutory Background

The quality of our nation's waters is governed by a "complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities." (*PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 704 [128 L. Ed. 2d 716, 114 S. Ct. 1900].) We first discuss California law, then federal law.

A. California Law

In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats. 1969, ch. 482, § 18, p. 1051.)¹ Its goal is "to attain the highest water [***307] quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.) As relevant here, one of those regional boards oversees

the Los Angeles region (the Los Angeles Regional Board).²

1 Further undesignated statutory references are to the Water Code.

2 The Los Angeles water region "comprises all basins draining into the Pacific Ocean between the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the ocean to San Antonio Peak and follows thence the divide between San Gabriel River and Lytle Creek drainages to the divide between Sheep Creek and San Gabriel River drainages." (§ 13200, subd. (d).)

(1) Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240). The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. (§ 13050, subd. (j).) Basin plans must be consistent with "state policy for water quality control." (§ 13240.)

B. Federal Law

In 1972, Congress enacted amendments (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 816) to the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), which, as amended in 1977, is commonly known as the Clean [*620] Water Act. The Clean Water Act is a "comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, supra*, 511 U.S. at p. 704, quoting 33 U.S.C. § 1251(a).) The act's national goal was to eliminate by the year 1985 "the discharge of pollutants into the navigable waters" of the United States. (33 U.S.C. § 1251(a)(1).) To accomplish this goal, the act established "effluent limitations," which are restrictions on the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents"; these effluent limitations allow the discharge of pollutants only when the water has been satisfactorily treated to conform with federal water quality standards. (33 U.S.C. §§ 1311, 1362(11).)

(2) Under the federal Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act. (33 U.S.C. § 1370.) This led the California Legislature in 1972 to amend the state's Porter-Cologne Act "to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act." (§ 13372.)

[**866] (3) Roughly a dozen years ago, the United States Supreme Court, in *Arkansas v. Oklahoma* (1992) 503 U.S. 91 [117 L. Ed. 2d 239, 112 S. Ct. 1046], described the distinct roles of the state and federal agencies in enforcing water quality: "The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a). Toward [***308] this end, [the Clean Water Act] provides for two sets of water quality measures. 'Effluent limitations' are promulgated by the [Environmental Protection Agency (EPA)] and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources.[³] See §§ 1311, 1314. '[W]ater quality standards' are, in general, promulgated by the States and establish the desired condition of a waterway. See § 1313. These standards supplement effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.' *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12 [48 L. Ed. 2d 578, 96 S. Ct. 2022, 2025, n. 12] (1976).

3 A "point source" is "any discernible, confined and discrete conveyance" and includes "any pipe, ditch, channel ... from which pollutants ... may be discharged." (33 U.S.C. § 1362 (14).)

[*621] (4) "The EPA provides States with substantial guidance in the drafting of water quality standards. See generally 40 CFR pt. 131 (1991) (setting forth model water quality standards). Moreover, [the Clean Water Act] requires, *inter alia*, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the State fails to comply with that recommendation, the Act authorizes the EPA to

promulgate water quality standards for the State. 33 U.S.C. § 1313(c)." (*Arkansas v. Oklahoma*, *supra*, 503 U.S. at p. 101.)

(5) Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma*, *supra*, 503 U.S. at p. 101.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)

With this federal and state statutory framework in mind, we now turn to the facts of this case.

II. Factual Background

This case involves three publicly owned treatment plants that discharge wastewater under NPDES permits issued by the Los Angeles Regional Board.

The City of Los Angeles owns and operates the Donald C. Tillman Water Reclamation Plant (Tillman Plant), which serves the San Fernando Valley. The City of Los Angeles also owns and operates the Los Angeles-Glendale Water Reclamation Plant (Los Angeles-Glendale Plant), which processes wastewater from areas within the City of Los Angeles and the independent cities of Glendale and Burbank. Both the Tillman Plant and the Los Angeles-Glendale Plant discharge wastewater directly into the Los Angeles River, now a concrete-lined flood control channel that runs through the City of Los Angeles, ending at the Pacific Ocean. The State Board and the Los Angeles Regional Board consider the Los Angeles River to be a navigable water of the United States for purposes of the federal Clean Water Act.

The third plant, the Burbank Water Reclamation Plant (Burbank Plant), is owned and operated by the City of Burbank [***309], serving residents and businesses within that city. The Burbank Plant discharges wastewater into the Burbank Western Wash, which drains into the Los Angeles River.

[*622] All three plants, which together process

hundreds of millions of gallons of sewage [**867] each day, are tertiary treatment facilities; that is, the treated wastewater they release is processed sufficiently to be safe not only for use in watering food crops, parks, and playgrounds, but also for human body contact during recreational water activities such as swimming.

In 1998, the Los Angeles Regional Board issued renewed NPDES permits to the three wastewater treatment facilities under a basin plan it had adopted four years earlier for the Los Angeles River and its estuary. That 1994 basin plan contained general narrative criteria pertaining to the existing and potential future beneficial uses and water quality objectives for the river and estuary.⁴ The narrative criteria included municipal and domestic water supply, swimming and other recreational water uses, and fresh water habitat. The plan further provided: "All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life." The 1998 permits sought to reduce these narrative criteria to specific numeric requirements setting daily maximum limitations for more than 30 pollutants present in the treated wastewater, measured in milligrams or micrograms per liter of effluent.⁵

4 This opinion uses the terms "narrative criteria" or descriptions, and "numeric criteria" or effluent limitations. Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, "no toxic pollutants in toxic amounts" would be a narrative description. This contrasts with numeric criteria, which detail specific pollutant concentrations, such as parts per million of a particular substance.

5 For example, the permits for the Tillman and Los Angeles-Glendale Plants limited the amount of fluoride in the discharged wastewater to 2 milligrams per liter and the amount of mercury to 2.1 micrograms per liter.

The Cities of Los Angeles and Burbank (Cities) filed appeals with the State Board, contending that achievement of the numeric requirements would be too costly when considered in light of the potential benefit to water quality, and that the pollutant restrictions in the NPDES permits were unnecessary to meet the narrative criteria described in the basin plan. The State Board summarily denied the Cities' appeals.

Thereafter, the Cities filed petitions for writs of administrative mandate in the superior court. They alleged, among other things, that the Los Angeles Regional Board failed to comply with sections 13241 and 13263, part of California's Porter-Cologne Act, because it did not consider the economic burden on the Cities in having to reduce substantially the pollutant content of their discharged wastewater. They also alleged that compliance with the pollutant restrictions set out in the NPDES permits issued by the regional [*623] board would greatly increase their costs of treating the wastewater to be discharged into the Los Angeles River. According to the City of Los Angeles, its compliance costs would exceed \$ 50 million annually, representing more than 40 percent of its entire budget for operating its four wastewater treatment plants and its sewer system; the City of Burbank estimated its added costs at over \$ 9 million annually, a nearly 100 percent increase above its \$ 9.7 million annual budget for wastewater treatment.

[***310] The State Board and the Los Angeles Regional Board responded that sections 13241 and 13263 do not require consideration of costs of compliance when a regional board issues a NPDES permit that restricts the pollutant content of discharged wastewater.

The trial court stayed the contested pollutant restrictions for each of the three wastewater treatment plants. It then ruled that sections 13241 and 13263 of California's Porter-Cologne Act required a regional board to consider costs of compliance not only when it adopts a basin or water quality plan but also when, as here, it issues an NPDES permit setting the allowable pollutant content of a treatment plant's discharged wastewater. The court found no evidence that the Los Angeles Regional Board had considered economic factors at either stage. Accordingly, the trial court granted the Cities' petitions for writs of mandate, and it ordered the Los Angeles Regional Board to vacate the contested restrictions on pollutants in the wastewater discharge permits issued to the three municipal plants here and to conduct hearings [**868] to consider the Cities' costs of compliance before the board's issuance of new permits. The Los Angeles Regional Board and the State Board filed appeals in both the Los Angeles and Burbank cases.⁶

⁶ Unchallenged on appeal and thus not affected by our decision are the trial court's rulings that (1) the Los Angeles Regional Board failed to show how it derived from the narrative criteria in the

governing basin plan the specific numeric pollutant limitations included in the permits; (2) the administrative record failed to support the specific effluent limitations; (3) the permits improperly imposed daily maximum limits rather than weekly or monthly averages; and (4) the permits improperly specified the manner of compliance.

The Court of Appeal, after consolidating the cases, reversed the trial court. It concluded that sections 13241 and 13263 require a regional board to take into account "economic considerations" when it adopts water quality standards in a basin plan but not when, as here, the regional board sets specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards. We granted the Cities' petition for review.

[*624] III. Discussion

A. Relevant State Statutes

The California statute governing the issuance of *wastewater permits* by a regional board is section 13263, which was enacted in 1969 as part of the Porter-Cologne Act. (See *ante*, at p. 619.) Section 13263 provides in relevant part: "*The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge [of wastewater]. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.*" (§ 13263, subd. (a), italics added.)

Section 13241 states: "Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

[***311] "(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

"(d) *Economic considerations.*

"(e) The need for developing housing within the region.

"(f) The need to develop and use recycled water."
(Italics added.)

The Cities here argue that section 13263's express reference to section 13241 requires the Los Angeles Regional Board to consider section 13241's listed factors, notably "[e]conomic considerations," before issuing NPDES permits requiring specific pollutant reductions in discharged effluent or treated wastewater.

[*625] Thus, at issue is language in section 13263 stating that when a regional board "prescribe[s] requirements as to the nature of any proposed discharge" of treated wastewater it must "take into consideration" certain factors including "the provisions of Section 13241." According to the Cities, this statutory language requires that a regional board make an independent evaluation of the section 13241 factors, including "economic considerations," before restricting the pollutant content in an NPDES permit. This was the view expressed in the trial court's ruling. The Court of Appeal rejected that view. It held that a regional board need consider the section 13241 factors only when it adopts a basin or water quality plan, but not when, as in this case, it issues a wastewater discharge [*869] permit that sets specific numeric limitations on the various chemical pollutants in the wastewater to be discharged. As explained below, the Court of Appeal was partly correct.

B. Statutory Construction

(6) When construing any statute, our task is to determine the Legislature's intent when it enacted the statute "so that we may adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715 [3 Cal. Rptr. 3d 623, 74 P.3d 726]; see *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268 [121 Cal. Rptr. 2d 203,

47 P.3d 1069].) In doing this, we look to the statutory language, which ordinarily is "the most reliable indicator of legislative intent." (*Hassan, supra*, at p. 715.)

(7) As mentioned earlier, our Legislature's 1969 enactment of the Porter-Cologne Act, which sought to ensure the high quality of water in this state, predated the 1972 enactment by Congress of the precursor to the federal Clean Water Act. Included in California's original Porter-Cologne Act were sections 13263 and 13241. Section 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in section 13241. Listed among the section 13241 factors is "[e]conomic considerations." (§ 13241, subd. (d).) The plain language of sections 13263 and 13241 indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the cost of compliance when setting effluent limitations in a wastewater discharge permit.

Our construction of sections 13263 and 13241 does not end with their plain statutory language, however. We must also analyze them in the context of the statutory scheme of which they are a part. (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 [12 [*312] Cal. Rptr. 3d 343, 88 P.3d 71].) Like sections 13263 and 13241, section 13377 is part of the Porter-Cologne Act. But unlike the former two statutes, section 13377 was [*626] not enacted until 1972, shortly after Congress, through adoption of the Federal Water Pollution Control Act Amendments, established a comprehensive water quality policy for the nation.

(8) Section 13377 specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the act's clean water standards, regardless of cost (see *id.*, §§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3)). (9) Because section 13263 cannot authorize what federal law forbids, it

cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards.⁷ Such a construction of section 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's [**870] declaration in section 13377 that all discharged wastewater must satisfy federal standards.⁸ This was also the conclusion of the Court of Appeal. Moreover, under the federal Constitution's supremacy clause (art. VI), a state law that conflicts with federal law is " 'without effect.' " (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 [120 L. Ed. 2d 407, 112 S. Ct. 2608]; see *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923 [12 Cal. Rptr. 3d 262, 88 P.3d 1].) To comport with the principles of federal supremacy, California law cannot authorize this [*627] state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

7 The concurring opinion misconstrues both state and federal clean water law when it describes the issue here as "whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions *that meet the clean water standards in more cost-effective and economically efficient ways.*" (Conc. opn. of Brown, J., *post*, at p. 629, some italics added.) This case has nothing to do with meeting federal standards in more cost effective and economically efficient ways. State law, as we have said, allows a regional board to consider a permit holder's compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit. (§§ 13241 & 13263.) Federal law, by contrast, as stated above in the text, "prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the [federal] act's *clean water standards, regardless of cost* (see *id.*, §§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3))." (Italics added.)

8 As amended in 1978, section 13377 provides for the issuance of waste discharge permits that

comply with federal clean water law "together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." We do not here decide how this provision would affect the cost-consideration requirements of sections 13241 and 13263 when more stringent effluent standards or limitations in a permit are justified for some reason independent of compliance with federal law.

[**313] Thus, in this case, whether the Los Angeles Regional Board should have complied with sections 13263 and 13241 of California's Porter-Cologne Act by taking into account "economic considerations," such as the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permits, depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act. We therefore remand this matter for the trial court to resolve that issue.

C. Other Contentions

The Cities argue that requiring a regional board at the wastewater discharge permit stage to consider the permit holder's cost of complying with the board's restrictions on pollutant content in the water is consistent with federal law. In support, the Cities point to certain provisions of the federal Clean Water Act. They cite section 1251(a)(2) of title 33 United States Code, which sets, as a national goal "*wherever attainable*," an interim goal for water quality that protects fish and wildlife, and section 1313(c)(2)(A) of the same title, which requires consideration, among other things, of waters' "*use and value for navigation*" when revising or adopting a "water quality standard." (Italics added.) These two federal statutes, however, pertain not to permits for wastewater discharge, at issue here, but to establishing water quality standards, not at issue here. Nothing in the federal Clean Water Act suggests that a state is free to disregard or to weaken the federal requirements for clean water when an NPDES permit holder alleges that compliance with those requirements will be too costly.

(10) At oral argument, counsel for amicus curiae National Resources Defense Council, which argued on behalf of California's State Board and regional water boards, asserted that the federal Clean Water Act incorporates state water policy into federal law, and that

therefore a regional board's consideration of economic factors to justify greater pollutant concentration in discharged wastewater would conflict with the federal act even if the specified pollutant restrictions were not less stringent than those required under federal law. We are not persuaded. The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit [*628] a state--when imposing effluent limitations that are *more stringent* than required by federal law--from taking into account the economic effects of doing so.

Also at oral argument, counsel for the Cities asserted that if the three municipal wastewater treatment facilities ceased releasing their treated wastewater into the concrete channel that makes up the Los Angeles River, it would (other than during the rainy season) contain no water at all, and thus would not be a "navigable water" of the [*871] United States subject to the Clean Water Act. (See *Solid Waste Agency v. United States Army Corps of Engineers* (2001) 531 U.S. 159, 172 [148 L. Ed. 2d 576, 121 S. Ct. 675] ["The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."].) It is unclear when the Cities first raised this issue. The Court of Appeal did not discuss it in its opinion, and the Cities did not seek rehearing on this ground. (See Cal. Rules of Court, rule [***314] 28(c)(2).) Concluding that the issue is outside our grant of review, we do not address it.

Conclusion

Through the federal Clean Water Act, Congress has regulated the release of pollutants into our national waterways. The states are free to manage their own water quality programs so long as they do not compromise the federal clean water standards. When enacted in 1972, the goal of the Federal Water Pollution Control Act Amendments was to *eliminate* by the year 1985 the discharge of pollutants into the nation's navigable waters. In furtherance of that goal, the Los Angeles Regional Board indicated in its 1994 basin plan on water quality the intent, insofar as possible, to remove from the water

in the Los Angeles River toxic substances in amounts harmful to humans, plants, and aquatic life. What is not clear from the record before us is whether, in limiting the chemical pollutant content of wastewater to be discharged by the Tillman, Los Angeles-Glendale, and Burbank wastewater treatment facilities, the Los Angeles Regional Board acted only to implement requirements of the federal Clean Water Act or instead imposed pollutant limitations that exceeded the federal requirements. This is an issue of fact to be resolved by the trial court.

Disposition

We affirm the judgment of the Court of Appeal reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants are necessary to satisfy federal Clean Water Act requirements for treated wastewater. The Court of Appeal is directed to remand this [*629] matter to the trial court to decide whether any numeric limitations, as described in the permits, are "more stringent" than required under federal law and thus should have been subject to "economic considerations" by the Los Angeles Regional Board before inclusion in the permits.

George, C. J., Baxter, J., Werdegar, J., Chin, J., and Moreno, J., concurred.

CONCUR BY: BROWN

CONCUR

BROWN, J., Concurring.--I write separately to express my frustration with the apparent inability of the government officials involved here to answer a simple question: How do the federal clean water standards (which, as near as I can determine, are the state standards) prevent the state from considering economic factors? The majority concludes that because "the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require." (Maj. opn., ante, at p. 618.) That seems a pretty self-evident proposition, but not a useful one. The real question, in my view, is whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions that *meet* the clean water standards in more cost-effective and economically

efficient ways. I can see no reason why a federal law--which purports to be an example of cooperative federalism--would decree such a result. I do not think the majority's reasoning is at fault here. Rather, the agencies involved seemed to have worked hard to make this simple question impenetrably obscure.

A brief review of the statutory framework at issue is necessary to understand my concerns. [***315]

[**872] I. Federal Law

"In 1972, Congress enacted the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), commonly known as the Clean Water Act (CWA) [Citation.] ... [¶] Generally, the CWA 'prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.]' ... The most important of those exceptions is pollution discharge under a valid NPDES [National Pollution Discharge Elimination System] permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. [Citations.] NPDES permits are valid for five years. [Citation.] [¶] Under the CWA's NPDES permit system, the states are required to develop *water quality standards*. [Citations.] A water quality standard 'establish[es] the desired condition of a waterway.' [Citation.] A water quality standard for any [*630] given waterway, or 'water body,' has two components: (1) the designated beneficial uses of the water body and (2) the *water quality criteria* sufficient to protect those uses. [Citations.] [¶] Water quality criteria can be either *narrative* or *numeric*. [Citation.]" (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092-1093 [1 Cal. Rptr. 3d 76].)

With respect to satisfying water quality standards, "a polluter must comply with *effluent limitations*. The CWA defines an effluent limitation as 'any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.' [Citation.] 'Effluent limitations are a means of *achieving* water quality standards.' [Citation.] [¶] NPDES permits establish effluent limitations for the polluter. [Citations.] CWA's NPDES permit system provides for a two-step process for the

establishing of effluent limitations. First, the polluter must comply with *technology-based effluent limitations*, which are limitations based on the best available or practical technology for the reduction of water pollution. [Citations.] [¶] Second, the polluter must also comply with more stringent *water quality-based effluent limitations* (WQBEL's) where applicable. In the CWA, Congress 'supplemented the "technology-based" effluent limitations with "water quality-based" limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." ' [Citation.] [¶] The CWA makes WQBEL's applicable to a given polluter whenever WQBEL's are 'necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations' [Citations.] Generally, NPDES permits must conform to state water quality laws insofar as the state laws impose more stringent pollution controls than the CWA. [Citations.] Simply put, WQBEL's implement water quality standards." (*Communities for a Better Environment v. State Water Resources Control Bd.*, *supra*, 109 Cal.App.4th at pp. 1093-1094, fns. omitted.)

This case involves water quality-based effluent limitations. As set forth above, "[u]nder the CWA, states have the primary role in promulgating water quality standards." (*Piney Run Preservation Ass'n v. Commrs. of Carroll Co.* (4th Cir. 2001) 268 F.3d 255, 265, fn. 9.) "Under the CWA, the water quality standards referred to in section 301 [see 33 U.S.C. § 1311] are primarily the states' handiwork." [***316] (*American Paper Institute, Inc. v. U.S. Env'tl. Protection Agency* (D.C. Cir. 1993) 302 U.S. App. D.C. 80 [996 F.2d 346, 349] (*American Paper*).) In fact, upon the 1972 passage of the CWA, "[s]tate water quality standards in effect at the time ... were deemed to be the initial water quality benchmarks for CWA purposes The states were to revisit and, if [*631] necessary, revise those initial standards at least once every three years." (*American Paper*, at p. 349.) Therefore, "once a water quality standard has been promulgated, section 301 of the CWA requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard." (*American Paper*, at p. 350.) Accordingly, it appears that in most instances, [**873] state water quality standards are identical to the federal requirements for NPDES permits.

II. State Law

In California, pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.; Stats. 1969, ch. 482, § 18, p. 1051; hereafter Porter-Cologne Act), the regional water quality control boards establish water quality standards--and therefore federal requirements for NPDES permits--through the adoption of water quality control plans (basin plans). The basin plans establish water quality objectives using enumerated factors--including economic factors--set forth in Water Code section 13241.

In addition, as one court observed: "The Porter-Cologne Act ... established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (Wat. Code, §§ 13100, 13140, 13200, 13201, 13240, 13241, 13243.) The Porter-Cologne Act identified these permits as 'waste discharge requirements,' and provided that the waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (Wat. Code, §§ 13263, subd. (a), 13377, 13374.) [¶] Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added Chapter 5.5 to the Porter-Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (Wat. Code, § 13370, subd. (c).) As part of these amendments, the Legislature provided that the state and regional water boards 'shall, as required or authorized by the [Clean Water Act], issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.' (Wat. Code, § 13377.) Water Code section 13374 provides that '[t]he term "waste discharge requirements" as referred to in this division is the equivalent of the term "permits" as used in the [Clean Water Act].' [¶] California subsequently obtained the required approval to issue NPDES permits. [Citation.] Thus, the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (Wat. Code, § 13374.)" (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 875 [22 Cal. Rptr. 3d 128].)

[*632] Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board)--the body responsible to enforce the statutory framework--failed to comply with its statutory mandate.

[***317] For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirement set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so.

Moreover, the Board acknowledges that it has neglected other statutory provisions that might have provided an additional opportunity to air these concerns. As set forth above, pursuant to the CWA, "[t]he states were to revisit and, if necessary, revise those initial standards at least once every three years--a process commonly known as triennial review. [Citation.] Triennial reviews consist of public hearings in which current water quality standards are examined to assure that they 'protect the public health or welfare, enhance the quality of water and serve the purposes' of the Act. [Citation.] Additionally, the CWA directs [**874] states to consider a variety of competing policy concerns during these reviews, including a waterway's 'use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.'" (*American Paper, supra*, 996 F.2d at p. 349.)

According to the Cities, "[t]he last time that the narrative water quality objective for toxicity contained in the Basin Plan was reviewed and modified was 1994." The Board does not deny this claim. Accordingly, the Board has failed its duty to allow public discussion--including economic considerations--at the required intervals when making its determination of

proper water quality standards.

What is unclear is why this process should be viewed as a contest. State and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions.

[*633] Our decision today arguably allows the Board to continue to shirk its statutory duties. The majority holds that when read together, Water Code sections 13241, 13263, and 13377 do not allow the Board to consider economic factors when issuing NPDES permits to satisfy federal CWA requirements. (Maj. opn., *ante*, at pp. 625-627.) The majority then bifurcates the issue when it orders the Court of Appeal "to remand this matter to the trial court to decide whether any numeric limitations, as described in the permits, are 'more stringent' than required under federal law and thus should have been subject to 'economic considerations' by the Los Angeles Regional Board before inclusion in the permits." (*Id.* at pp. 628-629.)

The majority overlooks the feedback loop established by the CWA, under which federal standards are linked to state-established water quality standards, including narrative water quality criteria. (See 33 U.S.C. § 1311 (b)(1)(C); 40 C.F.R. § 122.44(d)(1) (2004).) Under the CWA, NPDES permit requirements include the state narrative criteria, which are incorporated into the Board's basin plan under the description "no toxins in toxic amounts." As far as I can determine, NPDES permits [***318] designed to achieve this narrative criteria (as well as designated beneficial uses) will usually implement the state's basin plan, while satisfying federal requirements as well.

If federal water quality standards are typically identical to state standards, it will be a rare instance that a state exceeds its own requirements and economic factors are taken into consideration. ¹ In light of the Board's initial failure to consider costs of compliance and its repeated failure to conduct required triennial reviews, the result here is an unseemly bureaucratic bait-and-switch that we should not endorse. The likely outcome of the

majority's decision is that the Cities will be economically burdened to meet standards imposed on them in a highly questionable manner. ² In these times of tight fiscal budgets, it is difficult to imagine imposing additional financial burdens on municipalities without at least allowing them to present alternative views.

1 (But see *In the Matter of the Petition of City and County of San Francisco, San Francisco Baykeeper et al.* (Order No. WQ 95-4, Sept. 21, 1995) 1995 WL 576920.)

2 Indeed, given the fact that "water quality standards" in this case are composed of broadly worded components (i.e., a narrative criteria and "designated beneficial uses of the water body"), the Board possessed a high degree of discretion in setting NPDES permit requirements. Based on the Board's past performance, a proper exercise of this discretion is uncertain.

Based on the facts of this case, our opinion today appears to largely retain the status quo for the Board. If the Board can actually demonstrate that only the precise limitations at issue here, implemented in only one way, will achieve the desired water standards, perhaps its obduracy is justified. That case has yet to be made.

[*634] Accordingly, I cannot conclude that the majority's decision is wrong. The analysis [**875] may provide a reasonable accommodation of conflicting provisions. However, since the Board's actions "make me wanna holler and throw up both my hands," ³ I write separately to set forth my concerns and concur in the judgment--*dubitante*. ⁴

3 Marvin Gaye (1971) "Inner City Blues."

4 I am indebted to Judge Berzon for this useful term. (See *Credit Suisse First Boston Corp. v. Grunwald* (9th Cir. 2005) 400 F.3d 1119 [2005 WL 466202] (conc. opn. of Berzon, J.).)

The petitions of all appellants and respondent for a rehearing were denied June 29, 2005. Brown, J., did not participate therein.

VOLUME III
TAB 8

LEXSEE

**CITY OF ARCADIA et al., Plaintiffs and Appellants, v. STATE WATER
RESOURCES CONTROL BOARD et al., Defendants and Appellants.**

D043877

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,
DIVISION ONE**

**135 Cal. App. 4th 1392; 38 Cal. Rptr. 3d 373; 2006 Cal. App. LEXIS 92; 2006 Cal.
Daily Op. Service 797; 2006 Daily Journal DAR 1145; 36 ELR 20025**

January 26, 2006, Filed

SUBSEQUENT HISTORY: Rehearing denied by City of Arcadia v. State Water Resources Control Board, 2006 Cal. App. LEXIS 221 (Cal. App. 4th Dist., Feb. 17, 2006) Review denied by Arcadia, City of v. State Water Resources Control Board, 2006 Cal. LEXIS 4781 (Cal., Apr. 19, 2006)
Related proceeding at County of Los Angeles v. State Water Resources Control Bd., 143 Cal. App. 4th 985, 50 Cal. Rptr. 3d 619, 2006 Cal. App. LEXIS 1546 (Cal. App. 2d Dist., 2006)
Related proceeding at City of Arcadia v. State Water Resources Control Bd., 2010 Cal. App. LEXIS 2150 (Cal. App. 4th Dist., Dec. 14, 2010)

PRIOR HISTORY: [***1] Superior Court of San Diego County, No. GIC803631, Wayne L. Peterson and Linda B. Quinn, Judges.
City of Arcadia v. United States EPA, 265 F. Supp. 2d 1142, 2003 U.S. Dist. LEXIS 9044 (N.D. Cal., 2003)

COUNSEL: Rutan & Tucker, Richard Montevideo and Terence J. Gallagher for Plaintiffs and Appellants.

Downey Brand, Melissa A. Thorme; Lewis, Brisbois, Bisgaard, & Smith and B. Richard Marsh for County Sanitation Districts of Los Angeles County as Amicus Curiae on behalf of Plaintiffs and Appellants.

Demetriou, Del Guercio, Springer & Francis, Stephen A. Del Guercio, Michael A. Francis and Brian D. Langa for California Contract Cities Association as Amicus Curiae on behalf of Plaintiffs and Appellants.

Richards, Watson & Gershon and John J. Harris for The League of California Cities as Amicus Curiae on behalf of Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Tom Greene, Chief Assistant Attorney General, Mary E. Hackenbracht, Assistant Attorney General, Marilyn H. Levin and Gregory J. Newmark, Deputy Attorneys General, for Defendants and Appellants.

Law Office of Michael R. Lozeau, Michael R. Lozeau; and Dana P. Palmer for Santa Monica Baykeeper, Inc., Heal the Bay, Inc., [***2] and Natural Resources Defense Council, Inc., as Amici Curiae on behalf of Defendants and Appellants.

JUDGES: McConnell, P. J., with McIntyre and Irion, JJ., concurring.

OPINION BY: McConnell

OPINION

[**378] **McCONNELL, P. J.**--This case concerns the serious environmental problem of litter discharged from municipal storm drains into the Los Angeles River, and efforts of the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) and the State Water Resources Control Board (State Board) ¹ to ameliorate the problem through the adoption and approval of a planning document setting a target of zero trash discharge within a multi-year implementation period.

1 We refer to these entities together as the Water Boards.

The Water Boards appeal a judgment partially granting a petition for writ of mandate brought by the City of Arcadia and 21 other cities (Cities),² who [*1402] agree trash pollution must be remedied but oppose the target of zero trash as unattainable and inordinately expensive. The Water Boards challenge [***3] the court's findings that an assimilative capacity study is a required element of its action; a cost-benefit analysis and consideration of economic factors are required under state law and are not met; the zero trash target is inapplicable to the Los Angeles River Estuary (Estuary) because it does not appear on the state's list of impaired waters; and, the Water Boards failed to comply with the California Environmental Quality Act (CEQA) by not preparing an environmental impact report (EIR) or its functional equivalent.

2 In addition to Arcadia the Cities include Baldwin Park, Bellflower, Cerritos, Commerce, Diamond Bar, Downey, Irwindale, Lawndale, Monrovia, Montebello, Monterey Park, Pico Rivera, Rosemead, San Gabriel, Santa Fe Springs, Sierra Madre, Signal Hill, South Pasadena, Vernon, West Covina and Whittier.

The Water Boards also contend the court erred by granting the Cities declaratory relief on their claim the trash total maximum daily load (TMDL) does not apply to "nonwaters," meaning areas that do [***4] not drain into navigable waters such as the Los Angeles River or tributaries, as the parties agreed during this proceeding that the trash TMDL applies only to navigable waters.

The Cities also appeal, contending the trial court erred by not invalidating the trash TMDL on the additional grounds the Water Boards failed to provide for deemed compliance with the target of zero trash through certain methods; failed to implement load allocations for nonpoint sources of trash pollution; failed to adhere to the data collection and analysis required by federal and state law; relied on nonexistent, illegal and irrational uses to be made of the Los Angeles River; and, violated the Administrative Procedures Act (APA).

We conclude the Cities' appeal lacks merit. As to the Water Boards' appeal, we conclude the court properly invalidated the planning document on the ground of noncompliance with CEQA, and we affirm the judgment

insofar as it is based on that ground. We reverse the judgment to the extent it is based on other grounds. Further, we hold the court erred by granting declaratory relief on the nonwaters issue as there was no controversy when the court ruled.

[**379] BACKGROUND INFORMATION

I

[***5] *Statutory and Regulatory Scheme*

The "quality of our nation's waters is governed by a 'complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities.' " (*City of Burbank v. State Water Resources Control Bd.* [*1403] (2005) 35 Cal.4th 613, 619 [26 Cal. Rptr. 3d 304, 108 P.3d 862] (*City of Burbank*)). An overview of applicable law is required to place the facts here in context.

A

Federal Law

In 1972 Congress enacted amendments to the Federal Water Pollution Control Act (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 816; 33 U.S.C. § 1251 et seq.), which, as amended in 1977, is commonly known as the Clean Water Act. (*City of Burbank, supra*, 35 Cal.4th at pp. 619-620.) Its stated goal is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants into navigable waters. (33 U.S.C. § 1251(a).)

(1) The Clean Water Act places "primary reliance for developing water quality standards on the states." (*Scott v. Hammond* (7th Cir. 1984) 741 F.2d 992, 994.) It requires each state to develop such standards [***6] and review them at least once every three years for required modifications. (33 U.S.C. § 1313(a), (c)(1).) The standards must include designated uses such as recreation, navigation or the propagation of fish, shellfish and wildlife; water quality criteria sufficient to protect the designated uses; and an antidegradation policy. (40 C.F.R. §§ 131.6, 131.10-131.12 (2003).) The water quality criteria "can be expressed in narrative form or in a numeric form, e.g., specific pollutant concentrations." (*Florida Public Interest Research Group v. E.P.A.* (11th Cir. 2004) 386 F.3d 1070, 1073.) "Narrative criteria are broad statements of desirable water quality goals in a

water quality plan. For example, 'no toxic pollutants in toxic amounts' would be a narrative description." (*City of Burbank, supra*, 35 Cal.4th at p. 622, fn. 4.)

The Clean Water Act focuses on two possible sources of pollution: point sources and nonpoint sources. "Point source" means "any discernable, confined and discrete conveyance" such as a pipe, ditch, channel, tunnel, or [***7] conduit. (33 U.S.C. § 1362(14).) The Clean Water Act does not define nonpoint source pollution, but it has been described as " 'nothing more [than] a [water] pollution problem not involving a discharge from a point source.' " (*Defenders of Wildlife v. U.S. Environ. Protec.* (10th Cir. 2005) 415 F.3d 1121, 1124.)³

3 According to the Environmental Protection Act (EPA), nonpoint source pollution is caused by rainfall or snowmelt moving over and through the ground, and includes excess fertilizers, herbicides, and insecticides from agricultural lands and residential areas; oil, grease and toxic chemicals from urban runoff and energy production; sediment from improperly managed construction sites, crop and forest land, and eroding stream banks; salt from irrigation practices and acid drainage from abandoned mines; and bacteria and nutrients from livestock, pet wastes and faulty septic systems. (<<http://www.epa.gov/owow/nps/qa.html>> [as of Jan. 26, 2006].)

[*1404] (2) "Congress dealt with the problem of point source [***8] pollution using the National Pollution Discharge Elimination System [NPDES] permit process. Under this approach, compliance rests on technology- [***380] based controls that limit the discharge of pollution from any point source into certain waters unless that discharge complies with the [Clean Water] Act's specific requirements." (*San Francisco BayKeeper v. Whitman* (2002) 297 F.3d 877, 880; see 33 U.S.C. § 1311(b)(1)(A).) "Nonpoint sources, because of their very nature, are not regulated under the NPDES [program]. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the [Clean Water] Act which encourages states to develop areawide waste treatment management plans." (*Pronsolino v. Marcus* (N.D.Cal. 2000) 91 F. Supp. 2d 1337, 1348, citing 33 U.S.C. § 1288; see also 33 U.S.C. § 1329.)

"When the NPDES system fails to adequately clean

up certain rivers, streams or smaller water segments, the [Clean Water] Act requires use of a water-quality based approach. States are required to identify such waters ... [and] rank [them] in order of priority, and [***9] based on that ranking, calculate levels of permissible pollution called 'total maximum daily loads' or 'TMDLs.' " (*San Francisco BayKeeper v. Whitman, supra*, 297 F.3d at p. 880; see 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b) (2003).) "This list of substandard waters is known as the '303(d) list' (section 303 of the Clean Water Act having been codified as [title 33 United States Code] section 1313)." (*City of Arcadia v. U.S. Environmental* (9th Cir. 2005) 411 F.3d 1103, 1105 (*City of Arcadia II*).)

"A TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue from all combined sources." (*Dioxin/Organochlorine Center v. Clarke* (9th Cir. 1995) 57 F.3d 1517, 1520.) "A TMDL must be 'established at a level necessary to implement the applicable water quality standards' [Citation.] A TMDL assigns a *waste load allocation* ... to each point source, which is that portion of the TMDL's total pollutant load, which is allocated to a point source for which an NPDES permit is required. [Citation.] Once a TMDL is developed, effluent limitations [***10] in NPDES permits must be consistent with the [waste load allocations] in the TMDL." (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1095-1096 [1 Cal. Rptr. 3d 76]; see *Dioxin/Organochlorine Center v. Clarke*, at p. 1520.)⁴ A TMDL requires a [*1405] "margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." (33 U.S.C. § 1313(d)(1)(C).)

4 The Clean Water Act "does not define total maximum daily load. EPA's regulations break it into a 'waste[]load allocation' for point sources and a 'load allocation' for nonpoint sources." (*Pronsolino v. Marcus, supra*, 91 F. Supp. 2d at p. 1344, fn. 8; see 40 C.F.R. § 130.2(g)-(i) (2005).)

The EPA may allow states to adopt and administer NPDES permit programs (*Pronsolino v. Marcus, supra*, 91 F. Supp. 2d at p. 1347, fn. 10), and it has authorized California to administer [***11] such a program. (54 Fed.Reg. 40664 (Oct. 3, 1989).)

B

State Law

(3) California implements the Clean Water Act through the Porter-Cologne Act (Wat. Code, § 13000 et seq.), which was promulgated in 1969. Under the Porter-Cologne Act, nine regional boards regulate the quality of waters within their regions under the purview of the State Board. (Wat. Code, §§ 13000, 13100, 13200, 13241, 13242.)

[**381] Regional boards must formulate and adopt water quality control plans, commonly called basin plans, which designate the beneficial uses to be protected, water quality objectives and a program to meet the objectives. (Wat. Code, §§ 13050, subd. (j), 13240.) " 'Water quality objectives' means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." (*Id.*, § 13050, subd. (h).)

The EPA must approve or disapprove a state's TMDL within 30 days of its submission. [***12] (33 U.S.C. § 1313(d)(2).) If the EPA disapproves a state's submission, it must establish its own TMDL within 30 days of the disapproval. (*Ibid.*)

II

Trash TMDL

The Los Angeles River is a 51-mile flood control channel, largely concrete-lined, which runs through the City of Los Angeles and surrounding municipalities in Los Angeles County and terminates at the Pacific Ocean. In 1990 the Regional Board issued an NPDES storm water permit to the Los Angeles County Department of Public Works as the principal permittee and 84 cities as copermittees, to address various chemical pollutants discharged into the region's water bodies (Municipal NPDES Permit).

[*1406] In 1994 the Regional Board adopted a revised water quality control plan, or basin plan (1994 Basin Plan), which includes narrative water quality objectives. It provides that "[w]aters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses," and "[w]aters shall not contain suspended or settleable material in concentrations that cause nuisance or adversely affect beneficial uses."

(Italics [***13] omitted.) Beneficial uses of the Los Angeles River and surrounds include wildlife and marine habitat, including habitat for endangered species, and recreational activities such as fishing, walking, hiking, jogging, bicycling, horseback riding, bird watching and photography.

In 1996 and 1998 the Regional Board identified certain reaches of the Los Angeles River on the state's "303(d) list" as being impaired by trash, primarily through storm water runoff in thousands of municipal storm drains. ⁵ On September 19, 2001, the Regional Board adopted a resolution to amend its 1994 Basin Plan to incorporate a TMDL for trash in the Los Angeles River (Trash TMDL). Despite many objections from affected municipalities, the Trash TMDL sets a numeric target of zero trash as "even a single piece of trash can be detrimental, and no level of trash is acceptable in waters of the state." ⁶ "The numeric target is staff's interpretation of the narrative water quality objective [in [**382] the 1994 Basin Plan], including an implicit margin of safety."

5 The Regional Board defines "trash" as "man-made litter" within the meaning of Government Code section 68055.1, subdivision (g), which provides: " 'Litter' means all improperly discarded waste material, including, but not limited to, convenience food, beverage, and other produce packages or containers constructed of steel, aluminum, glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on the lands and waters of the state, but not including the properly discarded waste of the primary processing of agriculture, mining, logging, sawmilling, or manufacturing."

[***14]

6 The Regional Board adopted a Trash TMDL in January 2001, which also had a target of zero trash. It reconsidered the matter on September 19, 2001, "to provide clarifying language and greater flexibility in implementing the [Trash] TMDL."

The reduction of trash is to be phased over a 14-year period, including an optional two-year baseline monitoring period. In lieu of baseline monitoring, cities may accept a default baseline allocation of "640 gallons of uncompressed trash per square mile per year," a value based on data the City of Calabasas provided. The Trash TMDL provides for a "review of the current target [of zero trash] ... once a reduction of 50% has been achieved

and sustained," "based on the findings of future studies regarding the threshold levels needed for protecting beneficial uses."

Under the Trash TMDL, cities may use a variety of compliance methods, including "[e]nd-of-pipe full capture structural controls," "partial capture [*1407] control systems" and "[i]nstitutional controls." Cities using a full-capture system meeting certain criteria will be deemed in compliance with [***15] the zero target if the systems are properly maintained and maintenance records are available for the Regional Board's inspection.

On December 21, 2001, the Regional Board issued an order under Water Code section 13267 to the County of Los Angeles and copermittees under the Municipal NPDES Permit to submit baseline monitoring plans by February 1, 2002, and to monitor trash in the Los Angeles River between January 2002 and December 2003, with a final report due February 2004. ⁷ The Regional Board intends to use resulting data to "refine" the default baseline waste load allocations in the Trash TMDL.

⁷ In *City of Arcadia v. U.S. Environ. Protection Agency* (N.D.Cal. 2003) 265 F. Supp. 2d 1142, 1156 (*City of Arcadia I*), the court noted the Los Angeles County Department of Public Works has assumed responsibility for the baseline monitoring burden for all municipalities to which the Trash TMDL applies. The Trash TMDL states that "[e]ach of the permittees and copermittees are responsible for monitoring land uses within their jurisdiction," but "monitoring responsibilities may be delegated to a third-party monitoring entity such as the [Department of Public Works]."

[***16] In February and July 2002, the State Board and the Office of Administrative Law, respectively, approved the Trash TMDL. In August 2002 the EPA approved it and announced it supersedes an interim TMDL for trash the EPA adopted in March 2002 as a result of a consent decree in litigation between environmental groups and the EPA. (*City of Arcadia I, supra*, 265 F. Supp. 2d 1142, 1147.) ⁸

⁸ In *City of Arcadia I, supra*, 265 F. Supp. 2d at page 1153, the City of Arcadia and other cities unsuccessfully challenged the EPA's approval of the Trash TMDL on the ground it was unauthorized to do so after adopting its own TMDL. In *City of Arcadia II, supra*, 411 F.3d at

pages 1106-1107, the court affirmed the lower court's dismissal of the case.

III

Procedural History

The Cities are within the Regional Board's jurisdiction and are permittees under the 2001 Municipal NPDES Permit. In July 2002 the Cities filed a petition for writ of mandate and complaint for declaratory [***17] and injunctive relief against the Water Boards. They filed the action in the Los Angeles County Superior Court, but the parties stipulated to its transfer to the San Diego County Superior Court.

The second amended petition alleges numerous grounds on which the Trash TMDL violates the Clean Water Act or the Porter-Cologne Act, and the court adjudicated some issues in favor of each party. It found the [*1408] Water Boards improperly (1) failed to conduct an analysis of the Los Angeles River's assimilative capacity; (2) failed to conduct a cost-benefit analysis or [**383] consider economic factors under Water Code sections 13267 and 13241; (3) purported to apply the Trash TMDL to the Estuary even though it is not listed on the state's 1998 303(d) list as impaired; and (4) failed to prepare a required EIR or its functional equivalent under CEQA. The court issued a writ of mandate commanding the Water Boards to set aside the amendment to the 1994 Basin Plan and the Trash TMDL to the extent it was based on the above findings and to not take any further steps to implement it. The court denied the Water Boards' motion to vacate the judgment or grant [***18] a new trial, and judgment was entered on December 24, 2003.

The Cities later moved for an order that the prohibitory terms of the writ of mandate and judgment not be stayed on appeal. (Code Civ. Proc., § 1110b.) The court granted the motion, and further ordered that "to preserve the status quo and prevent injustice to [the Cities], the ... implementation schedule and compliance dates, and all milestones contained in the [Trash TMDL] shall be tolled effective December 24, 2003, through and until a final determination has been rendered on the pending appeal." The Water Boards appealed that order, and in accordance with the parties' stipulation we consolidated it with the other appeals.

DISCUSSION

WATER BOARDS' APPEAL

I

Standard of Review

(4) The Water Boards contend a deferential standard of review applies to our review of their action under Code of Civil Procedure section 1085, and the Cities claim an independent standard applies under Code of Civil Procedure section 1094.5. Code of Civil Procedure section 1094.5, the administrative mandamus [***19] statute, applies when "the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal." (Code Civ. Proc., § 1094.5, subd. (a).) "Acts of an administrative agency that are quasi-legislative in nature, e.g., establishment of regulations to carry out a statutory policy or direction, are not reviewable by administrative mandamus." (8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 268, pp. 1067-1068.) Rather, review of a quasi-legislative action is limited to traditional mandamus. (*Id.* at p. 1068.)

[*1409] (5) The trial court correctly found this proceeding is for traditional mandamus because the Regional Board's adoption and the State Water Board's approval of the Trash TMDL was quasi-legislative. Under Code of Civil Procedure section 1085, " ' 'review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking [***20] in evidentiary support, ... ' ' ... [and] [t]he petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law. [Citation.] We review the record de novo except where the trial court made foundational factual findings, which are binding on appeal if supported by substantial evidence." (*Citizens for Improved Sorrento Access, Inc. v. City of San Diego* (2004) 118 Cal.App.4th 808, 814 [13 Cal. Rptr. 3d 259], citations omitted.)

The Cities' reliance on Water Code section 13330 is misplaced. It provides that "[a]ny party aggrieved by a final decision or order of a regional board for which the state board denies review may obtain review of the decision or order of the regional [***384] board in the superior court" (*id.*, § 13330, subd. (b), italics added), and "[e]xcept as otherwise provided herein, Section 1094.5 of

the Code of Civil Procedure shall govern proceedings for which petitions are filed pursuant to this section" (*id.*, § 13330, subd. (d)). Given the language italicized *ante*, Water Code section 13330 necessarily applies to an administrative appeal of a quasi-judicial action [***21] under Code of Civil Procedure section 1094.5. Here, an appeal to the State Board was unnecessary because the Trash TMDL was ineffective without its approval. (Wat. Code, § 13245.) Indeed, the State Board notified the Cities in March 2001 that it "lacks statutory authority to accept petitions for review of water quality control plan (basin plan) amendments adopted" by regional boards.

As to CEQA issues, the parties agree an abuse of discretion standard applies. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1199 [24 Cal. Rptr. 3d 543].) Abuse of discretion "is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.) "Our task on appeal is 'the same as the trial court's.' [Citation.] Thus, we conduct our review independent of the trial court's findings." (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602, fn. 3 [35 Cal. Rptr. 2d 470].)

II

Assimilative Capacity Study

The trial court [***22] invalidated the Trash TMDL based in part on the Cities' argument an "assimilative capacity study" is a required element of a TMDL and none was performed here. In its statement of decision, the court [*1410] explained "[i]t is unreasonable to conclude that the beneficial uses of the [Los Angeles] River could not be maintained with some 'target' other than zero. Of course, it is possible the River would not support a greater target, however, without a study it is yet undetermined."

The Water Boards contend the trial court erred by substituting its own judgment for that of the Water Boards on the issue of whether the adoption of the Trash TMDL should have been preceded by a scientific study of the assimilative capacity of the Los Angeles River. They assert the matter was best suited for their determination rather than the court's and the evidence adequately supports their decision. We agree with the Water Boards.

During the notice and comment period, the Regional Board received numerous complaints that a zero Trash TMDL is infeasible, or at least unwarranted without a scientific assimilative capacity study, or load capacity study, showing a zero limit is the only means of protecting beneficial [***23] uses. For instance, the City of Los Angeles worried that "[i]f there's one gum wrapper in the [Los Angeles] River, you can get sued."

The Regional Board responded to one complaint as follows: "For more typical pollutants, the loading parameters are flow and pollutant concentration. For this pollutant [trash], flow does not serve to dilute the pollutant, but merely serves as a transport mechanism. Therefore, the typical loading calculation does not apply to trash." The Regional Board took the position that since littering is unlawful, a target of zero trash in the Los Angeles River is the only defensible position. It also explained that its staff "found no study to document that there is an acceptable level of trash that will cause no harm to aquatic life," and absent such a study it was compelled to adopt a zero target.

[**385] At a Regional Board hearing, Dr. Mark Gold, executive director of Heal the Bay, testified he was unaware of any assimilative capacity study having been performed anywhere on trash. He explained, "Basically it's a physical object. It's trash. It's not something that breaks down and becomes part of the environment in many, many cases. And so honestly, it probably [***24] won't reach any sort of threshold of being a scientific study of any value."

At a State Board hearing Dave Smith, an EPA team leader working with the Regional Board on the trash issue, testified "it would be difficult to design [an assimilative capacity] study and come up with firm answers." He also explained that both the Regional Board and the State Board "have conducted pretty diligent efforts to find research studies, reports, that look at the affects of trash on the aquatic environment," and neither they nor the EPA could find any literature to support a target of more than zero trash.

[*1411] Alex Helperin, of the Natural Resources Defense Council, testified at a Regional Board hearing that "[e]ven small quantities [of trash] can maim and kill wildlife, [which] becomes entangled in it or ingest[s] it. [Trash] [c]an obstruct and repel boaters and contract recreators and compromise the aesthetic quality that's essential to the recognized aspect of non-contact

recreation beneficial use for the Los Angeles River."

The administrative record includes numerous photographs of copious amounts of trash deposited in the Los Angeles River watershed through storm water drains. Dennis [***25] Dickerson, the executive officer of the Regional Board, testified he took photographs of trash in the Long Beach area shortly after storms, and among them are photographs of "water birds foraging among the trash." One photograph is of a bird with a cigarette butt in its mouth and another is of a fish trapped in a plastic six-ring can holder.

In arguing an assimilative capacity study is required *before* adopting a TMDL, the Cities rely principally on an EPA document issued January 7, 2000, entitled "Guidance for Developing TMDLs in California" (2000 EPA Guidance). It states: "The TMDL document must describe the relationship between numeric target(s) and identified pollutant sources, and estimate total assimilative capacity (loading capacity) of the water[body for the pollutant of concern ¶] The loading capacity is the critical quantitative link between the applicable water quality standards (as interpreted through numeric targets) and the TMDL. Thus, a maximum allowable pollutant load must be estimated to address the site-specific nature of the impairment. ... ¶] The loading capacity section must discuss the methods and data used to estimate loading capacity. [***26] A range of methods can be used" (Boldface omitted.)

The 2000 EPA Guidance, however, contains the following disclaimer: "[I]t does not impose legally-binding requirements on the EPA, the State of California, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA and State decision makers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate and consistent with the requirements of section 303(d) [of the Clean Water Act] and EPA's regulations."

(6) Smith, of the EPA, testified at a Regional Board hearing that he wrote the 2000 EPA Guidance and the Trash TMDL "fully complies with the Clean Water Act, its regulations and [the 2000 EPA Guidance]." Smith explained the "TMDL process specifically contemplates making decisions under uncertainty," and "[i]t does so by providing that a margin of safety has to be [**386] incorporated in every TMDL to account for the uncertainty in the analysis." Smith said states are required

"to move forward to make TMDL decisions [*1412] based on available information and data, not to wait again and again for better information to come forward." [***27] Generally, " 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.' " (*United States v. Mead Corp.* (2001) 533 U.S. 218, 227-228 [150 L. Ed. 2d 292, 121 S. Ct. 2164].)

In *Natural Resources Defense Council v. Muszynski* (2d Cir. 2001) 268 F.3d 91 (*Muszynski*), the plaintiff asked the court to invalidate a TMDL that the EPA had approved to control phosphorus pollution in drinking water, on the ground a margin of safety of only 10 percent was insufficient to account for uncertainty regarding the effects of phosphorus on water quality. The plaintiff argued "that no scientific or mathematical basis prescribed this percentage as opposed to any other." (*Id.* at p. 102.) The EPA countered that "because 'there is no "standard" or guideline for choosing a specific margin of safety, best professional judgment and the available information are used in setting [it].' " (*Ibid.*) The *Muszynski* court agreed with the EPA, explaining: "While the [margin of safety] may ... be set with an uncomfortable degree of discretion, requiring that EPA [or authorized regional board] show a rigorous [***28] scientific methodology *dictates one course of action as opposed to another and would effectively prevent the agency from acting in situations where action is required in the face of a clear public health or environmental danger but the magnitude of that danger cannot be effectively quantified.* '[A]s long as Congress delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence.' [Citation.] ... [S]imply to reject EPA's efforts to implement the [Clean Water Act] because it must respond to real water quality problems without the guidance of a rigorously precise methodology would essentially nullify the exercise of agency discretion in the form of 'best professional judgment.' " (*Muszynski, supra*, 268 F.3d at pp. 102-103, italics added.)

Further, in *Muszynski, supra*, 268 F.3d 91, 103, the court noted "that approval of the Phase I [margin of safety] was based, in part, on the limited information available. The EPA approval contemplates revision of the [margin of safety] as more information becomes available: 'As additional reservoir data and loading [***29] data become available, Phase I model

assumptions are being reexamined under Phase II.' "

We conclude federal law does not require the Regional Board to conduct an assimilative capacity study before adopting the Trash TMDL. Moreover, the evidence amply shows that because of the nature of trash, including Styrofoam containers and other materials that are undiluted by water, in contrast to chemical pollutants, and the dangers to wildlife of even small amounts of trash, an assimilative capacity study would be difficult to conduct and of little value at the outset. For instance, given the ill effects of trash in a [*1413] water body it is unlikely such a study would determine the Los Angeles River may be loaded with a certain percentage of trash without affecting beneficial uses, particularly since a TMDL must include a margin of safety that "takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." (33 U.S.C. § 1313(d)(1)(C).) In any event, the Trash TMDL requires the Regional Board to reconsider the zero trash target after a 50 percent reduction of trash is achieved, and no party suggests a trash reduction of [***30] at least 50 percent is unwarranted or unattainable. Because of [**387] this escape hatch, compliance with a zero trash target may never actually be mandated. The Water Boards' decision not to conduct or require an assimilative capacity study is within their expertise, not the court's, and we defer to them on the issue.

III

Cost-Benefit Analysis and Economic Considerations

The Water Boards next contend the court erred by finding the Trash TMDL is invalid because they violated state law by not conducting a cost-benefit analysis (Wat. Code, § 13267) or considering economic factors (*id.* at § 13241) before adopting and approving it.

A

Water Code Section 13267

A regional board is authorized to investigate the quality of waters in its region (Wat. Code, § 13267, subd. (a)), and when it requires a polluter to furnish "technical or monitoring program reports," the "burden, including costs, of these reports shall bear a reasonable relationship to the need for the report[s] and the benefits to be obtained from the reports." (Wat. Code, § 13267, subd.

(b)(1.) The court [***31] found the Regional Board adopted the Trash TMDL under the authority of Water Code section 13267, as the document mentions the statute several times and "expressly requires monitoring plans and submission of data to establish baselines for trash discharges."

The Water Boards persuasively contend Water Code section 13267 is inapplicable, and references to that statute in the Trash TMDL are to contemplated future orders. For instance, the Trash TMDL states "[b]aseline monitoring will be required via [Water Code] Section 13267," and the submission of baseline monitoring plans will be due 30 days after receipt of the Executive Officer's request as authorized by [Water Code] Section 13267." [*1414] It also states that "future storm water permits will be modified to incorporate the Waste Load Allocations and to address monitoring and implementation of this [Trash] TMDL."

Further, the Trash TMDL states "the permittee [under the Municipal NPDES permit] will submit a monitoring plan with the proposed monitoring sites and at least two alternative monitoring locations for each site. The plan must [***32] include maps of the drainage and storm drain data for each proposed and alternate monitoring location. The monitoring plan(s) will be submitted to the Regional Board within 30 days after receipt of the Executive Officer's letter requesting such a plan. Such a request is authorized pursuant to [Water Code] [s]ection 13267. ... The Regional Board's Executive Officer will have full authority to review the monitoring plan(s), to modify the plan, to select among the alternate monitoring sites, and to approve or disapprove the plan(s)."

Additionally, the Water Boards submit that the December 21, 2001 order the Regional Board issued under Water Code section 13267 to the County of Los Angeles and copermittees under the Municipal NPDES permit regarding baseline monitoring and reporting would have been "useless and unnecessary" had the Trash TMDL itself required monitoring and reporting, and since there was no appeal of the December 21 order to the State Board within 30 days (Wat. Code, § 13320, subd. (a)) the cost-benefit analysis issue is not subject to appellate review. We note that the December 21 order, but not the Trash TMDL, warns [***33] that under Water Code section 13268 the "failure to conduct the required monitoring and/or to provide the required information in

a timely manner [**388] may result in civil liability imposed by the Regional Board in an amount not to exceed ... \$ 1000."

(7) "Our primary aim in construing any law is to determine the legislative intent. [Citation.] In doing so we look first to the words of the statute, giving them their usual and ordinary meaning." (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501 [247 Cal. Rptr. 362, 754 P.2d 708].) We agree that by its plain terms Water Code section 13267 is inapplicable at the TMDL stage, and thus the court erred by invalidating the Trash TMDL on this ground. The monitoring and reports are required by the December 21, 2001 order, not the Trash TMDL, and the reduction of trash will be implemented by other NPDES permits. "TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans." (*Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123, 1129.) (8) "A TMDL does not, by itself, [***34] prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source [*1415] controls." (*City of Arcadia I, supra*, 265 F. Supp. 2d at p. 1144.) A "TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and water[bodies]." (*Id.* at p. 1145.)

B

Water Code Section 13241

Water Code section 13241 provides that "[e]ach regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance." In establishing water quality objectives a regional board is required to consider several factors, including "[e]conomic considerations." (Wat. Code, § 13241, subd. (d).)

The Water Boards contend Water Code section 13241 is inapplicable because the Trash TMDL does not establish water quality objectives, but [***35] merely implements, under Water Code section 13242, the existing narrative water quality objectives in the 1994 Basin Plan. It provides that waters shall not contain floating materials, including solids, or suspended or

settleable materials in concentrations that adversely affect beneficial uses. The Cities counter that the Trash TMDL effectively establishes new water quality objectives, because when the 1994 Basin Plan was adopted a TMDL for trash was not contemplated and thus economic considerations of such a TMDL were not considered. Further, the Trash TMDL imposes for the first time a numeric limit for trash and significantly increases the costs of compliance.

We need not, however, decide whether the Trash TMDL adopts new or revised water quality objectives within the meaning of Water Code section 13241, because even if the statute is applicable, the Water Boards sufficiently complied with it.⁹ Water Code section 13241, subdivision (d) does not define "economic considerations" or specify a particular manner of compliance, and thus, as the Water Boards assert, the matter is within a regional [**389] board's discretion. [***36] It appears there is no reported opinion analyzing the "economic considerations" phrase of this statute. In *City of Burbank, supra*, 35 Cal.4th at page 625, the court, without discussion, concluded that in adopting Water Code section 13241 the Legislature intended "that a regional board consider the *cost of compliance* [with numeric pollutant restrictions] when setting effluent limitations in a wastewater discharge permit." (Italics added.)

9 For the same reason, we are not required to reach the Water Boards' assertion that to any extent the California Supreme Court's recent opinion in *City of Burbank, supra*, 35 Cal.4th 613, applies to a TMDL, it precludes them from considering economic factors in establishing the Trash TMDL.

[*1416] The Trash TMDL discusses the costs of gathering and disposing of trash at the mouth of the Los Angeles River watershed during the rainy seasons between 1995 and 1999. It also states: "Cleaning up the river, its tributaries and [***37] the beaches is a costly endeavor. The Los Angeles County Department of Public Works contracts out the cleaning of over 75,000 catchments (catch basins) for a total cost of slightly over \$ 1 million per year, billed to 42 municipalities. ... [¶] Over 4,000 tons of trash are collected from Los Angeles County beaches annually, at a cost of \$ 3.6 million to Santa Monica Bay communities in fiscal years 1988-1989 alone. In 1994 the annual cost to clean the 31 miles of

beaches (19 beaches) along Los Angeles County was \$ 4,157,388."

The Trash TMDL also discusses the costs of various types of compliance measures, and explains the "cost of implementing this TMDL will range widely, depending on the method that the Permittees select to meet the Waste Load Allocations. Arguably, enforcement of existing litter ordinances could be used to achieve the final Waste Load Allocations at minimal or no additional cost. The most costly approach in the short-term is the installation of full-capture structural treatment devices on all discharges into the river. However, in the long term this approach would result in lower labor costs and may be less expensive than some other approaches."

The Trash TMDL [***38] defines catch basin inserts as "the least expensive structural treatment device in the short term," at a cost of approximately \$ 800 each. It cautions, however, that because catch basin inserts "are not a full capture method, they must be monitored frequently and must be used in conjunction with frequent street sweeping." The Trash TMDL estimates that if the approximately 150,000 catch basins throughout the watershed were retrofitted with inserts, capital costs would be \$ 120 million over 10 years, maintenance and operation costs would be \$ 330 million over 10 years, and maintenance and operation costs after full implementation would be \$ 60 million per year.

Further, the Trash TMDL discusses the full capture vortex separation system (VSS), which "diverts the incoming flow of storm[water] and pollutants into a pollutant separation and containment chamber. Solids within the separation chamber are kept in continuous motion, and are prevented from blocking the screen so that water can pass through the screen and flow downstream. This is a permanent device that can be retrofitted for oil separation as well. Studies have shown that VSS [units] remove virtually all of the trash contained [***39] in treated water. The cost of installing a VSS is assumed to be high, so limited funds will place a cap on the number of units which can be installed during any single fiscal year."

[*1417] The Trash TMDL estimates the retrofitting of the entire Los Angeles River watershed with low capacity VSS units would be \$ 945 million in capital costs and \$ 813 million in operation and maintenance costs over 10 years, and \$ 148 million in annual operation and maintenance costs after full implementation. The

installation of large capacity VSS units would run [**390] approximately \$ 332 million in capital costs and \$ 41 million in operation and maintenance costs over 10 years, and \$ 7.4 million per year in operation and maintenance costs after full implementation. The yearly cost of servicing one VSS unit is estimated to be \$ 2,000. The Trash TMDL explains that "outfitting a large drainage with a number of large VSS [units] may be less costly than using a larger number of small VSS [units]. Maintenance costs decrease dramatically as the size of the system increases." The Trash TMDL also contains a cost comparison of catch basin inserts and low capacity and large capacity VSS units.

Additionally, the Trash [***40] TMDL estimates the costs for end-of-pipe nets at between \$ 10,000 and \$ 80,000, depending on the length of the pipe network. It explains that " '[r]elease nets' are a relatively economical way to monitor trash loads from municipal drainage systems. However, in general they can only be used to monitor or intercept trash at the end of a pipe and are considered to be partial capture systems, as nets are usually sized at a 1/2&inches; to 1&inches; mesh."

The Cities assert that "a 'consideration' of economics should have included a discussion of the economic *impacts* associated with the vortex separation systems. Alternatively, the Water Boards could have analyzed other methods of compliance, such as a series of [best management practices], including increased street sweeping, catch basin inserts, release nets, or some other combination of [best management practices] that should have been evaluated for purposes of allowing the municipalities to be in deemed compliance with the zero [Trash] TMDL." (Italics added.) As stated, though, the Trash TMDL does include the estimated costs of several types of compliance methods and a cost comparison of capital costs and costs of operation and maintenance. [***41] The Cities cite no authority for the proposition that a consideration of economic factors under Water Code section 13241 must include an analysis of every conceivable compliance method or combinations thereof or the fiscal impacts on permittees.

Given the lack of any definition for "economic considerations" as used in Water Code section 13241, and our deference to the Water Boards' expertise, we conclude the Trash TMDL's discussion of compliance costs is adequate [*1418] and does not fulfill the arbitrary or capricious standard. Accordingly, the Trash

TMDL is not invalid on this ground.¹⁰

10 The Cities also assert that under federal law an economic analysis is a prerequisite to the adoption of a TMDL. They rely on 40 Code of Federal Regulations, part 130.6(c)(4), but it pertains to nonpoint sources of pollution that need not be addressed in a TMDL, as discussed further *post*. The portion of the regulation covering TMDL's does not mention economics (*id.*, § 130.6(c)(1)). Parts 130.6(5) and (6) of 40 Code of Federal Regulations discuss economics, but in the context of the area wide planning process under section 208(b)(2) of the Clean Water Act (33 U.S.C. § 1288(b)(2)), which is inapplicable here. According to the Water Boards, the Southern California Association of Governments is the designated area-wide planning agency.

[***42] IV

Los Angeles River Estuary

Additionally, the Water Boards challenge the court's finding they abused their discretion by attempting to include the Estuary in the Trash TMDL, as the Estuary is not on the state's 1998 303(d) list of impaired waters. The Water Boards contend a water body's formal listing on the state's 303(d) list is not a prerequisite to formulating a TMDL for it. Rather, an agency may simultaneously submit to the EPA the *identification* of a [**391] water body as impaired and a corresponding TMDL.

The Clean Water Act provides: "Each state shall identify those waters within its boundaries for which the effluent limitations ... are not stringent enough to implement any water quality standards applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters." (33 U.S.C. § 1313(d)(1)(A).) Further, it provides that "[e]ach state shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load" (*Id.* at § 1313(d)(1)(C).) [***43] These provisions do not prohibit a regional board from identifying a water body and establishing a TMDL for it at essentially the same time, or indicate that formal designation on a state's 303(d) list is a prerequisite to a TMDL.

Further, 33 United States Code section 1313(d)(2)

provides: "Each State shall submit to the [EPA] Administrator from time to time, ... for his [or her] approval the waters identified *and* the loads established under paragraphs (1)(A) [and] ... (1)(C) ... of this subsection. The [EPA] Administrator shall either approve or disapprove such identification *and* load not later than thirty days after the date of submission." (Italics added.) This clarifies that a regional board may simultaneously identify an impaired water body and establish a TMDL for it.

[*1419] In *San Francisco BayKeeper v. Whitman*, *supra*, 297 F.3d 877, 884-885, the court held an agency has no *duty* to submit a TMDL at the same time it identifies an impaired water body, noting the development of a TMDL "to correct the pollution is obviously a more intensive and time-consuming project than simply identifying the polluted waters, as the [***44] EPA has indicated." (*Id.* at p. 885.) The Water Boards assert the case does not deprive an agency from exercising its *discretion* to simultaneously submit to the EPA the identification of an impaired water body and a TMDL for it. Given the plain language of 33 United States Code section 1313(d)(2), we agree. Moreover, "[s]tates remain at the front line in combating pollution" (*City of Arcadia II, supra*, 411 F.3d at p. 1106), and "[s]o long as the [s]tate does not attempt to adopt more *lenient* pollution control measures than those already in place under the [Clean Water] Act, [it] does not prohibit state action." (*Id.* at p. 1107.)

Alternatively, the Cities complain the Regional Board did not sufficiently identify the Estuary as being impaired and included in the Trash TMDL until after its adoption and approval by the State Board and Office of Administrative Law and the completion of all public hearings. On July 29, 2002, the Regional Board sent the EPA a memorandum "to provide clarification on specific aspects" of the Trash TMDL. It stated that a "TMDL was established for the reaches of the Los [***45] Angeles River, tributaries and lakes listed on the [state's] 1998 303(d) list," and "[i]n addition, a TMDL was established for the Los Angeles River [E]stuary in the City of Long Beach. As described on page 12, paragraph 2 of the [staff] report, staff found that the impairment in the [E]stuary due to trash is 'even more acute in Long Beach where debris flushed down by the upper reaches collects.' [¶] The impairment in the [E]stuary was well documented during TMDL development," and it "would have been included in the 1998 303(d) list if the attached

photographic evidence had been available at the time of the listing."

The Trash TMDL lists the reaches of the Los Angeles River "that are impaired by trash, and listed on the [state's] 303(d) [**392] list." The list does not include the Estuary. The Water Boards assert that even so, it was always obvious the Estuary is impaired and included in the Trash TMDL. The Trash TMDL states it is "for the Los Angeles River Watershed," and "watershed" is defined as "a region or area bounded peripherally by a divide and draining ultimately to a particular watercourse or body of water." (Merriam-Webster's Collegiate Dict. (10th ed. 1996) p. [***46] 1336.) "Estuary" is defined as "a water passage where the tide meets a river current," especially "an arm of the sea at the lower end of a river." (*Id.* at p. 397.)

The Trash TMDL describes the watershed as beginning at the "western end of the San Fernando Valley to the Queensway Bay and Pacific Ocean at Long Beach," and it also states the watershed continues from "Willow Street all [*1420] the way through the [E]stuary." An amici curiae brief by Santa Monica BayKeeper, Inc., Heal the Bay, Inc., and Natural Resources Defense Council, Inc. (collectively BayKeeper), asserts Queensway Bay is the site of the Estuary, and no party has challenged the assertion. Further, the Trash TMDL lists and discusses the beneficial uses of the Estuary, including habitat for many species of birds, some endangered, and fish. It also states beneficial uses "are impaired by large accumulations of suspended and settled debris throughout the river system," and in particular "estuarine habitat" is impaired. Further, the administrative record contains several pictures of trash deposited in the Estuary during high flows, depicting "the variety of ways through which trash ... becomes an integral part of wildlife, [***47] affecting all plant and animal communities in the process."

The Trash TMDL's identification of the Estuary as impaired could have been clearer, but we conclude it was sufficient to put all affected parties on notice, and does not meet the arbitrary-and-capricious standard. Further, although the identification of impaired water bodies requires a priority ranking (33 U.S.C. § 1313(d)(2)), and the Trash TMDL does not prioritize the Estuary's need for a TMDL, we agree with amici curiae BayKeeper that any error in the Water Boards' procedure was not prejudicial because the Trash TMDL shows amelioration

of the trash problem in the entire Los Angeles River watershed is highly important, and it is unlikely the Water Boards would single out the Estuary for lower priority or that inclusion of the Estuary would disturb their existing priorities.

V

CEQA

(9) The Water Boards challenge the sufficiency of the evidence to support the trial court's finding that the amendment adding the Trash TMDL to the 1994 Basin Plan does not comport with CEQA. The court found the Regional Board's environmental checklist was deficient and there is sufficient evidence of a fair argument that [***48] the project may have a significant effect on the environment, thus necessitating an EIR or its functional equivalent. We conclude the court was correct.

A

General Legal Principles

(10) "CEQA compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the [*1421] imposition of feasible mitigation measures or through the selection of feasible alternatives." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1233 [32 Cal. Rptr. 2d 19, 876 P.2d 505].) CEQA mandates that public agencies refrain from approving projects with significant environmental effects if [**393] there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134 [65 Cal. Rptr. 2d 580, 939 P.2d 1280].)

CEQA is implemented through initial studies, negative declarations and EIR's. (*Sierra Club v. State Bd. of Forestry, supra*, 7 Cal.4th at p. 1229.) "CEQA requires a governmental agency [to] prepare an [EIR] whenever it considers approval of a proposed project that 'may have a significant effect on the environment.' " (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas, supra*, 29 Cal.App.4th at p. 1601.) [***49] "If there is no substantial evidence a project 'may have a significant effect on the environment' or the initial study identifies potential significant effects, but provides for mitigation revisions which make such effects insignificant, a public agency must adopt a negative declaration to such effect

and, as a result, no EIR is required. [Citations.] However, the Supreme Court has recognized that CEQA requires the preparation of an EIR 'whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.' [Citations.] Thus, if substantial evidence in the record supports a 'fair argument' significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified." (*Id.* at pp. 1601-1602.)

" 'Significant effect on the environment? means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the [***50] environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant.' " (Cal. Code Regs., tit. 14, § 15382.)

B

Certified Regulatory Program

(11) "State regulatory programs that meet certain environmental standards and are certified by the Secretary of the California Resources Agency are exempt from CEQA's requirements for preparation of EIRs, negative declarations, and initial studies. [Citations.] Environmental review documents prepared by certified programs may be used instead of environmental documents that CEQA would otherwise require. [Citations.] Certified regulatory [*1422] programs remain subject, however, to other CEQA requirements." (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2005) § 21.2, p. 1076; see Pub. Resources Code, § 21080.5.) Documents prepared by certified programs are considered the "functional equivalent" of documents CEQA would otherwise require. (*Mountain Lion Foundation v. Fish & Game Com., supra*, 16 Cal.4th at p. 113; 2 Kostka & Zischke, Practice Under the Cal. Environmental [***51] Quality Act, *supra*, § 21.10, p. 1086 ["the documentation required of a certified program essentially duplicates" that required for an EIR or negative declaration].)

An "agency seeking certification must adopt regulations requiring that final action on the proposed activity include written responses to significant

environmental points raised during the decisionmaking process. [Citation.] The agency must also implement guidelines for evaluating the proposed activity consistently with the [**394] environmental protection purposes of the regulatory program. [Citation.] The document generated pursuant to the agency's regulatory program must include alternatives to the proposed project and mitigation measures to minimize significant adverse environmental effects [citation], and be made available for review by other public agencies and the public [citation]." (*Mountain Lion Foundation v. Fish & Game Com.*, *supra*, 16 Cal.4th at p. 127.)

(12) The guidelines for implementation of CEQA (Cal. Code Regs., tit. 14, § 15000 et seq.) do not directly apply to a certified regulatory program's environmental document. (2 Kostka & Zischke, [***52] Practice Under the Cal. Environmental Quality Act, *supra*, § 21.10, p. 1086.) However, "[w]hen conducting its environmental review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA." (*Ibid.*)

In a certified program, an environmental document used as a substitute for an EIR must include "[a]lternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment," and a document used as a substitute negative declaration must include a "statement that the agency's review of the project showed that the project would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion." (Cal. Code Regs., tit. 14, § 15252, subd. (a)(2)(A), (B).)

The basin planning process of the State Board and regional boards is [***53] a certified regulatory program (Cal. Code Regs., tit. 14, § 15251, subd. (g)), and [*1423] the regulations implementing the program appear in the California Code of Regulations, title 23, sections 3775 to 3782. A regional board's submission of a plan for State Board approval must be accompanied by a brief description of the proposed activity, a completed environmental checklist prescribed by the State Board, and a written report addressing reasonable alternatives to

the proposed activity and mitigation measures to minimize any significant adverse environmental impacts. (*Id.*, § 3777, subd. (a).)

C

Environmental Documentation

The Regional Board's environmental documentation in lieu of documents CEQA ordinarily requires consists of a checklist and the Trash TMDL. The checklist asked a series of questions regarding whether implementation of the Trash TMDL would cause environmental impacts, to which the Regional Board responded "yes," "maybe" or "no." "Yes" or "maybe" answers required an explanation. The checklist described beneficial impacts pertaining to plant and animal life, water quality [***54] and recreation. The checklist denied the project would have any environmental impact on land, including soil displacement, air, noise, natural resources or traffic, and thus it included no discussion of those factors. The checklist concluded "the proposed Basin Plan amendment [adding the Trash TMDL] could not have a significant effect on the environment."

The Regional Board obviously intended its documentation to be the functional equivalent of a negative declaration. Nonetheless, on appeal the Water Boards claim for the first time that the Regional [**395] Board's environmental review process is tiered, and its documentation meets the requirements of a first tier EIR under Public Resources Code section 21159. They assert the court's criticism of the checklist is baseless "because it ignores the concept of tiered environmental review and specific provisions for pollution control performance standards."

" 'Tiering' refers 'to the coverage of general matters in broader EIRs (such as on general plans or policy statements) with subsequent narrower EIRs or ultimately *site-specific* EIRs incorporating by reference the general discussions and concentrating solely [***55] on the issues specific to the EIR subsequently prepared. Tiering is appropriate when the sequence of EIRs is: [¶] ... [f]rom a general plan, policy, or program EIR to a ... site-specific EIR.' " (*Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 285 [126 Cal. Rptr. 2d 615].) "[C]ourts have allowed first tier EIR's to defer detailed analysis to subsequent project EIR's." (*Friends of [*1424] Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82

Cal.App.4th 511, 532 [98 Cal. Rptr. 2d 334].)

(13) Public Resources Code section 21159, which allows expedited environmental review for mandated projects, provides that an agency "shall perform, at the time of the adoption of a rule or regulation requiring the installation of pollution control equipment, or a performance standard or treatment requirement, an environmental analysis of the reasonably foreseeable methods of compliance. ... The environmental analysis shall, at [a] minimum, include, all of the following: [¶] (1) An analysis of the reasonably foreseeable environmental impacts of the methods of compliance. [¶] (2) An analysis of reasonably foreseeable mitigation measures. [***56] [¶] (3) An analysis of reasonably foreseeable alternative means of compliance with the rule or regulation." (Pub. Resources Code, § 21159, subd. (a).) The Water Boards submit they complied with the statute, and the "tier two environmental review is the responsibility of the local agencies who will determine how they intend to comply with the performance standards" of the Trash TMDL.

Issues not presented to the trial court are ordinarily waived on appeal. (*Royster v. Montanez* (1982) 134 Cal. App. 3d 362, 367 [184 Cal. Rptr. 560].) In any event, we conclude the checklist and Trash TMDL are insufficient as either the functional equivalent of a negative declaration¹¹ or a tiered EIR. Moreover, an EIR is required since the Trash TMDL itself presents substantial evidence of a fair argument that significant environmental impacts may occur. "Because a negative declaration ends environmental review, the fair argument test provides a low threshold for requiring an EIR." (*Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 399 [10 Cal. Rptr. 3d 451].)

¹¹ A negative declaration may not be based on a "bare bones" approach in a checklist. (*Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 797, fn. 2 [88 Cal. Rptr. 2d 455], and cases cited therein.) A "certified program's statement of no significant impact must be supported by documentation showing the potential environmental impacts that the agency examined in reaching its conclusions," and "[t]his documentation would be similar to an initial study." (2 Kostka & Zischke, Practice Under the

Cal. Environmental Quality Act, *supra*, § 21.11, pp. 1088-1089, italics added.) Because we conclude an EIR is required, we need not expand on how the checklist and Trash TMDL fail to satisfy negative declaration requirements or their functional equivalent.

[***57] [**396] The Trash TMDL discusses various compliance methods or combinations thereof that permittees may employ, including the installation of catch basin inserts and VSS units. The Trash TMDL estimates that if the catch basin method is used exclusively, approximately 150,000 catch basins throughout the watershed would require retrofitting at a cost of approximately \$ 120 million. It explains, however, that the "ideal way to capture trash deposited into a storm[]drain system would be to install a VSS unit. This device diverts [*1425] the incoming flow of storm[]water and pollutants into a pollution separation and containment chamber." Only VSS units or similar full-capture devices will be deemed fully compliant with the zero trash target. The Trash TMDL estimates the cost of installing low capacity VSS units would be \$ 945 million and the cost of installing large capacity VSS units would be \$ 332 million.

The checklist and the Trash TMDL, however, ignore the temporary impacts of the construction of these pollution controls, which logically may result in soils disruptions and displacements, an increase in noise levels and changes in traffic circulation. Further, the Trash TMDL explains that since [***58] catch basin inserts "are not a full capture method, they must be monitored frequently and must be used in conjunction with frequent street sweeping." The checklist and the Trash TMDL also ignore the effects of increased street sweeping on air quality, and possible impacts caused by maintenance of catch basin inserts, VSS units and other compliance methods.

Indeed, the County of Los Angeles wrote to the Regional Board that "cleanout of structural controls, such as [catch basin inserts] and VSSs, naturally will increase existing noise levels due to vehicle and vacuuming noises." The City of Los Angeles advised that the Trash TMDL would result in increased maintenance vehicle traffic and "substantial air emissions or deterioration of ambient air quality," increased noise, increased use of natural resources and adverse impacts on existing transportation systems.

The Water Boards contend those comments are merely "unsubstantiated opinion and speculation by biased project opponents." Substantial evidence is not "[a]rgument, speculation, unsubstantiated opinion or narrative [or] evidence which is clearly inaccurate or erroneous." (Pub. Resources Code, § 21082.2, subd. (c).) [***59] However, letters and testimony from government officials with personal knowledge of the anticipated effects of a project on their communities "certainly supports a fair argument that the project may have a significant environmental impact." (*City of Livermore v. Local Agency Formation Com.* (1986) 184 Cal. App. 3d 531, 542 [230 Cal. Rptr. 867].) Again, however, the Trash TMDL itself satisfies the fair argument criterion.

Even if the Water Boards had relied on Public Resources Code section 21159 at the trial court, the environmental documents do not meet its minimum requirements. Neither the checklist nor the Trash TMDL includes an analysis of the reasonably foreseeable impacts of construction and maintenance of pollution control devices or mitigation measures, and in fact the Water Boards develop no argument as to how they ostensibly complied with the statute. While we agree a tiered environmental analysis is appropriate here, the Regional Board did not prepare a first-level EIR or its functional equivalent. We reject the Water Boards' argument the Regional Board did all it [*1426] could because there "is no way to examine project level [***60] impacts that are entirely dependent upon the speculative possibilities of how subsequent [**397] decision[.]makers may choose to comply" with the Trash TMDL. Tier two project-specific EIR's would be more detailed under Public Resources Code section 21159.2, but the Trash TMDL sets forth various compliance methods, the general impacts of which are reasonably foreseeable but not discussed.

As a matter of policy, in CEQA cases a public agency must explain the reasons for its actions to afford the public and other agencies a meaningful opportunity to participate in the environmental review process, and to hold it accountable for its actions. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles, supra*, 126 Cal.App.4th 1180, 1198.) The Water Boards' CEQA documentation is inadequate, and remand is necessary for the preparation of an EIR or tiered EIR, or functional equivalent, as substantial evidence raises a fair argument the Trash TMDL may have significant impacts on the

environment. The court correctly invalidated the Trash TMDL on CEQA grounds. ¹²

12 The Water Boards also contend the trial court erred by staying the implementation schedule for the Trash TMDL pending this appeal. The matter is moot given our holding on the CEQA issue.

[***61] VI

Declaratory Relief

In its statement of decision, the trial court explained the Cities "contend [the Water Boards] improperly attempted to control the watershed including the 'entire 584 square miles' of incorporated and unincorporated areas of the County [of Los Angeles], and nowhere in the [Trash] TMDL or the [1994] Basin Plan Amendment did [they] assert that the numeric Waste Load Allocations ... are to apply to the entire 584 square miles of watershed." The court, however, explained the Water Boards "concede the [Trash] TMDL only applies to navigable waters by asserting [they] didn't intend to control non-navigable waters," and it found "the parties are in agreement that the trash load allocations apply to the portion of the subject watershed as defined on pages 3575 and 3584 of the Administrative Record [pages of the Trash TMDL] and the Waste Load Allocations do not apply to non-waters."

The statement of decision nonetheless states the court granted the Cities' "relief as requested" as to "regulation of non-waters." In their third cause of action, the Cities sought a judicial declaration that the amendment to the 1994 Basin Plan and the Trash [***62] TMDL are invalid because they violate federal and state law. The judgment declared unenforceable a July 29, 2002, letter from [*1427] the Regional Board to the EPA that stated the "Waste Load Allocations apply to the entire urbanized portion of the watershed The urbanized portion of the watershed was calculated to encompass 584 square miles of the total watershed."

(14) "The fundamental basis of declaratory relief is the existence of an *actual, present controversy*." (5 Witkin, Cal. Procedure, *supra*, Pleadings, § 817, p. 273.) Because the parties agreed during this proceeding there was no *present* controversy, the judgment should not have included declaratory relief on the nonwaters issue.

CITIES' APPEAL

I

Concepts of "Maximum Extent Practicable" and "Best Management Practices"

(15) The Cities contend a zero target for trash in the Los Angeles River is unattainable, [**398] and thus the Trash TMDL violates the law by not deeming compliance through the federal "maximum extent practicable" and "best management practices" standards, which are less stringent than the numeric target of zero. The Cities rely on 33 United States Code section 1342(p)(3)(B)(iii), [***63] under which an NPDES permit for a municipal discharge into a storm drain "shall require controls to reduce the discharge of pollutants to the *maximum extent practicable*, including management practices, control techniques and system, design and engineering methods, and such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." (Italics added.)¹³ "Best management practices" are generally pollution control measures set forth in NPDES permits. (*BIA*, *supra*, 124 Cal.App.4th at p. 877.)

¹³ The Clean Water Act and applicable regulations do not define the maximum extent practicable standard. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 889 [22 Cal. Rptr. 3d 128] (*BIA*)). In *BIA*, the NPDES permit at issue defined the standard as "a highly flexible concept that depends on balancing numerous factors." (*Ibid.*)

The Cities assert that "as the [r]ecord [***64] reflects, compliance with the 'zero' [Trash] TMDL ... is impossible," and the Water Boards "themselves recognize that 'zero' is an impossible standard to meet." Contrary to the Cities' suggestion, the Water Boards made no implied finding or concession of impossibility. Rather, the record shows that members of the Water Boards questioned whether a zero trash target is actually attainable. A zero limit on [*1428] trash within the meaning of the Trash TMDL is attainable because there are methods of deemed compliance with the limit. The record does not show the limit is unattainable, and the burden was on the Cities as opponents of the Trash TMDL to establish impossibility. Further, the impossibility issue is not germane at this juncture, as the matter is at the planning stage with an

interim goal of a 50 percent reduction in trash, a goal everyone agrees is necessary and achievable.

In any event, the trial court found 33 United States Code section 1342(p)(3)(B)(iii) inapplicable to the adoption of a TMDL. The court also found state and federal laws authorize regional boards to "use water quality, and not be limited to practicability as the guiding principle for [***65] developing limits [in a TMDL] on pollution." Further, the court noted the Cities presented no authority for their proposition the Regional Board is required to adopt a storm water TMDL that is achievable.

(16) We agree with the court's assessment. The statute applicable to establishing a TMDL, 33 United States Code section 1313(d)(1)(C), does not suggest that practicality is a consideration. To the contrary, a regional board is required to establish a TMDL "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety." (33 U.S.C. § 1313(d)(1)(C).) The NPDES permit provision, 33 United States Code 1342(p)(3)(B), is inapplicable because, again, we are only considering the propriety of the Trash TMDL, a precursor to NPDES permits implementing it. Under the Trash TMDL, the numeric target will be reconsidered after several years when a reduction in trash of 50 percent is achieved, and thus it is presently unknown whether compliance with a trash limit of zero will ever actually be mandated.

(17) To bolster their position the Cities rely on 33 United States Code section 1329(a)(1)(C)). [***66] [**399] It provides, however, that in a state's assessment report for a *nonpoint* source management program, the state must "describe[] the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source." (*Ibid.*) In *BIA*, *supra*, 124 Cal.App.4th at page 887, we rejected the argument the statute shows Congress intended to apply a maximum extent practicable standard to point source discharges as well as nonpoint discharges. The Cities say they disagree with *BIA*, but they develop no argument revealing any flaw in the opinion. "[P]arties are required [*1429] to include argument and citation to authority in their briefs, and the absence of these

necessary elements allows this court to treat appellant's ... issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [37 Cal. Rptr. 2d 126].)

The Cities' reliance [***67] on *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, for the proposition that municipalities, unlike private companies, may not be required to strictly comply with numeric discharge limits is likewise misplaced. *Defenders of Wildlife v. Browner* involves a challenge to an NPDES permit, not the adoption of a TMDL. Further, the court there rejected the argument that "the EPA [or authorized regional or state board] may not, under the [Clean Water Act], require strict compliance with state water-quality standards, through numerical limits or otherwise." (*Id.* at p. 1166.) The court explained: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], [section] 1342(p)(3)(B)(iii) [of United States Code, title 33] states that '[p]ermits for discharges from municipal storm sewers ... shall require ... such other provisions as the [EPA] Administrator ... determines appropriate for the control of such pollutants.'" (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. ... [¶] Under that [***68] discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. ... Under 33 [United States Code section] 1342(p)(3)(B)(iii), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion." (*Id.* at pp. 1166-1167.)

In *BIA*, this court similarly held that 33 United States Code section 1342(p)(3)(B)(iii) does not divest a regional board's discretion to impose an NPDES permit condition requiring compliance with state water quality standards more stringent than the maximum-extent-practicable standard. (*BIA, supra*, 124 Cal.App.4th at pp. 871, 882-885; see also Wat. Code, § 13377 [waste discharge requirements shall meet federal standards and may also include "more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance"].) [***69] Thus, even if the analysis in *Defenders of Wildlife v. Browner* or *BIA* arguably has any

application to a TMDL, the opinions do not help the Cities.

(18) Additionally, the Cities' reliance on a November 2002 EPA memorandum on establishing TMDL's and issuing NPDES [**400] permits is misplaced, as it postdates the Regional Board's adoption of the Trash TMDL and its approval by the State Board and the EPA. Further, the memorandum states it [*1430] is not binding, and "indeed, there may be other approaches that would be appropriate in particular situations. When EPA makes a TMDL or permitting decision, it will make each decision on a case-by-case basis and will be guided by applicable requirements of the [Clean Water Act] and implementing regulations, taking into account comments and information presented at that time by interested persons regarding the appropriateness of applying these recommendations to the particular situation."

II

Nonpoint Sources of Pollution

The Cities contend the court should have invalidated the Trash TMDL on additional grounds, including the Water Boards' failure to identify load allocations and implementation measures for nonpoint sources of trash discharge. [***70] The Cities assert the Water Boards are required to adopt implementation measures "for the homeless and aerial sources of trash, [and] also for the other nonpoint sources of trash consisting of State and federal facilities, and other facilities not yet subject to NPDES Permits." The Cities submit that the Clean Water Act does not allow the Water Boards "to effectively impose the burden of the load allocation from all nonpoint sources solely on municipalities."

The Cities further claim the Water Boards acted arbitrarily and capriciously by imposing a trash target of zero on municipalities, but imposing a " 'de minimus' requirement on non-point source discharges." The Cities cite the July 29, 2002, letter from the Regional Board to the EPA, clarifying that it identified nonpoint sources of trash pollution "as wind blown trash and direct deposit of trash into the water," but "as the non-point sources were determined to be de-minimus, we did not believe it necessary to outline a reduction schedule for non-point sources." Contrary to the Cities' position, the Regional Board did not adopt a "de minimus" load allocation for nonpoint sources. Rather, as the trial court found, the Regional [***71] Board found the trash pollution from

nonpoint sources is de minimus compared to trash pollution from point sources. The TMDL states the "major source of trash in the [Los Angeles River] results from litter, which is intentionally or accidentally discarded in the watershed drainage areas."

In arguing the Trash TMDL is required to include a specific load allocation for nonpoint sources of pollution, the Cities rely on the 2000 EPA Guidance, which provides: "Load allocations for nonpoint sources *may* be expressed as specific allocations for specific discharges or as 'gross allotments' to nonpoint source discharger categories. Separate nonpoint source allocations *should* be established for background loadings. Allocations may be based on a variety [*1431] of technical, economic, and political factors. The methodology used to set allocations *should* be discussed in detail." (Italics added.)

The 2000 EPA Guidance, however, states it does not impose legally binding requirements. Further, the load allocation for nonpoint sources is implicitly zero for trash. Federal regulations define a TMDL as the sum of waste load allocations for point sources, load allocations for nonpoint sources [***72] and natural backgrounds. (40 C.F.R. § 130.2(i) (2003).) Since "[a] TMDL defines the specified maximum amount of a pollutant which can be discharged into a body of water from all sources combined" (*American Wildlands v. Browner* (10th Cir. 2001) 260 F.3d 1192, 1194), [**401] and the Trash TMDL specifies a zero numeric target for trash in Los Angeles River, load allocations are necessarily zero as well as waste load allocations.

Additionally, the Cities cite no authority for the proposition the Water Boards are required to identify an implementation program for nonpoint pollution sources. Again, "[w]here a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal. App. 3d 768, 783 [86 Cal. Rptr. 906], disapproved on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3 [98 Cal. Rptr. 217, 490 P.2d 537]; see *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1693, fn. 2 [44 Cal. Rptr. 2d 575].)

(19) In any event, although the Clean Water Act focuses on both point and nonpoint sources of pollution, it is settled that [***73] the measure "does not require states to take regulator[y] action to limit the amount of non-point water pollution introduced into its waterways.

While the [Clean Water Act] requires states to designate water standards and identify bodies of water that fail to meet these standards, ' "nothing in the [Clean Water Act] demands that a state adopt a regulatory system for nonpoint sources." ' " (*Defenders of Wildlife v. U.S. Environ. Protec.*, *supra*, 415 F.3d at pp. 1124-1125, citing *American Wildlands v. Browner*, *supra*, 260 F.3d 1192, 1197 ["In the [Clean Water] Act, Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution"]; *Appalachian Power Co. v. Train* (4th Cir. 1976) 545 F.2d 1351, 1373 ["Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [Clean Water] Act to regulate only the former"]; *City of Arcadia I*, *supra*, 265 F. Supp. 2d at p. 1145 ["For nonpoint sources, limitations on loadings are not subject to a federal nonpoint source permitting program, and therefore any nonpoint source reductions can be enforced ... only to [***74] the extent that a state institutes such reductions as regulatory requirements pursuant to state [*1432] authority".]) "Nonpoint sources, because of their very nature, are not regulated under the NPDES [program]. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the [Clean Water] Act which encourages states to develop areawide waste treatment management plans." (*Pronsolino v. Marcus*, *supra*, 91 F. Supp. 2d at p. 1348, citing 33 U.S.C. § 1288; see also 33 U.S.C. § 1329.)

We conclude the court correctly ruled on this issue.

III

Uses To Be Made of Watershed

The Cities next contend the Trash TMDL is invalid because the Water Boards "improperly relied on nonexistent, illegal and irrational 'uses to be made' of the [Los Angeles] River." (Boldface and some capitalization omitted.) The Cities complain that the Trash TMDL states a purported beneficial use of one of numerous reaches of the river on the state's 303(d) list is "recreation and bathing, in particular by homeless people who seek shelter there," and the State Board chairman questioned the legality of such uses. The Cities also assert there is no [***75] evidence to support the Trash TMDL's finding that swimming is an actual use of the river in any location.

The Cities rely on section 303(d)(1)(A) of the Clean Water Act (33 U.S.C. § 1313(d)(1)(A)), which provides

that in identifying impaired waters for its 303(d) list, states "shall establish a priority ranking for such waters, taking into account the severity of the pollution and the *uses to be made* of such waters." (Italics added.) [**402] The Cities assert "an 'illegal' use cannot be a 'use to be made' for the water body."

Additionally, the Cities cite Water Code section 13241, which requires regional boards to establish water quality objectives in water quality control plans by considering a variety of factors, including "[p]ast, present, and probable future beneficial uses of water." (Wat. Code, § 13241, subd. (a).) They assert the "Water Boards acted contrary to law by basing the [Trash] TMDL on any uses of the [Los Angeles] River other than the actual 'uses to be made' of the River." (Boldface omitted.)

The Cities, however, make no showing of prejudice. Swimming and bathing by the homeless are only [***76] two among numerous other beneficial uses that the Cities do not challenge, and there is no suggestion the numeric target of zero trash in the Los Angeles River would have been less stringent without consideration of the factors the Cities raise.

[*1433] IV

Scientific Methodology

Further, the Cities contend the Trash TMDL is invalid on the additional ground that before adopting and approving it the Water Boards failed to comply with the requisite data collection and analysis. The Cities rely on a federal regulation providing that "[s]tates must establish appropriate monitoring methods and procedures (including biological monitoring) necessary to compile and analyze data on the quality of waters of the United States and, to the extent practicable, ground-waters." (40 C.F.R. § 130.4(a) (2003).) "The State's water monitoring program shall include collection and analysis of physical, chemical and biological data and quality assurance and control programs to assure scientifically valid data" in developing, among other things, TMDL's. (*Id.*, § 130.4(b).)

The trial court rejected the Cities' position, finding they failed to establish the Water Boards' [***77] scientific data is inadequate or scientifically invalid. The court explained the Water Boards "have not failed to conduct ongoing studies, as they say, how else would

[they] know the River is impaired by trash[?] And the Record reveals studies relied upon by the Boards."

This argument is a variation on the assimilative capacity study issue, and we similarly reject it. As the Water Boards point out, "trash is different than other pollutants. ... The complex modeling and analytical effort that may be necessary for typical pollutants that may be present in extremely low concentrations have no relevance to calculating a trash TMDL." Further, the Trash TMDL does discuss sources of trash in the Los Angeles River. It states the "City of Los Angeles conducted an Enhanced Catch Basin Cleaning Project in compliance with a consent decree between the [EPA], the State of California, and the City of Los Angeles. The project goals were to determine debris loading rates, characterize the debris, and find an optimal cleaning schedule through enhancing basin cleaning. The project evaluated trash loading at two drainage basins[.]" It goes on to discuss the amounts and types of trash collected [***78] in the drainage basins between March 1992 and December 1994. The Cities cite no authority for the notion the Water Boards may not rely on data collected by another entity.

The Trash TMDL also states "[s]everal studies conclude that urban runoff is the dominant source of trash. The large amounts of trash conveyed by the urban storm water to the Los Angeles River is evidenced by the amount of ... trash that accumulates at the base of storm drains."

[*1434] [**403] Alternatively, the Cities contend a TMDL is not suitable for trash calculation. They rely on 33 United States Code section 1313(d)(1)(C), which provides: "Each State shall establish for [impaired] waters ... the total maximum daily load, for those pollutants which the [EPA] Administrator identifies ... as *suitable for such calculation*. Such load shall be established at a level *necessary* to implement the applicable water quality standards with seasonal variations and a margin of safety." (Italics added.)

The Cities also cite a 1978 EPA regulation that states a TMDL is "suitable for ... calculation" only under "proper technical conditions." (43 Fed.Reg. 60662, 60665 (Dec. 28, 1978) [***79] (italics omitted).) "Proper technical conditions" require "the availability of the analytical methods, modeling techniques and data base necessary to develop a technically defensible TMDL." (*Id.* at p. 60662.) The Cities assert the proper technical

conditions do not exist, referring to the Trash TMDL's comment that "[e]xtensive research has not been done on trash generation or the precise relationship between rainfall and its deposition in waterways."

The Cities ignore the EPA's determination that a TMDL *may* be calculated for trash as a pollutant. It approved the Regional Board's Trash TMDL, and had previously approved a trash TMDL for the East Fork of the San Gabriel River. (See Cal. Code Regs., tit. 23, § 3933.) Thus, the Cities' view that the 1978 EPA regulation prohibits a TMDL for trash is unfounded. TMDL's for trash are relatively new, and there is no evidence that in 1978 the EPA contemplated their establishment.

We find irrelevant the Cities' discussion of the EPA's proposed July 2000 TMDL "rule," as their federal register citation is not a regulation and merely concerns the 2003 withdrawal of a rule that never took effect. [***80] (68 Fed.Reg. 13608, 13609 (Mar. 19, 2003) ["The July 2000 rule was controversial from the outset"].) In August 2001 the EPA delayed implementation of the July 2000 rule for further consideration, noting that some local government officials argued "some pollutants are not suitable for TMDL calculation." (66 Fed.Reg. 41817, 41819 (Aug. 9, 2001).) Nothing is said, however, about whether a trash TMDL is unsuitable for calculation, and again, the EPA has approved such TMDL's. The withdrawal of the proposed July 2000 rule left the existing rule regarding the establishment of a TMDL in place. (33 U.S.C. § 1313(d)(1)(C).)

V

APA Requirements

Lastly, the Cities contend the trial court erred by finding the Water Boards did not violate the APA. They assert the July 29, 2002, "clarification [*1435] memorandum" from the Regional Board to the EPA makes substantive changes to the Trash TMDL regulation-the inclusion of the Estuary in the Trash TMDL and designating an allocation of zero for nonpoint pollution sources-violates the notice and hearing provisions of the APA. The Cities also contend the Trash TMDL and the clarification memorandum [***81] "establish[] a regulation in violation of the APA's elements of 'clarity,' 'consistency,' and 'necessity,' as defined in [Government] Code section 11349."

(20) The APA (Gov. Code, §§ 11340 et seq., 11370) "establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action [citations]; issue a complete text of the proposed regulation with a statement of the reasons for it [citation]; give interested parties an opportunity to comment on [**404] the proposed regulation [citation]; respond in writing to public comments [citations]; and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law [citation], which reviews the regulation for consistency with the law, clarity, and necessity [citations]." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568 [59 Cal. Rptr. 2d 186, 927 P.2d 296].) "One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so [***82] that they can conform their conduct accordingly [citation]." (*Id.* at pp. 568-569.)

The APA does not apply to "the adoption or revision of state policy for water quality control" unless the agency adopts a "policy, plan, or guideline, or any revision thereof." (Gov. Code, § 11353, subs. (a), (b)(1).) The Water Boards contend that while the Trash TMDL and amendment adding it to the 1994 Basin Plan are policies or plans covered by the APA, the clarification memorandum is not because it does not revise the terms of the Trash TMDL.

We are not required to reach the issue, because assuming the APA is applicable the Cities' position lacks merit. As to the Estuary, we have determined the Trash TMDL sufficiently notified affected parties of its inclusion in the document as an impaired water body. Further, we have determined the load allocation for nonpoint sources of trash pollution is also necessarily zero, and the Trash TMDL is not required to include implementation measures for nonpoint sources. Accordingly, the clarification memorandum is not germane.¹⁴

14 We deny the Water Boards' June 16, 2005, request for judicial notice.

[***83]

[*1436] DISPOSITION

The judgment is affirmed insofar as it is based on the

Trash TMDL's violation of CEQA, and on a rejection of each of the issues the Cities raised in their appeal. The judgment is reversed insofar as it is based on the Trash TMDL's lack of an assimilative capacity study, inclusion of the Estuary as an impaired water body, and a cost-benefit analysis under Water Code section 13267 or the consideration of economic factors under Water Code section 13241, and also insofar as it grants declaratory relief regarding the purported inclusion of nonnavigable waters in the Trash TMDL.

The court's postjudgment order staying the Trash TMDL's implementation schedule is affirmed. The parties are to bear their own costs on appeal.

McIntyre, J., and Irion, J., concurred.

A petition for a rehearing was denied January 17, 2006, and the petition of plaintiffs and appellants for review by the Supreme Court was denied April 19, 2006, S141673.

VOLUME III
TAB 9

LEXSEE

**COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY et al.,
Plaintiffs, Cross-defendants and Appellants; CALIFORNIA ASSOCIATION OF
SANITATION AGENCIES et al., Plaintiffs and Appellants, v. COUNTY OF KERN,
Defendant, Cross-complainant and Appellant; KERN COUNTY BOARD OF
SUPERVISORS, Defendant and Appellant; ARVIN-EDISON WATER STORAGE
DISTRICT et al., Interveners and Respondents.**

F043095

COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

**127 Cal. App. 4th 1544; 27 Cal. Rptr. 3d 28; 2005 Cal. App. LEXIS 516; 2005 Cal.
Daily Op. Service 2907; 2005 Daily Journal DAR 3974; 35 ELR 20070**

April 1, 2005, Filed

SUBSEQUENT HISTORY: Rehearing denied by County Sanitation Dist. No. 2 v. County of Kern, 2005 Cal. App. LEXIS 702 (Cal. App. 5th Dist., Apr. 25, 2005)

PRIOR HISTORY: [***1] Superior Court of Tulare County, No. 189564, Paul A. Vortmann, Judge.

COUNSEL: Lewis Brisbois Bisgaard & Smith, Daniel V. Hyde and Paul J. Beck for Plaintiff, Cross-defendant and Appellant County Sanitation District No. 2 of Los Angeles County.

Woodruff, Spradlin & Smart, Thomas L. Woodruff, Tami S. Crosby, Roberta A. Kraus and M. Lois Bobak for Plaintiff, Cross-defendant and Appellant Orange County Sanitation District.

Rockard J. Delgadillo, City Attorney, Christopher M. Westhoff, Assistant City Attorney, and Keith W. Pritsker, Deputy City Attorney, for Plaintiff, Cross-defendant and Appellant City of Los Angeles.

[*1557] Somach, Simmons & Dunn and Roberta L. Larson for Plaintiff and Appellant California Association of Sanitation Agencies.

Griswold, LaSalle, Cobb, Dowd & Gin, Robert M. Dowd and Raymond L. Carlson for Plaintiff and Appellant Southern California Alliance of Publicly Owned

Treatment Works.

Jones & Beardsley, Mark A. Jones; Borton, Petrini & Conron and Roger A. Parkinson for Plaintiff and Appellant Responsible Biosolids Management, Inc.

Bernard C. Barmann, Sr., County Counsel, James H. Thebeau, Deputy County Counsel; Hogan Guiney Dick and Michael M. Hogan [***2] for Defendant, Cross-complainant and Appellant and for Defendant and Appellant.

Law Offices of Young Wooldridge, Ernest A. Conant, Scott K. Kuney and Steven M. Torigiani for Intervener and Respondent Arvin-Edison Water Storage District.

McMurtrey, Hartsock & Worth, James A. Worth; and Linda Alvarado for Interveners and Respondents Cawelo Water District and West Kern Water District.

JUDGES: Dawson, J., with Dibiaso, Acting P. J., and Vartabedian, J., concurring.

OPINION BY: DAWSON [**35]

OPINION

DAWSON, J.--This appeal concerns the validity of an ordinance that restricts the application of sewage sludge on land located within the jurisdiction of Kern County. ¹ Sanitation agencies from Southern California ²

appeal adverse rulings from the trial court. The sanitation agencies contend (1) County was required to prepare an environmental impact report (EIR) under the California Environmental Quality Act (CEQA) ³ prior to adopting the ordinance, (2) the ordinance violated the commerce clause as well as other constitutional and statutory provisions, and (3) a biosolids impact fee of \$ 3.37 per ton violated the prohibition in Vehicle Code section 9400.8 against [*1558] local fees for [***3] the privilege of using roads. County contests all of these allegations. It contends that the ordinance benefited the Kern County environment and that any potential adverse environmental impacts were too remote and speculative to justify preparing an EIR.

1 The ordinance was enacted by the Kern County Board of Supervisors, on behalf of the County of Kern (collectively, defendants or County). For purposes of this opinion, "County" refers to the governmental entity and "Kern County" refers to the geographical area.

2 Plaintiffs, cross-defendants and appellants are County Sanitation District No. 2 of Los Angeles County (CSDLAC), Orange County Sanitation District (OCSA), and the City of Los Angeles (Bureau of Sanitation; CLABS); plaintiffs and appellants are California Association of Sanitation Agencies (CASA), Responsible Biosolids Management, Inc. (RBM), and the Southern California Alliance of Publicly Owned Treatment Works (SCAP).

3 Public Resources Code section 21000 et seq. All further statutory references are to the Public Resources Code unless otherwise indicated.

[***4] We hold County was required to prepare an EIR under CEQA. This is because CEQA requires the preparation of an EIR whenever substantial evidence supports a fair argument that an ordinance will cause potentially significant adverse environmental impacts. CEQA thus sets a low threshold for the required preparation of an EIR. Here, the evidence in the administrative record establishes a reasonable possibility that the ordinance will have both positive and adverse impacts on the environment in Kern County and other areas of California, principally because alternative methods of disposal must be implemented. The positive effects of a project do not absolve the public agency from the responsibility of preparing an EIR to analyze the potentially significant negative environmental effects of

the project, because those negative effects might be reduced through the adoption of feasible alternatives or mitigation measures analyzed in the EIR. Therefore, County was required to prepare an EIR.

We hold also that plaintiffs have failed to show that the ordinance discriminates against interstate commerce. We reject plaintiffs' constitutional and statutory attacks on the validity of the ordinance, [***5] except that we hold the biosolids impact fee [**36] was invalid to the extent it was a local fee for road use.

We will remand with directions to the trial court to issue a writ of mandate directing County to prepare an EIR for the ordinance, and for further proceedings to determine the extent to which the biosolids impact fee was a fee for road use. Otherwise, the rulings of the trial court in favor of County on plaintiffs' complaint will be affirmed.

County cross-appeals from the trial court's denial of its CEQA cross-claims against the sanitation agencies. We address County's contention that CEQA required those agencies to conduct an environmental examination in connection with certain biosolids disposal contracts they entered into or extended near the time the ordinance in question was enacted. We hold that the agencies' contract activities were within the scope of their program EIR's covering their wastewater treatment projects and, therefore, were "[s]ubsequent activities in the program" that should have been subjected to an examination in accordance with title 14, section 15168 of the California Code of Regulations ⁴ to determine if further CEQA review was necessary. We [*1559] further hold [***6] that, as to expired contracts, this question is moot. Therefore, judgment on County's cross-claims will be reversed and the matter remanded to the trial court with directions to (1) conduct further proceedings to make a complete determination of which contracts have expired, (2) enter an order dismissing as moot County's causes of action that are based on contracts that have expired, and (3) issue writs of mandate under the remaining causes of action directing the appropriate sanitation agency to conduct an examination to determine if additional environmental documents must be prepared in connection with the contracts and extensions.

4 In all further citations, title 14, section 15000 et seq. of the California Code of Regulations will be referred to as the Guidelines.

HISTORICAL BACKGROUND

Sewage sludge is a product of wastewater treatment. The safe and efficient disposal of sludge is a modern and worldwide concern--a by-product of population growth and modernization.⁵ Recent decades have witnessed [***7] increasing governmental involvement in the effort to safely and efficiently treat sewage and dispose of sewage sludge. In the United States, efforts at regulation have involved the executive, legislative and judicial branches of government at the federal, state and local levels. This historical background briefly describes the process that reduces sewage to sewage sludge and then discusses the disposal and use of that sludge.

5 European Commission Joint Research Centre, Institute for Environment and Sustainability, Soil and Waste Unit, Organic Contaminants in Sewage Sludge for Agricultural Use (Oct. 18, 2001) <http://europa.eu.int/comm/environment/waste/sludge/organics_in_sludge.pdf> (as of Apr. 1, 2005).

(1) "Sewage sludge" is defined by federal regulations as the "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works." (40 C.F.R. § 503.9(w) (2005).) More generally, sewage sludge refers to the mud-like deposit originating from sewage [***8] and created by the treatment processes used to decontaminate wastewater before it is released into local waterways.⁶ [***37] Sewage sludge typically consists of water and 2 to 28 percent solids.⁷ (68 Fed.Reg. 61084, 61086 (Oct. 24, 2003).) To illustrate, the Joint Water Pollution Control Plant located in Carson, California (Carson Plant) produces sewage sludge by detaining wastewater solids in an anaerobic digester for approximately 18 days. After digestion, the remaining solids are dewatered in a centrifuge that produces a residue that is approximately 25 percent solids. The Carson Plant refers to these residues as [*1560] "biosolids"--a term that is not defined by federal regulation, and the meaning of which varies with the context in which it is used. (Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Env'tl. Aff. L.Rev. at p. 688.) Some use the term to mean sewage sludge that has been stabilized and disinfected for beneficial use. (*Id.*, fn. 6.) To others, the term helps emphasize the material is a recyclable resource with potential beneficial properties. (Goldfarb, *Sewage Sludge*, at p. 688.)

6 Goldfarb et al., *Unsafe Sewage Sludge or*

Beneficial Biosolids?: Liability, Planning, and Management Issues Regarding the Land Application of Sewage Treatment Residuals (1999) 26 B.C. Env'tl. Aff. L.Rev. 687, 688 (Goldfarb, *Sewage Sludge*).

[***9]

7 Because the percentage of solids in sewage sludge varies, there is no constant for converting the wet weight of sewage sludge to its dry weight. Dry weight is defined by federal regulation to mean the mass reached after drying to essentially 100 percent solids content. (40 C.F.R. § 503.9(h) (2005).)

Scope of Sewage Sludge Production

National Production

The United States Environmental Protection Agency (EPA) recently estimated the annual production of sewage sludge from the 16,000 wastewater treatment plants in the United States at both 7 million tons and 8 million dry metric tons.⁸ (Compare 68 Fed.Reg. 68813, 68817 (Dec. 10, 2003) with 68 Fed.Reg. 61086 (Oct. 24, 2003).) In 2003, the EPA estimated that approximately 60 percent of sewage sludge was treated and applied to farmland, 17 percent was buried in landfills, 20 percent was incinerated, and 3 percent was used as landfill or mine reclamation cover. (68 Fed.Reg. 68817 (Dec. 10, 2003).) The land application of sewage sludge occurred [***10] on approximately 0.1 percent of the agricultural land in the United States. (68 Fed.Reg. 61086 (Oct. 24, 2003).) Other application sites include forests, strip-mines, reclamation sites, and public spaces like parks, golf courses, and highway median strips. (*Ibid.*)

8 The EPA has estimated the United States production of human sanitary waste, a precursor of sewage sludge, at approximately 150 million wet tons per year. (68 Fed.Reg. 7176, 7180 (Feb. 12, 2003).) This figure can be restated as about 0.518 wet tons per person per year (*ibid.*) or 2.8 pounds per person per day. By comparison, in 1997, the United States annual production of animal waste from cattle, hogs, chickens and turkeys (which includes more than manure) was estimated at 1,365,661,300 tons, or roughly 5 tons for every person in the United States.

California

CASA estimated that in 1998 California produced approximately 672,330 dry tons of biosolids and approximately 67.8 percent was applied [***11] to land, 10.6 percent was composted, 9.1 percent was buried in landfills, 5.6 percent was incinerated, and 6.9 percent was put in onsite and offsite storage.⁹

9 State Water Resources Control Board (State Water Board), Draft EIR, General Waste Discharge Requirements for Biosolids Land Application (June 28, 1999) figure 2-2 (State Water Board's 1999 Draft EIR), which was in the administrative record and is available at <<http://www.swrcb.ca.gov/programs/biosolids/deir/chapters/ch2.pdf>> (as of Apr. 1, 2005).

[*1561] The EPA estimated that in 2003 California produced 777,480 dry tons of treated sewage sludge.¹⁰ Approximately 50 [**38] percent of this sewage sludge was applied to land, 30 percent was put in landfills, 10 percent was transported out of state, 3 percent was incinerated, and the balance was put in long-term storage or treatment or put to other uses.¹¹

10 State Water Board, Final Statewide Program EIR, General Waste Discharge Requirements for Biosolids Land Application (June 2004) page 3-3 (State Water Board's 2004 Final PEIR for Biosolids), which is available at <http://www.swrcb.ca.gov/hearings/docs/finalbio_chap3.pdf> (as of Apr. 1, 2005).

[***12]

11 State Water Board's 2004 Final PEIR for Biosolids, page 3-4.

Conflict between urban and rural interests has caused controversy over the land application of sewage sludge in California. In 1998, approximately 73 percent of land-applied biosolids in California was applied within the geographical jurisdiction of the Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board), a region that generated only 16.7 percent of California's total production. In contrast, the Los Angeles and San Francisco Regions generated 37.9 percent and 14.4 percent, respectively, and received less than 0.1 percent and 1.8 percent, respectively, of the total land-applied biosolids.¹² The proportion of biosolids applied to land in the Central Valley Region has decreased as a result of restrictive ordinances adopted by counties.¹³

12 State Water Board's 1999 Draft EIR, table 2-2 and figure 2-2.

13 In 1998, the Counties of Kings, Kern, Fresno, and Riverside did not have ordinances that prohibited the land application of Class B biosolids. (See State Water Board's 2004 Final PEIR for Biosolids, p. 3-8.) By early 2004, these counties had adopted ordinances that prohibited the land application of Class B biosolids and were among the 17 of the 58 counties in California that had some type of ordinance related directly to the land application of biosolids. (*Ibid.*)

[***13] *Kern County*

In 1998, approximately one-third of the biosolids applied to land in California was applied in Kern County.¹⁴ In 1999, County estimated that one million wet tons of sewage sludge were applied to approximately 23,594 acres of irrigated agricultural land in Kern County.¹⁵ The acreage, which was distributed among 14 noncontiguous sites, represented approximately 3 percent of the harvested cropland in Kern County.

14 State Water Board's 1999 Draft EIR, table 2-1 (Kern County received 148,000 dry tons).

15 The administrative record contains a document dated September 1, 1999, that estimated the volume of Class B biosolids brought into Kern County at 823,350 wet tons per year. The four largest sources were the City of Los Angeles (273,700), Los Angeles County (214,000), Orange County (130,300) and "Fresno" (85,000).

[*1562] *Statutory and Regulatory Framework*

Federal

Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 896) [***14] to restore and maintain the quality of the nation's waters (33 U.S.C.A. § 1251(a)) by addressing various sources of pollution, including municipal sewage. In addition to providing extensive federal grants to finance the construction of local sewage treatment facilities, the 1972 amendments increased the role of the federal government by extending water quality standards to intrastate waters, setting technology-based effluent limitations, and implementing the water quality standards through a discharge permit system.¹⁶ The Clean Water Act reflected the judgment of

Congress [**39] that the problem of water pollution caused by the discharge of municipal sewage outweighed problems associated with treating the sewage and disposing of the sewage sludge.¹⁷ The federal legislation stimulated the building of sewage treatment facilities which, in turn, significantly increased the national production of sewage sludge. (See *Leather Industries of America, Inc. v. E.P.A.* (D.C. Cir. 1994) 309 U.S. App. D.C. 136 [40 F.3d 392, 394].)

16 The federal legislation became commonly known as the Clean Water Act (33 U.S.C.A. § 1251 et seq.) as a result of amendments adopted in 1977. (Pub.L. No. 95-217, § 2 (Dec. 27, 1977) 91 Stat. 1566.)

[***15]

17 "According to Milton Russell and Michael Gruber, 'Risk Assessment in Environmental Policy-Making,' 236 *Science* 286, 289 (April 17, 1989), 'the removal of pollutants from waste water produces sludge that must be either disposed of on land, incinerated, or dumped at sea. None of these procedures are without risk to human health or the environment.'" (Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993) p. 97, fn. 111.)

(2) The Clean Water Act addressed the problem of sewage sludge disposal in four ways. First, the use or disposal of sewage sludge was subjected to a permitting program (33 U.S.C.A. § 1345(a)-(c)).¹⁸ Second, the EPA was directed to develop comprehensive regulations establishing standards for sewage sludge use and disposal (33 U.S.C.A. § 1345(d)).¹⁹ Third, states were allowed to establish more stringent standards (33 U.S.C.A. § 1345(e)).²⁰ Fourth, grants were authorized for the conduct of scientific [*1563] studies, demonstration projects, and public information and education programs [***16] concerning the safe and beneficial management of sewage sludge (33 U.S.C.A. § 1345(g)).

18 The National Pollutant Discharge Elimination System (NPDES) permitting program set forth in the Clean Water Act regulates point sources of pollution that reach the waters of the United States. (33 U.S.C.A. § 1342.) Congress delegated the authority to issue permits to discharge pollutants under the NPDES to states with approved water quality programs.

19 The Water Quality Act of 1987 (Pub.L. No.

100-4 (Feb. 4, 1987) 101 Stat. 7) amended the Clean Water Act to require the EPA to identify and set numeric limits for toxic pollutants in sewage sludge and establish management practices for the use and disposal of sewage sludge containing those pollutants. (33 U.S.C.A. § 1345(d)(2).)

20 Similarly, legislation adopted by the European Union sets minimum standards for the use of sewage sludge in agriculture and also allows member states to impose more stringent measures. (See Council Directive 86/278/EEC of 12 June 1986, Protection of the Environment, and in Particular of the Soil, When Sewage Sludge Is Used in Agriculture, 1986 Official J. Eur. Coms. (L181), pp. 0006-0012 <http://europa.eu.int/smartapi/cgi/sga_d oc?smartapi!celexapi!prod!CELEXnumdoc&lg =EN&nu mdoc=31986L0278&model=guichett> [as of Apr. 1, 2005].) The Web site maintained by the European Union that summarizes the legislation is <<http://europa.eu.int/scadplus/leg/en/lv b/128088.htm>> (as of Apr. 1, 2005).

[***17] (3) Eventually, in 1993,²¹ the EPA complied with the directive regarding regulations by promulgating Standards for the Use or Disposal of Sewage Sludge (40 C.F.R. § 503 (2005)) (Part 503), which specify that sewage-sludge may be (1) applied to land, (2) placed in a surface disposal site, such as a sewage-sludge-only landfill, (3) burned in a sewage sludge incinerator, or (4) disposed of in a municipal solid waste landfill that complies with the minimum criteria set forth in 40 Code of Federal Regulations part 258. (Part 503, subparts B [land application], C [surface disposal] & E [incineration]; 40 C.F.R. § 503.4 (2005) [***40] [disposal in municipal solid waste landfill].)²²

21 The history of the EPA's regulation of sewage sludge prior to the final adoption of Part 503 in 1993 is described in Goldfarb, *Sewage Sludge, supra*, 26 B.C. Env'tl. Aff. L.Rev. at pages 697-704. The EPA has described the recent legal history of its regulation of sewage sludge in the Federal Register. (See 68 Fed.Reg. 75533 (Dec. 31, 2003).)

22 A fifth option, ocean dumping of sewage sludge, was eliminated as a legal disposal option effective December 31, 1991, by the federal

Ocean Dumping Ban Act of 1988. (33 U.S.C.A. §§ 1401-1445.) (See *City of New York v. United States EPA* (S.D.N.Y. 1981) 543 F. Supp. 1084 [prior to statutory ban, City of New York and EPA litigated deleterious impacts of ocean dumping versus other methods of disposal].)

[***18] The land application provisions of subpart B of Part 503 establish concentration ceilings as well as annual and cumulative loading rates for arsenic, cadmium, copper, lead, mercury, nickel, selenium and zinc (40 C.F.R. § 503.13 (2005)); establish management practices for the protection of water quality and public health (40 C.F.R. § 503.14 (2005)); set the standards for the reduction of pathogens²³ and vector attraction²⁴ (40 C.F.R. § 503.15 (2005)); and include requirements for monitoring (40 C.F.R. § 503.16 (2005)), recordkeeping (40 C.F.R. § 503.17 (2005)), and reporting (40 C.F.R. § 503.18 (2005)).

23 Pathogenic organisms cause disease and "include, but are not limited to, certain bacteria, protozoa, viruses, and viable" eggs of parasitic worms (40 C.F.R. § 503.31(f) (2005)), such as tapeworms, whipworms, roundworms, and hookworms.

24 Vectors are rodents, flies, mosquitoes, or other organisms capable of transporting infectious agents; vector attraction refers to the characteristic of sewage sludge that attracts these carriers. (See 40 C.F.R. § 503.31(k) (2005).)

[***19] [*1564] (4) Pathogen reduction standards contained in Part 503 are used to differentiate between Class A sewage sludge and Class B sewage sludge. (See 40 C.F.R. § 503.32 (2005).) While Class A sewage sludge is sufficiently treated to essentially eliminate pathogens, Class B sewage sludge is treated only to substantially reduce them. As a result, the requirements for land application of Class B sewage sludge are more stringent than the requirements imposed on Class A sewage sludge.

At the time of their adoption, the EPA stated it was confident the regulations in Part 503 adequately protected the environment and public health from all reasonably anticipated adverse effects. (58 Fed.Reg. 9248, 9249 (Feb. 19, 1993).) Nevertheless, Part 503 has been described as "quite controversial."²⁵ Citizens and environmental organizations have questioned the adequacy of the chemical and pathogen standards

contained in Part 503.²⁶ As a result of [***41] these concerns and the requirement in the Clean Water Act that the sewage sludge regulations be reviewed every two years, the EPA commissioned the National Research Council (NRC) of the National Academy of Sciences to independently [***20] review the scientific basis of the regulations governing the land application of sewage sludge.²⁷

25 Goldfarb, *Sewage Sludge, supra*, 26 B.C. Env'tl. Aff. L.Rev. at page 708; see Comment, *Sewage Sludge and Land Application Practices: Do the Section 503 Standards Guarantee Safe Fertilizer Usage?* (2000) 9 Dick. J. Env'tl. L. & P. 147, 169 (asserting EPA failed to account for variability of contaminants in sludge and how combinations of contaminants may affect public health and environment, and failed to foresee problems caused by lackadaisical monitoring and labeling requirements and by the lack of remedies for failure to comply with requirements). Another aspect of the controversy is illustrated by the dispute created when the Agricultural Marketing Service of the United States Department of Agriculture considered allowing the use of sewage sludge in "organic" production. The proposal was based on the view of the federal government that "there is no current scientific evidence that use of sewage sludge in the production of foods presents unacceptable risks to the environment or human health." (65 Fed.Reg. 13514 (Mar. 13, 2000).) Overwhelming public opposition led to the rejection and replacement of the proposal with a regulation that "prohibit[ed] sewage sludge] use in the production" of all organic foods. (*Ibid.* ["275,603 commenters ... almost universally opposed the use of [sewage sludge] in organic production systems"]; see 7 C.F.R. §§ 205.105(g) & 205.301(f)(2) (2005).)

[***21]

26 See EPA, Office of Water, Use and Disposal of Biosolids (Sewage Sludge) (Dec. 2003) <http://www.epa.gov/ost/biosolids/dec03f_actsheet.html> (as of Apr. 1, 2005).

27 See EPA, Office of Water, Use and Disposal of Biosolids (Sewage Sludge), *supra*; 33 U.S.C.A. § 1345(d)(2)(C) (two-year review of regulations).

In July 2002, the NRC published its report--Biosolids Applied to Land: Advancing Standards

and Practices--and made the following overarching findings: "There is no documented scientific evidence that the Part 503 rule has failed to protect public health. However, additional scientific work is needed to reduce persistent uncertainty about the potential for adverse human health effects from exposure to biosolids. There have been anecdotal [*1565] allegations of disease,[²⁸] and many scientific advances have occurred since the Part 503 rule was promulgated. To assure the public and to protect public health, there is a critical need to update the scientific basis of the rule to (1) ensure that the chemical and pathogen standards are supported by current scientific [***22] data and risk-assessment methods, (2) demonstrate effective enforcement of the Part 503 rule, and (3) validate the effectiveness of biosolids-management practices." (NRC, *Biosolids Applied to Land: Advancing Standards and Practices* (July 2002) p. 3 <<http://www.epa.gov/waterscience/biosolids/nas/complete.pdf>> [as of Apr. 1, 2005].)

28 The anecdotal allegations of which the EPA is aware (but unconvinced) include (1) over 350 claims of adverse effects collected by the Cornell Waste Management Institute, (2) the deaths of Shayne Conner, Tony Behun, and Daniel Pennock, and (3) the deaths of 300 dairy cattle on a farm near Augusta, Georgia that resulted in a \$ 550,000 jury verdict in a state court action. (G. Tracy Mehan, III, EPA, letter to Joseph Mendelson, III, Center for Food Safety, and Thomas Alan Linzey, Community Environmental Legal Defense Fund, Inc., Dec. 22, 2003, pp. 3, 5-7 [denying petition to stop land application of sewage sludge] <<http://www.centerforfoodsafety.org/pubs/SewageSludgePetitionResponse12-22-03.pdf> f> [as of Apr. 1, 2005].) The claims related to the dairy cattle also are described in the administrative record and in *Boyce v. Augusta-Richmond County* (S.D.Ga. 2000) 111 F. Supp. 2d 1363. The medical examiner's autopsy report for Shayne Conner is in the administrative record and it concludes the cause of his death is unknown.

[***23] In response to the NRC report, the EPA developed a final action plan that established objectives and identified research and regulatory projects designed to strengthen its sewage sludge use and disposal program.

(68 Fed.Reg. 75531, 75533 (Dec. 31, 2003); see EPA, Office of Water, Use and Disposal of Biosolids (Sewage Sludge), *supra*.) As an example of one project, the EPA intends to conduct an incident-tracking workshop to obtain input on developing a program focused on individuals who have received medical attention and suspect that they may have been affected by sewage sludge application practices, and to thereby isolate the causes of any health problems. (68 Fed.Reg. 75535 (Dec. 31, 2003).) As of the date of this opinion, the implementation of the final action plan is an ongoing process, and some of the activities have not been commenced. (See EPA, Office of Water, Use and Disposal of Biosolids (Sewage Sludge), *supra*.)

California

(5) In response to Congress's delegation of authority to the states to issue NPDES permits (see fn. 18, *ante*), the California [**42] Legislature amended the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 [***24] et seq.) to require the State Water Board and its regional counterparts to issue discharge permits that ensure compliance with the Clean Water Act. (See Wat. Code, § 13370 et seq.) As a result, on May 14, 1973, California became the first [*1566] state to be approved by the EPA to administer the NPDES permit program. (See 54 Fed.Reg. 40664 (Oct. 3, 1989); *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1452 [126 Cal. Rptr. 2d 389].)

In August 1993, as part of administering the NPDES permit program, the Central Valley Water Board adopted a general order setting the waste discharge requirements (WDR) for the use of sewage sludge as a soil amendment and approved an initial study and negative declaration in connection with that general order. Under the general order, a person wanting to apply biosolids to agricultural land could file with the Central Valley Water Board a notice of intent to comply with the general order, a filing fee, and a preapplication report and, upon receiving an approval letter from the Central Valley Water Board, could begin to apply biosolids subject to the terms and conditions in the [***25] general order. Projects using sewage sludge that did not fit the conditions contained in the general order were required to apply for individual WDR's.

On May 26, 1995, the Central Valley Water Board modified its earlier general order by adopting Order No.

95-140 titled "Waste Discharge Requirements General Order For Reuse of Biosolids and Septage on Agricultural, Forest, and Reclamation Sites." The order set minimum standards for the use of biosolids, including Class B sewage sludge, as a soil amendment.

(6) Also in 1995, the California Legislature specifically addressed the land application of sewage sludge by adopting Water Code section 13274 (Stats. 1995, ch. 613, § 1, p. 4590), which required the State Water Board or the regional boards to prescribe general WDR's for the discharge of treated sewage sludge used as a soil amendment. (Wat. Code, § 13274, subds. (a) & (b).) Water Code section 13274 also states that it does not restrict the authority of local government agencies to regulate the application of sewage sludge to land within their jurisdiction. (*Id.*, subd. (i).)

(7) Other California legislation affecting the [***26] disposal and use of sewage sludge is the California Integrated Waste Management Act of 1989 (Pub. Resources Code, § 40000 et seq., also known as Assem. Bill No. 939 (1989-1990 Reg. Sess.); see Stats. 1989, ch. 1095, § 22, p. 3812), which requires the use of recycling and source reduction to reduce the amount of solid waste going into landfills. (§ 41780.) More specifically, counties were required to adopt integrated waste management plans that described how 25 percent of the solid waste²⁹ stream would be recycled, reduced or composted [*1567] by 1995 and how 50 percent would be achieved by 2000. (See § 41780; *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1419, fn. 2 [23 Cal. Rptr. 2d 910].) This legislation caused sewage sludge to be diverted from disposal in landfills in favor of recycling it as a fertilizer applied to agricultural land.³⁰ For example, in 1995 the [***43] City of Oxnard purchased 1,280 acres in Kern County for \$ 1,174,000 as part of a program to apply its sewage sludge to agricultural land and thus reduce its use of landfills.

29 The California Integrated Waste Management Act of 1989 defines "solid waste" to include "dewatered, treated, or chemically fixed sewage sludge [that] is not hazardous waste, manure, vegetable or animal solid" (§ 40191, subd. (a).)

[***27]

30 According to one set of estimates, the portion of California's annual sewage sludge production

disposed of in landfills was 60.2 percent in 1988, 43.3 percent in 1991, 9.1 percent in 1998, and 30 percent in 2003. (State Water Board's 1999 Draft EIR, table 2-2 & fig. 2-2; State Water Board's 2004 Final PEIR for Biosolids, p. 3-4.)

By 2000, several of the nine regional boards had issued WDR's for the use of biosolids as a soil amendment. To provide a single regulatory framework for the land application of treated sewage sludge in California, in August 2000, the State Water Board issued Water Quality Order No. 2000-10-DWQ, entitled "General Waste Discharge Requirements for the Discharge of Biosolids to Land for Use as a Soil Amendment in Agricultural, Silvicultural, Horticultural, and Land Reclamation Activities" (General Order 2000-10).³¹ General Order 2000-10 also was intended to comply with the directive in Water Code section 13274 and streamline the permitting process. The State Water Board's final program EIR relating to General Order 2000-10 was approved on June 30, 2000, and [***28] it is part of the appellate record as a result of the superior court granting a request for judicial notice. General Order 2000-10 allowed Class B biosolids to be applied to agricultural land subject to numerous conditions, including site, crop, and harvesting restrictions.

31 General Order 2000-10 is available on the State Water Board's Web site. (See <<http://www.swrcb.ca.gov/resdec/wqorders/2000/wqo2000-10.doc>> [as of Apr. 1, 2005].)

The State Water Board's approval of General Order 2000-10 and certification of the final program EIR was vacated as a result of a CEQA lawsuit brought by County. (*County of Kern v. State Water Resources Control Board* (Jan. 13, 2003, C039485) [nonpub. opn.].)³² The Third Appellate District held the EIR was defective because it did not evaluate, as alternatives to General Order 2000-10, either a requirement that sewage sludge be treated to Class A standards before application as a soil amendment or a prohibition on the use of treated sewage sludge where fruits and vegetables [***29] are grown.

32 County referred to the Third Appellate District's unpublished decision in its reply brief and cited a statement made by the State Water Board in an appellate brief it filed in that case. Our reference to this unpublished opinion as part of a factual narrative of the historical

development of California's regulation of sewage sludge is not a citation or reliance upon that opinion as legal authority for purposes of California Rules of Court, rule 976.

[*1568] To comply with that decision, the State Water Board's 2004 Final PEIR for Biosolids considered, but rejected, the two alternatives specified by the Third Appellate District. Based on that final EIR, the State Water Board adopted Water Quality Order No. 2004-0012 on July 22, 2004 (General Order 2004-0012). 33 General Order 2004-0012 allows Class B biosolids to be applied to agricultural land subject to numerous conditions, including site and crop restrictions.

33 General Order 2004-0012 is available at <<http://www.swrcb.ca.gov/resdec/wqorders/2004/wqo/wqo2004-0012.pdf>> (as of Apr. 1, 2005).

[***30] *Kern County*

County first attempted to regulate the application of sewage sludge to agricultural land within its jurisdiction in August 1998, when it adopted Ordinance No. G-6528, an interim urgency ordinance which became operative on September 1, 1998, and was repealed effective December 31, 1999. Ordinance No. G-6528 allowed the application of Class A and Class B sewage sludge in Kern County by any person who [**44] obtained a permit from the County Environmental Health Services Department, paid a \$ 7,250 application fee, and observed specified management practices, site restrictions and other requirements.

On October 19, 1999, the Kern County Board of Supervisors adopted Ordinance No. G-6638 (Ordinance G-6638) to substitute a new chapter 8.05 into the Kern County Ordinance Code. Ordinance G-6638 provided for two regulatory stages. The first stage, which lasted three years, allowed the application of Class B sewage sludge on sites that had already been approved, but precluded the approval of any new sites. The second stage was scheduled to become effective on January 1, 2003, and allowed only exceptional quality (EQ) sewage sludge³⁴ to be applied to land in Kern County.

34 EQ sewage sludge must meet one of the Class A pathogen reduction alternatives set forth in 40 Code of Federal Regulations part 503.32(a) (2005); the more stringent pollutant concentration

standards set forth in 40 Code of Federal Regulations part 503.13(b)(3) (2005); and a level of vector attraction reduction required by 40 Code of Federal Regulations part 503.33 (2005).

[***31] Ordinance G-6638 is the subject of this appeal and its pertinent provisions are set forth, *post*, in Facts and Proceedings.

In late 2002, County adopted Ordinance No. 6931, which amended chapter 8.05 of the county code to impose a permitting requirement on the application of EQ biosolids to land within the unincorporated area of Kern County, and found that the project was exempt from CEQA pursuant to section 15308 of the Guidelines, which concerns actions by regulatory agencies to protect the environment. This appeal does not directly involve the 2002 amendment.

[*1569] *Overview of California Cases Involving Land Application of Sewage Sludge*

The application of sewage sludge to land has been the topic of litigation before this and other appellate courts located in California.

This court considered the application of CEQA to Kings County's sewage sludge ordinance in *Magan v. County of Kings* (2002) 105 Cal.App.4th 468 [129 Cal. Rptr. 2d 344]. In that case, the Kings County Board of Supervisors determined that its ordinance regulating the application of sewage sludge to land in Kings County was categorically exempt from review under CEQA, and this court upheld that determination. (105 Cal.App.4th at pp. 476-477.) [***32]

As described earlier, in January 2003, the Third Appellate District considered County's challenge to the adequacy of the EIR the State Water Board prepared in connection with its adoption of General Order 2000-10. (*County of Kern v. State Water Resources Control Board, supra*, C039485 [nonpub. opn.].) That litigation led to the certification of the State Water Board's 2004 Final PEIR for Biosolids and the adoption of General Order 2004-0012.

In *U.S. v. Cooper* (9th Cir. 1999) 173 F.3d 1192, the defendant sludge hauler directly applied sludge to a local farm instead of taking the sludge to a composting site first as required by a NPDES permit issued to the City of San Diego by the regional water quality board. The

sludge hauler was convicted under the Clean Water Act of knowingly violating conditions imposed by the permit on the disposal of sewage sludge. The Ninth Circuit Court of Appeals upheld the conviction and ruled, among other things, that Part 503--which encouraged the direct land application of sewage sludge, but did not require state and local governments to allow it--did not preempt the conditions in the permit that [*45] the sludge hauler violated. (*U.S. v. Cooper, supra*, at pp. 1200-1201.) [***33]

In addition to the foregoing appellate cases, the briefing in this appeal mentions other cases before state and federal trial courts concerning County's efforts to regulate the land application of sewage sludge. County contends that Shaen Magan brought two state court actions challenging Ordinance G-6638 and that the judgments entered in County's favor in those actions are now final. In addition, County represents that another state court action brought against it has been stayed by the Tulare County Superior Court pending the resolution of this appeal, and that CASA and others have sued it in a federal action attacking an amended version of the ordinance.

[*1570] **FACTS AND PROCEEDINGS**

In connection with its consideration and adoption of an ordinance regulating the land application of biosolids within its jurisdiction, County undertook a process that involved the public and produced an administrative record of over 25,000 pages.

In 1997, County established a Biosolids Ordinance Advisory Committee to assist in the preparation of a draft ordinance. The committee included representatives from farming organizations, sludge generators and applicators, environmental groups, County [***34] staff and other interested parties. In all, the committee held five public meetings between November 20, 1997, and April 29, 1999. Expert presentations on the scientific issues involving biosolids were received at two public hearings held by County.

In January 1998, County pursued early consultation with public agencies and interested parties to obtain comments on the potential environmental effect of its proposed form of biosolids ordinance. After revisions to the proposed ordinance, County again sought early consultation in May 1999 in connection with determining whether compliance with CEQA would require

preparation of an EIR for the proposed ordinance. After the second consultation period was complete, an initial study was prepared.

On August 10, 1999, an environmental checklist form was completed which found the project--that is, enactment of the ordinance--would not have a significant effect on the environment, and which recommended the preparation of a negative declaration.

County's Planning Department prepared a proposed negative declaration for the biosolids ordinance and published the corresponding notice of availability for public review on August 13, 1999. On October 19, 1999, after [***35] the period for public review of the negative declaration expired, County enacted Ordinance G-6638 and adopted the negative declaration. Section 3 of Ordinance G-6638 amended chapter 8.05 of the Kern County Ordinance Code (Kern Code) effective January 1, 2000, to provide in part:

"8.05.010 PURPOSE AND INTENT

"There are numerous unanswered questions about the safety, environmental effect, and propriety of land applying Biosolids or sewage sludge, even when applied in accordance with federal and state regulations. Biosolids may contain heavy metals, pathogenic organisms, chemical pollutants, and synthetic organic compounds, which may pose a risk to public health and the environment if improperly handled. There is a lack of adequate scientific [*1571] understanding concerning the risk land applying of Biosolids may pose to land, air and water and to human and animal health. ... Consequently, in order to promote the general health, safety and welfare of Kern County and its inhabitants, it is [**46] the intent of this chapter that the land application of Biosolids shall be prohibited in the unincorporated area of Kern County.

"The County recognizes there are existing permitted sites involved in the land [***36] application of Biosolids. Consistent with the protection of private property rights under the United States and California constitutions, this ordinance contains a three year amortization period to permit the orderly discontinuation of the land application of Biosolids by January 1, 2003.

"The County also recognizes that Exceptional Quality Biosolids, as defined in this chapter, are considered by the U.S. Environmental Protection Agency to be a product ... that can be applied as freely as any

other fertilizer or soil amendment to any type of land. Therefore, the provisions of this chapter do not apply to Exceptional Quality Biosolids unless specifically stated herein. Further, the provisions of this chapter do not apply to Compost, as defined herein, manufactured from Biosolids at composting facilities that are otherwise regulated by the County through Solid Waste and Conditional Use Permits.

"8.05.020 DEFINITIONS

"A. **Agency** means an authorized representative of the Environmental Health Services Department of the County. ... [¶] ... [¶]

"E. **Biosolids** are treated solid, semi-solid or liquid residues generated during the treatment of sewage in a wastewater [***37] treatment facility that meet [certain federal requirements for pathogen reduction, vector attraction reduction and pollutant concentrations]. ... Biosolids as used in this chapter excludes Biosolids products that are in a bag or container packaged for routine retail sales through regular retail outlets which are primarily used for landscaping.

"F. **Biosolids Impact Fee** means the fee per ton of Biosolids charged to Biosolids applicators for mitigating the impacts to the Kern County infrastructure shown to be caused by the transport of Biosolids. Permittees which can establish the lack of impact on County infrastructure shall be exempt from payment of the fee. [¶] ... [¶]

[*1572] "H. **Class A Biosolids** are Biosolids that meet the pathogen reduction requirements in 40 CFR 503.32(a)³⁵ and contain constituents in concentrations not exceeding the concentrations listed in 40 CFR 503.13, Table 1 or Table 3.

35 This reference was probably intended to be limited to subsection (a), which states the pathogen reduction requirements for sewage sludge to be classified Class A.

[***38] "I. **Class B Biosolids** are Biosolids that meet the pathogen reduction requirements in 40 CFR 503.32(b).

"J. **Compost** means the product resulting from the controlled biological decomposition of organic materials which may include Biosolids. Facilities where compost is produced are required to obtain Solid Waste Facilities

and Conditional Use Permits as a condition of operation. Compost products are required to meet or exceed product quality criteria as established by the California Integrated Waste Management Board. [¶] ... [¶]

"M. **Exceptional Quality Biosolids** are Class A Biosolids that meet the pollutant concentrations in 40 CFR 503.13, Table 3 and have achieved a level of vector attraction reduction required by 40 CFR 503.33. Additionally, Class A Biosolids must meet both the fecal coliform and Salmonella sp. bacteria limits contained in alternatives 1 through 6 of 40 CFR 503.32(a) to be Exceptional [**47] Quality. For the purposes of this chapter, Exceptional Quality Biosolids are in bulk form and shall not include Compost which meets or exceeds Exceptional Quality [***39] criteria. [¶] ... [¶]

"P. **Land Application** means the placement of Biosolids on agricultural land at a predetermined agronomic rate to support vegetative growth. For purposes of this chapter, placement includes the spraying or spreading of Biosolids onto the land surface, the injection of Biosolids below the surface, or the incorporation of Biosolids into the soil. [¶] ... [¶]

"R. **Permit** means a Land Application Permit issued by the Agency jointly to an Applier and all POTWs or other generators who supply Biosolids to the Applier. Such permit authorizes the Land Application of Biosolids in the County. Permits are not transferable to other parties without the prior approval of the Agency as provided in Section 8.05.040.R. [¶] ... [¶]

"T. **POTW** means publicly or privately owned treatment works that process wastewater and generate Biosolids. ... [¶] ... [¶]

[*1573] "8.05.030 GENERAL REQUIREMENTS

"A. Prior to commencing any Land Application activities under this chapter, the Applier shall obtain a Permit and pay all applicable fees. Only Sites with an Existing Permit shall be eligible for issuance of a Permit under this chapter. [¶] ... [¶]

"H. Biosolids [***40] Impact Fee.

"1. There is levied by the County of Kern a fee of \$ 3.37 per ton for each ton of Biosolids land applied within the county. The amount of the fee shall be calculated

based on the monthly activity report as required by section 8.05.070(I) and is to be remitted to the Agency along with the filing of the monthly activity report. Permittees are subject to enforcement action, including revocation of the Permit, for non-payment. Where the Permittee can demonstrate the land application of Biosolids does not have an impact on County infrastructure or roads, the Agency may waive this fee.

"2. Permittees, either directly or through the wastewater treatment plant generating the Biosolids to be applied on the Permittee's property, which separately contract with the County or are determined to provide a reciprocal benefit, as determined by the Board of Supervisors, shall be exempt from this fee.

"3. Funds generated by this impact fee and other permit fees may be available to fund the following uses: Expenses associated with the inspection of properties within the County which have permits for the land application of Biosolids; development and operation of a GIS tracking system for all [***41] Biosolids land applied within the County so that there is an accurate data base containing this information; technical studies and pilot projects which provide additional data on Biosolids land application; correction of any infrastructure deficiencies directly associated with the hauling of Biosolids; and, the cost of public outreach and education programs to ensure that the standards expressed within this ordinance and contained in the federal guidance for the beneficial use of Biosolids are adhered to. The budget for the expenditure of the Biosolids Mitigation Fund on mitigating the impact of Biosolids land application within the County as set forth above, shall be prepared by the Director of the Resource Management Agency for approval by the Board of Supervisors annually. [¶] ... [¶]

"8.05.040 PERMIT APPLICATION

[**48] " A. It shall be unlawful for any person to apply Biosolids to land within the unincorporated area of the County without obtaining a Permit from the Agency and being in compliance with the terms and conditions as stated herein.

[*1574] "B. The application for a Permit shall be filed with the Agency on an application form furnished by the Agency, accompanied by an [***42] eight thousand dollar (\$ 8,000) fee. ... [¶] ... [¶]

"G. The Agency may deny an application for one (1)

or more of the following reasons:

"1. Prior significant non-compliance with local, state or federal regulations or permits related to the land application of biosolids.

"2. Inadequate, incomplete, or inaccurate application information.

"3. The land application proposal would not be in conformance with the applicable requirements of this chapter. [¶] ... [¶]

"M. Fees to review and process Permit applications, appeal an action of the Agency, as specified herein, inspect Sites, engage in enforcement activities and compensate for infrastructure impacts shall be established by the Board of Supervisors. [¶] ... [¶]

"8.05.050 MANAGEMENT PRACTICES

"A. Transportation, Storage and Land Application of Biosolids shall not degrade the groundwater or surface water.

"B. Discharge of Biosolids to surface waters or surface water drainage courses is prohibited and all Biosolids shall be confined to within the boundaries of the Site.

"C. All irrigation tailwater on Sites utilized for Biosolids application shall be maintained on the permitted Site and shall not be allowed [***43] to flow on to adjacent properties, either by means of surface or subsurface flows. [¶] ... [¶]

"8.05.080 INSPECTION AND ENFORCEMENT

"A. The Agency shall inspect all Sites at least one (1) time per week during the period when Biosolids are being applied and may inspect more frequently or at any time.

"B. The Agency may charge for services not specifically described that are rendered by personnel that are necessary for the enforcement of the provisions of this ordinance. The charge will be calculated on the per-hour fee of [*1575] seventy-five (\$ 75.00) dollars as established in Section 8.04.100. Any laboratory analysis will be charged at the Agency's actual costs as charged by a Certified Laboratory retained by Agency for any testing.

"C. Any person violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor.

"D. In addition, any violation of this chapter may be deemed by the Agency to be a public nuisance, and may be abated, or enjoined by the Agency, irrespective of any other remedy herein provided.

"8.05.090 EFFECTIVE DATE

"The provisions of this chapter shall expire on December 31, 2002, unless otherwise extended by the board of [***44] supervisors."

Section 4 of Ordinance G-6638 replaced the expired version of chapter 8.05 with a new chapter 8.05 scheduled to become effective on January 1, 2003. Provision 8.05.010 was revised slightly but still stated that the chapter did not apply to EQ biosolids or compost. The definitions of EQ biosolids and compost were not changed. The substantive requirements of that new chapter 8.05 stated:

[**49] " **8.05.040 BIOSOLIDS PROHIBITED**

"A. It shall be unlawful for any person to land apply Biosolids to property within the unincorporated area of the County. Any Site for which a Permit was issued prior to ... January 1, 2003 shall discontinue land application of Biosolids upon the effective date of this chapter.[³⁶]

36 All subsequent references to Kern Code provision 8.05.040(A), Ordinance G-6638, are to this version, which was contained in section 4 of Ordinance G-6638 and was scheduled to become effective on January 1, 2003. The substantive requirements of provision 8.05.040(A) were reenacted by the adoption of Ordinance No. G-6931, which repealed Ordinance G-6638. All subsequent references to the "heightened treatment standards" are to those substantive requirements; this term was chosen because the effect of those requirements was that sewage sludge could not be applied to land in the unincorporated areas of Kern County unless the sludge was treated to the higher standards used to define EQ biosolids.

"B. The discharge of Biosolids to surface waters or surface water drainage courses, including wetlands and water ways, is prohibited."

[***45] Section 5 of Ordinance G-6638 declared that the provisions of Ordinance G-6638 were severable and that the invalidity of any clause or provision would not affect the validity of the other provisions of the ordinance.

[*1576] On November 8, 1999, CSDLAC, OCSD, CLABS, SCAP, CASA, and RBM filed a petition for writ of mandate and complaint for injunction and declaratory relief. The first cause of action in the petition alleged County violated CEQA by approving the negative declaration and making findings that Ordinance G-6638 would not have significant impact on the environment. The second cause of action asserted the adoption of Ordinance G-6638 was an invalid exercise of police power and a violation of the commerce clause. The third cause of action alleged the imposition of the biosolids impact fee violated provisions of the California Constitution concerning taxes, as well as the equal protection and due process clauses of the United States and California Constitutions, by unfairly discriminating against vehicles carrying biosolids.³⁷

37 The theory of discrimination alleged was that vehicles loaded with Class B biosolids should not be singled out, and that all vehicles using the same roads and carrying a load of similar weight caused damage to the roads and thus should be charged the same fee.

[***46] On March 1, 2000, County filed its cross-action against CSDLAC, OCSD and CLABS challenging changes made in their sewage sludge disposal programs. After amendment on June 19, 2000, County's cross-action contained (1) four causes of action alleging CLABS violated CEQA by entering certain contracts and amendments relating to the disposal of biosolids generated at its facilities without performing any environmental review; (2) one cause of action alleging CSDLAC violated CEQA by failing to undertake any environmental review when it and Yakima Company amended and extended their contract for the transportation of sewage sludge from CSDLAC's facilities to Kern County for application on farm land; and (3) five causes of action alleging OCSD violated CEQA by entering biosolids management agreements or options for the purchase of real estate used in connection with the disposal or use of biosolids generated at its facilities without performing any environmental review.

The superior court granted plaintiffs' request that

their CEQA cause of action be bifurcated, took all of the CEQA claims under submission on August 30, 2000, and by written ruling entered on November 22, [*50] 2000, denied the CEQA [***47] claims of all parties.

Approximately a year and a half later, the superior court heard and denied plaintiffs' motions for summary judgment, and granted County's motion for a protective order regarding depositions and written discovery requested by CSDLAC, OCSO and Shaen Magan relating to the remaining non-CEQA causes of action that challenged the validity of County's legislative act of adopting Ordinance G-6638.

[*1577] On June 3, 2002, the parties agreed to present their cases by trial briefs. After considering the briefs filed by the parties, the superior court entered an order on November 25, 2002, denying the non-CEQA claims alleged in plaintiffs' second and third causes of action. The superior court filed a statement of decision on January 7, 2003, which ruled that (1) Ordinance G-6638 was not an invalid exercise of police power or a violation of the commerce clause and (2) the biosolids impact fee passed constitutional scrutiny because it had a rational basis and was not an illegal general or special tax. On March 10, 2003, judgment was entered in favor of County on all causes of action asserted by plaintiffs and in favor of the cross-defendants on all causes of action asserted by [***48] County in its cross-action.

CSDLAC, OCSO, CLABS, CASA, RBM and SCAP timely filed an appeal. County timely filed a notice of appeal from the judgment that denied its cross-action.

DISCUSSION

Plaintiffs contend County erroneously found that Ordinance G-6638 would not have a significant effect on California's environment and, therefore, County violated CEQA when it approved the negative declaration and adopted Ordinance G-6638. The superior court ruled the approval of the negative declaration was appropriate because there was no "substantial evidence of a fair argument that adoption of this ordinance, which continues to allow application of biosolids but requires [plaintiffs] to upgrade them to protect the environment, would have an adverse impact on the environment."

We hold that the preparation of an EIR was mandatory under the low threshold imposed by the fair argument standard because the administrative record

contained sufficient, credible evidence that the heightened treatment standards for the application of sewage sludge to land in the unincorporated areas of Kern County might have a significant adverse effect on California's environment. Furthermore, the possibility [***49] that the net overall impact of the ordinance was beneficial did not override the requirement in CEQA for the preparation of an EIR addressing the significant adverse environmental impacts the ordinance may have caused. (Guidelines, § 15063, subd. (b).)

I. CEQA Standard of Review

A. General Principles

(8) It is well established in CEQA proceedings that (1) the public agency is the finder of fact, (2) the superior court's findings are not binding on the appellate court, and (3) the scope and standard of review applied by [*1578] the appellate court to the agency's decision is the same as that applied by the superior court. (See §§ 21168, 21168.5; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277 [19 Cal. Rptr. 2d 402] [county's approval of a negative declaration and conditional use permit reinstated and trial court reversed].)

(9) When a CEQA petition challenges action of a public agency that is legislative or quasi-legislative in character, the standard of review contained in section 21168.5 [**51] and the procedures for traditional mandamus set forth in Code of Civil Procedure section 1085 are applied. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566-567 [8 Cal. Rptr. 2d 139, 888 P.2d 1268].) [***50] Section 21168.5 provides: "In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."

(10) Amendment or adoption of an ordinance is a legislative act subject to review under section 21168.5. (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 172, fn. 2 [105 Cal. Rptr. 2d 214, 19 P.3d 567] [§ 21168.5 applied to CEQA challenge to city ordinance that removed certain properties from register of

historic landmarks]; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68 [118 Cal. Rptr. 34, 529 P.2d 66] [city's adoption of ordinances without CEQA compliance was governed by § 21168.5]; *Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482, 488 [82 Cal. Rptr. 2d 705] [county's amendment of a zoning ordinance reviewed [***51] under § 21168.5.) Accordingly, the Kern County Board of Supervisors' adoption of Ordinance G-6638 is reviewable under section 21168.5 for a prejudicial abuse of discretion.

B. Fair Argument Test

(11) CEQA requires a governmental agency to "prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment." (§ 21100, subd. (a); see Guidelines, § 15064, subd. (a)(1).) Conversely, a negative declaration--rather than an EIR--is appropriate when the administrative record before the [*1579] governmental agency does not contain substantial evidence that the project may have a significant effect on the environment. (§ 21080, subd. (c).)

(12) When a court reviews an agency's decision to certify a negative declaration, the court must determine whether substantial evidence supports a "fair argument" that the project may have a significant effect on the environment. (See §§ 21080, subs. (c) & (d), 21151; *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123 [26 Cal. Rptr. 2d 231, 864 P.2d 502]; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151 [39 Cal. Rptr. 2d 54] [Ct. App., 5th Dist. voided negative declaration and mandated preparation of EIR].) The determination by an appellate court under the fair argument test involves a question of law decided independent of any ruling by the superior court. (*Stanislaus Audubon Society, Inc.*, at p. 151.) Consequently, "we independently 'review the record and determine whether there is substantial evidence in support of a fair argument [the proposed project] may have a significant environmental impact, while giving [the lead agency] the benefit of a doubt on any legitimate, disputed issues of credibility.'" (*Ibid.*, quoting *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1603 [35 Cal. Rptr. 2d 470]; see § 21151.)

(13) California courts, including the Fifth Appellate District, routinely describe [**52] the fair argument test as a low threshold requirement for the initial preparation of an EIR that reflects a preference for resolving doubts in favor of environmental review. (See *Stanislaus Audubon Society, Inc. v. County of Stanislaus, supra*, 33 Cal.App.4th at p. 151; [***53] *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316-1317 [8 Cal. Rptr. 2d 473] [Ct. App., 1st Dist., Div. 1]; see also *No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal.3d at p. 84.)

In contrast to this description of the fair argument test, County asserts that "[a]ny reasonable doubts whether substantial evidence exists must be resolved in favor of the agency's decision." This assertion is rejected because (1) it misstates the low threshold of the fair argument test and (2) the case relied upon by County did not actually involve the fair argument test or the approval of a negative declaration. (See *Marin Mun. Water Dist. v. KG Land California Corp.* (1991) 235 Cal. App. 3d 1652, 1660 [1 Cal. Rptr. 2d 767] [court explicitly stated it was applying the substantial evidence standard to the agency's approval of the EIR].) Where the question is the sufficiency of the evidence to support a fair argument, "deference to the agency's determination is not appropriate" (*Sierra Club v. County of Sonoma, supra*, 6 Cal.App.4th at pp. 1317-1318.) [*1580]

(14) A logical deduction from the formulation of the fair argument test is that, if substantial evidence [***54] establishes a reasonable possibility of a significant environmental impact, then the existence of contrary evidence in the administrative record is not adequate to support a decision to dispense with an EIR. (Guidelines, § 15064, subd. (f)(1); *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905 [60 Cal. Rptr. 2d 821].) The environmental review necessary to complete an EIR prepares the agency to weigh the conflicting substantial evidence on each side of an issue and make its findings of fact.

(15) The fair argument test also requires the preparation of an EIR where "there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial" (Guidelines, § 15063, subd. (b)(1); see *San Joaquin Raptor/Wildlife*

Rescue Center v. County of Stanislaus (1996) 42 Cal.App.4th 608, 614-615 [49 Cal.Rptr.2d 494].) In other words, for projects that may cause both beneficial and adverse significant impacts on the environment, preparation of an EIR is required because the consideration of feasible [***55] alternatives and mitigation measures might result in changes to the project that decrease its adverse impacts on California's environment. Consequently, the argument that an EIR was unnecessary because the net overall effect of Ordinance G-6638 was beneficial to the environment must fail, regardless of potential environmental benefits, if substantial evidence shows a reasonable possibility of one or more significant adverse environmental impacts.

C. Definitions Relevant to the Fair Argument Test

The fair argument test contains several terms that are defined further by CEQA, the Guidelines, or case law.

(16) First, the term "substantial evidence" is defined by the Guidelines to mean "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a); see *No Oil, Inc. v. City of Los Angeles*, *supra*, 13 Cal.3d at p. 75.) CEQA specifically provides that "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact" (§ 21080, subd. (e)(1)) and excludes [***56] "argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (*Id.*, subd. (e)(2); see Guidelines, § 15384, subd. (a).) Thus, the existence of a public controversy is not a substitute for substantial evidence. (Guidelines, § 15064, subd. (f)(4).)

[*1581] (17) Second, a project "may" have a significant effect on the environment if there is a "reasonable possibility" that it will result in a significant impact. (*No Oil, Inc. v. City of Los Angeles*, *supra*, 13 Cal.3d at p. 83, fn. 16.)

Third, "environment" is defined by CEQA as "the physical conditions [that] exist within the area [that] will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§ 21060.5.) Section 15360 of the

Guidelines explains this definition by providing: "The area involved shall be the area in which significant effects would occur either directly or indirectly as a result of the project. The 'environment' includes both [***57] natural and man-made conditions."

Fourth, the phrase "significant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in the environment." (§ 21068; see Guidelines, § 15382.) "In determining whether an effect will be adverse or beneficial, the lead agency shall consider the views held by members of the public in all areas affected as expressed in the whole record before the lead agency." (Guidelines, § 15064, subd. (c).)

Fifth, the "significance" of an environmental effect requires the evaluation of "direct physical changes in the environment [that] may be caused by the project and reasonably foreseeable indirect physical changes in the environment [that] may be caused by the project." (Guidelines, § 15064, subd. (d); see § 21065.)³⁸ In this context, "direct" means "caused by and immediately related to the project." (Guidelines, § 15064, subd. (d)(1).) "Indirect" means "not immediately related to the project, but ... caused indirectly by the project" such as a physical change caused by a direct physical change. (*Id.*, subd. (d)(2).) The test for the strength of the nexus between the project and an indirect physical [***58] change is whether "that change is a reasonably foreseeable impact [that] may be caused by the project." (*Id.*, subd. (d)(3).) The "reasonably foreseeable" test excludes physical changes that are speculative or not likely to occur. (*Ibid.*)

38 The Guidelines caution that an ironclad definition of "significant effect" is not possible because the significance of an activity may vary with the setting. (Guidelines, § 15064, subd. (b).)

Sixth, "effects" and "impacts" are synonymous and include (1) "[d]irect or primary effects [that] are caused by the project and occur at the same time and place" and (2) "[i]ndirect or secondary effects [that] are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable." (Guidelines, § 15358, subd. (a).) A common example of an indirect effect is the pollution that results from the growth-inducing effect of a project. (See Guidelines, §§ 15064, subd. (d)(2), 15382.) [*1582]

[**54] II. *An EIR is Required Under the Low [***59] Threshold of the Fair Argument Test*

Plaintiffs contend the implementation of Ordinance G-6638 created a reasonable possibility of significant environmental impacts both inside and outside Kern County. Plaintiffs contend these significant impacts included (1) increased vehicle traffic, (2) increased air pollution in the form of vehicle emissions, dust and volatilization of pesticides, (3) degraded water quality from the use of alternative fertilizers, (4) increased burdens on landfills, (5) increased energy and fuel consumption, (6) increased soil erosion, (7) increased use of irrigation water, (8) increased exposure of humans to pathogens, (9) loss of habitat for small animals, and (10) loss of productivity of marginal farmland.

County contends the fair argument test was not met because (1) the relevant environment was approximately 23,594 acres of farmland³⁹ in Kern County where Class B biosolids were applied and (2) it was not reasonably possible that significant adverse environmental impacts would occur on that farmland. To support its first contention, County asserts that any broader sweep of the ordinance would depend on alternative methods of biosolids disposal chosen [***60] by plaintiffs, and that the environmental impacts resulting from those methods were thus too uncertain and speculative for County to evaluate. To support its second contention, County asserts EQ biosolids would serve as an adequate substitute for the Class B biosolids that could no longer be applied by farmers.

39 This farmland represents about 3 percent of the total harvested cropland in Kern County.

CEQA defines the relevant geographical environment as the area where physical conditions will be affected by the proposed project. (§ 21060.5.) Consequently, the project area does not define the relevant environment for purposes of CEQA when a project's environmental effects will be felt outside the project area. (See *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369 [110 Cal. Rptr. 2d 579].) Moreover, "the purpose of CEQA would be undermined if the appropriate governmental agencies went forward without an awareness of the effects a project will have on areas outside [***61] of the boundaries of the project area." (*Ibid.*)

We agree with County that some of the physical changes to the environment resulting from the adoption of Ordinance G-6638 would depend on the reactions of plaintiffs and others to its requirements. Consequently, we will not limit our review to a particular geographical area, but begin by examining (1) the reasonably foreseeable reactions of those affected by the heightened treatment standards, (2) how such reactions might cause physical changes to [*1583] the environment, and (3) the environmental significance of those physical changes. The two main groups directly affected by Ordinance G-6638 were sewage sludge generators and the farmers who used Class B biosolids as a fertilizer. We will analyze each group separately.

A. Reactions of Sewage Sludge Generators and Related Impacts

Under the heightened treatment standards of Ordinance G-6638, sludge generators such as CSDLAC, CLABS and OCSD that applied Class B biosolids to agricultural land in Kern County were required to either reduce their production of biosolids or dispose of their biosolids in some other way.

[**55] 1. *Continued production and disposal of sewage sludge [***62] was foreseeable*

It was reasonably foreseeable that the City of Los Angeles, and the Counties of Los Angeles and Orange would continue to produce sewage sludge and would need to dispose of it. County does not dispute this point. The administrative record includes documents stating that the generation of biosolids will continue to increase along with the state's population. Therefore, at the time County certified the negative declaration, it was reasonably foreseeable that the heightened treatment standards would compel CSDLAC, CLABS, OCSD and other agencies to find a substitute for applying Class B biosolids on land within the jurisdiction of Kern County.

2. *Alternative methods of disposal were reasonably foreseeable*

a. Foreseeability of disposal alternatives

The following alternatives were foreseeable, because of the applicable rules of law governing the use and disposal of sewage sludge and because of information contained in the administrative record: (1) further treatment to convert Class B biosolids to EQ biosolids

followed by land application, (2) land application of Class B biosolids somewhere other than Kern County, (3) incineration, or (4) disposal [***63] in a landfill.

The applicable rules of law set forth in state statute and federal regulations address land application, ⁴⁰ landfilling, and incineration of sewage sludge. (See Wat. Code, § 13274, subs. (d), (f) & (g); 40 C.F.R. § 503, subparts B [land application], C [surface disposal, i.e., landfill] & E [incineration].) ⁴¹ [*1584] Also, land application of sewage sludge that has been treated to heightened standards is suggested by Ordinance G-6638 itself.

⁴⁰ Land application may involve sewage sludge that has received various levels of treatment. For example, composting may be an intermediate step that prepares the sewage sludge to be applied to land as EQ biosolids.

⁴¹ See generally Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Env'tl. Aff. L.Rev. at pages 690-697 (discussing the three main ways to dispose of sewage sludge: landfilling, incineration and land application).

The administrative record contains a vast amount of information about the alternative methods for [***64] disposing of Class B biosolids. Part of that information was presented in comments from persons familiar with the disposal of sewage sludge. For instance, a September 13, 1999, declaration of James F. Stahl, an assistant chief engineer and assistant general manager of CSDLAC, identified the four alternatives and provided historical data showing the disposal options California had used in the past: "[I]n 1998 approximately 1,849 dry tons per day of sludge were generated in California. Of that amount, approximately 67.8% was land applied, while about 7% was in storage, 5.6% was incinerated, 9% was disposed of in landfills, and 10.6% [was] used in compost. In California, the most common use of land-applied biosolids is for agricultural crop production. ... [A]bout one-third of all land-applied biosolids in the State of California in 1998 were applied in Kern County." ⁴²

⁴² Mr. Stahl relied on a survey conducted by CASA that was described in the State Water Board's 1999 Draft EIR, figure 2-2.

[***65] A letter from the Chief of the Office of Clean Water Act Compliance of Region IX of the EPA indicated the alternatives were (1) treatment to Class A

standards, (2) hauling further distances for land application, [**56] and (3) adding the organic, nitrogen-rich material to landfills. These methods and incineration were identified in the September 13, 1999, comments jointly submitted by CASA and SCAP and a June 14, 1999, letter signed by attorneys for OCSO, CSDLAC and CLABS. In addition, a letter from the Chair of the Central Valley Water Board mentions landfilling and incineration as alternative methods of disposal.

As a result of the foregoing comments and existing law, the foreseeable alternative methods of disposal of Class B biosolids included (1) land application outside Kern County, (2) further treatment to EQ biosolids standards followed by land application, (3) landfilling and (4) incineration.

b. Reasonableness limitation on foreseeable alternatives

(18) Next, we consider which of the foreseeable alternatives were *reasonably* foreseeable under the circumstances of this case. Under the fair argument test, the inquiry into what is reasonably foreseeable depends on whether [***66] the administrative record contains enough evidence to show a reasonable possibility that a particular alternative would be used in the future.

[*1585] OCSO, CSDLAC and CLABS were among the entities affected by Ordinance G-6638 that submitted comments to County predicting how they would respond to the ordinance.

An assistant general manager of OCSO, Blake P. Anderson, stated in a September 9, 1999, declaration that OCSO intended to respond to the ordinance by (1) converting Class B biosolids to EQ biosolids and (2) hauling the portion of the Class B biosolids not converted to more distant locations for land application. At that time, OCSO was "in the process [of] developing a request for proposals in order to obtain bids for the conversion of OCSO's Class B biosolids to exceptional quality biosolids." Earlier, in comments attached to its June 14, 1999, letter, OCSO discussed the limitations on landfills in Southern California and indicated that the landfills most likely to be used to dispose of Class B biosolids were located in Arizona and Utah.

The declaration of Mr. Stahl, CSDLAC's assistant general manager, stated adoption of the ordinance would cause CSDLAC to apply its biosolids to [***67] land

further away and, if the sites with permits for land application of Class B biosolids did not have sufficient capacity, to treat the biosolids to meet Class A or EQ standards. Mr. Stahl also addressed the potential alternatives of incineration and local landfilling by stating that (1) incineration was not feasible in Southern California because of its adverse impact on air quality and (2) local landfilling lacked viability because of various constraints placed on those landfills, which included the recycling requirements of the California Integrated Waste Management Act of 1989. Also, Gregory M. Adams, the head of the air quality engineering section of CSDLAC, opined that the incineration of sewage sludge in Southern California was not feasible because of its adverse impact on air quality.

A September 10, 1999, letter from CLABS stated that "[t]o date, our analysis indicates that the alternative with the highest likelihood of immediate success is the conversion of Class B biosolids to what are known as exceptional quality biosolids under the federal regulations." The letter described the testing undertaken for the conversion of Class B biosolids at its Terminal Island wastewater [***68] treatment plant and its Hyperion treatment plant and stated that it was reasonably foreseeable that within three years CLABS would be converting 100,000 wet tons per year of Class B biosolids to EQ biosolids. The letter also mentioned that the City of Los Angeles [**57] had examined potential alternative sites for land application of Class B biosolids as well as the use of a landfill in Arizona as a backup method for disposal.

[*1586] The foregoing predictions by entities that would have to change their practices when the heightened treatment standards went into effect are not rendered speculative by virtue of being predictions of future methods of compliance. Predicting the physical changes a project will bring about is an inescapable part of CEQA analysis. (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 919 [100 Cal. Rptr. 2d 173] [CEQA compels reasonable forecasting]; ⁴³ see *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 398-399 [253 Cal. Rptr. 426, 764 P.2d 278].)

43 In addressing forecasting, i.e., predicting or estimating what will occur in the future, the Guidelines state that "[d]rafting an EIR or

preparing a negative declaration necessarily involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can." (Guidelines, § 15144.)

[***69] (19) County contends that, when it adopted Ordinance G-6638, it could only speculate as to which alternative biosolids generators would adopt when the heightened treatment standards went into effect on January 1, 2003. Determining whether alternative methods of compliance with a new ordinance are reasonably foreseeable or speculative depends on the facts in the record rather than a bright-line rule of law. A bright-line rule--stating that the existence of alternative means of compliance with a new rule or regulation would cause each alternative to be so uncertain that it was not reasonably foreseeable--would contradict the requirements for environmental analysis imposed by section 21159, subdivision (a). That subdivision provides that when specified agencies adopt a rule or regulation concerning pollution control, performance standards, or treatment requirements, the agency must perform "an environmental analysis of the reasonably foreseeable methods of compliance." ⁴⁴ Thus, CEQA recognizes that the existence of alternative methods of compliance does not, in itself, make the alternatives not reasonably foreseeable. Nothing in logic dictates a different conclusion when the new edict is [***70] a county ordinance, even though the express terms of section 21159 do not cover ordinances. Consequently, regardless of whether the situation concerns a new rule, regulation or ordinance, whether one or more methods of future compliance are reasonably foreseeable depends upon the quality and quantity of evidence in the administrative record.

44 The section in the Guidelines corresponding to section 21159, subdivision (a) provides that adoption of a rule or regulation concerning pollution control, performance standards, or treatment requirements by specified state agencies requires an "environmental analysis of the reasonably foreseeable methods by which compliance ... will be achieved." (Guidelines, § 15187, subd. (a).)

The evidence in this case includes predictions of OCSD, CSDLAC and CLABS that are supported by a

reasoned analysis of the options available to them, an investigation into the practicalities of those options, and the plans or [*1587] intentions they had formed at that stage of their investigation. Accordingly, [***71] the predictions and the information upon which the predictions were based constitute substantial evidence supporting a fair argument that the reasonably foreseeable alternatives for disposing of sewage sludge that otherwise would have been applied to Kern County farmland as Class B biosolids were (1) hauling the Class B biosolids to other locations [**58] where land application was allowed, (2) treating the Class B biosolids to meet more stringent standards, and (3) depositing the Class B biosolids in landfills. In other words, based on the record cited on appeal (see Cal. Rules of Court, rule 14(a)(1)(C)), the only alternative method of disposal that was not *reasonably* foreseeable was incineration.

3. *Significance of environmental impacts of disposal alternatives*

(20) The next inquiry under the fair argument test is whether the likelihood of implementation of the reasonably foreseeable disposal alternatives created a reasonable possibility of a significant effect on the environment. A project will have a significant effect on the environment if it will cause "a substantial, or potentially substantial, adverse change in" (§ 21068) "the physical conditions [that] [***72] exist within the area [that] will be affected by [the] project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§§ 21060.5 [defining "environment"], 21068 [defining "significant effect on the environment"]; see Guidelines, §§ 15360, 15382.)

One illustration of the foreseeability of secondary environmental impacts occurred in *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398 [117 Cal. Rptr. 2d 582] where a county approved amendments that modified its general plan relating to land use regulation of unincorporated territory within a city's sphere of influence. The general plan amendment caused the slope development standards to become more lenient in certain areas and created the possibility for development of land previously considered too steep for development. (*Id.* at pp. 412-413.) The Fourth Appellate District held that an expected secondary effect of the adoption of a general plan amendment was an increase in grading that would destroy the natural contours of

hillsides and possibly eliminate the natural habitat for plants and animals. (*Id.* at p. 413.) Despite the county's [***73] argument that the evidence lacked the necessary specificity and the absence of a particular development project, the court concluded the administrative record contained [*1588] "substantial evidence of a fair argument that the amendments [to the general plan] may have a significant effect on the environment." (*Id.* at p. 414.) Thus, the trial court's decision to require the preparation of an EIR was upheld. (*Ibid.*)

a. *Hauling*

Mr. Anderson stated that OCS D anticipated hauling at least five truckloads of Class B biosolids per day to Kings County and two truckloads per day to Yuma, Arizona, which would involve a total of 2,000 vehicle miles per day and 1,200 vehicle miles per day, respectively.

Mr. Stahl stated Ordinance G-6638 would cause CSDLAC to apply Class B biosolids to land "at a currently-permitted location in Kings County for which [CSDLAC has] an existing contract" and at more remote permitted locations because the permitted capacity in Kings County could only accept about two-thirds of the biosolids generated by CSDLAC, OCS D and CLABS. Mr. Stahl also stated the additional hauling distance to the location in Kings County was approximately 45 miles [***74] one way. Based on this additional mileage and the amount of wet tons of sewage sludge CSDLAC produced, Mr. Adams stated that the additional hauling of CSDLAC alone would result in nitrogen oxide (NOx) emissions of 63 pounds per day. Daily operations-related emissions that exceed 55 pounds per day of NOx are considered significant under the thresholds [**59] established by the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD). ⁴⁵ (See Guidelines, § 15064.7 [public agencies encouraged to develop and publish thresholds of significance]; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 [126 Cal. Rptr. 2d 441] [adopting quantitative standard as threshold of significance "promotes consistency, efficiency, and predictability in deciding whether to prepare an EIR".]) Accordingly, Mr. Adams concluded that the additional hauling of sewage sludge produced by CSDLAC would have a significant effect on the environment.

45 The SJVUAPCD and the South Coast Air

Quality Management District (SCAQMD) have both established thresholds of significance for direct and indirect project emissions, such as NO_x, reactive organic gases (ROG), carbon monoxide (CO), sulfur oxide (SO_x) and fine particulate matter (PM-10).

[***75] The information in the administrative record supported a reasonable inference that the totality of additional hauling of Class B biosolids beyond sites in Kern County to locations in Kings County and further north would create additional NO_x emissions that would have a significant adverse impact on the air quality within the jurisdiction of the SJVUAPCD. This determination is based on the levels of significance established by the SJVUAPCD. (See [*1589] Guidelines, § 15064.7.) Accordingly, under the fair argument test, an EIR should have been prepared to consider the impact of Ordinance G-6638 on air quality.

b. *Treatment to EQ standards*

Mr. Stahl's declaration also stated CSDLAC had not built facilities sufficient to process its biosolids to meet Class A or EQ standards, but the design parameters for a pasteurization facility to accomplish that processing had been calculated by CSDLAC and would require approximately 700 MMBTUH⁴⁶ for heating in a natural gas boiler and 3,200 Hp⁴⁷ for pumping and handling.

46 Million British thermal units per hour. A British thermal unit is a unit of energy defined as the quantity of heat required to raise the temperature of one pound of water one degree Fahrenheit.

[***76]

47 Horsepower, which is a unit of power that can be defined as 550 foot pounds per second or 745.7 watts.

The declaration of Mr. Adams states that for the 700 MMBTUH design parameter calculated by CSDLAC for a pasteurization facility, a natural gas fired boiler of that capacity "would emit approximately 111 lbs of NO_x and 581 lbs of CO per day at their BACT [best available control technology] levels (i.e., 5 ppm NO_x and 50 ppm CO)." This estimate of the per day emission of NO_x is more than twice the threshold of significance set by the SCAQMD, and the estimate of CO emission also exceeds the threshold of significance of 550 pounds per day. Mr. Adams also stated that the processing activity necessary

for another sanitation agency to convert 100,000 tons of Class B biosolids to EQ biosolids per year would also exceed the thresholds of significance for NO_x and CO.

In addition, the declaration of Robert A. Gillette, a civil engineer and principal of Carollo Engineers, described the energy consumption associated with the additional treatment processes used to convert Class B biosolids to Class A biosolids. In his declaration, Mr. Gillette expressed the opinion that the most viable processes for converting Class B biosolids to Class A at a treatment plant were in-vessel composting, heat drying, and lime stabilization. Based on these processes and other data, Mr. Gillette estimated: [*60] "If only one third of the Class B biosolids presently used in Kern County are converted to Class A, the electricity usage for these alternatives is equivalent on an annual average basis to the amount used by between 1,500 and 5,000 homes in Southern California, according to data from Southern California Edison. The natural gas usage is equivalent on an annual average basis to the amount used by between 3,000 and 6,000 homes in Southern California according to data from the Southern California Gas Company."

[*1590] Mr. Gillette also stated his opinion that if 200,000 wet tons per year of Class B biosolids were converted to more stringent standards instead of applied to land in Kern County, "the environmental impact from the additional use of energy would be very significant."

While we recognize that OCSD, CSDLAC and CLABS each had choices in deciding what combination of further treatment and [***78] hauling to distant sites to implement, we conclude that a fair argument can be made that the aggregate impact of the alternatives adopted by these entities and the publicly and privately owned treatment works (POTW) serving Kern County communities⁴⁸ may cause a substantial, or potentially substantial, adverse change in the air quality within the jurisdiction of the SCAQMD and the SJVUAPCD. Furthermore, a fair argument can be made that the increased energy use caused by further treatment processes would cause a significant effect on the environment.

48 A Central Valley Water Board letter of September 17, 1999, stated the negative declaration "should also address the impacts of the proposed ban on POTWs serving Kern County communities."

c. *Landfill capacity*

The historical data in the administrative record shows that the biggest changes in the disposal and use of biosolids in California between 1988 and 1998 were the reduction in the use of landfills (60.2 percent to 9.1 percent) and the increase in [***79] the use of land application (12.7 percent to 67.8 percent). From this data, it is reasonable to infer that land application has acted as a substitute for disposal in landfills and, as land application becomes more difficult, the use of landfills will be a partial substitute for land application. For instance, page 2-2 of the State Water Board's 1999 Draft EIR links the "huge increase in land application" reflected in the 1998 data with the reduction in the use of landfills.

The California Integrated Waste Management Act of 1989 includes the legislative findings that the "amount of solid waste generated in the state coupled with diminishing landfill space and potential adverse environmental impacts from landfilling constitutes an urgent need for state and local agencies to enact and implement an aggressive new integrated waste management program" (§ 40000, subd. (d)), and that the reuse of solid waste would preserve landfill capacity and protect the state's environment (*id.*, subd. (e)).

Based in part on (1) the volume of Class B biosolids applied to land in Kern County before the heightened treatment standards became effective, (2) the use of landfills as a substitute for land [***80] application of biosolids, and (3) the legislative findings regarding diminishing landfill capacity and the adverse [*1591] environmental impact associated with landfilling, we conclude that a fair argument exists that the potential increased use of California's limited landfill space to dispose of an organic, nitrogen-rich material may have a significant adverse effect on the environment. Accordingly, [**61] that potential environmental impact should be assessed in an EIR.

d. *Summary*

(21) The reasonably foreseeable reactions of sewage sludge generators to Ordinance G-6638, and the reasonably foreseeable environmental impacts of those reactions, include: (1) increased fuel consumption and vehicle emissions resulting from hauling Class B biosolids greater distances; (2) the consumption of energy for the heating, pumping and handling involved in

treating Class B biosolids to meet more stringent standards, and the emissions generated by the additional treatment; and (3) loss of landfill capacity.⁴⁹

49 In determining the foreseeability of a significant environmental impact, predicting what combination of alternatives will be used is less important when environmental impacts are associated with each alternative in the limited array of choices available.

[***81] B. *Farmer Reaction and Related Impacts*

Plaintiffs argue that the reaction of Kern County farmers to the heightened treatment standards for sewage sludge applied to land after December 31, 2002, would result in significant impacts, "including the loss of productivity of marginal farmland (EPA, Garvey, Magan), increased air pollution from volatilization of increased pesticide usage, increased dust, and additional truck traffic (EPA, Regional Board, Garvey, Wilson, Tow, Anderson, Stahl, Adams, Hyde, Nixon, Westhoff) ... increased energy and fuel consumption (Wilson, Gillette, Anderson, Stahl, Nixon), increased erosion and dust (Garvey, Tow), increased water use (Garvey, Dixon, Tow), increased risks to human health (Nixon, Gerba), and loss of habitat for small animals (Garvey)." (Fn. omitted.)

County argues that the evidence referred to by plaintiffs is too general and does not show that "the Ordinance will result in significant environmental impacts on the land to which it applies." County asserts the lack of site-specific evidence occurred because "no physical changes would occur in the unincorporated area during the first three years because the Ordinance allowed the continued [***82] use of Class B biosolids; and no significant impacts [*1592] would occur after January 1, 2003 because the Ordinance allows the continued land application of EQ biosolids."

1. *Reasonably foreseeable farmer reactions*

Plaintiffs predicted that farmers who could not apply Class B biosolids after December 31, 2002, would react by (1) taking land out of agricultural production, (2) applying animal manure as a substitute for the biosolids, or (3) using chemical fertilizers. County asserts plaintiffs have indulged in assumptions unsupported by facts and have "ignore[d] evidence showing it is far more likely sludge generators will convert their Class B biosolids to

EQ, ensuring an adequate substitute for Class B biosolids for anyone who wishes to use them." County supports its prediction by referring to various contracts and related documents of the sanitation agencies that contemplate the use of composting as a disposal option.⁵⁰

50 Reliance upon these documents could be an after-the-fact justification because the documents were not part of the administrative record before the Kern County Board of Supervisors when it decided to adopt Ordinance G-6638 and to certify the negative declaration.

[***83] In effect, County has argued its forecast of how farmers would react when they could no longer apply Class B biosolids was the only forecast supported by substantial [**62] evidence. (See Guidelines, § 15144 [forecasting].) This position is rejected for three reasons.

First, the documents cited by County in its appellate brief were not considered by County in adopting Ordinance G-6638 as they were not a part of the administrative record. (See § 21003, subd. (b) [document cannot be "meaningful and useful to decisionmakers" if it was not available to them].)

Second, County has cited and this court has located no evidence in the administrative record that supports the factual assertion that EQ biosolids are "an adequate substitute for Class B biosolids." Indeed, the evidence in the administrative record, including a letter from the EPA, indicates that most treatment processes for Class B biosolids reduce the nitrogen levels considerably and therefore reduce its value as fertilizer. County contends this evidence is unreliable because another document that was not in the administrative record shows that one of the primary land application sites used by OCSD in Kern County did not need [***84] additional nitrogen for crop growth and would not be available for land application of Class B biosolids for a year or more. This attack on the evidence is faulty because (1) it is based on a document that is not in the administrative record; (2) it pertains to only one of the many land application sites in Kern County and provides no basis for inferring that all the other sites have the same characteristic; and (3) the [*1593] period the site was unavailable was not shown to extend to the time the heightened treatment standards went into effect.⁵¹

51 In other words, County failed to show that by January 1, 2003, nitrogen levels at the site would

have remained so high that EQ biosolids could have been used as fertilizer without any need for an additional source of nitrogen.

Third, even if one were to assume EQ biosolids and Class B biosolids were equivalents as fertilizer, the administrative record does not contain evidence which supports County's assumption that EQ biosolids would be available in sufficient quantities [***85] to completely replace Class B biosolids at all land application sites in Kern County. Some of the Class B biosolids that would have been applied in Kern County would be hauled to more distant locations or placed in landfills, which supports the inference that the EQ biosolids generated by the conversion of Class B biosolids would not be sufficient to completely replace the use of Class B biosolids.

Consequently, we reject County's position that the only reasonable forecast of the farmers' reaction to the implementation of the heightened treatment standards was that they all would use EQ biosolids as a substitute for Class B biosolids. Instead, substantial evidence in the administrative record shows that it was reasonable to forecast that the farmer reactions also would include taking marginal land out of production and substituting other types of fertilizer to replace the Class B biosolids. (See *League for Protection of Oakland's etc. Historic Resources v. City of Oakland*, *supra*, 52 Cal.App.4th at pp. 904-905 [substantial evidence of one impact is not negated if the record also contains substantial evidence showing a different impact will result].)

The forecast [***86] that farmers would take land out of production was reasonable because one farmer told the Kern County Board of Supervisors that the availability of Class B biosolids made it feasible for him to bring 1,200 acres of marginal alkali soil into production, and another stated that the availability of biosolids as a free fertilizer allowed him to break even on a [**63] 160-acre parcel. Shaen Magan wrote a letter indicating that if he was unable to continue farming with the use of biosolids, then approximately 4,000 acres of his farmland located in Kern County would revert to open-range land. From these statements, it is reasonable to infer that without the free application of Class B biosolids, the marginal land would be taken out of production.

The forecast that some land would remain in production and substitutes would be used was reasonable

because Pat McCarthy stated that he was currently applying Class B biosolids in his family's farming operations and, similar to gypsum, sulfur, animal waste and dairy waste, it was just one tool available to farmers. This statement supports an inference that he would [*1594] continue to farm by using one or more other types of fertilizer available to replace the [***87] Class B biosolids.

2. Potential environmental impacts of farmer reactions

a. Dust and air quality

Plaintiffs claim substantial evidence shows that "[a]t marginal sites that are currently used for Class B biosolids application, there will be a significant increase in soil loss of approximately 28,800 tons per year as PM-10 (Dust)" and cite to a letter prepared by Harry A. Tow, a principal engineer with Quad Knopf, Inc. In his letter, Tow states that sites left fallow and unfarmed will experience a significant increase in soil loss through wind erosion. The figure of 28,800 tons per year calculated by Tow equates to approximately 157,808 pounds per day, which is over 1,000 times the 150 pounds per day threshold of significance established for PM-10 by the SJVUAPCD for any project.

Tow also stated that more dust and odor is likely to be created where animal manure is used as a substitute for Class B biosolids because the transport and application of dry manure is not regulated and it could be applied in wind conditions where the application of biosolids would not be allowed.

[*1595] Plaintiffs also cite a September 10, 1999, letter written on behalf of OCS D by Diane D. [***88] Garvey, who has a degree in civil and environmental engineering and a 20-year career in biosolids management. Garvey's company is Garvey Resources, Inc., and it is located in Lansdale, Pennsylvania. In Garvey's opinion, farmers who use chemical fertilizers as a substitute for biosolids will suffer increased soil loss from wind erosion because biosolids reduce soil erosion by increasing the amount of organic matter in the soil, which improves the soil's structure and cohesion. To support her opinion, Garvey quotes from an article titled "Agricultural Tillage Systems: Water Erosion and Sedimentation" published by the Soil and Water Conservation Society.

b. Increased use of animal manure

Plaintiffs contend a fair argument exists that increased use of animal manure by farmers affected by Ordinance G-6638 would lead to more surface water pollution, more groundwater pollution and the spread of pathogens such as cryptosporidium, giardia, salmonella and E. coli. This argument is supported by a report by the United States Geological Survey and a report prepared for United States Senator Tom Harkin, both of which are in the administrative record, and show that animal manure has had [***89] an adverse impact on the environment at locations across the country and in California.

Plaintiffs also cite the September 10, 1999, letter written by Garvey which asserted that increased use of animal manure [**64] would increase (1) nitrate contamination of groundwater and (2) the spread of disease because animal manure is not treated to reduce pathogens like Class B biosolids. Garvey asserts biosolids cause less nitrate contamination because biosolids are closely monitored and more consistent in quality; in contrast, the quality of animal manure can vary greatly in solids and nitrogen content based on the age of the manure, storage method, the feed given to the animals and their weight. The inconsistent quality of manure means that some areas of a field will receive more nitrogen than can be used by the crops and the excess nitrates will contaminate the groundwater.

With respect to the pathogens in animal manure, plaintiffs cite a September 13, 1999, letter from Charles P. Gerba, Ph.D., from the Department of Soil, Water and Environmental Science at the University of Arizona, which described some of the pathogens found in animal manure, asserted outbreaks of some of these pathogens were [***90] associated with the use of animal manure as a fertilizer, and observed that animal manure that is land applied is not regulated for pathogen removal, unlike Class B biosolids.⁵² The lack of regulatory oversight to the land application of animal manure also is mentioned in the comments submitted to County by the EPA.

52 Under Part 503, sewage sludge must be treated to significantly reduce pathogens to obtain Class B status. (See 40 C.F.R. § 503.32(b) (2005) [Class B pathogen requirements and site restrictions].)

c. Increased use of concentrated chemical fertilizers

Plaintiffs assert substantial evidence shows that

increased use of concentrated chemical fertilizers by affected farmers would lead to a number of adverse environmental impacts including (1) soil erosion, ⁵³ (2) surface water pollution, (3) groundwater pollution, (4) increased use of irrigation water, (5) decreased crop production and (6) increased use of pesticides.

53 The soil loss from wind erosion is discussed in part II.B.2.a., *ante*.

[***91] We agree that it is reasonable to forecast that this farmland will have a lower organic content than it would have had if Class B biosolids had continued to be applied. There is ample evidence in the administrative record showing that the application of biosolids increases the organic content of soil. For example, the September 9, 1999, letter submitted to County by Robert C. Dixon, a certified professional agronomist, indicates that biosolids are an organic soil amendment with a high level of organic matter.

[*1596] Both Garvey and Dixon asserted that the substitution of chemical fertilizers for biosolids could result in adverse impacts to the environment by (1) decreasing the ability of the soil to retain water and thus increasing the amount of water used to irrigate crops, and (2) increasing the amount of nutrients likely to leach below the root zone before they can be utilized by the crops and thereby increasing the amount of nutrients that leach into and pollute the groundwater.

Dixon also asserted that the increase in organic matter from biosolids increases the ability of the soil to hold onto pesticides, fertilizers and the soil itself. Thus, the water runoff from fields using biosolids [***92] would pollute surface water less because the runoff would transport fewer nutrients, pesticides and sediment.

Garvey asserted that the decrease in organic matter would decrease beneficial microbial populations in the soil and would increase farmer dependence on pesticides.

[**65] 3. *Significance of potential impacts from farmer reactions*

On our own initiative, we could provide bases on which to attack the significance of the above noted potential impacts to the environment arising from the reasonably foreseeable reactions of affected farmers. ⁵⁴ County, however, has not provided any detailed analysis of the potential impacts plaintiffs have identified, other

than to argue (1) the potential impacts will not arise because farmers will use EQ biosolids as a replacement for Class B biosolids and (2) plaintiffs' claims are based on (a) unsupported assumptions and opinions and (b) biased and unreliable information. (See § 21080, subd. (e); Guidelines, § 15384, subd. (a); *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal. App. 3d 1337, 1349 [272 Cal. Rptr. 372] [agency entitled to disbelieve biased witness].)

54 For example, Tow's analysis of the impact of dust on air quality suffers from a rather glaring deficiency--his failure to compare the potential dispersal of PM-10 after January 1, 2003, to the dispersal of PM-10 from the same land while it was farmed and biosolids were applied to it. The question, of course, is *change* to the environment which might arise from the ordinance. (See § 21068; Remy et al., *Guide to the Cal. Environmental Quality Act (CEQA)* (10th ed. 1999) p. 162 (Remy, *Guide to CEQA*).)

[***93] Neither of County's arguments is compelling. First, substantial evidence in the record establishes a reasonable possibility that farmers would react to the heightened treatment standards in various ways (see part II.B.1., *ante*) and thus would not limit their reaction to using EQ biosolids as a complete substitute for Class B biosolids. Moreover, County's argument appears to be an after-the-fact rationalization for a decision already made because the [*1597] administrative record contains no evidence that County seriously investigated whether EQ biosolids would be a complete substitute for the Class B biosolids that had been used. ⁵⁵ The after-the-fact nature of the position is illustrated by County's inability to cite any supporting evidence in the administrative record. (See fn. 50, *ante*.)

55 For instance, in completing the initial study County did not investigate the basic question of quantity--whether the volume of EQ biosolids available for application to farmland in Kern County would be sufficient to replace the volume of Class B biosolids that had been used.

[***94] (22) Second, County's generalized assertion that the evidence relied upon by plaintiffs was biased and unreliable fails because County (1) did not make any express credibility findings in connection with its approval of the negative declaration and (2) has not shown that there were "legitimate, disputed issues of

credibility.' [Citation.]" (*Stanislaus Audubon Society, Inc. v. County of Stanislaus*, *supra*, 33 Cal.App.4th at p. 151.) Were we to accept County's broad-brush assertion of the incredibility of plaintiffs' evidence, the fair argument test would be effectively eviscerated because much of the evidence submitted in administrative proceedings concerning CEQA projects comes from people and entities who are interested in the outcome of the lead agency's decision. Instead, we hold that before an agency may rely on its purported rejection of evidence as incredible, it must first identify that evidence with sufficient particularity⁵⁶ to allow the reviewing court to determine whether there were legitimate, disputed issues of credibility. (E.g., *Leonoff v. Monterey County Bd. of Supervisors*, *supra*, 222 Cal. [**66] App. 3d at pp. 1351-1353 [court [***95] upheld county's rejection of project opponents' evidence of purportedly significant traffic impacts].)

56 Under the facts of this case, we need not decide whether that identification must take place in explicit findings by the agency, elsewhere in the administrative record, or in the briefing submitted by the lead agency to the court.

We refrain from supplying arguments County has not made, or from requesting further briefing, because to do so would not reflect County's actual analysis but would simply create more after-the-fact justifications. Moreover, it would not change the need to remand this matter with directions to County to prepare an EIR. (See part II.A., *ante*.)

(23) We also agree with plaintiffs that, under CEQA, the lead agency bears a burden to investigate potential environmental impacts. "If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of [***96] fair argument by lending a logical plausibility to a wider range of inferences." (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311 [248 Cal. Rptr. 352].) [*1598]

In this case, Tow's calculation regarding the creation of 28,800 tons per year of PM-10 is not a reasonable prediction. Nevertheless, County failed to study the impact of dust on air quality and, as a result, there exists a plausible inference that the heightened treatment standard could cause, in the aggregate, the addition of 150 pounds per day of PM-10 to the air within the jurisdiction of the

SJVUAPCD based on (1) Tow's analysis of wind erosion from fallow land, (2) Tow's analysis of the additional dust that will result from the use of animal manure, (3) Garvey's claim that increased use of chemical fertilizers will affect soil structure and lead to more wind erosion, and (4) the PM-10 from the additional truck emissions created by further hauling distances. Accordingly, the heightened treatment standards may have a significant adverse impact on the amount of PM-10 in the air and an EIR should address this potential impact.

In addition, we conclude the impacts from the increased use of animal [***97] manure and the increased use of chemical fertilizers may have a significant adverse impact on the environment and should be addressed in an EIR.

C. *Magan v. County of Kings Is Distinguishable*

In *Magan v. County of Kings*, *supra*, 105 Cal.App.4th 468, the Kings County Board of Supervisors found that an ordinance regulating the application of sewage sludge to land in Kings County was categorically exempt from review under CEQA as an action taken by a regulatory agency for the protection of the environment. (See Guidelines, § 15308 [class 8 categorical exemption concerning protection of the environment]; see also § 21084.) In upholding the superior court's denial of a writ of mandate, this court determined that (1) the county met its burden of showing substantial evidence supported the board of supervisors' decision that the ordinance fell within the categorical exemption (*Magan*, at p. 476) and (2) that the petitioner failed to meet his burden of producing substantial evidence showing a reasonable possibility of adverse environmental impact sufficient to remove the ordinance from the categorically exempt class (*ibid.*). In particular, this [***98] court observed that the petitioner "has failed to support his claims with *any* evidence in the record. The claims are based entirely on speculation." (*Id.* at p. 477.)

The present case is distinguished easily from *Magan v. County of Kings* based on [**67] the contents of the administrative record.⁵⁷ In this case, the administrative record contains a large quantity of specific information about alternative methods of disposing of the Class B biosolids that otherwise [*1599] would have been applied to Kern County farmland and the environmental significance of the impact of those alternatives on energy consumption, air quality within the jurisdiction of the SJVUAPCD, and landfill capacity. Thus, plaintiffs in this

case have done exactly what the petitioner in *Magan v. County of Kings* failed to do--produced substantial evidence to support their argument that the ordinance would indirectly cause "a substantial, or potentially substantial, adverse change in" "the physical conditions [that] exist" inside and outside the county. (§§ 21060.5, 21068; Guidelines, §§ 15360, 15382; *Heninger v. Board of Supervisors* (1986) 186 Cal. App. 3d 601, 609-611 [231 Cal. Rptr. 11] [***99] ["considerable body of evidence" supported a fair argument that an ordinance amendment authorizing installation of alternative private sewage disposal systems might have a significant effect on the environment; thus, a negative declaration was inappropriate and the preparation of an EIR was required].)

57 This court has emphasized the importance of connecting one's arguments to the contents of the administrative record in a CEQA proceeding. (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362 [1 Cal. Rptr. 3d 726]; see Cal. Rules of Court, rule 14(a)(1)(C).)

D. Deferral of Environmental Analysis

County asserts deferring the preparation of an EIR was appropriate because the uncertainty over how the sanitation agencies would react to Ordinance G-6638 rendered environmental analysis of those reactions premature.

1. Deferral and the fair argument test

(24) A threshold issue is how the concept of deferral of environmental analysis interacts with the fair argument [***100] test. When a public agency is preparing an EIR and decides to defer environmental review of an action that may be taken in the future, courts analyze the decision to defer environmental review under a specific test. (See *National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505, 1516-1520 [50 Cal. Rptr. 2d 339] [deferral of environmental analysis in the context of EIR preparation and the test for deferral].) That test provides that the "discussion of a [future potential action] is not required in an EIR for the project ... if: (1) obtaining more detailed useful information is not meaningfully possible at the time when the EIR for the project is prepared, and (2) it is not necessary to have such additional information at an earlier stage in determining whether or not to proceed with the project." (*Id.* at p. 1518.)⁵⁸

58 A dispute over the application of the test for deferral often is closely related to a dispute concerning the proper scope of the project and whether a line can be drawn between the project covered by the EIR and the future action for which environmental analysis is deferred. (See *National Parks & Conservation Assn. v. County of Riverside*, *supra*, 42 Cal.App.4th at pp. 1514-1515; see also *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal. App. 3d 223, 236-237 [242 Cal. Rptr. 37] [discussion of pipelines in an EIR for exploration phase of multistage oil project need not address specific pipeline routes because quantity and quality of oil discovery was uncertain and another EIR would be prepared in connection with the city's approval of a specific pipeline route].)

[***101] [*1600] (25) In the context of a negative declaration, however, the courts have not [**68] used this test to determine whether the approval of the negative declaration complies with CEQA. (See *Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 580 [80 Cal. Rptr. 2d 294] (*Pala Band*) [applying fair argument test, court held preparation of EIR would be premature; upheld negative declaration]; *Sundstrom v. County of Mendocino*, *supra*, 202 Cal. App. 3d at pp. 306-307 [deferring environmental assessment related to mitigation measures violated CEQA; negative declaration held invalid].) Further, we believe that use of an inquiry separate from the fair argument test would be inappropriate if it were used to raise or lower the threshold imposed by that test. Because the concept of deferral of environmental review does not change the threshold imposed by the fair argument test, there is no need for a separate inquiry. In other words, the idea of deferral is subsumed in the fair argument test, which considers whether a potential environmental impact is speculative or reasonably foreseeable; undertaking a separate inquiry would be redundant.

2. Timing and [***102] Guidelines section 15004

County contends preparation of an EIR would have been premature because "meaningful information for environmental assessment" (Guidelines, § 15004, subd. (b)) was not available at the time Ordinance G-6638 was adopted.

Section 15004 of the Guidelines addresses the time for preparation of an EIR or negative declaration, and

subdivision (b) states: "Choosing the precise time for CEQA compliance involves a balancing of competing factors. EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." The "Discussion" that follows section 15004 of the Guidelines states: "This section codifies the requirement that EIRs and Negative Declarations be prepared before an agency makes a decision on the project and early enough to help influence the project's plans or design. For EIRs and Negative Declarations to be effective in serving the purposes of CEQA, the preparation of these documents must be coordinated with the planning, review, and approval processes [***103] as described in subsection (c). Early preparation is necessary for the legal validity of the process and for the usefulness of the documents. Early preparation enables agencies to make revisions in projects to reduce or avoid adverse environmental effects before [*1601] the agency has become so committed to a particular approach that it can make changes only with difficulty." ⁵⁹

59 The Discussion is available on the Internet at <http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art1.html> (as of Apr. 1, 2005). (See generally *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1987) 189 Cal. App. 3d 498, 503, fn. 1 [234 Cal. Rptr. 527] [judicial notice taken of the "Discussion" that followed a section of the Guidelines].)

County's timing argument is ill-suited to the facts of this case because it (1) confuses deferring environmental analysis of Ordinance G-6638 with avoiding it and (2) treats the reactions of the sanitation agencies as though they were part of the same [***104] CEQA project. ⁶⁰

60 The project description contained in County's proposed negative declaration states the project is "the adoption of a Kern County ordinance regulating the land application of Class A and B biosolids" The project description does not include any biosolids management activities that might be undertaken by sanitation agencies in response to the ordinance.

[**69] An agency's deferral of environmental assessment was appropriate in *Pala Band, supra*, 68

Cal.App.4th 556, and *Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464 [11 Cal. Rptr. 2d 792] (*Kaufman & Broad*) because the agency had the opportunity to assess all of the physical impacts of its multistage activity in an EIR prepared by the agency at a later stage of the project. Thus, those cases do not use timing considerations to justify an agency's completely avoiding the preparation of an EIR for its project.

In *Pala Band, supra*, 68 Cal.App.4th 556, the County of [***105] San Diego adopted a countywide integrated waste management plan, which was a statutory prerequisite to the development of new landfills in the county. The court held the preparation of an EIR would be premature where all 10 proposed landfill sites identified in the siting element of the plan were only "tentatively reserved" and the county had made no commitment to develop any of the sites. (*Id.* at pp. 574-575, 580.) Thus, it was not "reasonably foreseeable at the current planning stage that any of the sites will actually be developed" (*id.* at p. 575), and the county could wait and subsequently prepare an EIR to help it decide which sites to actually develop.

Similarly, in *Kaufman & Broad, supra*, 9 Cal.App.4th 464, a school district formed a consolidated facilities district (CFD) but did not prepare an EIR. The formation of the CFD was merely an initial step and many alternative courses of action remained open to the school district. (*Id.* at p. 476.) For instance, formation of the CFD did not commit the school district to build a new facility, buy or lease portable classrooms, or rehabilitate existing facilities. [***106] (*Id.* at pp. 474-475.) The formation of the CFD caused no physical changes to the environment and it was not an essential step culminating in [*1602] activity that might cause physical changes to the environment. (*Id.* at p. 474.) In other words, physical changes would not occur until the district actually committed to building a new facility or some other course of action. Therefore, the school district itself had the opportunity to prepare an EIR when it committed to a stage of the project that would cause a physical change to the environment. ⁶¹ (Cf. Guidelines, § 15165 [issues raised by multiple and phased projects where significant environmental impacts arise earlier in the process].)

61 The analogy between the adoption of a land use ordinance and the multistage activities involved in *Pala Band* and *Kaufman & Broad* is

weak. The stronger analogy is between the adoption of Ordinance G-6638 and the adoption of (1) an amendment to a general plan, (2) revised sphere of influence guidelines, or (3) development plans for an area surrounding an airport. (See *City of Redlands v. County of San Bernardino*, *supra*, 96 Cal.App.4th at pp. 412-413 [adoption of negative declaration set aside and county required to prepare an EIR in connection with general plan amendment]; *City of Livermore v. Local Agency Formation Com.* (1986) 184 Cal. App. 3d 531 [230 Cal. Rptr. 867] [LAFCO's negative declaration vacated and preparation of EIR required for changes in sphere of influence guidelines regarding urban development]; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, *supra*, 91 Cal.App.4th at p. 369 [final subsequent EIR certified in connection with approval of updated specific plan for development of area surrounding county airport properly considered "project's effect on growth and housing ... felt outside of the project area"].)

[***107] [**70] The present case is distinguishable from *Pala Band* and *Kaufman & Broad* because the adoption of Ordinance G-6638 was a definitive action by County that *completed* its project and, accordingly, County had no opportunity to assess the indirect physical impacts of Ordinance G-6638 before those impacts occurred. Therefore, we reject County's attempts to use cases upholding a public agency's deferral of EIR preparation as support for its avoidance of EIR preparation.

Furthermore, in this case the CEQA "project" was Ordinance G-6638 itself. (See fn. 58, *ante*.) The final form of that project was proposed at the time Ordinance G-6638 was proposed, and County's commitment to the project became final when it adopted that ordinance. By avoiding the preparation of an EIR, County committed to a particular approach and completed its project without the benefit of the environmental analysis and information an EIR would have contained.

3. Each agency has separate CEQA responsibilities

Another aspect of County's deferral argument is that (1) the sanitation agencies are responsible for performing an environmental review of the potential environmental impacts resulting [***108] from the changes those agencies make in their biosolids management programs,

and (2) plaintiffs are trying to [*1603] avoid this responsibility by foisting it on County. We reject County's argument because it misses the mark on how CEQA operates. If only the sanitation agencies were required to prepare, supplement, or amend their EIR's, there would be no environmental review of (1) feasible alternatives to the heightened treatment standards adopted in Ordinance G-6638, (2) its cumulative impacts, and (3) mitigation measures available to County but not the sanitation agencies. Under this approach, the environmental review contemplated by CEQA would contain a gap, and California's environment would be deprived of the benefits that might result from County's consideration of feasible alternatives, cumulative impacts, and mitigation measures.⁶²

62 Plaintiffs point to the State Water Board's 1999 Draft EIR contained in the administrative record and argue that if the adoption of General Order 2000-10 at the state level created potential impacts that could be foreseen and required analysis, then the potential impacts from the adoption of Ordinance G-6638 (which represented a greater change from the status quo) also must be foreseeable. In plaintiffs' view, consistent application of CEQA's concept of foreseeability at the state and county level requires rejection of County's position that the potential physical impacts of Ordinance G-6638 were so attenuated as to be unforeseeable.

[***109] (26) Furthermore, the fact that County must prepare an EIR does not absolve the sanitation agencies of their responsibilities to comply with CEQA. (See part VII., *post*.)⁶³ As noted by the Third Appellate District in *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal. App. 3d 433 [243 Cal. Rptr. 727], "Each public agency is required to comply with CEQA and meet its responsibilities, including evaluating mitigation measures and project alternatives. (See Guidelines, § 15020.)" (*Id.* at p. 442, fn. 8.) When agencies--even agencies with antagonistic positions--comply with their responsibilities for environmental review under CEQA, their action should be taken after consideration of the other's position and, [**71] as a result, their action may achieve a measure of coordination that would not have existed without that review. (See § 21000, subs. (d) & (f).)

63 Justice Stephen Breyer has described the

problem of regulatory inconsistency which can arise when agencies ignore their regulatory program's environmental effect on other programs. (See Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation*, *supra*, pp. 21-22.)

[***110] E. *Relief Appropriate Under Section 21168.9*

Section 21168.9 sets forth the requirements for the court order entered after a failure to comply with CEQA has been found. (See *San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (2001) 89 Cal.App.4th 1097, 1102-1103 [109 Cal. Rptr. 2d 108].) An order granting relief for CEQA violations "shall include only those mandates ... necessary to achieve compliance with [CEQA] and only those specific project activities in noncompliance with [CEQA]." (§ 21168.9, subd. (b).) In this case, the specific project activity that did not comply with CEQA was the approval of the negative declaration and the adoption of the heightened treatment standards.

[*1604] (27) Accordingly, the order could mandate that County void all or part of its decision to approve the negative declaration and adopt the heightened treatment standards. (§ 21168.9, subd. (a).) The order also could mandate that County take specific action necessary to bring its decision into compliance with CEQA. (§ 21168.9, subd. (a)(3).)

We requested supplemental briefing concerning how section 21168.9 should be applied in this case and what directions should be given to the superior [***111] court on remand. (Gov. Code, § 68081.) We asked whether the heightened treatment standard should be voided or allowed to remain in effect pending the completion of an EIR, and whether the adoption of Ordinance No. G-6931, which repealed Ordinance G-6638 but reenacted the heightened treatment standards, should affect the relief ordered.

The parties concurred that the heightened treatment standards should remain operative pending County's (1) completion of an EIR in good faith and without unnecessary delay and (2) approval of whatever replacement version of the biosolids ordinance is generated as a result of completing the EIR. ⁶⁴ This position presumes (1) the severability of the heightened treatment standards from the other provisions in Ordinance G-6638 as well as from the additional

provisions added by Ordinance No. G-6931, such as the licensing permit required for the land application of EQ biosolids, and (2) that the equities favor it. Because we conclude both of these presumptions are appropriate, we will accept the position adopted by the parties.

64 At the time County begins the EIR process, it will not know the exact terms of the ordinance that it might approve at the end of that process because the terms it initially proposes, i.e., the "project," may be revised after considering feasible alternatives and mitigation measures.

[***112] (28) First, we conclude that the heightened treatment standards are grammatically, functionally, and volitionally severable from the remainder of chapter 8.05 as adopted by Ordinance G-6638 or as currently in effect under Ordinance No. G-6931. (See *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821-822 [258 Cal. Rptr. 161, 771 P.2d 1247].) ⁶⁵ Therefore, the CEQA violations relating to the adoption of the heightened treatment standards do not infect the other provisions of the ordinances. (See § 21168.9, subd. (b).)

65 This conclusion regarding severability does not mean, however, that the heightened treatment standards are the entire "project" for purposes of determining the scope of the EIR.

Second, County and CSDLAC both state they are unaware of any published [**72] case in which (1) a negative declaration that related to the adoption of an ordinance, regulation or general order was ruled invalid under CEQA, and (2) the appellate court did not invalidate the ordinance, regulation or general [1605] order itself. (Cf. [***113] *Friends of Sierra Madre v. City of Sierra Madre*, *supra*, 25 Cal.4th at p. 196 [appropriate relief for noncompliance with CEQA was invalidation of ordinance; ordinance not allowed to remain in effect pending compliance with CEQA]; *No Oil, Inc. v. City of Los Angeles*, *supra*, 13 Cal.3d at p. 88 [superior court directed to set aside three ordinances].) Nevertheless, a remedy less severe than immediately voiding the heightened treatment standards may be ordered if supported by equitable principles. (See *Laurel Heights Improvement Assn. v. Regents of University of California*, *supra*, 47 Cal.3d at pp. 423-425; *San Bernardino Valley Audubon Society v. Metropolitan Water Dist.*, *supra*, 89 Cal.App.4th at p. 1104.) Because the heightened treatment standards currently contained in

Ordinance No. G-6931 have been in effect for over two years, we will follow the more steady course of allowing the status quo to continue pending the completion of an EIR. The alternative of reverting to a situation where the application of Class B biosolids is not subject to any local regulation and then, after an EIR is completed, [***114] possibly returning to a situation where Class B biosolids either cannot be land applied or are highly regulated by County would be disruptive to County, the sanitation agencies, and the members of the biosolids industry that are subject to the ordinances.

In light of (1) the position of the parties, (2) the authority given to the courts in section 21168.9 to fashion the terms of the writ of mandate, and (3) the equitable considerations relevant to this proceeding, we hold that the heightened treatment standards may continue in effect provided that County prepares, in good faith without unnecessary delay, an EIR that complies with CEQA. If County decides to forgo regulating the application of biosolids to land, or does not prepare an EIR in good faith⁶⁶ and without unnecessary delay, then the superior court shall enter an order that immediately invalidates the heightened treatment standards. Questions concerning County's good faith or lack of diligence, if raised, shall be decided by the superior court in the first instance.

⁶⁶ One issue that may arise in connection with the good faith of County's attempt to prepare an EIR is whether its definition of the scope of the EIR appropriately considers the "project" to include the "whole of an action" actually implemented by County in regulating the land application of sewage sludge. (Guidelines, § 15378, subd. (a); see *Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 637-640 [10 Cal. Rptr. 3d 560].)

[***115] III. *Ordinance G-6638 Is Consistent with Water Code Section 13274*

In the proceedings before the superior court, County argued that Ordinance G-6638 was a local determination concerning sewage sludge that was authorized by Part 503 and by Water Code section 13274. Plaintiffs agree that Water Code section 13274 allows a county to impose stricter regulations than [*1606] those contained in the federal regulations on the land application of Class B biosolids. Plaintiffs contend, however, that County has imposed an outright ban and thus has gone further than

Water Code section 13274 allows when it is read in conjunction with Part 503. (See *Blanton v. Amelia County* (2001) 261 Va. 55 [540 S.E.2d 869] [**73] [county ordinance banning use of biosolids on farmland held invalid because of conflict with Virginia statute and regulations]; *O'Brien v. Appomattox County* (W.D.Va. 2003) 293 F. Supp. 2d 660 [same]; *Franklin County v. Fieldale Farms Corp.* (1998) 270 Ga. 272 [507 S.E.2d 460] [Georgia water quality statute regulating land application of [***116] sludge implicitly preempted county ordinance regulating land application of sewage sludge, except in area of monitoring].)

Plaintiffs' contention presents an issue of statutory construction concerning the meaning of subdivision (i) of section 13274 of the Water Code, which provides: "Nothing in this section restricts the authority of a local government agency to regulate the application of sewage sludge and other biological solids to land within the jurisdiction of that agency, ..." (Italics added.)

(29) Under plaintiffs' statutory construction, the word "regulate" does not include the authority to prohibit an activity. Accepting this narrow view of the word "regulate" for purposes of argument,⁶⁷ it does not follow that County lacks the authority to prohibit the application of Class B biosolids to land within its jurisdiction. This is because the statute refers to "sewage sludge" and not specifically to Class B biosolids.⁶⁸ Ordinance G-6638 did not prohibit "the application of sewage sludge ... to land within the jurisdiction of [County]" (Wat. Code, § 13274, subd. (i)) within the usual, ordinary meaning of that [***117] language because it would have allowed the application of sewage sludge that has been treated to specified, stringent standards. By allowing the land application of EQ biosolids, Ordinance G-6638 would have regulated how much treatment sewage sludge must receive before it was applied within the unincorporated area of Kern County. Accordingly, the heightened treatment standards do not conflict with Water Code section 13274 when the term "sewage sludge" is given its usual, ordinary meaning--that is, read literally.⁶⁹

⁶⁷ But see *Young v. Department of Fish & Game* (1981) 124 Cal. App. 3d 257, 279 [177 Cal. Rptr. 247] ("power to regulate includes the power to prohibit"); *Watkins v. Naifeh* (Tenn. 1982) 635 S.W.2d 104, 107 ("extremely broad powers to regulate the sale ... of alcoholic beverages ... extends even to the power to ban such sales"); see

also *Personal Watercraft Coalition v. Marin County Bd. of Supervisors* (2002) 100 Cal.App.4th 129, 150 [122 Cal. Rptr. 2d 425].

68 Class B biosolids are one category of "sewage sludge," which Part 503 defines as the "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works." (40 C.F.R. § 503.9(w) (2005).)

[***118]

69 We need not reach the question of statutory construction concerning whether the authority to "regulate" includes or excludes the authority to ban an entire activity. Thus, although we requested supplemental briefing on whether it would be appropriate for this court to take judicial notice of State Water Board's General Order 2004-0012, which states the Water Code does not preempt the authority of local agencies to prohibit the use of biosolids, we need not consider the weight to give the regulatory agency's construction of the statute. (See generally *Yamaha Corp. of America v. State Bd. of Equalization* (1999) 19 Cal.4th 1, 6-8 [78 Cal. Rptr. 2d 1, 960 P.2d 1031].)

[*1607] Furthermore, plaintiffs have not demonstrated a legislative purpose that justifies narrowly construing the term "sewage sludge" to mean only Class B biosolids rather than using the broader, literal construction of the term set forth in 40 Code of Federal Regulations part 503.9(w) (2005). (See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal. Rptr. 115, 755 P.2d 299] [literal construction should prevail unless contrary to legislative purpose].) [***119] Thus, the heightened treatment standards do not conflict with [**74] Water Code section 13274 when that section is read in conjunction with Part 503. (See 40 C.F.R. § 503.5(b) (2005) [state and local government authorized to impose more stringent requirements].)

IV. Commerce Clause Analysis

Plaintiffs contend that the heightened treatment standards in Kern Code provision 8.05.040(A), 70 Ordinance G-6638, violate the commerce clause of the United States Constitution (U.S. Const., art. I, § 8, cl. 3) in that those standards (1) impermissibly discriminate against out-of-county biosolids by allowing municipalities located in Kern County to apply their own Class B biosolids on land in the incorporated areas of

Kern County, and (2) were adopted for the protectionist purpose of banning out-of-county biosolids in order to prevent damage to the reputation of agricultural products grown in Kern County.

70 See footnote 36, *ante*.

As factual support for the first of these [***120] contentions, plaintiffs point out that the City of Bakersfield maintains an extensive Class B biosolids application program within its incorporated area. At an April 27, 1999, hearing before the Kern County Board of Supervisors, Lauren Fondahl, the biosolids coordinator for the EPA regional office in San Francisco, observed that the proposed ordinance would not prevent Bakersfield and other cities in Kern County from applying Class B biosolids on city lands, and stated that "Bakersfield has been applying for many years now on lands across from East Planz Road[,] Wasco, Taft, Delano and North of Kern in Kern Community Service District have also been applying on city lands for years."

71

71 According to the Web site maintained by the City of Bakersfield Public Works Department, approximately 3,541 dry tons per year of Class B biosolids produced from two treatment plants are applied to 5,000 acres of farmland owned by the city. (<<http://www.bakersfieldcity.us/cityservices/pubwrks/wastewater>> [as of Apr. 1, 2005].) Assuming an even distribution, each square foot of farmland would receive approximately five ounces of Class B biosolids per year.

[***121] [*1608] In contrast to the Bakersfield example, however, the administrative record also shows that not all municipalities located in Kern County were able to apply their Class B biosolids on land within an incorporated area of Kern County. A September 13, 1999, letter from the City of Shafter indicated that the city had applied biosolids from its treatment plant to neighboring agricultural land that was in the unincorporated area of Kern County and stated that the proposed ordinance would "force local, smaller communities, which rely on cost-saving alternatives to promote growth and development, to explore other methods of biosolid use or treatment that require technology and resources that we may not be able to acquire."

A. Scope of the Dormant Commerce Clause

(30) The commerce clause of the federal Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." (U.S. Const., art. I, § 8, cl. 3.) This explicit grant of power has been interpreted as an implied limitation on the power of states and local government to adopt statutes, regulations and ordinances that burden or interfere with interstate [***122] commerce. (*West Lynn Creamery, Inc. v. Healy* (1994) 512 U.S. 186, 192 [129 L. Ed. 2d 157, 114 S. Ct. 2205].) Known as the "dormant" or "negative" commerce clause (*Barclays Bank [**75] PLC v. Franchise Tax Bd. of Cal.* (1994) 512 U.S. 298, 311, fn. 9 [129 L. Ed. 2d 244, 114 S. Ct. 2268]), this limitation has been characterized as "predicated upon the implications of the commerce clause itself, [citations], or upon the presumed intention of Congress, where Congress has not spoken, [citations]." (*Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761, 768 [89 L. Ed. 1915, 65 S. Ct. 1515].) Consequently, where Congress has spoken and specifically authorized the state or local government action, the dormant commerce clause does not apply. (*White v. Mass. Council of Constr. Employers* (1983) 460 U.S. 204, 213 [75 L. Ed. 2d 1, 103 S. Ct. 1042] (*White*).)

The threshold question is whether Ordinance G-6638 is subject to analysis under the dormant commerce clause.⁷² This question will be answered in the [*1609] affirmative if (1) an article of commerce is involved and (2) Congress did not specifically authorize the adoption of such an ordinance.

72 The parties did not address this threshold question in their initial briefs, but followed the approach used by others in analyzing the validity of local sewage sludge regulation. For example, the parties in a case involving a ban on biosolids application by a county in Virginia appear to have assumed the dormant commerce clause applied and argued whether the sewage sludge ordinance violated a particular test. (*Welch v. Bd. of Sup'rs of Rappahannock County, Va.* (W.D.Va. 1995) 888 F. Supp. 753, 758 (*Welch*); see *Synagro-WWT, Inc. v. Rush Tp., Penn.* (M.D.Pa. 2002) 204 F. Supp. 2d 827, 842-843 [allegations sufficient to state a claim under two-tiered analysis applied to violations of dormant commerce clause]; Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Env'tl. Aff. L.Rev. at pp. 718-727 [discussion of dormant commerce clause does not

address whether enactment of Clean Water Act restricts or eliminates application of dormant commerce clause to local sewage sludge regulations]; Harrison & Eaton, *The Role of Municipalities in Regulating the Land Application of Sewage Sludges and Septage* (2001) 41 Nat. Resources J. 77, 112-115 [overview of commerce clause does not address threshold question].) Accordingly, this court requested supplement briefing on this threshold question. (See Gov. Code, § 68081.)

[***123] B. Article of Commerce

(31) The United States Supreme Court has held that the processing and disposal of solid waste in landfills is an article of commerce. (*C & A Carbone, Inc. v. Clarkstown* (1994) 511 U.S. 383, 391 [128 L. Ed. 2d 399, 114 S. Ct. 1677]; see *Philadelphia v. New Jersey* (1978) 437 U.S. 617, 628 [57 L. Ed. 2d 475, 98 S. Ct. 2531]; Nowak & Rotunda, *Constitutional Law* (5th ed. 1995) § 8.8, pp. 299-300 [out-of-state buyers purchased space in landfill, waste was not purchased]; but see Cox, *Burying Misconceptions About Trash and Commerce: Why It Is Time to Dump Philadelphia v. New Jersey* (1991) 20 Cap. U. L.Rev. 813, 829 [trash is not a commodity but a regulated stream to which the commerce clause should not apply].) Sewage sludge differs from solid waste in that economic benefits are realized by farmers using treated sewage sludge as a fertilizer. This difference creates a stronger case for concluding that an article of commerce is involved in transactions concerning the use of sewage sludge on agricultural land. Accordingly, based on the strength of the analogy to solid waste and the commercial value resulting from the application of treated [***124] sewage sludge to land, we conclude that the land application of sewage sludge is an article of commerce for purposes of the commerce clause.

C. Congress Authorized Local Sewage Sludge Ordinances

Congress has not been silent on the issue of local regulation of the land application of sewage sludge. Specifically, the Clean Water Act authorizes some degree of local control over the use and disposal of [**76] sewage sludge so long as federal regulatory standards are met: "The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment

works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations." (33 U.S.C.A. § 1345(e).)

The regulations of the EPA reiterate this aspect of local control: "Nothing in this part precludes a State or political subdivision thereof ... from imposing requirements for the use or disposal of sewage sludge more [*1610] stringent than the requirements in this part [***125] or from imposing additional requirements for the use or disposal of sewage sludge." (40 C.F.R. § 503.5(b) (2005).)

(32) The foregoing statutory and regulatory language must be examined to determine if Congress affirmatively permitted the adoption of a local ordinance like Ordinance G-6638. (*White, supra*, 460 U.S. at p. 213 [applicable federal statute and regulations examined to determine if they authorized City of Boston's requirement that construction contracts it entered must be with firms that hire half or more of their workers from Boston].) "Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 [89 L. Ed. 1915, 65 S. Ct. 1515] (1945)." (*Ibid.*) As the United States Supreme Court has noted, however, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." (*South-Central Timber Dev. v. Wunnicke* (1984) 467 U.S. 82, 91 [81 L. Ed. 2d 71, 104 S. Ct. 2237].)

(33) It is unmistakably clear that Congress [***126] intended "the manner of disposal or use of sludge [to be] a local determination" so long as minimum federal standards were met. (33 U.S.C.A. § 1345(e).) (34) It is equally clear that the restriction in Ordinance G-6638--that only sewage sludge meeting the heightened treatment standards can be applied to land in Kern County--reflects a local determination of the manner of disposal or use of sewage sludge.⁷³ Thus, the heightened treatment standards are the type of local regulation expressly authorized by the Clean Water Act. (Cf. *Welch, supra*, 888 F. Supp. at p. 760 [ordinance banning the land application of sewage sludge permissible under Clean Water Act].) Because Congress authorized a local ban on the land application of sewage sludge (*Welch, supra*, at pp. 757-758), one can strongly infer that Congress also

authorized local governments to impose a lesser burden on commerce such as the heightened treatment standards in Kern Code provision 8.05.040(A), Ordinance G-6638. (See *Posadas de Puerto Rico Assoc. v. Tourism Co.* (1986) 478 U.S. 328, 345-346 [92 L. Ed. 2d 266, 106 S. Ct. 2968] [the greater power to ban an activity necessarily [***127] includes the lesser power to impose conditions on the activity].)

73 Plaintiffs argue the statutory phrase "local determination" refers only to the decisions made by a wastewater treatment agency and excludes ordinances adopted by land use agencies such as County. We reject this statutory construction because, among other things, it cannot be reconciled with the EPA's regulation concerning local imposition of requirements for the use or disposal of sewage sludge. (See 40 C.F.R. § 503.5(b) (2005).)

In light of the foregoing, plaintiffs' assertion that Ordinance G-6638 is a step [**77] towards the balkanization of the sewage sludge industry misses the [*1611] mark; the natural consequence of Congress's authorization of local control is variety and inconsistency in the way localities choose to address the subject. What plaintiffs characterize as balkanization is more appropriately characterized as Congress's choosing to exploit one of the strengths of our federal system--its flexibility--by allowing states [***128] and localities to (1) experiment with different approaches (see *New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311 [76 L. Ed. 747, 52 S. Ct. 371] (dis. opn. of Brandeis, J.) [describing states as laboratories that can experiment with different laws]), subject to the minimum national standard contained in Part 503, and (2) adapt their regulations to local conditions, such as geography, climate, soil types and population density.

D. Discrimination Against Interstate Commerce

Plaintiffs contend, however, that although Congress has authorized some local determinations concerning the land application of sewage sludge, it has not expressly authorized ordinances that discriminate against interstate commerce. (Cf. *White, supra*, 460 U.S. at p. 213 [federal program authorized local favoritism in hiring construction workers as a means for economic revitalization and providing opportunities for the poor, minorities, and unemployed].) We will address this contention by considering whether the Clean Water Act

authorized discriminatory local ordinances and, if not, whether Ordinance G-6638 discriminates against interstate commerce.

1. *The Clean Water [***129] Act does not authorize discrimination*

(35) The Clean Water Act does not explicitly authorize local governmental units to discriminate against sewage sludge that arrives in a state through interstate commerce. (See 33 U.S.C.A. § 1345(e).) Nor is there anything in the statutory language that gives rise to a reasonable inference that Congress intended such a result. Also, County has cited no legislative history revealing such a Congressional intent. Thus, County has failed to establish that Congress demonstrated an unmistakably clear intent to allow discriminatory state regulation of the land application of sewage sludge. (See *South-Central Timber Dev. v. Wunnicke*, *supra*, 467 U.S. at p. 91.) Consequently, any discriminatory aspect of a local ordinance regulating the land application of sewage sludge is still subject to scrutiny under the limitation imposed on discrimination by the dormant commerce clause.

2. *Ordinance G-6638 is not facially discriminatory*

(36) Unless Congress has provided otherwise, an ordinance that discriminates against interstate commerce, as opposed to one that regulates evenhandedly, is virtually always invalid [***130] under the dormant commerce clause. (*Oregon [*1612] Waste Systems v. Dept. of Env. Quality* (1994) 511 U.S. 93, 99 [128 L. Ed. 2d 13, 114 S. Ct. 1345] [landfill disposal fees imposed by Oregon statute were higher for waste generated in other states than for waste generated in Oregon and, thus, were facially discriminatory and invalid].) In this context, discrimination means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." (*Ibid.*)

Ordinance G-6638 does not on its face discriminate against interstate commerce, because its provisions apply to the land application of all sewage sludge regardless of its geographical origin. (See Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Env'tl. Aff. [**78] L.Rev. at p. 722 ["local ordinance upheld in *Welch* banned all land application of sewage sludge, not just sewage sludge generated out-of-state"].) Consequently, Ordinance G-6638 is distinguishable from a Michigan statute that violated the dormant commerce clause by creating

separate categories for in-county and out-of-county solid waste. (*Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources* (1992) 504 U.S. 353 [119 L. Ed. 2d 139, 112 S. Ct. 2019]; [***131] see *Philadelphia v. New Jersey*, *supra*, 437 U.S. at p. 624 [New Jersey's prohibition on the importation of solid waste unconstitutional].)

3. *Ordinance G-6638 is not discriminatory in effect*

In addition to facial discrimination, an ordinance may be discriminatory "in practical effect." (*Hughes v. Oklahoma* (1979) 441 U.S. 322, 336 [60 L. Ed. 2d 250, 99 S. Ct. 1727].) Plaintiffs' claim of discrimination in practical effect is based on an incorrect comparison of the impacts of different regulations, rather than different impacts caused by the challenged ordinance. Plaintiffs compare (a) the effect of the ordinance within the geographical area that comprises the jurisdiction of County to (b) the effect of other regulations, or the lack of regulations, applicable to the incorporated areas of Kern County. The incorporated areas of Kern County are necessarily outside the jurisdiction and authority of County; County's authority extends only to the unincorporated areas within its borders. (See Cal. Const., art. XI, § 7 ["A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict [***132] with general laws"]; *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 274-275 [17 Cal. Rptr. 2d 845] [only unincorporated area of a county is "within its limits"].) Therefore, the correct comparison is between the impact of the ordinance on sewage sludge generated outside the jurisdictional authority of County and the impact on sewage sludge generated within that area. (See *Associated Industries of Missouri v. Lohman* (1994) 511 U.S. 641, 650 [128 L. Ed. 2d 639, 114 S. Ct. 1815] ["discrimination is appropriately assessed with reference to the specific subdivision in which applicable laws reveal differential treatment"].) In this case, the ordinance's burden on the sewage sludge [*1613] industry is the same without regard to the place of origin of the sewage sludge. Sewage sludge, regardless of whether it originates in Kern County, other counties in California, or out of state must be treated to the same standards before it is allowed to be applied to land in the unincorporated areas of Kern County.

Plaintiffs stated at oral argument that discrimination in practical effect occurred because no in-county

producer of sewage sludge needed access to land within the unincorporated area [***133] of Kern County to dispose of its sewage sludge. This argument is rejected because it is factually inaccurate. The administrative record contains a letter from the City of Shafter indicating that it had applied biosolids from its treatment plant to neighboring agricultural land that was in the unincorporated area of Kern County.

Consequently, plaintiffs have failed to meet their burden of showing that the ordinance, in practical effect, treats out-of-state economic interests ⁷⁴ differently than [**79] in-state economic interests. (See *Pacific Merchant Shipping Assn. v. Voss* (1995) 12 Cal.4th 503, 517 [48 Cal. Rptr. 2d 582, 907 P.2d 430] [party raising commerce clause challenge has burden of showing discrimination].) In other words, plaintiffs have failed to show that Ordinance G-6638 causes an out-of-county producer of sewage sludge to be at a disadvantage to an in-county producer of sewage sludge in the competition among those producers to acquire the right to place their sewage sludge on agricultural land located in the unincorporated areas of Kern County. ⁷⁵

74 If Ordinance G-6638 were shown to discriminate against out-of-county interests, that discrimination, by definition, would include discrimination against out-of-state interests. (See *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, *supra*, 504 U.S. 353.) Thus, even though the record does not show any sewage sludge originating outside California was ever shipped to Kern County, we will treat plaintiffs' arguments as implicating interstate commerce.

[***134]

75 This lack of discrimination also means the heightened treatment standards do not violate the equal protection clause.

Plaintiffs condemn Ordinance G-6638 as illegitimate economic protectionism prohibited by the commerce clause. But the possibility that the reputation of agricultural produce from Kern County benefited from the enactment of Ordinance G-6638 is not enough to violate the commerce clause. First, Ordinance G-6638 still falls within the scope of what Congress authorized. Second, the possibility that consumers might view Kern County produce more favorably does not render the ordinance discriminatory against interstate commerce

from the perspective of (1) in-county farmers who are selling sewage sludge disposal services and applying biosolids to their land in the unincorporated areas of Kern County or (2) the producers of sewage sludge, regardless of their location, that are buying sewage sludge disposal services. RBM focuses on the farmers who applied Class B biosolids and argues [*1614] Ordinance G-6638 had the practical effect of discriminating against them for the benefit of farmers who [***135] claimed the reputation of their products was harmed by allowing the land application of Class B biosolids in Kern County. This theory of discrimination and protectionism fails because all in-county farmers are subject to the same practical effect of Ordinance G-6638--they can no longer apply Class B biosolids to their land. Furthermore, this result was not achieved at the expense of out-of-state competition. (See *Hunt v. Washington Apple Advertising Comm'n* (1977) 432 U.S. 333 [53 L. Ed. 2d 383, 97 S. Ct. 2434] [out-of-state competition improperly discriminated against by North Carolina statute that prohibited sale of closed apple containers displaying another state's grading classification]; see also *Oregon Waste Systems v. Dept. of Env. Quality*, *supra*, 511 U.S. at pp. 106-107.)

E. Burden on Interstate Commerce

As we have stated, though the Clean Water Act does not authorize discrimination against interstate commerce, it does explicitly authorize local governmental entities to regulate the land application of sewage sludge. Because Congress has specifically and unmistakably authorized nondiscriminatory local ordinances like Ordinance G-6638, our analysis [***136] of the dormant commerce clause need not consider "whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits,' *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 [25 L. Ed. 2d 174, 90 S. Ct. 844] (1970)." (*C & A Carbone, Inc. v. Clarkstown*, *supra*, 511 U.S. at p. 390.) Application of the *Pike* test is inappropriate in this case because the enactment of the Clean Water Act reflects a determination by Congress that local regulation is appropriate, which necessarily implies that localities have a legitimate purpose in regulating the use and disposal of [**80] sewage sludge within their jurisdictional boundaries and that the local benefits from such a regulation outweigh any nondiscriminatory burdens on interstate commerce that might result.

V. California Constitutional Limitations on Exercise of

Police Power

Plaintiffs contend that the Kern County Board of Supervisors failed to consider the effect of the ordinance on surrounding areas beyond the borders of Kern County, and that this failure renders the ordinance a defective exercise of the police powers granted to County by the [***137] California Constitution. (See Cal. Const., art. XI, § 7 ["A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws"].)

(37) The California Supreme Court has identified the standard for determining whether the adoption of a land use restriction is a valid exercise of the [*1615] police power granted under the California Constitution. An ordinance is valid "if it is fairly debatable that the [land use] restriction in fact bears a reasonable relation to the general welfare." (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 601 [135 Cal. Rptr. 41, 557 P.2d 473].) The "general welfare" that must be considered may extend beyond the geographical limits of the local governmental entity adopting the ordinance. "[I]f a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region." (*Ibid.*)

In ruling against the plaintiffs on this claim, the superior court stated "that OCS D has not [***138] presented any evidence of the impact on the entire region as is required pursuant to *Associated Home Builders ...* ." The superior court observed that the administrative record did not contain a study of the ordinance's regional impact and found OCS D was collaterally estopped from raising the issue again because it had already been presented in the CEQA portion of the lawsuit.

We previously held that the imposition of heightened treatment standards in Kern Code provision 8.05.040(A), Ordinance G-6638, was not valid under CEQA. An EIR should have been prepared because plaintiffs presented substantial evidence to support a fair argument that the heightened treatment standards might have a significant effect on the environment, including effects occurring outside Kern County. (See part II.A., *ante.*) Assuming for purposes of argument that County exceeded the limitations imposed by the California Constitution on the exercise of police power when it adopted Ordinance G-6638, the preparation of the EIR required by this

decision would have the effect of addressing the alleged failure to consider the general welfare outside Kern County. Therefore, we need not rule separately on this constitutional [***139] challenge to the heightened treatment standards.

VI. *The Biosolids Impact Fee Violates Vehicle Code Section 9400.8*

Vehicle Code section 9400.8 provides in pertinent part: "Notwithstanding any other provision of law, ... no local agency may impose a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads, after December 31, 1990, unless the local agency had imposed the fee prior to June 1, 1989." ⁷⁶

76 This statutory provision became operative because voters approved Senate Constitutional Amendment No. 1 of the 1989-1990 Regular Session (Prop. 111) at the June 5, 1990, primary election. (See *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 583, fn. 13 [7 Cal. Rptr. 2d 245, 828 P.2d 147].)

[*1616] [**81] In moving for summary adjudication of issues, OCS D asserted that the biosolids impact fee was invalid because it was barred by Vehicle Code section 9400.8. [***140] The superior court denied summary adjudication and ruled "[t]his issue was not raised by OCS D's pleadings and the pleadings control. Pleadings must give notice of the claim. [Citation.]" OCS D raised the issue again at trial and requested leave to amend its complaint. The superior court denied this request and stated that "[a]mendment at this time would be unduly prejudicial to ... County."

Plaintiffs contend that the complaint raised the preemption issue, although it did not specifically reference Vehicle Code section 9400.8, and that the superior court's refusal to consider the issue at the motion for summary adjudication or at trial was a prejudicial abuse of discretion. County argues that plaintiffs' claim is procedurally defective because they did not exhaust their administrative remedies and failed to file a timely motion to amend their complaint. County also asserts that the biosolids impact fee imposed by the ordinance is a bona fide impact fee and not a fee for the privilege of using the streets and highways in Kern County. ⁷⁷

77 The provisions of Ordinance G-6638

relevant to the biosolids impact fee are contained in Kern Code provisions 8.05.020(F) and 8.05.030(H), which expired on December 31, 2002. (See FACTS AND PROCEEDINGS, *ante*.)

[***141] **(38)** We independently review issues of statutory construction and the application of that construction to a set of undisputed facts as questions of law. (*Twedt v. Franklin* (2003) 109 Cal.App.4th 413, 417 [134 Cal. Rptr. 2d 740].)

A. Exhaustion Doctrine

County asserts that plaintiffs did not raise Vehicle Code section 9400.8 during the administrative proceedings and, as a result, "are barred by the exhaustion doctrine from seeking judicial review of this claim. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal. App. 3d 1194, 1197-1198 [200 Cal. Rptr. 855].)"

Coalition for Student Action v. City of Fullerton did not involve a claim that a local ordinance was preempted by a state statute. (See *Coalition for Student Action v. City of Fullerton*, *supra*, 153 Cal. App. 3d 1194.) In that case, the plaintiffs failed to assert CEQA violations at the administrative level and then sought to set aside approval of construction plans based on alleged violations of CEQA. The superior court denied their petition for a writ of mandate based on the failure to exhaust administrative remedies, and the Court of Appeal affirmed. [***142] (*Id.* at p. 1198.) [*1617]

Alleged violations of CEQA are distinguishable from alleged violations of Vehicle Code section 9400.8 because (1) CEQA expressly requires the exhaustion of administrative remedies (§ 21177; see Remy, Guide to CEQA, *supra*, pp. 578-588 [exhaustion of administrative remedies] and (2) compliance with CEQA is first determined by a public agency rather than the courts. In contrast, a claim that an ordinance violates Vehicle Code section 9400.8 is not given to the exclusive jurisdiction of a county's board of supervisors. (See *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390-391 [6 Cal. Rptr. 2d 487, 826 P.2d 730] [exhaustion doctrine applies where an agency alone has jurisdiction over a case].) In asserting its [**82] theory of exhaustion, County has not shown that there was an available administrative procedure for asserting the ordinance violated the prohibition contained in Vehicle Code section 9400.8. (See *People v. Beaumont Inv., Ltd.*

(2003) 111 Cal.App.4th 102, 125 [3 Cal. Rptr. 3d 429] [exhaustion doctrine does not apply in the absence of an available administrative remedy].) [***143] The coincidental existence of a CEQA administrative procedure did not confer exclusive jurisdiction over the preemption challenge on the Kern County Board of Supervisors, or require the preemption challenge to be raised in the CEQA proceeding, before a court could obtain jurisdiction over such a challenge.

(39) Accordingly, we hold that the doctrine of exhaustion of administrative remedies does not apply to the claim that the biosolids impact fee imposed by the ordinance is preempted by Vehicle Code section 9400.8.

B. Mitigation Fee Act Does Not Apply to the Biosolids Impact Fee

County asserts that the biosolids impact fee was adopted by County pursuant to the Mitigation Fee Act, Government Code section 66000 et seq. and therefore the prohibition in Vehicle Code section 9400.8 does not apply.

(40) We do not address the issues of statutory construction raised in connection with the Mitigation Fee Act in detail because the prohibition on certain fees contained in Vehicle Code section 9400.8 is not overridden by the Mitigation Fee Act. Vehicle Code section 9400.8 [***144] expressly states that its prohibition applies "[n]otwithstanding any other provision of law." The Mitigation Fee Act was in effect at the time Vehicle Code section 9400.8 became operative and thus was among the other provisions of law covered by the quoted phrase. In short, despite the existence of the Mitigation Fee Act, a local agency may not impose a charge for the privilege of using its streets and highways.

C. Prejudice and Leave to Amend to Reference Specific Code Section

(41) The superior court found that allowing plaintiffs to amend their pleadings to assert a violation of Vehicle Code section 9400.8 would prejudice County. This finding is not supported by any evidence. Indeed, County [*1618] did not even assert it experienced prejudice in its trial brief, reply trial brief, or appellate brief. "A pleading may be amended at the time of trial unless the adverse party can establish prejudice. [Citation.] Where a party is allowed to prove facts to establish one cause of action, an amendment which would allow the same facts to

establish another cause of action is favored, and a trial court abuses its discretion by prohibiting [***145] such an amendment when it would not prejudice another party. [Citations.] A variance between pleading and proof does not justify the denial of an amendment to conform pleading to proof unless the unamended pleading 'misled the adverse party to his prejudice in maintaining his action or defense upon the merits.' [Citations.]" (*Brady v. Elixir Industries* (1987) 196 Cal. App. 3d 1299, 1303 [242 Cal. Rptr. 324], overruled on another ground in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1248-1251 [32 Cal. Rptr. 2d 223, 876 P.2d 1022].)

(42) As a general rule, where the evidence to support the cause of action in the amendment is already before the court, the opposing party will not experience prejudice if the amendment is allowed. (See Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2004) ¶ 12:394, p. 12-79 (rev. # 1, 2004).) In this case, the general rule applies because the evidence relied upon by [**83] plaintiffs was contained in the administrative record and was discussed before the superior court in connection with the constitutional challenges raised against the biosolids impact fee. In addition, County has not shown that the lack of a specific reference [***146] to Vehicle Code section 9400.8 in the complaint misled it in the presentation of its defense, either in terms of the evidence it would have produced or in a manner not related to evidence. Thus, County has not shown that this situation falls within an exception to the general rule. Accordingly, we conclude that plaintiffs should have been allowed to assert that the biosolids impact fee was prohibited by Vehicle Code section 9400.8.

D. Vehicle Code Section 9400.8 Preempts the Biosolids Impact Fee

The general principles governing state law preemption of a local ordinance were set forth by the California Supreme Court in *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893 [16 Cal. Rptr. 2d 215, 844 P.2d 534] as follows:

(43) "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.' [Citations.] [¶] 'A conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' [Citations.] [¶] Local legislation is 'duplicative' of general law when it is coextensive

[***147] therewith. [Citation.]

[*1619] "Similarly, local legislation is 'contradictory' to general law when it is inimical thereto. [Citation.]

"Finally, local legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area [citation], or when it has impliedly done so in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality. [Citations.]" (*Sherwin-Williams Co. v. City of Los Angeles, supra*, 4 Cal.4th at pp. 897-898.)

(44) By adopting Vehicle Code section 9400.8, the Legislature expressly [***148] prohibited a county from "impos[ing] a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads" (*Ibid.*) This language raises two questions of statutory construction. First, was the biosolids impact fee a "tax, permit fee, or other charge"? Second, do fees "for the privilege of using its streets or highways" ⁷⁸ include fees designed to cover damage resulting from the use of a county's roads?

78 "Highway" and "street" are both defined as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." (Veh. Code, §§ 360, 590.)

County does not argue that the biosolids impact fee was not a "permit fee or other charge" for purposes of Vehicle Code section 9400.8. The parties' dispute focuses on the second issue. County specifically [**84] argues the fee was not for road use, but was a bona fide impact fee: "The [***149] fee is imposed only on permittees to recover the costs for repairing damage or upgrading county roads due to the incremental increase in truck traffic transporting biosolids to be land applied in Kern County."

In describing the underlying basis for the fee, County states in its appellate brief that it "commissioned an engineering firm to determine the condition of local roads used for biosolids transport, the volume of traffic attributable to trucks hauling biosolids on ... those roads, and the estimated cost of maintaining the roads in their current condition. [Citation.] The study specifically identified the roads affected, the length of the road segments, the required thickness of paving overlay needed to maintain them, and the price [*1620] of the required materials. [Citation.] Based on this information, ... County determined the amount of the fee needed to pay the estimated cost of the required maintenance. [Citation.]"

County explicitly argues that a fee for the privilege of using its roads is distinguishable from a fee "for mitigating the impacts to the ... County infrastructure shown to be caused by the transport of Biosolids." (Ordinance G-6638, Kern Code provision 8.05.020(F) [definition [***150] of biosolids impact fee].) Whether such a distinction should be recognized is a matter of statutory construction.

(45) A reviewing court's fundamental task in determining the meaning of a statute "is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citation.]" (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [105 Cal. Rptr. 2d 457, 19 P.3d 1196].) The analysis starts with an examination of the actual words of the statute, giving them their usual, ordinary meaning. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 [66 Cal. Rptr. 2d 319, 940 P.2d 906].) A court may refer to the definitions contained in a dictionary to obtain the usual and ordinary meaning of a word. (*Martinez v. Enterprise Rent-A-Car Co.* (2004) 119 Cal.App.4th 46, 54, fn. 3 [13 Cal. Rptr. 3d 857].)

Webster's Third New International Dictionary (1986), page 2524, states the verb "use" "is general and indicates any putting to service of a thing, usu. for an intended or fit purpose" This definition is quite broad because it covers "any putting to service" (italics added). If the Legislature employed the literal meaning of this definition, then the "privilege of using" a road would cover the privilege of putting that road [***151] to service. Because trucks hauling loads within the legal weight limit are putting to service the roads over which they travel and they have the privilege of traveling over those roads as a result of being properly licensed and

registered, it follows that a literal reading of the phrase the "the privilege of using [a county's] streets or highways" includes driving a truck on a road even if it causes incremental damage to the road. In other words, a road maintenance or impact fee is simply one type of fee for the privilege of using a road.

Before adopting the literal meaning of the word "using," we must check the resulting statutory construction to determine if it comports with, or frustrates, the purpose of the statutory scheme. (See *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 777 [63 Cal. Rptr. 2d 859, 937 P.2d 290] [statutory language must be construed in context by referring to the nature and purpose of the statutory scheme as a whole]; *Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645 [335 P.2d 672] [legislative purpose will not be sacrificed to a literal construction].) [*1621]

[**85] First, neither Vehicle Code section 9400.8 [***152] nor the remainder of article 3 of chapter 6 of division 3 of the Vehicle Code--which addresses weight fees assessed at vehicle registration--contains an express exception for local fees or charges that attempt to recover damage to streets or highways caused by vehicle use.

Second, such an exception cannot be implied. Vehicle Code section 9400.8 expressly creates an exception for "extra legal loads" and authorizes local agencies to collect a permit fee for those types of loads. Because the exception for extra legal loads shows the Legislature was capable of expressing its intent to except certain uses, it creates the inference that the Legislature did not intend any exceptions that were not expressly stated. (See Code Civ. Proc., § 1858 [judge may not insert what Legislature has omitted]; see *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230 [32 Cal. Rptr. 2d 19, 876 P.2d 505] [express statutory exemptions generally preclude implied exemptions].)

Third, Vehicle Code section 9400.8 is part of article 3 of chapter 6 of division 3 of the Vehicle Code. Division 3 concerns the registration of vehicles and [***153] certificates of title. Chapter 6 addresses registration and weight fees. Article 3, which includes Vehicle Code sections 9400 through 9410, concerns weight fees. For example, subdivision (b) of Vehicle Code section 9400 sets forth registration fees based on unladen weight for commercial motor vehicles with not more than two axles, and subdivision (c) does the same for commercial motor

vehicles with three or more axles and certain trailers and dollies. ⁷⁹ Thus, it appears that Vehicle Code section 9400.8 is part of a statutory scheme that regulates fees based on vehicle weight. ⁸⁰ This statutory scheme as set forth in article 3 of chapter 6 of division 3 of the Vehicle Code, and the Legislature's statement in the legislation that added section 9400.8 to the Vehicle Code that "[n]othing in this act shall be construed to allow local governments to impose fees not otherwise authorized by statute" (Stats. 1989, ch. 1337, § 4, p. 5498), support the conclusion that the Legislature intended to fully occupy the field of fees related to the weight of vehicles carrying legal [***154] loads.

⁷⁹ Vehicle Code section 9400.1 became effective on September 29, 2000, and sets forth a range of fees based on gross vehicle weight for commercial motor vehicles with declared gross vehicle weight of 10,001 pounds or more. (Stats. 2000, ch. 861, § 50.)

⁸⁰ The commercial weight fees collected under this statutory scheme are deposited with the State Treasurer, who, on order of the Controller, shall deposit the money in the State Highway Account in the State Transportation Fund. (Veh. Code, § 42205, subd. (a).) Funds from the commercial weight fee not used to cover the administration costs related to the fee may be appropriated by the Legislature to various uses including the maintenance and construction of public streets and highways. (Veh. Code, § 42205, subd. (b); see Cal. Const., art. XIX, §§ 1, 2.)

[*1622] In opposition to the foregoing reasoning, County has cited no case law, legislative history, published legal opinion of the [***155] Attorney General, treatise, article or other authority that adopts or endorses the distinction between fees for the privilege of using roads and fees that recover damages caused by a specific type of road use. Nor has County offered an explanation as to how such a distinction would further the purpose of the statutory scheme. In other words, County has not shown the Legislature intended to allow local agencies to charge fees for road use that causes incremental damage to the roads.

(46) Accordingly, Vehicle Code section 9400.8 must be construed to prohibit a local agency from imposing fees or charges on legal [***86] loads that are hauled on its roads, even though hauling such loads may cause

damage beyond minor wear and tear to the roads.

The final step of our analysis is to determine if the biosolids impact fee was in fact the type of fee prohibited by Vehicle Code section 9400.8. This is necessary because, on its face, the biosolids impact fee was not assessed on miles driven on roads. Instead, the biosolids impact fee was assessed primarily on tons of Class B biosolids applied to land in the unincorporated areas of Kern County. Although this [***156] basis of assessment is attenuated from actual road use, that attenuation is insufficient to save the entire biosolids impact fee. The undisputed facts in the administrative record establish that the per-ton amount of the biosolids impact fee was derived from (1) the miles of Kern County roads used in the hauling of biosolids, ⁸¹ (2) the quality of those roads, ⁸² (3) an estimate of the total weight of Class B biosolids that would be hauled before the January 1, 2003, deadline, (4) the load and volume of nonbiosolid traffic experienced by the road segments, and (5) the amount of load and volume of traffic added to each road segment by the transport of biosolids. The funds generated by the biosolids impact fee were to be used to maintain and repair roads and correct any other "infrastructure deficiencies directly associated with the hauling of Biosolids" (Ordinance G-6638, Kern Code provision 8.05.030(H)(3)), but also were available for other purposes not related to roads and other infrastructure.

⁸¹ An inventory of those roads established their total length at 153.5 miles.

⁸² The roads were classified into three categories. According to the biosolids staff report dated October 5, 1999, issued by the County Resource Management Agency, category 3 roads were designed for heavy truck traffic and, as a result, "[t]he increased truck traffic due to the biosolids transport [would] not have any noticeable effect on the structural integrity of these roads."

[***157] (47) The way County calculated the biosolids impact fee and the way funds generated could be applied leads inescapably to the conclusion that the fee was, at least in part, a fee imposed on road use. This conclusion is reinforced by the exception in Kern Code provision 8.05.03(H)(1), Ordinance G-6638, [*1623] that allows a waiver of the fee "[w]here the Permittee can demonstrate the land application of Biosolids does not

have an impact on County infrastructure or roads." Because the primary purpose of the biosolids impact fee was to collect funds based on the use of streets or highways located in Kern County, it violated Vehicle Code section 9400.8.

E. Remedy

Although the primary purpose of the biosolids impact fee was to pay for road repair and maintenance, that was not its exclusive purpose. Kern Code provision 8.05.030(H)(3), Ordinance G-6638, was in effect from January 1, 2000, through December 31, 2002, and stated that the money generated by the biosolids impact fee and other permit fees would be available to fund a number of different uses, some of which were not related to the impact of hauling biosolids over County roads.

Because of these multiple purposes, we asked [***158] OCSD and County to submit supplemental letter briefs on the issue of what relief is appropriate when an ordinance imposes a fee for more than one purpose and one of the purposes conflicts with a statute and other purposes do not. We asked OCSD and County whether the superior court should be directed to (1) uphold the entire biosolids impact fee, (2) invalidate the entire fee, or (3) determine what portion of the fee, if any, was or will [**87] be used for purposes not contrary to Vehicle Code section 9400.8 and allow that portion to stand.

The first alternative--upholding the entire fee based on the existence of some potentially valid uses of the funds generated by that fee--is not appropriate because such a remedy would allow public agencies to adopt fees with illegal purposes and save those fees from invalidation by appending one valid purpose for which the fees could be used. Thus, when a fee has both valid and invalid purposes, the entire fee cannot be upheld as valid.

Conversely, it would be unduly harsh to completely invalidate a fee when part of the funds would be used for proper purposes and the formula by which the fee is calculated--in this case, tons of [***159] biosolids applied to the unincorporated areas of Kern County--does not itself run afoul of a statutory prohibition.⁸³

83 A stronger argument for invalidating the entire fee might exist if the formula by which the fee is applied to the public were itself contrary to

a statute.

(48) Accordingly, we hold the appropriate relief when a fee is imposed for both valid and invalid purposes is to uphold the fee to the extent that the funds generated are applied to valid purposes and those purposes are otherwise severable from the invalid ones. (See *Williams Communications v. City* [*1624] of *Riverside* (2003) 114 Cal.App.4th 642, 656-660 [8 Cal. Rptr. 3d 96] [unlawful portion of school facilities fee imposed on developer ordered refunded under Gov. Code, § 66020, subd. (e)].)⁸⁴

84 Government Code section 66020 is not applicable to the biosolids impact fee, but it provides a useful analogy for determining the appropriate relief in this case.

[***160] In this case, Ordinance G-6638 expressly stated that (1) the invalidity of any of its provisions would not affect the validity of its other provisions and (2) its provisions were severable. (See *City and County of San Francisco v. Flying Dutchman Park, Inc.* (2004) 122 Cal.App.4th 74, 79 [18 Cal. Rptr. 3d 532] [illegal allocation did not require invalidation of entire parking tax ordinance or reduction of parking tax arrearages because offending clause was severable under ordinance's savings clause].) Furthermore, the rate used to determine the biosolids impact fee as well as the funds generated by the fee are inherently divisible, at least down to the penny. We conclude that the appropriate relief is to invalidate the biosolids impact fee to the extent it was or will be used for purposes that violated Vehicle Code section 9400.8.

OCSD contends this court should direct the superior court to invalidate the entire biosolids impact fee and order a refund of that fee with interest. Recognizing that Kern Code provision 8.05.030(H)(3), Ordinance G-6638, created the possibility of valid purposes mixed with invalid purposes, OCSD asserts: "To the extent that ... 8.05.030(H)(3) [***161] could be read as authorizing the use of biosolids impact fees for property inspections or the GIS tracking system, then the annual permit fee would have to be reduced and the overpayment would have to be refunded--the County cannot recover the same cost twice."

OCSD's assertion is based on the factual premise that the annual permit fees collected were sufficient to pay for all of the valid uses and, therefore, the funds generated by

the biosolids impact fee were not needed, and will not be budgeted, for valid uses. We are unable to confirm this factual premise based on the current appellate record.

Relief in the form of apportionment or allocation between valid and invalid purposes cannot be granted without further [**88] findings of fact. Therefore, this matter will be remanded to the superior court for further proceedings to consider how the funds generated by the biosolids impact fee were spent or will be spent and how to separate the valid applications of funds, if any, from the invalid applications.⁸⁵

85 Deciding these broad questions may involve the consideration of a wide variety of specific factual and legal issues. For example, if the terms of section 3 of Ordinance G-6638, Kern Code provision 8.05.040(M) are construed to allow the biosolids impact fee to be used to pay costs and expenses incurred in "enforcement activities," then funds from the biosolids impact fee might appropriately be allocated to cover various amounts expended in connection with *Kern County Environmental Health Services v. Arciero Ranches* (Aug. 9, 2001, F035181) (nonpub. opn.). These issues and others are best addressed in the first instance by the superior court.

[**162] [*1625] Because of the relief that will be granted on remand, we need not address the claims that the biosolids impact fee violated the equal protection clause of the United States Constitution and constituted an illegal general or special tax. (See fn. 37, *ante*; see also *Waters-Pierce Oil Co. v. City of Hot Springs* (1908) 85 Ark. 509 [109 S.W. 293] [taxing vehicles differently based on contents--petroleum products, ice or other--instead of capacity and size unconstitutional].) On one hand, if all or a portion of the biosolids impact fee is invalidated under Vehicle Code section 9400.8, then addressing other grounds of invalidity would be redundant. On the other hand, if all or a portion of the biosolids impact fee was or will be allocated to expenditures specifically related to County's biosolids regulatory program, then a rational basis exists for imposing a per ton fee on Class B biosolids and not imposing a per ton fee on other materials carried by truck. The existence of a rational basis for distinguishing between biosolids and other materials means the distinction does not violate equal protection. (See *Genesis Environmental Services v. San Joaquin Valley Unified*

Air Pollution Control Dist. (2003) 113 Cal.App.4th 597, 605 [6 Cal. Rptr. 3d 574] [***163] [equal protection claims are based on the lack of a rational basis for treating similarly situated persons differently].) Similarly, funds allocated to valid uses do not constitute illegal general or special taxes. (See *City of Dublin v. County of Alameda, supra*, 14 Cal.App.4th 264 [county landfill \$ 6 per ton surcharge valid as a reasonably necessary charge for cost of the program].)

VII. County's Cross-action

County's cross-action alleged that a number of contracts and contract extensions entered by CSDLAC, CLABS, and OCS D relating to the transport and disposal of biosolids were projects for purposes of CEQA, and that some level of CEQA review should have been performed before they were entered. Environmental assessment was required, according to County, because the new contracts and extensions were either separate projects or modifications of prior projects that may have triggered the need for a subsequent EIR, supplemental EIR or subsequent negative declaration.

The superior court ruled against County on all of the causes of action in its cross-action and concluded that (1) some of the actions by the sanitation agencies were covered by program [**164] EIR's that did not require additional CEQA documentation, (2) the Central Valley Water Board rather than the sanitation agency was the lead agency for some of the projects, and (3) CEQA review of an option to purchase real estate was premature under the [*1626] provisions of Guidelines section 15004 [**89] . County appeals from the rulings related to nine contracts.⁸⁶

86 The first, second, fourth, seventh, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action of County's cross-action each address one of the nine contracts.

A. Mootness of Expired Contracts and Extensions

(49) The termination dates for some of the contracts and extensions have passed since the ruling by the superior court. Consequently, we directed the parties to submit supplemental letter briefs on the question whether County's CEQA challenges to those contracts or extensions are moot. The standard this court applies in determining the mootness of a CEQA appeal is whether any effective relief can be granted the appellant. (

Association for a Cleaner Environment v. Yosemite Community College Dist., *supra*, 116 Cal.App.4th 629 [***165] [question whether initial study should have been prepared was not moot]; *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888-889 [92 Cal. Rptr. 2d 268] [completing and opening car wash project for operations while appeal was pending did not render preparation of EIR moot because modification or removal of project remained possible.]

1. Extension of CSDLAC-Yakima Agreement

On November 9, 1994, CSDLAC and Yakima Company (Yakima) entered into an agreement for the removal, transportation and reuse of biosolids (Yakima Agreement) pursuant to which biosolids produced at the Carson Plant would be transported to Kern County and applied to a specific site owned and cultivated by the Buttonwillow Land and Cattle Company. The Yakima Agreement required Yakima to (1) obtain all the necessary licenses, permits and other approvals needed to perform the agreement, (2) keep complete records, (3) conduct testing of soil, groundwater and plant tissue, (4) provide CSDLAC access to the site and records for inspection purposes, (5) provide CSDLAC with copies of all regulatory reports, and (6) maintain insurance. Yakima agreed to remove up to 1,000 wet tons of [***166] biosolids per week from CSDLAC's treatment plant and was paid \$ 25 per wet ton.

The Yakima Agreement began on November 9, 1994, remained effective for a period of three years, and provided for two 3-year renewal periods upon agreement of Yakima and CSDLAC's chief engineer. Yakima was granted the right to terminate the Yakima Agreement by giving 24 hours' notice if it could no longer legally perform the required services.

In October 1997, CSDLAC and Yakima agreed to the first extension of the Yakima Agreement. Almost two years later, in a letter dated September 16, [*1627] 1999, CSDLAC stated: "The first three-year extension was granted and will expire on November 8, 2000. Due to the current uncertain situation involving proposed ordinances in the County of Kern, which may place restrictions on the land application of biosolids, [CSDLAC's] preference is to extend the contract through the second allowable three-year period. It is our understanding that Yakima is interested and will participate in this arrangement at the original biosolids

management fee of \$ 25.00 per wet ton."

Yakima agreed to the second extension by countersigning the letter and, as a result, the termination [***167] date of the extended contract became November 8, 2003.

[**90] a. Previous CEQA review and documentation

CSDLAC's final program EIR for the "Joint Outfall System 2010 Master Facilities Plan, June 1995" (1995 final Program EIR), discussed the Yakima Agreement: "Since circulation of the draft EIR, some changes in the reuse sites have occurred. ... Ag Tech has opened an additional land application site near Delano, California, that now receives some of the Districts' biosolids. The Districts also have initiated new land application contracts with the Yakima Company near Buttonwillow, California; McCarthy Family Farms near Corcoran, California; and one short-term contract with Bio Gro Systems near Blythe, California." The 1995 final Program EIR also stated that in January 1995, approximately 1,699 wet tons per week were delivered to McCarthy Family Farms and 580 wet tons per week were delivered to Yakima Company.

CSDLAC's draft Program EIR recognized that NOx emissions generated by trucks transporting biosolids from the Carson Plant to disposal or use sites would be considered a significant impact under the thresholds adopted by the South Coast Air Basin and the Southeast [***168] Desert Air Basin. To mitigate this impact, CSDLAC stated it would perform maintenance on its trucks at least as frequently as recommended by the manufacturer.

The 1995 final Program EIR also references the mitigated negative declarations from the Central Valley Water Board obtained by McCarthy Family Farms and Yakima Company in connection with the permits that authorize them to land apply biosolids. More specifically, the Central Valley Water Board adopted resolution No. 95-011 approving the initial study and adopting a mitigated negative declaration for the issuance of a WDR relating to Yakima Company's application of biosolids to 1,372 acres of farmland in Kern County.

Based on the 1995 final Program EIR and the mitigated negative declaration of the Central Valley Water Board, CSDLAC contends that both the [*1628] hauling and the land application aspects of the extension

of the Yakima Agreement were covered by CEQA documents and that further CEQA review was unnecessary. In contrast, County argues that CSDLAC violated CEQA by (1) approving the extension of the Yakima Agreement without performing the review required by Guidelines section 15168 and (2) failing to prepare a subsequent or supplemental [***169] EIR that analyzed the extension.

b. *Mootness*

In responding to our inquiry, both parties have agreed that the November 8, 2003, termination date rendered County's CEQA challenge to the extension of the Yakima Agreement moot. (See *Giles v. Horn* (2002) 100 Cal.App.4th 206 [123 Cal. Rptr. 2d 735] [challenges to county contracts moot because contracts had been fully performed and had expired].) County, however, asserts that we should exercise our discretion to address the controversy because of its importance and the likelihood similar controversies will recur. We also conclude the challenge to the Yakima Agreement is moot. Furthermore, we decline County's invitation to render an advisory opinion because the future disputes between County and CSDLAC regarding CSDLAC's disposal activities are likely to be factually distinct. Thus, any ruling made now would do little to prevent future disputes from arising.

2. *CLABS Contract No. C-87685*

In January 1994, CLABS entered contract No. C-87685 (Contract C-87685) with [**91] Gardner-Arciero for the loading, transporting and beneficial use of biosolids produced by CLABS. Gardner-Arciero applied the biosolids to farms near Cantil, [***170] California. On February 11, 2000, the Los Angeles City Council approved amendment No. 3 to Contract C-87685, which included an extension of the contract through February 14, 2003. The second cause of action in County's cross-action alleged CLABS violated CEQA by failing to perform any environmental review before approving the amendment of Contract C-87685. The superior court rejected the second cause of action and ruled (1) the Central Valley Water Board, not CLABS, was the lead agency for the project, (2) the contract had been reviewed under a program EIR prepared by CLABS, and (3) the amendment did not expand the project in a way that required additional review under CEQA.

The date for the expiration of the amendment to Contract C-87685 has passed, but County asserts its CEQA claim regarding the amendment of Contract C-87685 is not moot unless that contract cannot be renewed or extended.

As with the CSDLAC-Yakima Agreement, we conclude that County's CEQA challenges to CLABS's February 11, 2000, approval of amendment [*1629] No. 3 to Contract C-87685 is moot because the contract is no longer in effect. (See *Giles v. Horn, supra*, 100 Cal.App.4th 206.) Moreover, the mere [***171] prospect that Contract C-87685 or a similar contract might become operative because of future actions taken by CSDLAC and Gardner-Arciero does not create an actual, present controversy.

3. *CLABS Contract No. C-94375*

In October 1996, CLABS entered contract No. C-94375 (Contract C-94375) with RBM and Valley Communities, Inc. (collectively, RBM-Valley) for the loading, transporting and beneficial use of biosolids produced at the Terminal Island and Hyperion treatment plants. RBM-Valley agreed to load CLABS's biosolids onto its trucks, transport the biosolids to RBM-Valley's sites, unload the biosolids at designated sites, and beneficially use the biosolids in accordance with applicable laws and regulations. The term of Contract C-94375 was to run for three years from the date of the first load.

On October 26, 1999, the Los Angeles City Council approved an amendment of Contract C-94375 to provide CLABS the option of renewing it for two additional three-year terms, the first of which would be from October 31, 1999, through October 30, 2002. The first cause of action in County's cross-action alleged the extension of Contract C-94375 was a project for purposes of CEQA, and CLABS violated CEQA [***172] by failing to perform any environmental review before approving the extension. The superior court rejected this claim, ruling the extension already had been reviewed under a program EIR adopted by CLABS and further review was not required.

In its supplemental letter brief, CLABS represented that Contract C-94375 was amended again in 2000 and that the contract, as then amended, remains in effect. RBM⁸⁷ and CLABS assert that performing CEQA review at this point, such as preparing an EIR or the

checklist referenced in Guidelines section 15168, subdivision (c)(4), would be pointless because the particular amendment to Contract C-94375 challenged in the cross-action is no [*92] longer in effect. In contrast, County contends that its CEQA claim regarding Contract C-94375 is not moot because the contract has remained in effect as a result of the subsequent amendment in 2000.

87 RBM also submitted a supplemental letter brief and requested that we consider it. That request is granted.

We conclude that County's cause of [***173] action based on Contract C-94375 is not moot. First, a court order addressing Contract C-94375 may still be able to provide effective relief. For example, if an environmental assessment actually is performed by CLABS, such assessment could lead to mitigation [*1630] measures, either as part of a supplemental EIR or a subsequent mitigated negative declaration, that affect the performance of Contract C-94375. (See *Association for a Cleaner Environment v. Yosemite Community College Dist.*, *supra*, 116 Cal.App.4th at p. 641 [CEQA claim not moot because performing initial study could lead to adoption of mitigation measures].) Second, Contract C-94375 itself is still in effect and the case law regarding the mootness of contract-based claims involves the expiration of the entire contract, not just the expiration of a single amendment. (See *Giles v. Horn*, *supra*, 100 Cal.App.4th at pp. 228-229.)

4. OCSD's contract with Yakima

OCSD and Yakima entered into a contract titled "Agreement for the Management of Biosolids and Construction and Operation of Storage/Composting Facility," effective January 10, 2000 (OCSD-Yakima Agreement). Under section 1 of [***174] the OCSD-Yakima Agreement, Yakima charged \$ 25 per wet ton "to accept delivery of up to 100 wet tons per day of Class B Biosolids" from OCSD's plants and apply the biosolids to land at specified sites in Kern County. Yakima represented that it had valid permits from the Central Valley Water Board and Kern County Environmental Health Services Department that authorized it to land apply biosolids at the sites.

The OCSD-Yakima Agreement also contained a number of provisions regarding the construction and operation of a storage and composting facility. In July 2000, however, OCSD and Yakima amended the

OCSD-Yakima Agreement to remove any reference to the construction or operation of a storage and composting facility. The trial court ruled County's CEQA challenge to the storage and composting facility was moot. We concur in that ruling.

The remaining part of the OCSD-Yakima Agreement, which concerns the land application of Class B biosolids to sites located in Kern County, was not formally terminated and technically remains in effect. Section 21.1 of the OCSD-Yakima Agreement stated that the term of the agreement would end in January 2012, unless terminated earlier. Section 23.1 of the OCSD-Yakima [***175] Agreement stated Yakima could terminate the agreement on 24 hours' notice if it could no longer legally perform the required services. OCSD contends the adoption of the heightened treatment standards had the effect of terminating the agreement by making the land application of Class B biosolids illegal. [*1631] County asserts the CEQA claim in its thirteenth cause of action is not moot because OCSD and Yakima could resume activities under the OCSD-Yakima Agreement if the heightened treatment standards were invalidated or modified. ⁸⁸ [***93] Even assuming the claim presently is moot, we will exercise our inherent discretion and consider County's CEQA claim regarding the OCSD-Yakima Agreement because of the potential it will be reinstated if the heightened treatment standards are modified. (See *In re William M.* (1970) 3 Cal.3d 16, 23 [89 Cal.Rptr. 33, 473 P.2d 737] [court has discretion to consider issue likely to recur].)

88 For example, in conducting its environmental review, County might consider alternatives to the current heightened treatment standards that would allow the application of Class B biosolids to land only used to grow fiber crops, such as cotton, or land not used for food crops and grazing. If an alternative is adopted that allows some lands to receive Class B biosolids, then deliveries might resume under the OCSD-Yakima Agreement.

[***176] 5. OCSD's contract with Magan

OCSD and Shaen Magan entered a contract titled "Agreement for the Management of Biosolids," effective January 10, 2000 (OCSD-Magan Biosolids Agreement). Under the agreement, OCSD agreed to pay Magan a base fee of \$ 22.40 per wet ton for biosolids that Magan accepted, transported, and used on land located in Kings

and Kern Counties. The agreement was not expressly limited to Class B biosolids. The OCSD-Magan Biosolids Agreement was scheduled to terminate January 2003 and provided for early termination in the event that Magan could no longer legally perform the services required.

In its supplemental letter brief, OCSD has represented that OCSD and Magan agreed to extend the OCSD-Magan Biosolids Agreement through December 31, 2004, and it was likely that OCSD would exercise an option to extend the agreement an additional year. Because the agreement may have been extended through 2005, we will address the merits of County's challenge to OCSD's failure to perform any environmental assessment concerning the OCSD-Magan Biosolids Agreement and leave it to the superior court to determine the question of mootness on remand.

6. OCSD's option [***177] contracts

On January 10, 2000, OCSD entered three contracts involving the option to purchase real estate. One option contract was entered with Shaen Magan involving 1,360 acres and another option contract was entered with Shaen Magan, Inc., involving 2,666 acres. Also, OCSD entered an option and right of first refusal with Yakima, which had a 12-year total term and involved 320 acres.

[*1632] The appellate record does not show whether OCSD's option agreements with Shaen Magan and Shaen Magan, Inc., which were to expire after three years, have been exercised, extended or allowed to expire. Similarly, the appellate record does not show the current status of OCSD's option and right of first refusal with Yakima. The option was to expire after three years and the right of first refusal was to remain in effect for nine years thereafter, but OCSD and Yakima may have rescinded it like the portion of the OCSD-Yakima Agreement. We will consider the merits of County's CEQA claims concerning these contracts and, on remand, the superior court can determine whether those claims are moot.

B. Program EIR and Subsequent Environmental Assessment

Both CLABS and OCSD have adopted program EIR's [***178] that cover the management of biosolids generated at the treatment plants they operate.

1. EIR's of CLABS

In connection with CLABS's wastewater treatment operations, the City of Los Angeles prepared a CEQA document titled "Offsite Sludge Transportation and Disposal Program Final EIR" dated March 1989 (CLABS 1989 FEIR). Section 3 of the CLABS 1989 FEIR is titled "Setting, Impacts, and Mitigation Measures" and excerpts are part of the appellate record.

The CLABS 1989 FEIR states that (1) the hauling and disposal of sewage sludge [**94] from the treatment plants is not one specific action, but consists of potential combinations of actions involving different disposal technologies and transportation modes; (2) a detailed discussion of current or proposed projects is not provided because site-specific issues will be dealt with on a case-by-case basis; (3) future or ongoing specific projects may require additional CEQA documentation; and (4) such additional CEQA documentation would tier off the CLABS 1989 FEIR.

More recently, the City of Los Angeles also prepared a CEQA document titled "Biosolids Management Program Final [EIR]" dated July 1996 (CLABS 1996 FEIR). The first page [***179] of its executive summary is part of the appellate record. The CLABS 1996 FEIR was designed to "serve as the basis for examining subsequent implementation actions to determine if additional environmental documentation is required." The CLABS 1996 FEIR stated that (1) under the concept of tiering, the site-specific environmental documents would incorporate by reference the analysis of environmental effects contained in the CLABS 1996 FEIR and (2) if additional effects are created or further mitigation measures are required, supplemental environmental documents would be required.

[*1633] 2. OCSD's program EIR

OCSD adopted a 1999 Strategic Plan that covered all aspects of its operations and assessed its wastewater systems needs and options to the year 2020. Volume 8 of OCSD's 1999 Strategic Plan addressed biosolids management. OCSD acted as the lead agency for purposes of preparing and considering the environmental documents that CEQA required for the adoption of the 1999 Strategic Plan. As a result, OCSD caused a draft program EIR, dated June 1999, to be prepared covering the 1999 Strategic Plan (OCSD 1999 DEIR). Chapter 8.0 of the OCSD 1999 DEIR was titled "Residual Solids/Biosolids [***180] Management Setting, Impacts, and Mitigations." In October 1999, after receipt of

comments, the "Orange County Sanitation District 1999 Strategic Plan Final Program [EIR]" was prepared. Both the draft and final EIR are part of the administrative record.

OCSO used a program EIR to allow for more streamlined and focused environmental reviews in the future, including the use of tiering. In addition, the OCSO 1999 DEIR states that "[s]hould the design or project description as identified in this document change substantially for any of the near-term projects, subsequent project-level impact evaluation will be necessary."

3. Lead agencies under the program EIR's

(50) CEQA defines "lead agency" as "the public agency [that] has the principal responsibility for carrying out or approving a project [that] may have a significant effect upon the environment." (§ 21067.) If more than one public agency is involved in a project but only one public agency carries out the project, then "that agency shall be the lead agency even if the project would be located within the jurisdiction of another public agency." (Guidelines, § 15051, subd. (a); see § 21165.)

CLABS and OCSO are the [***181] agencies that actually carry out the construction and operation of wastewater treatment facilities. Thus, under the ordinary meaning of the language contained in the statutory definition of "lead agency," both CLABS and OCSO are lead agencies. This conclusion is not controversial in that CLABS and OCSO have recognized in their program EIR's that they are each the lead agency for purposes of their wastewater treatment operations.

[**95] Because the operation of a wastewater treatment facility includes managing the biosolids that the facility produces, CLABS and OCSO are also each the lead agency for their activities concerning the management of biosolids. Again, this conclusion is based on (1) a straightforward application of the statutory definition of "lead agency" and the criteria contained in the Guidelines (see [*1634] § 21067; Guidelines, §§ 15050, 15051), and (2) the program EIR's of CLABS and OCSO, both of which cover the activity of biosolids management. Thus, the program EIR's effectively acknowledge that biosolids management is the responsibility of CLABS and OCSO, even though they carry out that responsibility by contracting with other entities to handle the physical aspects of hauling and disposing [***182] of the biosolids generated. (See §

21065, subd. (b) [definition of "project" includes activity undertaken in whole or in part through a contract with a public agency].)

4. Assessment of later actions related to the program

Having determined that CLABS and OCSO are lead agencies with program EIR's that address biosolids management, the question becomes what procedural steps those lead agencies should have performed to comply with CEQA when entering contracts or extensions concerning the use or disposal of biosolids generated at their facilities.

The program EIR's of CLABS and OCSO expressly state that activity undertaken after the adoption of the program EIR's might result in the use of a tiered EIR to achieve future CEQA compliance. Therefore, one possible answer to the question is that the lead agencies must follow the steps of performing a preliminary review, completing an initial study, and preparing a tiered EIR. (See § 21094.)

(51) Alternatively, section 21166 sets forth the conditions where a subsequent or supplemental EIR is required to cover a new activity that is regarded as a change in a project already covered by an existing EIR. In particular, a subsequent [***183] or supplemental EIR is required where "[s]ubstantial changes are proposed in the project [that] will require major revisions of the [EIR]." (§ 21166, subd. (a); see Guidelines, §§ 15162 [subsequent EIR], 15163 [supplement to EIR] & 15164 [addendum to EIR].)

To identify the initial procedural steps that CLABS and OCSO should have taken, we turn to the provisions in the Guidelines that explicitly address how subsequent activity that is related to the program covered by a program EIR must be handled to comply with the documentation requirements of CEQA. Section 15168 of the Guidelines provides:

"(c) Use With Later Activities. Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared.

"(1) If a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration.

[*1635] "(2) If the agency finds that pursuant to Section 15162 [regarding subsequent EIR's], no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as [***184] being within the scope of the project covered by the program EIR, and no new environmental document would be required.

"(3) An agency shall incorporate feasible mitigation measures and alternatives developed in the program EIR into subsequent actions in the program.

[**96] "(4) Where the subsequent activities involve site specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the program EIR."

The Discussion that follows section 15168 of the Guidelines states: "Use of the program EIR also enables the Lead Agency to characterize the overall program as the project being approved at that time. Following this approach when individual activities within the program are proposed, the agency would be required to examine the individual activities to determine whether their effects were fully analyzed in the program EIR. If the activities would have no effects beyond those analyzed in the program EIR, the agency could assert that the activities are merely part of the program which had been approved earlier, and no further CEQA [***185] compliance would be required. This approach offers many possibilities for agencies to reduce their costs of CEQA compliance and still achieve high levels of environmental protection." ⁸⁹

89 The Discussion is available at <http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art11.html> (as of Apr. 1, 2005).

Based on the requirements of subdivision (c) of section 15168 of the Guidelines, County argues that if CLABS's and OCSD's sludge disposal contracts are viewed as "subsequent activities" in their wastewater collection, treatment and disposal program, then CLABS and OCSD are required to conduct an examination to determine if additional environmental documents must be prepared and, with respect to site-specific activities, prepare a written checklist or similar device to determine whether the environmental effects of the contracts were covered by the program EIR.

There is little doubt that the contracts and extensions entered by CLABS and OCSD concern the management of biosolids and that CLABS and OCSD [***186] have characterized the management of biosolids as part of the overall program covered by their program EIR's. Therefore, the contracts and extensions are "[s]ubsequent activities in the program" for purposes of Guidelines section 15168, subdivision (c). Consequently, CLABS and OCSD [*1636] were required to conduct the examination and make the determinations required by that subdivision. ⁹⁰

90 We do not address what impact, if any, the provisions of section 15004 of the Guidelines might have on the steps taken to comply with CEQA after the examination and determinations required by subdivision (c) of section 15168 of the Guidelines have been made.

The required examination and determinations were not made. Neither CLABS nor OCSD has cited to any evidence in the administrative record showing it completed these requirements. With respect to some of OCSD's contracts, the administrative record affirmatively shows such an examination was overlooked. One staff report sent to the board of directors of the OCSD on November 17, 1999, concerning [***187] the OCSD's consideration of the OCSD-Yakima Agreement and the OCSD-Magan Biosolids Agreement, contained no entries under the heading "CEQA FINDINGS." Similarly, another staff report that recommended authorizing the staff to negotiate with Magan for the purchase of a site for the long-term management of OCSD's biosolids contained only the notation "N/A" under the heading "CEQA FINDINGS."

[**97] As a result of their failure to conduct an examination and document the determinations required to be made after the examination, CLABS and OCSD violated section 15168, subdivision (c) of the Guidelines. Accordingly, they have "not proceeded in a manner required by law" and have abused their discretion for purposes of section 21168.5. ⁹¹

91 We will not go so far as to rule what determinations should have been made, but remand to allow CLABS and OCSD to make those determinations in the first instance.

C. Remand and Remedy

To remedy the foregoing violations of CEQA and appropriately dispose of the moot causes of action [***188] in County's cross-action, the judgment on the cross-action will be reversed and the superior court directed to dismiss the moot causes of action (see *Giles v. Horn, supra*, 100 Cal.App.4th at p. 229 [when an appeal is moot, the preferable procedure is to reverse the judgment and direct the trial court to dismiss the action for having become moot prior to its final determination on appeal]), and issue a writ of mandate under the remaining causes of action.

We have determined that dismissals of the second cause of action concerning Contract C-87685 between CLABS and Gardner-Arciero, and the seventh cause of action concerning the CSDLAC-Yakima Agreement are appropriate because of mootness. Additional causes of action in the cross-action may be moot at the time the superior court issues a writ of mandate. For instance, if Yakima and OCS D formally terminate the OCS D-Yakima Agreement, then the thirteenth cause of action would be moot and should be dismissed rather [*1637] than included in the writ. Similarly, if any option agreement has expired unexercised or has been formally terminated, then the related cause of action would be moot. Consequently, immediately prior to issuing [***189] a writ of mandate, the superior court should determine which causes of action are moot and exclude them from the writ or writs issued.

If all of the remaining causes of action are justiciable, the superior court should issue a writ of mandate under the first and fourth causes of action of the cross-action ⁹² directing CLABS to undertake the examination required by section 15168, subdivision (c) of the Guidelines as well as the other steps necessary to comply with that provision and any other provisions of CEQA or the Guidelines that become applicable as a result of the determinations made under section 15168, subdivision (c) of the Guidelines. A similar writ of mandate should be issued under the remaining causes of action that concern OCS D ⁹³ and are justiciable. The superior court also shall require a return be filed to notify it of (1) the determinations made under Guidelines section 15168, subdivision (c), and (2) the other actions taken by the [**98] sanitation agency in response to the writ of mandate. (See § 21168.9, subd. (b) [trial court shall retain jurisdiction by way of a return]; Cal. Civil Writ Practice (Cont.Ed.Bar 3d ed. 2004) § 11.1 & appen. A-15, pp. 473-474, 581-582.) [***190]

92 The first cause of action concerns Contract C-94375 and the fourth cause of action concerns the "Contract to Purchase Real Property" that the City of Los Angeles entered with Valley Communities, Inc., and Buena Vista Lake Properties regarding 4,688 acres of land located in Kern County at a purchase price of approximately \$ 9.6 million. The contract to purchase real property was not discussed in part VII.A., *ante*, because it was performed and did not expire. Accordingly, the CEQA cause of action relating to that contract is not moot.

93 These causes of action are the tenth (OCS D-Magan Biosolids Agreement), eleventh (option agreement to purchase real estate from Magan), twelfth (option agreement to purchase real estate from Shaen Magan, Inc.), thirteenth (OCS D-Yakima Agreement) and fourteenth (option agreement to purchase real estate from Yakima) contained in County's cross-action.

The question of whether any acts taken in performance of the contracts should be enjoined should, if raised by the parties [***191] on remand, be determined by the superior court in accordance with section 21168.9 and any other applicable provisions of law.

VIII. Evidentiary Objections

In connection with the non-CEQA causes of action, plaintiffs contend the superior court erred in failing to permit them to conduct discovery or submit extra-record evidence at the time of trial. Because plaintiffs' cause of action concerning the biosolids impact fee will be remanded for further proceedings, the assertions of reversible error based on the evidentiary rulings related to that cause of action need not be addressed.

[*1638] To the extent that the evidentiary issues relate to plaintiffs' allegations that counsel for County advised the Kern County Board of Supervisors that it only had to consider the proposed ordinance's impacts within Kern County and had no duty to consider the impacts to the surrounding communities, those evidentiary issues are no longer relevant because of the broader environmental review that will be conducted in connection with the preparation of an EIR. For the same reason that we did not address the issues concerning the claim based on California's constitutional limits on exercises of the police [***192] power (see part V., *ante*

), we need not address the related evidentiary issues.

Insofar as the evidentiary issues might relate to the other alleged constitutional violations, such as the claims based on the commerce clause and equal protection, or the affirmative defenses of laches, unclean hands and estoppel, we conclude the evidentiary rulings of the superior court did not affect the outcome on those claims and defenses, and thus were not reversible error.

DISPOSITION

Appeal

The judgment entered on plaintiffs' petition and complaint is reversed and the matter is remanded to the superior court. The orders underlying the judgment are reversed in part and affirmed in part as set forth *post*.

As to plaintiffs' first cause of action, the superior court is directed to vacate its November 22, 2000, order denying that cause of action under CEQA. The superior court is further directed to issue a writ of mandate ordering County to void its negative declaration relating to Ordinance G-6638 and to prepare an EIR that covers the adoption of an ordinance regulating the land application of treated sewage sludge within its jurisdiction. The heightened treatment standards [***193] once reflected in Kern County Ordinance Code provision 8.05.040(A), Ordinance G-6638, and now set forth in Ordinance No. G-6931, may remain operative, provided that County prepares, in good faith without unnecessary delay, an EIR that complies with CEQA.

As to plaintiffs' second cause of action, the November 25, 2002, order denying relief is affirmed.

As to plaintiffs' third cause of action regarding the validity of the biosolids impact fee, the superior court is

directed to vacate its November 25, 2002, order denying relief under that cause of action. On remand, the superior court is directed to uphold the biosolids impact fee to the extent that the funds generated are, or will [**99] be, applied to valid purposes and those purposes are [*1639] otherwise severable from the invalid ones. The superior court also is directed to hold such further proceedings as it deems appropriate for the purpose of determining how the funds generated by the biosolids impact fee were spent, or will be spent, and how to separate the valid applications of funds, if any, from the invalid applications.

Cross-action

The judgment on County's cross-action is reversed and the matter remanded to the superior court with directions to (1) [***194] enter an order dismissing the second and seventh causes of action as moot; (2) determine which of the remaining causes of action in the cross-action (first, fourth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action) have become moot and dismiss those causes of action; (3) issue a writ of mandate under the causes of action that are not moot directing CLABS or OCSD to undertake (a) the examination and make the determinations necessary to comply with section 15168, subdivision (c) of the Guidelines and (b) the steps necessary to comply with any other provisions of CEQA or the Guidelines that become applicable as a result of the determinations made under Guidelines section 15168; and (4) require the party subject to the writ of mandate to file a return.

The parties shall bear their own costs on the appeals.

Dibiaso, Acting P. J., and Vartabedian, J., concurred.

A petition for a rehearing was denied April 25, 2005.

VOLUME III
TAB 10

LEXSEE

DIVERS' ENVIRONMENTAL CONSERVATION ORGANIZATION, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents; UNITED STATES DEPARTMENT OF THE NAVY et al., Real Parties in Interest and Respondents.

D046112

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,
DIVISION ONE**

145 Cal. App. 4th 246; 51 Cal. Rptr. 3d 497; 2006 Cal. App. LEXIS 1874; 2006 Cal. Daily Op. Service 10951; 36 ELR 20237

November 29, 2006, Filed

SUBSEQUENT HISTORY: Rehearing denied by Divers' Environmental Conservation Organization v. State Water Resource Control Board, 2006 Cal. App. LEXIS 2102 (Cal. App. 4th Dist., Dec. 27, 2006)

PRIOR HISTORY: [***1] Superior Court of San Diego County, No. GIC819689, Ronald S. Prager, Judge.

COUNSEL: Briggs Law Corporation, Cory J. Briggs; Environmental Advocates and Suzanne E. Bevasch for Plaintiff and Appellant.

Lawyers for Clean Water, Inc., Daniel Cooper and Layne Friedrich for California Coastkeeper Alliance as Amicus Curiae on behalf of Plaintiff and Appellant.

Bill Lockyer, Attorney General, Mary Hackenbracht and Carol A. Squire, Deputy Attorneys General, for Defendants and Respondents.

No appearance for Real Parties in Interest and Respondents.

JUDGES: Benke, Acting P. J., with Nares and Haller, JJ., concurring.

OPINION BY: Benke [*250]

OPINION
[**499]

BENKE, Acting P. J.--This is an appeal from an order denying a petition for a writ of mandate. The petition challenged a discharge permit respondent California Regional Water Quality Control Board, San Diego Region (the Regional Board), issued to real parties in interest United States Department of the Navy et al. (Navy). We affirm. Although the Regional Board could have issued a permit that imposed numeric limits on chemicals in the Navy's stormwater discharges into San Diego Bay, under provisions of the Federal Water Pollution Control [***2] Act (33 U.S.C. § 1251 et seq.), commonly known as the Clean Water Act (CWA), and applicable regulations, the Regional Board was authorized to instead require that the Navy limit its stormwater chemical discharges by employing so-called "best management practices" (BMP's). Given these circumstances, we reject appellant Divers' Environmental Conservation Organization's (Divers') contention that the permit was defective for its failure to analyze or impose numeric limits on chemicals in the Navy's stormwater discharges.

SUMMARY

In November 2002 the Regional Board issued a National Pollutant Discharge Elimination System (NPDES) permit to the Navy governing discharges from the Naval Base San Diego Complex ¹ (the base complex) to San Diego Bay. The permit includes regulations governing stormwater discharges from the base complex to the bay. In particular, the permit requires that the Navy develop and adopt a "Storm Water Pollution Prevention

Plan" (the prevention plan), which employs BMP's² designed to reduce or eliminate pollutants received into the bay from industrial activities at the base complex. The permit requires that the prevention plan identify [***3] and evaluate sources of pollution [**500] that might affect stormwater discharges from the base complex and then implement site-specific BMP's to reduce or prevent pollutants in the base complex's stormwater discharges. Under the permit the Navy is required [*251] to consider implementing nonstructural BMP's, such as good housekeeping, preventative maintenance, spill response procedures, material handling and storage procedures, employee training programs, recycling procedures, and erosion controls. Where nonstructural BMP's are not effective, the permit requires that the Navy consider structural BMP's, such as structures which cover chemicals and other pollutants, retention ponds, berms and other devices which channel runoff away from pollutant sources and treatment facilities, such as vegetative swales, which reduce pollutants in stormwater discharges.

1 The base complex includes four installations: Naval Station, San Diego; Mission Gorge Recreational Facility; Broadway Complex; and the Naval Medical Center, San Diego.

2 The permit defines BMP's as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. The BMPs also include treatment measures, operating procedures, and practices to control facility site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. The BMPs may include any type of pollution prevention and pollution control measure necessary to achieve compliance with this Order."

[***4] In addition to the prevention plan and based on the Regional Board's study of water quality, the permit contains a numeric limit on the amount of toxicity in the Navy's total effluent. This limitation requires that test organisms be able to survive in the effluent. The permit also prohibits the discharge of the first quarter-inch of runoff from "high-risk" areas.

The Regional Board's study of water quality noted that levels of copper and zinc in stormwater runoff were matters of concern. In addition to the BMP's and

limitation on toxicity in the total effluent discharges, the permit set forth "benchmarks" for copper and zinc. The permit requires the Navy to measure the concentration of copper and zinc in its stormwater discharges and if they exceed the benchmark levels, the Navy must commence an iterative process of reviewing and upgrading its BMP's.

The permit requires that the Navy annually review all BMP's to determine "whether the BMP's are properly designed, implemented, and are effective in reducing and preventing pollutants in storm water discharges." In the event the Regional Board finds the prevention plan does meet the requirements of the permit, the permit requires [***5] the plan be revised to implement additional BMP's.

Before the permit was finally adopted by the Regional Board, Divers' challenged it administratively. Divers' argued that applicable federal regulations required that instead of regulating the Navy's industrial stormwater discharges by way of a BMP's-based prevention plan, the Regional Board was required to set numeric "water quality based effluent limitations" (WQBEL's) on the Navy's stormwater discharges and that before setting those [**501] numeric WQBEL's the Navy was required to conduct an analysis of particular pollutants for which there was a reasonable potential the stormwater [*252] discharges would cause or contribute to a violation of any state water quality standard. The Regional Board rejected Divers's argument and adopted the permit without numeric WQBEL's and without performing any analysis of particular pollutants in the Navy's stormwater discharges. Divers' filed an administrative petition with respondent State Water Resources Control Board (State Board). The administrative petition was dismissed on the grounds it failed to raise substantial issues appropriate for review by the State Board.

Divers' filed a petition [***6] for a writ of administrative mandate (Code Civ. Proc., § 1094.5) against the State Board and the Regional Board. The trial court dismissed the State Board as a defendant. As against the Regional Board, Divers' alleged the board abused its discretion in failing to conduct an analysis of the reasonable potential impact of particular stormwater pollutants on state water quality standards and in failing to impose numeric WQBEL's on the Navy's stormwater discharges. The trial court denied Divers's petition.

Divers' filed a timely notice of appeal.

DISCUSSION

I

Standard of Review

"[O]ur standard of review must extend appropriate deference to the administrative agencies in this case, and their technical expertise. [Citations.] And while interpretation of a statute or regulation is ultimately a question of law, we must also defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision." (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1103-1104 [1 Cal. Rptr. 3d 76] [***7] (*Communities*)).

II

The Clean Water Act

(1) "In 1972, Congress enacted the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), commonly known as the Clean Water Act (CWA). [Citation.] The goal of the CWA is 'to restore and maintain the chemical, [*253] physical, and biological integrity of the Nation's waters.' (33 U.S.C. § 1251(a); see *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046, 1054] (*Arkansas*)). [¶] Generally, the CWA 'prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.] [Citation.] The most important of those exceptions is pollution discharge under a valid NPDES permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. [Citations.] NPDES permits are valid for five years. [Citation.]" (*Communities, supra*, 109 Cal.App.4th at p. 1092.)

Initially, the CWA regulated permittees by requiring them to adopt technology-based effluent limitations. (33 U.S.C. § 1311(b)(1)(A).) [***8] These are limitations based on the best available or practical technology for the reduction of water pollution.

After July 1, 1977, permittees were required to not only adopt technology-based effluent limitations but

more WQBEL's. "In the CWA, Congress 'supplemented the "technology-based" effluent limitations with "water quality-based" limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." ' [Citation.]" (*Communities, supra*, 109 Cal.App.4th at p. 1093.)

(2) In general terms the CWA and governing regulations require that in addition to determining an applicant's obligations by focusing on what technology can be used on the applicant's discharges, the permitting agency must also focus on the quality of the body of water into which the applicant is discharging pollutants. Thus under 40 Code of Federal Regulations part 122.44(d)(1)(i) (2005), WQBEL's must be imposed on applicants "whenever the permitting agency determines that pollutants 'are or may be discharged [***9] at a level which will cause, or *have the reasonable potential to cause, or contribute* to an excursion above any State water quality standard' " (*Communities, supra*, 109 Cal.App.4th at p. 1094.) Under 40 Code of Federal Regulations part 122.44(d)(1)(ii) [**502] in making the determination about whether WQBEL's are required "the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water." [*254]

(3) When, after employing the procedures and analysis required by 40 Code of Federal Regulations part 122.44(d)(1)(ii), a permitting agency determines that an applicant's discharge "has the reasonable potential to cause ... an in-stream excursion above ... a State water quality standard for an individual pollutant" the permit must contain effluent limits for that pollutant. (40 C.F.R. § 122.44(d)(1)(iii) (2005).)

[***10] As we explain more fully below, this appeal rests in large measure on Divers's contention that 40 Code of Federal Regulations part 122.44(d)(1) mandated a numeric analysis of individual pollutants in the Navy's stormwater and numeric WQBEL's for pollutants which would cause the bay to exceed applicable water quality standards. As we explain, we do not adopt this interpretation of the regulations. Briefly, as we read the

regulations, the analysis which is mandatory in all cases is the more general analysis required by part 122.44(d)(1)(ii); only if that analysis results in a finding that discharges are likely to exceed state numeric criteria for a particular pollutant are limits for that pollutant required. However, as we believe is the case here, an analysis of stormwater discharges may satisfy the requirements of part 122.44(d)(1)(ii) without any numeric analysis of individual pollutants and hence without giving rise to any obligation to impose specific pollutant limitations under part 122.44(d)(1)(iii).

III

Stormwater Discharges

Before 1987 the CWA did not expressly regulate stormwater discharges.³ In 1987 Congress added [***11] subdivision (p) to section 402 of the CWA [*255] (33 U.S.C. § 1342(p)),⁴ [**503] which expressly requires NPDES permits [**504] for stormwater discharges either associated with industrial activity or from municipal storm sewer systems. Section 402(p)(4)(A) of the CWA gave the administrator of the EPA until 1989 to promulgate regulations governing stormwater discharges from industrial polluters and large municipalities; [*256] applicants for stormwater permits were given until 1990 to make applications and the EPA or state was given until 1991 to issue or deny the permit.

³ Shortly after the CWA was enacted in 1972 "the EPA promulgated regulations exempting most municipal storm sewers from the NPDES permit requirements. [Citations.] When environmental groups challenged this exemption in federal court, the Ninth Circuit held a storm sewer is a point source and the EPA did not have the authority to exempt categories of point sources from the Clean Water Act's NPDES permit requirements. [Citation.] The *Costle* court [(*Natural Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977) 568 F.2d 1369)] rejected the EPA's argument that effluent-based storm sewer regulation was administratively infeasible because of the variable nature of storm water pollution and the number of affected storm sewers throughout the country. [Citation.] Although the court acknowledged the practical problems relating to storm sewer regulation, the court found the EPA had the flexibility under the Clean Water Act to design regulations that would overcome

these problems. [Citation.]

"During the next 15 years, the EPA made numerous attempts to reconcile the statutory requirement of point source regulation with the practical problem of regulating possibly millions of diverse point source discharges of storm water. [Citations.]

"Eventually, in 1987, Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. [Citations.]" (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 873-874 [22 Cal. Rptr. 3d 128].)

[***12]

4 Section 402(p) of the CWA states:

"(p) Municipal and industrial storm water discharges

"(1) General rule

"Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 1342 of this title) shall not require a permit under this section for discharges composed entirely of storm water.

"(2) Exceptions

"Paragraph (1) shall not apply with respect to the following storm water discharges:

"(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

"(B) A discharge associated with industrial activity.

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

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

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

"(3) Permit requirements

"(A) Industrial discharges

"Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

"(B) Municipal discharge

"Permits for discharges from municipal storm sewers--

"(i) may be issued on a system- or jurisdiction-wide basis;

"(ii) shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers; and

"(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

"(4) Permit application requirements

"(A) Industrial and large municipal discharges

"Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for storm water discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as

practicable, but in no event later than 3 years after the date of issuance of such permit.

"(B) Other municipal discharges

"Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for storm water discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

"(5) Studies

"The Administrator, in consultation with the States, shall conduct a study for the purposes of--

"(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

"(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

"(C) establishing procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality.

"Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

"(6) Regulations

"Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate storm water discharges,

other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State storm water management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate."

[***13] In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by way of BMP's, rather than by way of imposing either technology-based or water quality-based numerical limitations. "Unlike discharges of process wastewater where numeric effluent limitations (technology-based and/or water-quality-based) are typically used to control the discharge of pollutants from industrial facilit[y]s, the primary permit condition used to address discharges of pollutants in a facilities stormwater is a pollution prevention plan. The development and implementation of a site-specific stormwater pollution prevention plan is considered to be the most important requirement of the EPA and State issued stormwater general permits. Site-specific stormwater pollution prevention plans allow permittees to develop and implement 'best management practices', whether structural or non-structural, that are best suited for controlling stormwater discharges from their industrial facility." (U.S. EPA NPDES Permit Writers' Manual (Dec. 1996) pp. 149-150; see also U.S. E.P.A. Interim Permitting Strategy Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43761 [***14] (Aug. 26, 1996); and U.S. E.P.A. Questions and Answers, 61 Fed. Reg. 57425 (Nov. 6, 1996).) In addition to the rationale it has expressed, the EPA also adopted 40 Code of Federal Regulations part 122.44(k) (2005) [*257] so that the regulation reads, in part, as follows: "[E]ach NPDES permit shall include conditions meeting the following requirements when applicable. [¶] ... [¶]

"(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

"(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

"(2) Authorized under section 402(p) of the CWA for

the control of stormwater discharges;

"(3) Numeric effluent limitations are infeasible; or

"(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA."

As we explain more fully below, essentially 40 Code of Federal Regulations part 122.44(k)(2) (2005) allows permitting agencies to treat BMP's as the type of WQBEL's appropriate for control of stormwater discharges.

IV

[***15] *Reasonable Potential Analysis*

In its first argument on appeal Divers' contends that because the Regional Board did not identify and analyze the numeric level of particular pollutants in the Navy's stormwater discharges, it did not perform the reasonable potential analysis required by 40 Code of Federal Regulations part 122.44(d)(1) (2005).

(4) Contrary to Divers's argument, 40 Code of Federal Regulations part 122.44(d)(1) (2005) does not require that in all cases a permitting authority analyze the particular pollutants in an applicant's stormwater discharges. As we have seen, [**505] the procedures a permitting agency must engage in in performing the required reasonable potential analysis are set forth in 40 Code of Federal Regulations part 122.44(d)(1)(ii). By its terms that portion of the regulation does not require any analysis of particular pollutants. Rather, it only requires that the permitting authority use procedures that account for existing controls, the variability of the pollutants in effluent, the sensitivity of [*258] species to toxicity, and the dilution of effluent in receiving waters. (40 C.F.R. § 122.44(d)(1)(ii).) [***16] While, as Divers' points out, a numeric analysis of particular pollutants would in most instances be the most effective means of meeting the requirements of 40 Code of Federal Regulations part 122.44(d)(1)(ii), that is not the only means of meeting the requirements of the regulation. As the trial court noted, the Regional Board performed a water quality analysis and made extensive findings with respect to the toxicity of copper and zinc in the Navy's discharge and established benchmarks for concentrations of those chemicals in the Navy's discharges. The fact the studies the Regional Board performed did not produce numeric

analysis of all the potential pollutants in the Navy's stormwater discharges did not prevent the Regional Board from nonetheless concluding, on the basis of the studies it did perform, that the stormwater discharges had a reasonable potential to cause or contribute to pollution in the bay above state water quality standards. As the Regional Board points out and the EPA has repeatedly noted, stormwater consists of a variable stew of pollutants, including toxic pollutants, from a variety of sources which impact a receiving body on a [***17] basis which is only as predictable as the weather. Given these circumstances the Regional Board could reasonably conclude that any attempt to provide a numeric analysis of pollutants in stormwater discharges was not the most effective means of determining whether WQBEL's were nonetheless needed for the Navy's stormwater discharges.

(5) Inherent in the flexibility we find in 40 Code of Federal Regulations part 122.44(d)(1)(ii) (2005) is our conclusion the BMP'S authorized by 40 Code of Federal Regulations section 122.44(k)(2) are in fact WQBEL's, which a permitting authority may employ when it has found that stormwater discharges may cause a receiving body to exceed state water quality standards. In reaching this conclusion we are persuaded by the reasoning the court adopted in *Communities*, where the opponent of a permit argued that numeric WQBEL's were required by 40 Code of Federal Regulations part 122.44(d)(1). "Case law is limited. A few cases seem to assume that a WQBEL is always a number, but the cases do not squarely address and decide the issue. [Citations.] But *Natural Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977) 186 U.S. App. D.C. 147 [568 F.2d 1369] [***18] (*Costle*), suggests that Congress did not intend numeric effluent limitations to be the only limitation on pollution discharges under the CWA, but intended a flexible approach including alternative effluent control strategies. [Citation.]

"We find instructive a prior decision of the State Board, of which we have taken judicial notice: *In the Matter of the Petition of Citizens for a Better Environment, Save San Francisco Bay Association, and Santa Clara Valley* [*259] *Audubon Society* (Order No. WQ 91-03, May 16, 1991) 1991 WL 135460 (Cal.St.Wat.Res.Bd.). In that order, the State Board stated: "The petitioners contend that the Clean Water Act, and regulations and court decisions interpreting the Act, require the inclusion of numeric effluent limitations in NPDES permits We have reviewed these authorities,

and also opinions we have received [**506] from EPA, and conclude that numeric effluent limitations are not legally required. Further, we have determined that the program of prohibitions, source control measures and "best management practices" set forth in the permit constitutes effluent limitations as required by law.' [Citation.]

"The State Board noted the EPA's [***19] regulatory definition of 'effluent limitation' was broad, and noted that the *Costle* decision supported the conclusion that numeric limitations were not required--especially since CWA ' "gives EPA considerable flexibility in framing the permit to achieve a desired reduction in pollutant discharges. ..." ' [Citation.]

"Specifically referring to section 122.44(d)(1), the State Board noted the regulation did not contain 'the term "numeric" effluent limitation. ... Concededly, in most cases, the easiest and most effective chemical-specific limitation would be numeric. However, there is no legal requirement that effluent limitations be numeric.' [Citation.]" (*Communities, supra*, 109 Cal.App.4th at pp. 1104-1105.)

(6) Where, as in the case of stormwater discharges, BMP's will be the WQBEL's employed, the study performed under 40 Code of Federal Regulations part 122.44(d)(1)(ii) (2005) must at a minimum look to the likely impact of stormwater as a whole on the receiving body; however, as we have seen, the BMP's that may be imposed if there is a determination that state water quality standards will be exceeded are usually systemic procedures [***20] tailored to decrease the overall risk toxic pollutants from the discharger will reach stormwater runoff. Because there is no direct correlation between the type and volume of toxic pollutants in stormwater and the BMP's that will be employed to reduce those volumes, a permitting authority can reasonably conclude that in the case of stormwater discharges such a detailed numeric analysis is not a cost-effective means of performing a "reasonable potential" analysis. In sum, contrary to Divers' contention, the Regional Board was not required to perform a numeric analysis of each pollutant in the Navy's stormwater discharges. [*260]

V

Feasibility Study

Divers' does not accept our conclusion the Regional Board was authorized to employ BMP's in lieu of numeric WQBEL's. Instead, Divers' argues that in the case of industrial permits, such as the one the Navy obtained, BMP's are permissible only upon a finding by the permitting authority that numeric WQBEL's are not feasible. We do not read 40 Code of Federal Regulations part 122.44(k)(2) (2005) so narrowly.

As we have noted, 40 Code of Federal Regulations part 122.44(k)(2) (2005) [***21] gives permitting authorities the power to impose BMP's when they are "[a]uthorized under section 402(p) of the CWA for the control of storm water discharges." Divers' contends that section 402(p) of the CWA (33 U.S.C. § 1342(p)) does not authorize BMP's to control *industrial* stormwater discharges and that the only authority for use of BMP's in an industrial setting is provided by 40 Code of Federal Regulations part 122.44(k)(3), which permits BMP's when numeric effluent limitations are not feasible.

Divers' fundamentally misinterprets section 402(p) of the CWA. Before enactment of section 402(p) there was considerable controversy over whether and in what manner stormwater discharges were subject to permitting under the CWA. (See *Building Industry Assn. of San Diego County v. State* [**507] *Water Resources Control Bd.*, *supra*, 124 Cal.App.4th at pp. 873-874.) Enactment of section 402(p) made it clear that such discharges were subject to the permitting requirements of the CWA and gave the EPA broad discretion in developing and enforcing rules governing stormwater discharges. In this context BMP's are expressly mentioned in [***22] the statute as one of the limitations a permitting authority may impose in municipal stormwater permits. (See 33 U.S.C. § 1342(p)(3)(B)(iii).) However, neither the absence of an express reference to BMP's in industrial settings nor the illustrative reference with respect to municipal stormwater permits, is very persuasive in determining whether, as the Regional Board and the EPA have found, in enacting section 402(p) Congress intended to authorize a wide array of controls over all stormwater discharges, including use of BMP's. In this regard we note the final paragraph of section 402(p) contains a further reference to BMP's and gives the EPA the power to use management practices as a means, among others, of controlling stormwater discharges from sources other than industrial activities and municipalities. This reference to management practices, along with the reference to the use of BMP's in municipal settings, show

that in enacting section 402(p) of the CWA, Congress clearly recognized the role of BMP's as a means of controlling pollutants in stormwater discharges. [*261]

In sum, there is nothing on the face of the statute that suggests that in making express [***23] reference to BMP's in particular instances Congress intended to limit use of BMP's in controlling stormwater discharges in general.⁵ Indeed, we can discern no rationale which would permit BMP's in the case of municipalities and other nonindustrial stormwater discharges but bar them in the case of industrial discharges. Thus the EPA, along with the Regional Board, could reasonably conclude that in enacting section 402(p) of the CWA, Congress intended to permit the EPA and permitting authorities wide discretion in regulating stormwater runoff, including the use of BMP's where the agencies believed they were appropriate.

⁵ As we noted in *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*, *supra*, 124 Cal.App.4th at page 874, under section 402(p)(3)(B)(iii) of the CWA municipalities are only required to reduce "pollutants to the maximum extent practicable," whereas stormwater from industrial discharges must be governed by WQBEL's. Nothing in our opinion in *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* addressed the specific question raised here: whether a permitting authority may use BMP's as a means of limiting industrial stormwater waste.

[***24] Because the Regional Board and EPA's interpretation of section 402(p) of the CWA is not at odds with either the language or overall purposes of the statute, we must accept it. (See *Communities*, *supra*, 109 Cal.App.4th at p. 1104.) Accordingly, read in light of that interpretation of the statute, 40 Code of Federal Regulations part 122.44(k)(2) (2005) fully authorized the Regional Board to use BMP's as the principal means of limiting the Navy's stormwater discharges.

VI

Benchmarks

As we have noted, under the permit the Navy is required to determine whether levels of zinc and copper in its stormwater discharges reach designated benchmarks, and if they do the Navy is then required to

review and amend its BMP's. The benchmarks for these chemicals is higher than applicable water quality [**508] standards for San Diego Bay as set forth in the EPA's California toxic rule (CTR). (See 65 Fed. Reg. 31682-31719 (May 18, 2000).) Contrary to Divers's argument, the discrepancy between the benchmarks and CTR standards does not invalidate the permit.

The CTR was adopted by the EPA because California failed to adopt final water quality standards [***25] as required by the CWA. (See 33 U.S.C. § 1313(c); 40 C.F.R. §§ 131.6, 131.12 (2005).) The standards set forth in the CTR are expressed as numeric criteria for specific toxic pollutants and apply to California's inland waters and enclosed bays and estuaries. Following the holding in *Communities*, it is now clear that in implementing numeric [*262] water quality standards, such as those set forth in the CTR, permitting agencies are not required to do so solely by way of corresponding numeric WQBEL's. (*Communities*, *supra*, 109 Cal.App.4th at pp. 1095, 1104-1105.) In *Communities* the court stated: "[A] water quality standard can be numeric; the question before us is whether a WQBEL, which implements a ... numeric water quality standard, *must itself* be numeric." (*Id.* at p. 1095.) The court then went on to answer this question in the negative. (*Id.* at pp. 1104-1105.)

We also note that in adopting the CTR, the EPA took note of the use of BMP's as a means of controlling municipal runoff and stated that the EPA "believes that compliance with water quality standards [***26] through the use of Best Management Practices (BMPs) is appropriate." (65 Fed. Reg. 31703 (May 18, 2000).) This reference to BMP's, in the context of adopting the CTR, supports the Regional Board's contention that the CTR does not require it to impose the CTR's numeric water quality standards as numeric limits on toxic substances in the Navy's stormwater discharges.

In sum the Regional Board was empowered to enforce the CTR by way of the BMP's and benchmarks set forth in the permit. Although the CTR governs the entire bay, including the point of any discharge, in employing benchmarks for further action by the Navy, the permit does not in any manner authorize the Navy to violate the CTR. In this context the benchmarks only

serve as a means of ensuring that the Navy will monitor toxicity of its stormwater discharges and take appropriate action in the event it discovers toxicity at designated levels. As the Regional Board points out, it is fully capable of taking enforcement action against the Navy in the event a violation of the CTR occurs.

VII

Delegation of Discretion

Finally, we note that Divers' contends that in allowing the Navy to develop a prevention [***27] plan, including BMP's, the permit delegated too much discretion to the Navy. Our review of the record does not support this contention. The requirements of the prevention plan the Navy must develop are set forth in an 18-page attachment to the permit. The attachment sets forth in some detail what the plan must include in terms of identifying sources of pollution, monitoring, recordkeeping and reporting. In particular, we note the permit provides that "[u]pon notification by the Regional Board and/or local agency that the [prevention plan] does not meet one or more of the minimum requirements of this Section," the Navy must revise the plan and implement [*263] additional BMP's that are effective in reducing and eliminating pollutants in its discharges. Thus the permit both carefully limits the [**509] Navy's discretion in developing a prevention plan and provides for meaningful regulatory review of the prevention plan. (See *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir. 2003) 344 F.3d 832, 856.)

Judgment affirmed. ⁶

⁶ Amicus curiae California Coastkeeper Alliance asked that we take judicial notice of data it prepared and filed with the State Board in other proceedings and after the Regional Board issued the Navy's permit. We deny the request for judicial notice. Appellant's objection to respondents' lodgment of exhibits is overruled.

Nares, J., [***28] and Haller, J., concurred.

A petition for a rehearing was denied December 27, 2006.

VOLUME III
TAB 11

LEXSEE

**HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Plaintiffs and Appellants,
v. CITY OF SALINAS et al., Defendants and Respondents.**

No. H022665.

COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

**98 Cal. App. 4th 1351; 121 Cal. Rptr. 2d 228; 2002 Cal. App. LEXIS 4198; 2002 Cal.
Daily Op. Service 4853; 2002 Daily Journal DAR 6161**

June 3, 2002, Decided

SUBSEQUENT HISTORY: [***1] Rehearing Denied July 2, 2002.

Review Denied August 28, 2002, Reported at: 2002 Cal. LEXIS 5938.

PRIOR HISTORY: Superior Court of Monterey County. Super. Ct. No. M45873. Richard M. Silver, Judge.

DISPOSITION: The judgment is reversed. Costs on appeal are awarded to plaintiffs.

COUNSEL: Timothy J. Morgan; Jonathan M. Coupal and Timothy A. Bittle for Plaintiffs and Appellants.

James C. Sanchez, City Attorney; Richards, Watson & Gershon, Mitchell E. Abbott and Patrick K. Bobko for Defendants and Respondents.

JUDGES: Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.

OPINION BY: Elia

OPINION

[*1352] [**229] **ELIA, J.**

In this "reverse validation" action, plaintiff taxpayers challenged a storm drainage fee imposed by the City of Salinas. Plaintiffs contended that the fee was a "property-related" fee requiring voter approval, pursuant to California Constitution, article XIII D, section 6, subdivision (c), which was added by the passage of

Proposition 218. The trial court ruled that the fee did not violate this provision because (1) it was not a property-related fee [*1353] and (2) it met the exemption [***2] for fees for sewer and water services. We disagree with the trial court's conclusion and therefore reverse the order.

BACKGROUND

In an effort to comply with the 1987 amendments to the federal Clean Water Act (33 U.S.C. § 1251 et seq.; 40 C.F.R. § 122.26(a) et seq. (2001)), the Salinas City Council took measures to reduce or eliminate pollutants contained in storm water, which was channeled in a drainage system separate from the sanitary and industrial waste systems. On June 1, 1999, the city council enacted two ordinances to fund and maintain the compliance program. These measures, ordinance Nos. 2350 and 2351, added former chapters 29 and 29A, respectively, to the Salinas City Code. Former section 29A-3 allowed the city council to adopt a resolution imposing a "Storm Water Management Utility fee" to finance the improvement of storm and surface water management facilities. The fee would be imposed on "users of the storm water drainage system."

On July 20, 1999, the city council adopted resolution No. 17019, which established rates for the storm and surface water management system. The resolution specifically states: "There is hereby imposed on each [***3] and every developed parcel of land within the City, and the owners and occupiers thereof, jointly and severally, a storm drainage fee." The fee was to be paid annually to the City "by the owner or occupier of each and every developed parcel in the City who shall be

presumed to be the primary utility rate payer" The amount of the fee was to be calculated according to the degree to which the property contributed runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of "impervious area" ¹ on that parcel.

1 "Impervious Area," according to resolution No. 17019, is "any part of any developed parcel of land that has been modified by the action of persons to reduce the land's natural ability to absorb and hold rainfall. This includes any hard surface area which either prevents or retards the entry of water into the soil mantle as it entered under natural conditions pre-existent to development, and/or a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions pre-existent to development."

[***4] [**230] Undeveloped parcels--those that had not been altered from their natural state--were not subject to the storm drainage fee. In addition, developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the City's storm drainage facilities were required to pay in proportion to the amount they did contribute runoff or used the City's treatment services.

[*1354] On September 15, 1999, plaintiffs filed a complaint under Code of Civil Procedure section 863 to determine the validity of the fee. ² Plaintiffs alleged that this was a property-related fee that violated article XIII D, section 6, subdivision (c), of the California Constitution because it had not been approved by a majority vote of the affected property owners or a two-thirds vote of the residents in the affected area. The trial court, however, found this provision to be inapplicable on two grounds: (1) the fee was not "property related" and (2) it was exempt from the voter-approval requirement because it was "related to" sewer and water services.

2 Plaintiffs are the Howard Jarvis Taxpayers Association, the Monterey Peninsula Taxpayers Association, and two resident property owners.

[***5] *DISCUSSION*

Article XIII D was added to the California

Constitution in the November 1996 election with the passage of Proposition 218, the Right to Vote on Taxes Act. Section 6 of article XIII D ³ requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. (§ 6, subd. (a)(2).) The provision at issue is section 6, subdivision (c) (hereafter section 6(c)), which states, in relevant part: "Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area."

3 All further unspecified section references are to article XIII D of the California Constitution.

Section 2 [***6] defines a "fee" under this article as a levy imposed "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (§ 2, subd. (e).) A "property-related service" is "a public service having a direct relationship to property ownership." (§ 2, subd. (h).) (1a) The City maintains that the storm drainage fee is not a property-related fee, but a "user fee" which the property owner can avoid simply by maintaining a storm water management facility on the property. Because it is possible to own property without being subject to the fee, the City argues this is not a fee imposed "as an incident of property ownership" or "for a property-related service" within the meaning of section 2.

We cannot agree with the City's position. Resolution No. 17019 plainly established a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the [*1355] City. The resolution [**231] expressly stated that "each owner and occupier of a developed lot or parcel of real property within the City, is served by the City's storm drainage facilities" and burdens the [***7] system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property "should therefore pay for the improvement, operation and maintenance of such facilities." Accordingly, the resolution makes the fee applicable to "*each and every developed parcel* of land within the City." (Italics added.) This is not a charge directly based on or measured by use, comparable to the metered use of

water or the operation of a business, as the City suggests. (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal. 4th 830, 838 [102 Cal. Rptr. 2d 719, 14 P.3d 930] [art. XIII D inapplicable to inspection fee imposed on private landlords; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal. App. 4th 79 [101 Cal. Rptr. 2d 905] [water usage rates are not within the scope of art. XIII D].)

The "Proportional Reduction" clause on which the City relies does not alter the nature of the fee as property related. ⁴ A property owner's operation of a private storm drain system reduces the amount owed to the City to the extent that runoff into the City's system is reduced. The fee [***8] nonetheless is a fee for a public service having a direct relationship to the ownership of developed property. The City's characterization of the proportional reduction as a simple "opt-out" arrangement is misleading, as it suggests the property owner can avoid the fee altogether by declining the service. Furthermore, the reduction is not proportional to the amount of services requested or used by the occupant, but on the physical properties of the parcel. Thus, a parcel with a large "impervious area" (driveway, patio, roof) would be charged more than one consisting of mostly rain-absorbing soil. Single-family residences are assumed to contain, on average, a certain amount of impervious area and are charged \$ 18.66 based on that assumption.

4 According to the public works director, proportional reductions were not anticipated to apply to a large number of people.

Proposition 218 specifically stated that "[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local [***9] government revenue and enhancing taxpayer consent." (Prop. 218, § 5; reprinted at Historical Notes, 2A West's Ann. Cal.Const. (2002 supp.) foll. art. XIII C, p. 38 [hereafter Historical Notes].) (2) We are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers--in this case, the voters of California--in a manner that effectuates their purpose in adopting the law. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 244-245 [149 Cal. Rptr. 239, 583 P.2d 1281]; *Arden Carmichael, Inc. v. County of Sacramento* (2000) 93 Cal. App. 4th 507, 514-515 [113 Cal. Rptr. 2d 248]; *Board of Supervisors v. Lonergan* (1980) 27 Cal. 3d 855, 863 [167 [*1356] Cal.

Rptr. 820, 616 P.2d 802].) (1b) To interpret the storm drainage fee as a use-based charge would contravene one of the stated objectives of Proposition 218 by "frustrat[ing] the purposes of voter approval for tax increases." (Prop. 218, § 2.) We must conclude, therefore, that the storm drainage fee "burden[s] landowners *as landowners*," and is therefore subject [***10] to the voter-approval requirements of article XIII D unless an exception applies. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra*, 24 Cal. 4th at p. 842.)

[**232] *EXCEPTION FOR "SEWER" OR "WATER" SERVICE*

As an alternative ground for its decision, the trial court found that the storm drainage fee was "clearly a fee related to 'sewer' and 'water' services." The exception in section 6(c) applies to fees "for sewer, water, and refuse collection services." Thus, the question we must next address is whether the storm drainage fee was a charge *for sewer service or water service*.

The parties diverge in their views as to whether the reach of California Constitution, article XIII D, section 6(c) extends to a storm drainage system as well as a sanitary or industrial waste sewer system. The City urges that we rely on the "commonly accepted" meaning of "sewer," noting the broad dictionary definition of this word. ⁵ The City also points to Public Utilities Code section 230.5 and the Salinas City Code, which describe storm drains as a type of sewer. ⁶

5 Webster's Third New International Dictionary, for example, defines "sewer" as "1: a ditch or surface drain 2: an artificial usu. subterranean conduit to carry off water and waste matter (as surface water from rainfall, household waste from sinks or baths, or waste water from industrial works)." (Webster's 3d New Internat. Dict. (1993) p. 2081.) The American Heritage Dictionary also denotes the function of "carrying off sewage or rainwater." (American Heritage College Dict. (3d ed. 1997) p. 1248.) On the other hand, the Random House Dictionary of the English Language (2d ed. 1987) page 1754, does not mention storm or rainwater in defining "sewer" as "an artificial conduit, usually underground, for carrying off waste water and refuse, as in a town or city."

[***11]

6 Public Utilities Code section 230.5 defines "Sewer system" to encompass all property connected with "sewage collection, treatment, or disposition for sanitary or drainage purposes, including . . . all drains, conduits, and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters." Salinas City Code section 36-2, subdivision (31) defines "storm drain" as "a sewer which carries storm and surface waters and drainage, but which excludes sewage and industrial wastes other than runoff water."

Plaintiffs "do not disagree that storm water is carried off in storm sewers," but they argue that we must look beyond mere definitions of "sewer" to examine the legal meaning in context. Plaintiffs note that the storm water management system here is distinct from the sanitary sewer system and the industrial waste management system. Plaintiffs' position echoes that of the [*1357] Attorney General, who observed that several California [***12] statutes differentiate between management of storm drainage and sewerage systems. ⁷ (81 Ops.Cal.Atty.Gen. 104, 106 (1998).) Relying extensively on the Attorney General's opinion, plaintiffs urge application of a different rule of construction than the plain-meaning rule; they invoke the maxim that "if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted." (*In re Marquis D.* (1995) 38 Cal. App. 4th 1813, 1827 [46 Cal. Rptr. 2d 198].) Thus, while section 5, which addresses assessment procedures, refers to exceptions specifically [**233] for "*sewers, water, flood control, [and] drainage systems*" (italics added), the exceptions listed in section 6(c) pertain only to "sewer, water, and refuse collection services." Consequently, in plaintiffs' view, the voters must have intended to exclude drainage systems from the list of exceptions to the voter-approval requirement.

⁷ For example, Government Code section 63010 specifies "storm sewers" in delimiting the scope of " '[d]rainage,'" while separately identifying the facilities and equipment used for " '[s]ewage collection and treatment.'" (Gov. Code, § 63010, subd. (q)(3), (10).) Government Code section

53750, part of the Proposition 218 Omnibus Implementation Act, explains that for purposes of articles XIII C and article XIII D " '[d]rainage system' " means "any system of public improvements that is intended to provide for erosion control, landslide abatement, or for other types of water drainage." Health and Safety Code section 5471 sets forth government power to collect fees for "services and facilities . . . in connection with its water, sanitation, storm drainage, or sewerage system."

[***13] The statutory construction principles invoked by both parties do not assist us. The maxim proffered by plaintiffs, "although useful at times, is no more than a rule of reasonable inference" and cannot control over the lawmakers' intent. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal. 4th 342, 350 [45 Cal. Rptr. 2d 279, 902 P.2d 297]; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal. 4th 985, 991 [73 Cal. Rptr. 2d 682, 953 P.2d 858].) On the other hand, invoking the plain-meaning rule only begs the question of whether the term "sewer services" was intended to encompass the more specific sewerage with which most voters would be expected to be familiar, or all types of systems that use sewers, including storm drainage and industrial waste. The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

We conclude that the term "sewer services" is ambiguous in the context of both section 6(c) and Proposition 218 as a whole. We must keep in mind, however, the voters' [***14] intent that the constitutional provision be construed liberally to curb the rise in "excessive" taxes, assessments, and fees exacted [*1358] by local governments without taxpayer consent. (Prop. 218, §§ 2, 5; reprinted at Historical Notes, *supra*, p. 38.) Accordingly, we are compelled to resort to the principle that exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage. ⁸ (Cf. *Estate of Banerjee* (1978) 21 Cal. 3d 527, 540 [147 Cal. Rptr. 157, 580 P.2d 657]; *City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16 Cal. App. 4th 1005 [20 Cal. Rptr. 2d 658].)

⁸ Sanitary sewerage carries "putrescible waste"

from residences and businesses and discharges it into the sanitary sewer line for treatment by the Monterey Regional Water Pollution Control Agency. (Salinas City Code, § 36-2, subd. (26).)

The City itself treats storm drainage differently [***15] from its other sewer systems. The stated purpose of ordinance No. 2350 was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of "non-storm water" into the storm drainage system, which channels storm water into state waterways. According to John Fair, the public works director, the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water.⁹ The Salinas City Code contains requirements [**234] addressed specifically to the management of storm water runoff.¹⁰ (See, e.g., Salinas City Code, §§ 31-802.2, 29-15.)

9 Resolution No. 17019 defined "Storm Drainage Facilities" as "the storm and surface water sewer drainage systems comprised [*sic*] of storm water control facilities and any other natural features [that] store, control, treat and/or convey surface and storm water. The Storm Drainage Facilities shall include all natural and man-made elements used to convey storm water from the first point of impact with the surface of the earth to a suitable receiving body of water or location internal or external to the boundaries of the City. . . ." The "storm drainage system" was defined to include pipes, culverts, streets and gutters, "storm water sewers," ditches, streams, and ponds. (See also Salinas City Code, former § 29-3, subd. (l) [defining "storm drainage system"].)

[***16]

10 Storm water under ordinance No. 2350 includes "stormwater runoff, snowmelt runoff, and surface runoff and drainage." (Salinas City Code, former § 29-3, subd. (dd).)

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

We conclude that article XIII D required the City to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of [*1359] the affected area. The trial court therefore [***17] erred in ruling that ordinance Nos. 2350 and 2351 and Resolution No. 17019 were valid exercises of authority by the city council.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to plaintiffs.

Premo, Acting P. J., and Mihara, J., concurred.

A petition for a rehearing was denied July 2, 2002, and respondents' petition for review by the Supreme Court was denied August 28, 2002.

VOLUME III
TAB 12

LEXSEE

CITY OF RANCHO CUCAMONGA, Plaintiff and Appellant, v. REGIONAL WATER QUALITY CONTROL BOARD-SANTA ANA REGION et al., Defendants and Respondents; COUNTY OF SAN BERNARDINO et al., Real Parties in Interest and Respondents.

E037079

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,
DIVISION TWO**

135 Cal. App. 4th 1377; 38 Cal. Rptr. 3d 450; 2006 Cal. App. LEXIS 86; 2006 Cal. Daily Op. Service 845; 2006 Daily Journal DAR 1126; 36 ELR 20026

January 26, 2006, Filed

NOTICE:

As modified Feb. 27, 2006.

SUBSEQUENT HISTORY: Modified by City of Rancho Cucamonga v. Reg'l Water Quality, 2006 Cal. App. LEXIS 246 (Cal. App. 4th Dist., Feb. 27, 2006)

PRIOR HISTORY: [***1] APPEAL from the Superior Court of San Bernardino County, No. RCV 071613, Shahla Sabet, Judge.

COUNSEL: James L. Markman; Richards, Watson & Gershon, John J. Harris and Evan J. McGinley for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Mary E. Hackenbracht, Assistant Attorney General, Richard Magasin and Jennifer F. Novak, Deputy Attorneys General, for Defendants and Respondents.

JUDGES: Gaut J., with Hollenhorst, Acting P. J. and Richli J., concurring.

OPINION BY: GAUT

OPINION

[**452] **GAUT, J.--**

1. Introduction

This case involves environmental regulation of municipal storm sewers that carry excess water runoff to the Santa Ana River as it passes through San Bernardino County on its way to the Pacific Ocean. Federal and state laws impose regulatory controls on storm sewer discharges. Municipalities are required to obtain and comply with a federal regulatory permit limiting the quantity and quality of water runoff that can be discharged from these storm sewer systems.

In this instance, the Regional Water Quality Control Board for the Santa Ana Region (the Regional Board) conducted public hearings and then issued a comprehensive 66-page [***2] municipal storm sewer permit governing 18 local [*1380] public entities. Two permittees, the City of Rancho Cucamonga and the City of Upland, among others, filed an administrative appeal with the State Water Resources Control Board (the State Board.) The State Board summarily dismissed the appeal. The Cities of Rancho Cucamonga and Upland¹ then filed a petition for writ of mandate and complaint against the State Board and the Regional Board.

1 Upland is not a party to this appeal.

The trial court sustained without leave to amend the demurrer of the State Board to the entire action. It sustained the demurrer as to four causes of action and granted the motion to strike of the Regional Board. After a hearing, the trial court denied the petition for writ of mandate.

Both procedurally and substantively, the City of Rancho Cucamonga challenges the conditions imposed by the NPDES² permit and waste discharge requirements (the 2002 permit). It contends the procedure by which the 2002 permit was adopted was not legal, that [***3] the 2002 permit's conditions are not appropriate for the area, and that the permit's requirements are too expensive. Because we conclude the permit was properly adopted and its conditions and requirements are appropriate, we reject these contentions.

2 The National Pollutant Discharge Elimination System.

2. The National Pollutant Discharge Elimination System

California cases have repeatedly explained the complicated web of federal and state laws and regulations concerning water pollution, especially storm sewer discharge into the public waterways. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619-621 [26 Cal. Rptr. 3d 304, 108 P.3d 862] (*Burbank*); *Building Industry Assn. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872-875 [22 Cal. Rptr. 3d 128] (*Building Industry*); *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092-1094 [1 Cal. Rptr. 3d 76] (*Communities*); *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1451-1453 [**453] [126 Cal. Rptr. 2d 389]).

[***4] For purposes of this case, the important point is described by the California Supreme Court in *Burbank*: "Part of the Federal Clean Water Act [33 U.S.C. § 1251 et seq.] is the National Pollutant Discharge Elimination System (NPDES), [t]he primary means' for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma* [(1992) 503 U.S. [*1381] 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046]). The NPDES sets out the conditions under which the federal [Environmental Protection Agency] or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)" (*Burbank, supra*, 35 Cal.4th at p. 621.)

California's Porter-Cologne Act (Wat. Code, § 13000 et seq.) establishes a statewide program for water quality control. Nine regional boards, overseen by the State Board, administer the program in their respective regions. (Wat. Code, §§ 13140, [***5] 13200 et seq., 13240, and 13301.) Water Code sections 13374 and 13377 authorize the Regional Board to issue federal NPDES permits for five-year periods. (33 U.S.C. § 1342, subd.(b)(1)(B).)

As discussed more fully in part 6 *post*, the state-issued NPDES permits are subject to the informal hearing procedures set forth for administrative adjudications. (Gov. Code, § 11445.10 et seq.; Cal. Code Regs., tit. 23, § 647 et seq.) The issuance of permits is specifically excluded from the procedures for administrative regulations and rulemaking. (Gov. Code, §§ 11340 et seq., 11352.)

3. Factual and Procedural Background

The Regional Board issued the first NPDES permit for San Bernardino County in 1990. The principal permittee was the San Bernardino Flood Control District (the District). The 1990 permit required the permittees to develop and implement pollution control measures, using "best management practices" and monitoring programs, to eliminate illegal discharges [***6] and connections, and to obtain any necessary legal authority to do so. The management programs could be existing or new.

In 1993, the District developed the NPDES drain area management program (DAMP).

The second NPDES permit was issued in 1996 and was based on the report of waste discharge (ROWD) prepared by the principal permittee and copermittees, including Rancho Cucamonga. The 1996 permit proposed extending the existing program, which included inspections of industrial and commercial sources; policies for development and redevelopment; better public education; and implementation of a monitoring program. It offered a commitment to reduce pollutants to the "maximum extent practicable."

In 2000, the permittees submitted another ROWD to renew their NPDES permit. The 2000 ROWD proposed continuing to implement and develop water quality management and monitoring programs.

[*1382] Based on the 2000 ROWD, the Regional Board staff created five successive drafts of the 2002

permit, incorporating written comments by Rancho Cucamonga and others and comments made during two public workshops. Some of the comments addressed the economic considerations of anticipated prohibitive compliance costs.

[***7] The notice of the public hearing to consider adoption of the 2002 permit hearing [**454] announced: "relevant Regional Board files are incorporated into the record;" the governing procedures were those for an informal hearing procedure as set forth in "Title 23, California Code of Regulations, Section 647 et seq.;" and "Hearings before the Regional Water Board are not conducted pursuant to Government Code section 11500 et seq.," the alternative formal hearing procedure for administrative adjudication. The notice was mailed to all permittees. The accompanying "fact sheet," which was publicly circulated, offered further information about the conduct and nature of the hearing and the legal and factual grounds for the Regional Board's recommendation to adopt the 2002 permit.

The informal public hearing was conducted on April 26, 2002. Neither Rancho Cucamonga nor any of the permittees objected to the form or substance of the hearing. Ultimately, after a staff presentation and testimony, including a statement from Rancho Cucamonga's counsel, the Regional Board adopted the 2002 permit. After the State Board dismissed their administrative appeal, [***8] Rancho Cucamonga and Upland filed the instant action.

The operative pleading is the second amended petition for writ of mandate and complaint. The petition alleges that the State Board and the Regional Board acted illegally and in excess of their jurisdiction in developing, adopting and implementing the 2002 permit. Based on 26 pages of general allegations, the petition asserts eight causes of action, alleging the State Board and the Regional Board violated sections 13241, 13263, and 13360 of the Water Code (the Porter-Cologne Act); the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.); the California Administrative Procedure Act (Gov. Code, §§ 11340-11529); the California Constitution; and the federal Clean Water Act; and seeking declaratory and injunctive relief.

The State Board successfully opposed the action on demurrer. The Regional Board eliminated four causes of action, the fourth, fifth, seventh, and eighth by demurrer and motion to strike. On the remaining four causes of

action, the trial court found in favor of the Regional Board.

[*1383] 4. State Board's Demurrer

Rancho Cucamonga maintains the [***9] trial court should not have sustained the demurrer of the State Board without leave to amend because the State Board is the ultimate authority on state-issued NPDES permits, and, therefore, was properly joined as a party: "Because the State Board has for all intents and purposes adopted the rules and policies of general application upon which the Permit is based, it is clearly a proper party to this action."

The difficulty with Rancho Cucamonga's theory of liability against the State Board is, to quote Gertrude Stein about the City of Oakland, "There is no there there." (Stein, *Everybody's Autobiography* (1937).) In other words, Rancho Cucamonga's allegations against the State Board lack any substance. Instead, Rancho Cucamonga launches an unspecific attack on the State Board without identifying any particular problems. The petition makes the unexceptional allegation that the State Board formulates general water control policy which it implements and enforces through regional boards. It also alleges the State Board has not complied with the Administrative Procedure Act but it does not identify any objectionable policies or how there is no compliance. Instead the petition complains [***10] about a State Board letter directing that all NPDES permits follow consistent principles regarding standard urban storm water mitigation plans. [**455] Additionally, the petition maintains the 2002 permit included new reporting requirements and increased costs of compliance.

But the foregoing allegations did not articulate any improper State Board conduct. The 2002 permit, issued by the Regional Board and not by the State Board, is not subject to formal rulemaking procedures. (Gov. Code, § 11352, subd. (b).) The State Board's letter, explaining a precedential decision concerning mitigation plans, is not an example of formal rulemaking. (Gov. Code, § 11425.60, subd. (b).) By dismissing Rancho Cucamonga's administrative appeal concerning the 2002 permit, the State Board declined to become involved and the Regional Board's decision to issue the permit became final and subject to judicial review. (*People ex rel Cal. Regional Wat. Quality Control Bd. v. Barry* (1987) 194 Cal.App.3d 158, 177 [239 Cal. Rptr. 349].) But the State Board was not made a proper party by reason of its

dismissal of the administrative appeal.

[***11] Furthermore, even if Rancho Cucamonga had identified any cognizable claim against the State Board, it would have been barred by the 30-day statute of limitations for challenging an improperly adopted State Board regulation or order. (Wat. Code, § 13330; Gov. Code, § 11350.)

[*1384] We hold the trial court properly sustained without leave to amend the State Board's demurrer to the second amended petition for writ of mandate and complaint.

5. Standard of Review for Petition for Writ of Mandate

In deciding a petition for writ of mandate, the trial court exercises its independent judgment. (Code Civ. Proc., § 1094.5, subd. (c); Wat. Code, § 13330, subd. (d); *Building Industry, supra*, 124 Cal.App.4th at p. 879.) But, "[i]n exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings [¶] ... [¶] ... Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817-818 [85 Cal. Rptr. 2d 696, 977 P.2d 693] (*Fukuda*).)

[***12] On appeal, the reviewing court determines whether substantial evidence supports the trial court's factual determinations. (*Fukuda, supra*, 20 Cal.4th at p. 824; *Building Industry, supra*, 124 Cal.App.4th at p. 879.) The trial court's legal determinations receive a de novo review with consideration being given to the agency's interpretations of its own statutes and regulations. (*Building Industry, supra*, at p. 879; *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482 [22 Cal. Rptr. 3d 772].)

6. Rancho Cucamonga's Objections to the Administrative Record and Lack of Notice

The notice of the administrative hearing for adoption of the 2002 permit included the statement that the Regional Board's files would be incorporated as part of the record. Before trial on the writ petition, Rancho Cucamonga attempted to raise an omnibus objection to the entire administrative record and a specific objection to four documents, three studies about marine pollution

and one economic study. The trial court ruled the objections had been waived by not making them before or at the time of the hearing. Applying the presumption of administrative [***13] regularity, we affirm the trial court's evidentiary ruling. (*Mason v. Office of Admin. [**456] Hearings* (2001) 89 Cal.App.4th 1119, 1131 [108 Cal. Rptr. 2d 102].)

The reasons given by Rancho Cucamonga as to why the trial court should have sustained its objections to all or part of the administrative record are that it did not waive its objections to the record because Rancho Cucamonga did not know the hearing was adjudicative; the Regional Board did not provide [*1385] notice of an informal hearing (Gov. Code, § 11445.30); and Rancho Cucamonga never had an opportunity to object to the administrative record.

(1) As noted previously, Government Code section 11352, subdivision (b), makes the issuance of an NPDES permit exempt from the rulemaking procedures of the Administrative Procedure Act. Permit issuance is a quasi-judicial, not a quasi-legislative, rulemaking proceeding: "The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function." (*Sommerfield v. Helmick* (1997) 57 Cal.App.4th 315, 320 [67 Cal. Rptr. 2d 51]; see *City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718 [279 Cal. Rptr. 22].)

[***14] Instead, the Regional Board correctly followed the administrative adjudication procedures (Gov. Code, § 11445.10 et seq.) and the companion regulations at California Code of Regulations, title 23, sections 647-648.8 for informal adjudicative public hearings. These procedures were announced in the notice of hearing which also stated that Government Code section 11500 et seq., governing formal administrative adjudication hearings, would not apply, thus satisfying Government Code section 11445.30 requiring notice of an informal hearing procedure. At the time of the hearing, Rancho Cucamonga did not object to the informal procedure. Rancho Cucamonga's effort to argue that federal notice requirements (40 C.F.R. § 124.8, subd. (b)(6)(ii) (2005)) should also have been followed fails because this involved a state-issued NPDES permit adopted according to California procedures.

Because Rancho Cucamonga was given notice that the hearing on the permit would proceed as an informal administrative adjudication, it cannot successfully argue

it was relieved of the obligation to object to the administrative record [***15] at the time of the hearing. An informal administrative adjudication contemplates liberality in the introduction of evidence. (23 Cal. Code Regs., tit. 23, §§ 648, subd. (d), 648.5.1.) If Rancho Cucamonga wished to object to the informal hearing procedures, including the liberal introduction of evidence, it should have raised its objections as provided by statute and regulation before or at the time of the hearing (Gov. Code, §§ 11445.30, 11445.40, 11445.50; 23 Cal. Code Regs., tit. 23, § 648.7), not a year later in the subsequent civil proceeding.

7. Economic Considerations for Issuance of NPDES Permit

Rancho Cucamonga's next assignment of error is that the Regional Board failed to consider the economic impact of the requirements of the 2002 permit by not conducting a cost-benefit analysis. Rancho Cucamonga relies on the California Supreme Court's *Burbank* opinion, in which the court held: "When ... a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit *more stringent* than federal [***16] law [*1386] requires, California law allows the board to take into account economic factors, including the wastewater discharger's cost of compliance." (*Burbank, supra*, 35 Cal.4th at p. 618.) Rancho Cucamonga contends that the 2002 permit exceeds federal requirements and that, therefore, this case should be remanded for a consideration of [**457] economic factors. (See *ibid.*; Wat. Code, § 13241, subd. (d).)

The two problems with this argument are the trial court found there was no evidence that the 2002 permit exceeded federal requirements and Rancho Cucamonga does not explain how it does so. There was also evidence that the 2002 permit was based on a fiscal analysis and a cost-benefit analysis. In the absence of the foundational predicate and in view of evidence that cost was considered, Rancho Cucamonga's contention on this point fails.

(2) We also reject Rancho Cucamonga's related procedural argument that the Regional Board's motion to strike was impermissible as piecemeal adjudication. (*Regan Roofing v. Superior Court* (1994) 24 Cal.App.4th 425, 432-436; *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1851-1855 [16 Cal. Rptr. 2d 458].) [***17] It is well recognized a court may strike all

or part of a pleading as it did in this instance. (Code Civ. Proc., §§ 431.10, 436; *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683 [40 Cal. Rptr. 2d 169].)

8. Substantial Evidence

Rancho Cucamonga also challenges the trial court's independent factual determination that sufficient evidence supports the findings of the Regional Board. Rancho Cucamonga's main contention is that the 2002 permit was not distinctively crafted for San Bernardino County but, instead, copied a similar permit for other counties without identifying any particular water quality impairment in San Bernardino County caused by the permittees. In other words, no evidence in the record supports issuance of the 2002 permit and the trial court did not identify any such evidence in its statement of decision.

(3) One problem with Rancho Cucamonga's foregoing argument is that the Clean Water Act requires an NPDES permit to be issued for *any* storm sewer discharge, whether there is any actual impairment in a particular region. (33 U.S.C. § 1342; *Communities, supra*, 109 Cal.App.4th at pp. 1092-1093.) [***18] Therefore, Rancho Cucamonga's contention that the permit fails to identify impaired water bodies in the region is beside the point.

In its statement of decision, the trial court discussed the inadequacy of the arguments and evidence cited by Rancho Cucamonga and concluded: "The San Bernardino Permit is based in part on the Basin Plan for this region. It is [*1387] also based on the permittees' own reports and monitoring within this region It incorporates the permittees' management program, which is unique to these cities and county." The trial court included a citation to the 1993 DAMP report's "Geographic Description of the Drainage Area," which discusses the specific conditions present in San Bernardino County.

On appeal, Rancho Cucamonga faults the trial court for not presenting a more detailed description of the evidence supporting the issuance of the permit. We do not think the trial court, or this court, must bear that burden.

(4) First, "[a]n agency may ... rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence.

(*Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d 525, 535-536 [127 Cal. Rptr. 775].)" [***19] (*Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 866 [226 Cal. Rptr. 575].) Here the Regional Board adopted the recommendation of its staff in issuing the permit. And, as the record shows, the staff's recommendation was based on the previous 1990 and 1996 permits, the 1993 DAMP [**458] report and the 2000 ROWD, the permittees' application for renewal of the 1996 permit, as well as more general water quality factors. The evidence contradicts Rancho Cucamonga's assertion, that "the Regional Board simply copied verbatim the NPDES Permit for North Orange County, a coastal region with markedly different water quality conditions and problems."

As part of the trial court's consideration of the petition for writ of mandate, Rancho Cucamonga and the Regional Board directed the court to review specific items of evidence contained in the administrative record. In its opposing brief, the Regional Board offered a detailed account of the evidence supporting the issuance of the permit. The trial court indicated it had reviewed the parties' submissions before ruling. It discussed the evidence at the hearing on the petition and referred to it in its statement of decision. [***20] (*Lala v. Maiorana* (1959) 166 Cal.App.2d 724, 731 [333 P.2d 862].) Rancho Cucamonga had the burden of showing the Board abused its discretion or its findings were not supported by the facts. (*Building Industry, supra*, 124 Cal.App.4th at pp. 887-888.) To the extent it attempted to do so at the trial court level, it was not successful.

This court has independently reviewed the record with particular attention to the evidence as emphasized by the parties. We do not, however, find it incumbent upon us or the trial court to review the many thousands of pages submitted on appeal and identify the particular evidence that constitutes substantial evidence. Instead, we deem the trial court's findings sufficient and not affording any grounds for reversal. (*Building Industry, supra*, 124 Cal.App.4th at p. 888; see *Weisz Trucking Co., Inc. v. Emil R. Wohl* [*1388] *Construction* (1970) 13 Cal.App.3d 256, 264 [91 Cal. Rptr. 489], citing *Perry v. Jacobsen* (1960) 184 Cal.App.2d 43, 50 [7 Cal. Rptr. 177].)

9. Safe Harbor Provision

As it did repeatedly below, Rancho Cucamonga

maintains the 2002 permit violates section 402(k) of the Clean [***21] Water Act (33 U.S.C. § 1342(k)), because the permit does not include "safe harbor" language, providing that, if a permittee is in full compliance with the terms and conditions of its permit, it cannot be found in violation of the Clean Water Act. (*U.S. Public Interest v. Atlantic Salmon* (1st Cir. 2003) 339 F.3d 23, 26; *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 205 [48 L.Ed.2d 578, 96 S.Ct. 2022].) The trial court found there was no statutory right to a "safe harbor" provision to be included as the term of the permit. We agree.

This seems like much ado about nothing because 33 United States Code section 1342 (k), already affords Rancho Cucamonga the protection it seeks: "Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health." Rancho Cucamonga does not cite any persuasive authority as to why this statutory protection had to [***22] be duplicated as a provision in the 2002 permit.

Furthermore, the 2002 permit complied with the State Board's water quality order No. 99-05, a precedential decision requiring NPDES permits to omit "safe harbor" language used in earlier permits. A permit without "safe harbor" language was upheld in *Building Industry, supra*, 124 [**459] Cal.App.4th at page 877. The trial court did not err.

10. Maximum Extent Practicable

Rancho Cucamonga protests that the 2002 permit's discharge limitations/prohibitions exceed the federal requirement that storm water dischargers should "reduce the discharge of pollutants to the maximum extent practicable." (33 U.S.C. § 1342(p)(3)(B)(iii).) The trial court, however, found there was no evidence presented that the 2002 permit exceeded federal requirements. Because there is no evidence, the issue presented is hypothetical and, therefore, premature. (*Building Industry, supra*, 124 Cal.App.4th at p. 890.)

Additionally, as Rancho Cucamonga recognizes, *Building Industry* rejected the contention that a "regulatory permit violates federal law because it allows the Water Boards to impose municipal [***23] storm

sewer control measures more [*1389] stringent than a federal standard known as 'maximum extent practicable.' [Citation.] [Fn. omitted.] ... [W]e ... conclude the Water Boards had the authority to include a permit provision requiring compliance with state water quality standards." (*Building Industry, supra*, 124 Cal.App.4th at p. 871.) The *Burbank* case, allowing for consideration of economic factors when federal standards are exceeded, does not alter the analysis in this case where there was no showing that federal standards were exceeded and where there was evidence that economic factors were considered. Furthermore, like the permit in *Building Industries*, the 2002 permit contemplates controlling discharge of pollutants to the maximum extent practicable through a "cooperative iterative process where the Regional Water Board and Municipality work together to identify violations of water quality standards." (*Building Industry, supra*, at p. 890.) The 2002 permit does not exceed the maximum extent practicable standard.

11. The Requirements of the 2002 Permit

Rancho Cucamonga lastly complains the requirements of the 2002 permit are "overly prescriptive," [***24] illegally dictating the manner of compliance and improperly delegating to the permittees the inspection duties of the State Board and the Regional Board. Rancho Cucamonga's arguments contradict the meaning and spirit of the Clean Water Act.

(5) In creating a permit system for dischargers from municipal storm sewers, Congress intended to implement actual programs. (*National Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977) 186 U.S. App.D.C. 147 [568 F.2d 1369, 1375].) The Clean Water Act authorizes the imposition of permit conditions, including: "management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (33 U.S.C. § 1342(p)(3)(B)(iii).) The act authorizes states to issue permits with conditions necessary to carry out its provisions. (33 U.S.C. § 1342(a)(1).) The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants. (*National Resources Defense Council v. U.S. EPA* (1992) 966 F.2d 1292, 1308.) [***25] That is what the Regional Board has created in the 2002 permit.

Rancho Cucamonga's reliance on Water Code section 13360 is misplaced because that code section involves enforcement and implementation of state water quality law, (Wat. Code, § 13300 et seq.) not compliance with the Clean Water Act (Wat. Code, § 13370 et seq.) The federal law [**460] preempts the state law. (*Burbank, supra*, 35 Cal.4th at p. 618.) The Regional Board must comply with federal law requiring detailed conditions for NPDES permits.

[*1390] Furthermore, the 2002 permit does afford the permittees discretion in the manner of compliance. It is the permittees who design programs for compliance, implementing best management practices selected by the permittees in the DAMP report and approved by the Regional Board. Throughout the permit, the permittees are granted considerable autonomy and responsibility in maintaining and enforcing the appropriate legal authority; inspecting and maintaining their storm drain systems according to criteria they develop; establishing the priorities for their own inspection requirements; and establishing programs [***26] for new development. The development and implementation of programs to control the discharge of pollutants is left largely to the permittees.

More particularly, we agree with the Regional Board that the permit properly allocated some inspection duties to the permittees. As part of their ROWD application for a permit, the permittees proposed to "Conduct Inspection, Surveillance, and Monitoring. Carry out all inspections, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal storm drain system." The ROWD also discussed continuing existing inspection programs.

(6) Water Code section 13383 provides that as part of compliance with the Clean Water Act, the Regional Board may establish inspection requirements for any pollutant discharger. Federal law, either expressly or by implication, requires NPDES permittees to perform inspections for illicit discharge prevention and detection; landfills and other waste facilities; industrial facilities; construction sites; certifications of no discharge; nonstormwater discharges; permit compliance; and local [***27] ordinance compliance. (40 C.F.R. 122.26(d), (g) (2005); 33 U.S.C. § 1342(p)(3)(B)(ii).) Permittees must report annually on their inspection activities. (40 C.F.R. § 122.42(c)(6) (2005).)

Rancho Cucamonga claims it is being required to conduct inspections for facilities covered by other state-issued general permits. Rancho Cucamonga and the other permittees are responsible for inspecting construction and industrial sites and commercial facilities within their jurisdiction for compliance with and enforcement of local municipal ordinances and permits. But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits. The Regional Board may conduct its own inspections but permittees must still enforce their own laws at these sites. (40 C.F.R. § 122.26(d)(2) (2005).)

[*1391] 12. Disposition

Rancho Cucamonga is the only of the original 18 permittees still objecting to the 2002 NPDES permit. It has not successfully demonstrated that substantial evidence does not support the trial court's factual determinations or the [***28] trial court erred in its interpretation and application of state and federal law.

We affirm the judgment and order the prevailing parties to recover their costs on appeal.

Hollenhorst, Acting P. J., and Richli, J., concurred.

On February 27, 2006, the opinion was modified to read as printed above.

VOLUME III
TAB 13

LEXSEE

In the Matter of Natural Resources Defense Council, Inc., et al., Appellants, v New York State Department of Environmental Conservation, Respondent.

No. 48

COURT OF APPEALS OF NEW YORK

25 N.Y.3d 373; 34 N.E.3d 782; 13 N.Y.S.3d 272; 2015 N.Y. LEXIS 934; 2015 NY Slip Op 03766

May 5, 2015, Decided

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

PRIOR HISTORY: Matter of Natural Resources Defense Council, Inc. v. New York State Dept. of Env'tl. Conservation, 120 A.D.3d 1235, 994 N.Y.S.2d 125, 2014 N.Y. App. Div. LEXIS 6035, 2014 NY Slip Op 6090 (N.Y. App. Div. 2d Dep't, 2014)

DISPOSITION: Order, insofar as appealed from, affirmed, with costs.

COUNSEL: Lawrence M. Levine, for appellants.

Barbara Underwood, for respondent.

Nadia B. Ahmad et al.; Citizens Campaign for the Environment; East of Hudson Coalition; City of New York et al., amici curiae.

JUDGES: READ, J. RIVERA, J.(dissenting in part). Opinion by Judge Read. Judges Pigott, Abdus-Salaam and Stein concur. Judge Rivera dissents in part in an opinion in which Chief Judge Lippman and Judge Fahey concur.

OPINION BY: READ

OPINION

[**273] [*378] [**783] READ, J.:

Runoff from rain and snow melt courses over roofs, roads, driveways and other surfaces, picking up pollutants along the way. It then passes through municipal storm sewer systems into rivers and lakes, adding the pollutants accumulated during its journey to those bodies of water. These municipal storm sewer [*379] systems thus differ from other entities that discharge effluents into our State's surface waters (for example, industrial or commercial facilities and sewage treatment plants) in three major ways: precipitation is naturally occurring, intermittent and variable and cannot be stopped; although municipalities operate sewer systems, stormwater contamination results from the often unforeseen or unpredictable choices of individual residents and businesses (for example, to let litter pile up or to use certain lawn fertilizers), as well as decisions made long ago about the design of roads, parking lots and buildings; and because stormwater runoff flows into surface waters through tens of thousands of individual outfalls, each locality's contribution to the pollution of a particular river or lake is difficult to ascertain or allocate through numeric limitations.

Federal and state law prohibit discharges of stormwater from New York's municipal separate storm sewer systems in urbanized areas (referred to as MS4s) without authorization under a State Pollutant Discharge Elimination System (SPDES) permit. As an alternative to an individual SPDES permit, municipal separate storm sewer systems that serve a population under 100,000 (or small MS4s) may seek to discharge stormwater under a

SPDES general permit. The 2010 General Permit -- the subject of this lawsuit -- requires these municipal systems to develop, document and implement a Stormwater Management Program (SWMP) in compliance with detailed specifications developed by the New York State Department of Environmental Conservation (DEC or the Department) to limit the introduction of pollutants into stormwater to the maximum extent practicable. To obtain initial coverage (i.e., authorization to discharge) under the terms of the 2010 General Permit, small MS4s must first submit a complete and accurate notice of intention (NOI) to DEC.

After the 2010 General Permit took effect on May 1st of that year,¹ the Natural [***274] [**784] Resources Defense Council, Inc. (NRDC) and seven other environmental advocacy groups (collectively, [*380] NRDC) brought this hybrid CPLR article 78 proceeding/declaratory judgment action against DEC to challenge certain aspects of the 2010 General Permit. NRDC claims generally that by allowing small MS4s to gain coverage under the 2010 General Permit based upon an NOI reviewed only for completeness and not subject to an opportunity for a public hearing, DEC has created an "impermissible self-regulatory system" that fails to force local governments to reduce the discharge of pollutants to the maximum extent practicable -- the statutory standard -- and violates federal and state law². Equating NOIs with applications for individual SPDES permits, Supreme Court granted partial relief to NRDC (35 Misc 3d 652, 940 N.Y.S.2d 437 [Sup Ct Westchester County 2012]). The Appellate Division, as relevant here, rejected NRDC's federal and state law challenges to the 2010 General Permit (120 AD3d 1235, 994 N.Y.S.2d 125 [2d Dept 2014]). We granted NRDC leave to appeal (23 NY3d 901, 987 N.Y.S.2d 1, 10 N.E.3d 189 [2014]), and now affirm.

1 DEC issued the first General Permit in 2003 for a five-year period, and in 2008 issued a revised two-year General Permit, which expired on April 30, 2010. The five-year 2010 General Permit expired on April 30, 2015. A substantively identical new two-year General Permit took effect on May 1, 2015 and expires on April 30, 2017. Almost all the 500 plus small MS4s authorized to discharge stormwater under the challenged 2010 General Permit were initially covered by the 2008 (or, before that, the 2003) General Permit. The 2010 General Permit authorized them to discharge

stormwater on an interim basis for up to 180 days after May 1, 2010. These small MS4s gained coverage under the 2010 General Permit by submission of their Annual Reports (discussed later in more detail) due in June 2010; they were not required to and did not submit NOIs.

2 As previously observed (*see* n 1, *supra*), virtually all the small MS4s in the State achieved coverage under the 2010 General Permit by virtue of NOIs that they submitted to DEC for initial coverage under the 2003 or 2008 General Permits, and their 2009 Annual Reports. As a result, the practical effect of a ruling in favor of NRDC is not self-evident, and threatens to create considerable confusion; i.e., would these small MS4s be required to resubmit an NOI, or would they be grandfathered? (*see* 6 NYCRR 750-1.21 [d] [3]).

I.

Background

The NPDES and SPDES Programs

The Federal Water Pollution Control Act Amendments of 1972 (Pub L No 92-500, 86 Stat 816-904 [codified as amended at 33 USC §§ 1251-1388 [2014]], popularly known as the Clean Water Act, ushered in the modern era of water pollution control whereby discharges of pollutants from "point sources" (i.e., "any discernible and confined discrete conveyance" [33 USC § 1362 (14)]) into the waters of the United States are prohibited except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued by the Administrator of the United States Environmental Protection Agency (EPA or the Agency). "Generally speaking," the statute envisaged [*381] site-specific individual NPDES permits that "place[d] limits on the type and quantity of pollutants that can be released into the Nation's waters" (*South Florida Water Mgmt. Dist. v Miccosukee Tribe of Indians*, 541 U.S. 95, 102, 124 S. Ct. 1537, 158 L. Ed. 2d 264 [2004]).

Although the federal government plays the dominant role in water pollution control under the Clean Water Act, states may continue their own water pollution control regulations as long as they are at least as stringent as federal law demands (33 USC § 1370). And importantly, states are allowed to administer the NPDES permit program for discharges into navigable waters within their

borders, subject to the Administrator's approval (33 USC § 1342 [b]). To attain this approval, a [***275] [**785] state must demonstrate that its permit program meets the requirements of the Clean Water Act and that the state possesses adequate legal authority to implement it (*id.*). In 1973, the Legislature amended the Environmental Conservation Law to create SPDES, New York's version of NPDES (*see* L 1973, ch 801 [adding a new title 8 to article 17 of the Environmental Conservation Law and amending other provisions of article 17 to bring them into conformity with new title 8]). EPA approved New York's SPDES program, which is administered by DEC, in 1975.

EPA's Stormwater Exemption

In its 1973 regulations implementing the NPDES program, EPA excluded discharges from a number of classes of point sources from the permit requirement, including separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity (*see* 38 Fed Reg 18000 [July 5, 1973] [40 CFR former 124.11 (f)]). EPA justified the exclusion as necessary to conserve its regulatory resources for more significant polluters. The United States Circuit Court for the District of Columbia ruled that the Clean Water Act did not give EPA this option, but interpreted the statute to grant the Agency considerable leeway in setting permit terms (*see Natural Res. Def. Council v Costle*, 568 F2d 1369, 1377, 186 U.S. App. D.C. 147 [DC Cir 1977]). Noting its "sensitiv[ity] to EPA's concerns of an intolerable permit load," the D.C. Circuit suggested that area or general permits would be a permissible and "well-established" device for coping with the avalanche of NPDES permit applications anticipated in the wake of its decision (*id.* at 1380-1381; *see also Natural Res. Def. Council v Train*, 396 F Supp 1393, 1402 [DDC 1975] [EPA has "substantial discretion to use administrative devices, such [*382] as area permits," to make its burden of permit issuance "manageable"]).

The Water Quality Act

In the Water Quality Act of 1987 (Pub L No 100-4, 101 Stat 7 [codified as amended in scattered sections of 33 USC]) (the Water Quality Act), Congress endorsed permits for municipal stormwater discharges "issued on a system- or jurisdiction-wide basis" (33 USC § 1342 [p] [3] [B] [i]). These permits were mandated to "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," and "controls to reduce the discharge of pollutants *to the maximum extent*

practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants" (*id.* at § 1342 [p] [3] [B] [ii], [iii] [emphasis added]).

The Water Quality Act did not define "maximum extent practicable," but section 1342 (p)'s text and legislative history indicate that Congress had in mind something other than conventional end-of-pipe control techniques and numeric effluent limits (*see* 132 Cong Rec 32, 381 [1986] [remarks of Sen. Stafford, then Chairman of the Senate Environment and Public Works Committee] ["These permits will not necessarily be like industrial discharge permits. Often, an end-of-pipe technology is not appropriate for this type of discharge"]; *see also Defenders of Wildlife v Browner*, 191 F3d 1159, 1164-1165 [recognizing that Congress "chose *not* to include" provisions (like effluent limitations under 33 USC § 1311) for municipal storm-sewer discharges], *amended on denial of rehrq*, 197 F3d 1035 [9th Cir 1999] [emphasis added]).

The Water Quality Act established a timetable for EPA to issue NPDES permitting [***276] [**786] regulations and for EPA and states to issue permits for certain categories of stormwater discharges, principally discharges associated with industrial activity and discharges from large municipal separate stormwater sewer systems (those systems serving a population of 100,000 or more) (*see* 33 USC § 1342 [p] [2], [4]). But for the many small municipal systems (those serving a population under 100,000), the Water Quality Act embraced a different approach.

The statute directed the Administrator, in consultation with the states, to conduct studies and report the results to Congress before developing a program to regulate stormwater discharges [*383] from these systems (*see* 33 USC § 1342 [p] [5]). The study was meant to identify sources or classes of stormwater discharges for which NPDES permits were not required by the Clean Water Act; determine, to the maximum extent practicable, the extent and nature of their pollution; and develop procedures and methods to mitigate the effect of these discharges on water quality (*id.*). Congress then directed EPA to "issue regulations (based on the results of the studies . . .) which designate stormwater discharges . . . to be regulated to protect water

quality and [to] establish a comprehensive program to regulate such designated sources" (*id.* § 1342 [p] [6]). This program was to be designed, "at a minimum," to "(A) establish priorities, (B) establish requirements of State stormwater management programs, and (C) establish expeditious deadlines. The program [might] include *performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate*" (*id.* [emphasis added]).

New York's 1988 Legislation

By chapter 360 of the Laws of 1988, the Legislature amended the Environmental Conservation Law to authorize DEC to issue general SPDES permits, as allowed by the Water Quality Act. To this end, new section 17-0808 specified at subdivision three that "[p]ermits for discharges from municipal storm sewers:

"a. May be issued on a system or jurisdiction-wide basis, pursuant to paragraph (a) of subdivision seven of section 70-0117 of this chapter;

"b. Shall include a requirement which regulates non-storm-water discharges into the storm sewers; and

"c. Shall require controls to reduce the discharge of pollutants *to the maximum extent practicable, including management practices, control techniques and system design and engineering methods, and such other provisions as the commissioner determines appropriate for the control of such pollutants*" (Environmental Conservation Law § 17-0808 [3] [emphasis added]; compare 33 USC 1342 [p] [3] [B] [iii], the cognate federal provision).

Additionally, the Legislature amended existing section 70-0117 of the Environmental Conservation Law to include a new subdivision 7 to provide as follows:

[*384] "(a) Under the [SPDES] program . . . , the department may issue a general permit, upon application or on its own initiative, to cover a category of point sources of one or more discharges within a stated geographical area which (i) involve the same or substantially similar types of operations, (ii) discharge the same types of pollutants, (iii) require the same effluent limitations or operating conditions, (iv) require the same or similar monitoring, and (v) which will result in minimal cumulative impacts.

"(b) General permits can only be issued for the following categories of discharges, if, by virtue of their nature and location, the department determines such discharges are more appropriately controlled [***277] [**787] under a general permit than under individual permits:

"(i) separate storm sewers or stormwater conveyance systems; . . .

"(c) Any general permit under this subdivision shall set forth the conditions which shall apply to any discharge authorized by such general permit.

"(d) The department may require any person authorized by a general permit to apply for and obtain an individual permit and the department shall adopt rules and regulations specifying circumstances under which an individual permit may be required.

"(e) General permits shall be governed by the procedures set forth in this article [70] for the issuance of major permits" (former Environmental Conservation Law § 70-0117 [7], renumbered Environmental Conservation Law § 70-0117 [6] [L 1994, ch 170, § 202]).

The bill that became chapter 360 was drafted by and introduced at the request of DEC, which sought general permitting authority in order to avoid "issuance of thousands of individual SPDES permits covering discharges of heat, stormwater and non-industrial waste as well as . . . discharges of a minor nature[, which] *do not require the individual attention the statute currently demands*" (Bill Jacket, L 1988, ch 360 at 9 [emphasis added]). Similarly, DEC explained that general permitting would [*385] "reduce the amount of paperwork and resources dedicated to permitted discharges which *do not warrant technical case review*. Past regulation of such discharges has created *substantial administrative burdens without corresponding increases in environmental protection*. Staff time spent on processing these types of permits detracts from time that could be spent on major and toxic discharges" (*id.* [emphases added]).

The bill's Senate and Assembly sponsors repeated these rationales (*id.* at 18, 23, 29).

EPA's Final Rule

EPA promulgated its final rule regulating stormwater

discharges from small municipalities' separate stormwater sewer systems on December 8, 1999, effective February 7, 2000 (64 Fed Reg 68722 [Dec 8, 1999] codified at 40 CFR pts 9, 122, 123 and 124)). These so-called Phase II regulations expanded the existing NPDES Phase I stormwater program³. The record to support the regulation of small MS4s included the studies and reports to Congress mandated by the Water Quality Act, as well as EPA's evaluation of comments and considerable additional research and studies. Based on this record, EPA determined that surface water contamination from wet-weather discharges from these systems was best controlled by means of measures designed to reduce the quantity of pollutants introduced into stormwater and the volume of stormwater flow rather than end-of-pipe numeric limits (*id.* at 68753). Accordingly, the regulations required small MS4s to develop and implement a SWMP that identified best management practices to attain "minimum control measures" in six key areas: public education and outreach; public involvement; illicit discharge detection and elimination; [***278] [**788] construction site runoff control; stormwater management in new development and redevelopment; and pollution prevention and good housekeeping of municipal operations (*id.* at 68736; 68754-68762).

3 As the first step in carrying out the requirements of the Water Quality Act, the Phase I program covered NPDES permitting of stormwater discharges from MS4s serving a population of 100,00 or more and stormwater discharges associated with industrial activity, including construction activities involving five or more acres (33 USC § 1342 [p] [2], [4]; *see also* 55 Fed Reg 47990 [Nov 16, 1990]). In addition to small MS4s, the Phase II regulations also addressed construction sites that disturb one to five acres and additional sources that might be designated on a case-by-case basis (64 Fed Reg at 68722).

[*386] EPA determined that if small MS4s carried out best management practices in accordance with their SWMPs, they would comply with the statutory standard to reduce pollutants to the maximum extent practicable (*id.* at 68754; *see also id.* at 68843 [40 CFR 122.34 (a)]); and "[a]bsent evidence to the contrary, . . . presume[d] that a small MS4 program that implements the six minimum measures . . . does not require more stringent limitations to meet water quality standards" (64 Fed Reg

at 68753). EPA recommended that small MS4s include the public in developing, implementing and reviewing the SWMP (*id.* at 68844 [40 CFR 122.34 (b) (2) (ii)]);⁴ and required that all records, including a description of the SWMP, must be made available to the public for review and copying at reasonable times during regular business hours (64 Fed Reg at 68846 [40 CFR 122.34 (g) (2)]).⁵

4 The 2010 General Permit requires small MS4s to provide the public with the opportunity to participate in the development, implementation, review and revision of the SWMP. In this context, "development" means the "period after initial authorization under [the 2010 General Permit] when [the small MS4] creates, designs or develops activities, BMPs, tasks or other measures to include in [its] SWMP"; and "implementation" means the "period after development of [the] SWMP, where the [small MS4] puts into effect the practices, tasks and other activities in [its] SWMP."

5 The 2010 General Permit directs small MS4s to ensure that copies of SWMPs and Annual Reports are available for public inspection.

EPA interpreted the Water Quality Act as authorizing it to develop a stormwater program for small municipalities either as part of the NPDES permit program or as a stand-alone non-NPDES program, such as a self-implementing rule. EPA settled on the use of NPDES permits instead of a rule for several reasons, including a desire to maintain consistency with its Phase I program for stormwater control; to capitalize upon the existing government infrastructure for administration of the NPDES program and the regulated community's understanding of how the NPDES program works; and to provide flexibility in order to facilitate watershed planning and sensitivity to local conditions (*id.* at 68739). EPA did note, however, that "[k]ey provisions" of the rule "promot[ed] a streamlined approach to permit issuance by, for example, using general [*387] permits" (*id.* at 68740; *see also id.* at 68762 [although the permit to authorize a small MS4's discharges might take the form of either an individual NPDES permit issued to one or more facilities as co-permittees or a general NPDES permit that applied to a group of small MS4s, EPA "expect[ed]" that most discharges would be authorized or "covered" under general permits for reasons of administrative efficiency and reduced paperwork burdens]). In fact, EPA recommended using general

permits, rather than individual permits, for all stormwater sources newly regulated under its rule (*id.* at 68737).

A small MS4 that seeks coverage under a general NPDES permit for its stormwater discharges is required to submit an NOI to the permitting authority. The [***279] [**789] NOI must specify the best management practices to be implemented for each of the six required minimum control measures along with measurable goals for the development and implementation of each best management practice (*id.* at 68762-68764). Although "[s]everal commenters suggested that EPA require permitting authorities to approve or disapprove the submitted BMPs and measurable goals[,] EPA disagree[d] that formal approval or disapproval by the permitting authority [was] needed" (*id.* at 68764).⁶

6 EPA allows a small MS4 that submits a complete and timely NOI to discharge upon receipt of the NOI by the state permitting authority, after a waiting period specified in the general permit, on a date specified in the general permit or upon receiving notice of inclusion from the state permitting authority (*see* 40 CFR 122.28 [b] [2] [iv]). By contrast, the 2010 General Permit requires DEC to publish a notice in the Environmental Notice Bulletin when an NOI is received from a small MS4. These notices provide a web link to the actual NOI, and inform the public of the physical location of the NOI and SWMP, which are available for public inspection. The NOI is subject to a 28-day public comment period prior to DEC's authorization of the small MS4's discharges.

EPA afforded small MS4s up to five years to fully develop and implement their SWMPs,⁷ with annual reports required to document progress (*id.* at 68770, 68846 [40 CFR 122.34 (g) (3)]). The Agency stated that "[t]he permitting authority will use the reports in evaluating compliance with permit conditions and, where necessary, will modify the permit conditions to address changed conditions" (64 Fed Reg at 68770).

7 DEC reduced the time period from five to three years for the New York program.

[*388] *The 2010 General Permit*

The 2010 General Permit is a 97-page document,

with appendices, which requires small MS4s to develop, document and implement a SWMP that includes 44 mandatory best management practices grouped into the six program components, or minimum control measures. Many of the mandatory best management practices afford small MS4s little or no choice about what they must do to comply with the 2010 General Permit; others afford more freedom in implementation. As an example of the latter, under the minimum control measure addressing public outreach, small MS4s must develop and implement an ongoing public education and outreach program, but enjoy flexibility to decide how best to accomplish this in light of local conditions or considerations (e.g., a media campaign, presentations to community groups, outreach to commercial entities, a webpage, printed materials, posters and/or 13 other suggested ways or management practices to raise the public's awareness and engage its participation in reducing pollution of stormwater runoff).

At the other end of the spectrum, the 2010 General Permit imposes highly prescriptive requirements for small MS4s to develop, implement and enforce a program to detect and eliminate non-stormwater (i.e., illicit) discharges. The small MS4s must develop and maintain maps showing the location of all outfalls, verify each of them in the field and conduct an outfall inventory in accordance with detailed guidance published on EPA's website. Further, each small MS4's program must include procedures to identify areas that are of greatest concern and describe those areas, available equipment, staff and funding; identify and locate illicit discharges; eliminate illicit discharges; and document the steps the small MS4 has taken to implement its program.

The NOI and Annual Reports Provided for by the 2010 General Permit

The NOI is currently a 19-page document that sets out the six minimum control [***280] [**790] measures, listing the mandatory and optional best management practices for each. The small MS4 must commit to each mandated and any optional best management [*389] practice initially identified in the SWMP;⁸ describe initially identified measurable goals for each of the required or chosen best management practices, with start and end dates, including work to be done by partners. And finally, either a principal executive or ranking elected official must sign the NOI, certifying that the information submitted is, to the best of the signer's knowledge and belief, true, accurate and

complete, and acknowledging awareness of the significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations. As noted previously (*see* n 6, *supra*), the NOI is made available to the public for comment for a 28-day period. Small MS4s that submit an NOI are authorized to discharge stormwater upon written notification from DEC that a complete NOI has been received. DEC, however, may also choose to require the small MS4 to submit an application for an individual SPDES permit or an alternative SPDES general permit. DEC annually audits up to 10% of all municipal storm sewers, makes site inspections, reviews citizen complaints and, where necessary, takes enforcement action.

8 Small MS4s in specified watershed improvement strategy areas must identify the additional best management practices that they will implement in order to reach specified pollutant load reductions.

The vast majority of New York's 500 plus small MS4s achieved initial authorization to discharge stormwater prior to the effective date of the 2010 General Permit; they were able to maintain coverage under the 2010 General Permit by submitting their 2009 Annual Reports (*see* n 1 and 2, *supra*). The 2010 General Permit directs small MS4s to make Annual Reports and SWMPs available for public review; provides for notice of receipt of 2009 Annual Reports to be published in the Environmental Notice Bulletin;⁹ and requires small MS4s to present draft Annual Reports to the public and to include its responses to any public comments (including, as appropriate, any modifications of the SWMP) when they submit these reports to DEC. The Annual Report summarizes the activities performed by the small MS4 during the reporting period and those planned for the next year, and includes, among other things, an assessment of compliance with permit conditions; the appropriateness of the identified best management practices; and [*390] progress toward meeting the measurable goals for each minimum control measure and achieving the statutory goal of reducing the discharge of pollutants to the maximum extent practicable. DEC's review of Annual Reports allows the Department to keep tabs on small MS4s and to require any necessary refinement of best management practices. DEC refers to these contemplated successive rounds of reviewing and, as necessary, finetuning and refocusing best management practices as

the "iterative process" that is the hallmark of the flexible "maximum extent practicable" standard, which Congress deliberately chose as best suited for regulating small municipalities' stormwater discharges.

9 The 2010 General Permit states that "[f]or public participation purposes, the [2009] Annual Report will be considered equivalent to an NOI."

II.

Discussion

The Clean Water Act

There is no doubt that the 2010 General Permit complies with EPA's 1999 [***281] [**791] regulations, which allow permitting authorities to authorize small MS4s to discharge stormwater under a general NPDES permit upon receipt of an NOI --- i.e., without *any* regulatory review, public notice and comment or opportunity for a public hearing. There is likewise no doubt that the 2010 General Permit affords more generous regulatory review and public participation than EPA's 1999 regulations require. But NRDC contends, and the dissent agrees, that the federal courts have held that the regulatory review and public participation features of EPA's 1999 regulations, on which the 2010 General Permit is necessarily modeled, constitute an "impermissible self-regulatory system" in contravention of the Clean Water Act, and that New York courts are bound to follow suit with respect to the New York program. Stated slightly differently, NRDC and the dissent assert that federal court decisions make clear that the Clean Water Act does not allow DEC to authorize a small MS4's stormwater discharges under the 2010 General Permit without first engaging in an undefined more detailed review of the NOI (and, apparently, the SWMP) and providing the public an opportunity to request a hearing.

After EPA promulgated its 1999 regulations, various environmental, municipal and industry groups brought petitions for review, which were consolidated in the United States Court of Appeals for the Ninth Circuit (*see Environmental Defense Ctr., [*391] Inc. v EPA, 344 F3d 832 [9th Cir 2003] [EDC]*). The environmental petitioners argued that, by allowing permitting authorities to authorize small MS4s to discharge stormwater on the basis of "unreviewed NOIs," the regulations created an "impermissible self-regulatory system," and additionally

"fail[ed] to provide for public participation as required by the Clean Water Act, because the public receive[d] neither notice nor opportunity for hearing regarding an NOI" (*id.* at 854, 856). A divided panel agreed.

Applying *Chevron* analysis,¹⁰ the *EDC* majority first determined that the Clean Water Act unambiguously expressed Congress's intent that "EPA issue no permits to discharge from municipal storm sewers unless those permits require[d] controls to reduce the discharge of pollutants to the maximum extent practicable" (*id.* at 854 [internal citations omitted]), and that EPA's 1999 regulations did not fulfill this plain command. This was the case, the majority reasoned, because absent a permitting agency's "meaningful review" of the minimum control measures selected by a small MS4,¹¹ the municipal operator might "misunderstand[] or misrepresent[] its own stormwater situation and propos[e] a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable" (*id.* at [***282] [**792] 854-856). The *EDC* majority also concluded that NOIs (unlike NRDC and the dissent, the court did not mention SWMPs) are "functionally equivalent" to NPDES permit applications, and therefore are subject to the same public availability and public hearing requirements (*id.* at 857).

10 The United States Supreme Court held in the seminal case of *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.* (467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 [1984]) that federal courts will accept a federal agency's reasonable interpretation of the ambiguous statutory language of statutes that the agency administers.

11 As pointed out earlier, EPA's 1999 regulations did not require *any* review of NOIs. DEC takes the position that its review of NOIs for completeness is "meaningful review"; specifically, DEC does not authorize a small MS4's stormwater discharges until after examining the NOI to make sure that the system operator has committed to carrying out a SWMP that comprehends, at a minimum, 44 *mandatory* best management practices (clearly identified in the NOI as "required"), and has established measurable goals by which to assess how successfully these best management practices, as implemented, control stormwater discharges to the maximum extent practicable.

The dissenting judge considered the "central issues" in the case to be whether the Clean Water Act allowed EPA to use a general permit system to administer the NPDES program and [*392] whether NOIs should properly be regarded as "permits." Citing *Chevron*, he noted that "resolution of these issues require[d] a complicated weighing of policies (e.g., administrative streamlining vs. robust inquiry) that is precisely what agencies are designed to do and courts are without the resources or experience to do" (*id.* at 881 [Tallman, J., dissenting]).

In the dissenting judge's view, although the majority correctly recognized that EPA was allowed to use a general permit system, it "ignore[d] the effects of the general permit. By filing an NOI, a discharger obligates itself to comply with the limitations and controls imposed by the general permit under which it intends to operate. EPA mandates that all permits (including general permits) condition their issuance on satisfaction of pollution limitations imposed by the Clean Water Act[; t]herefore, the *general permit* imposes the obligations with which the discharger must comply (including applicable Clean Water Act standards), and EPA's decision not to review every NOI is not a failure to insure compliance with the [statute]" (*id.* at 882).

As for the majority's objection that EPA's general permit system did not allow for sufficient public participation, the dissenting judge chided his colleagues for "fail[ing] to give deference to EPA and impos[ing] the majority's own wishes instead" (*id.*). He added that where "an agency promulgates rules after a deliberative process, it is incumbent upon [the federal courts] to respect the agency's decisions or else risk trivializing the function of that agency"; and that "[i]n this case, EPA made a permissible decision to create a general permit program supported by NOIs" (*id.*).¹²

12 The dissent comments that the Supreme Court "has chosen not to take up *EDC*," citing *Texas Cities Coalition on Stormwater v EPA* (541 U.S. 1085, 124 S. Ct. 2811, 159 L. Ed. 2d 246 [2004])(dissenting op at 34-35). The Texas Cities Coalition sought Supreme Court review of its challenge to EPA's 1999 regulations, primarily on Tenth Amendment grounds.

In *Texas Indep. Producers & Royalty Owners Assn. v EPA* (410 F3d 964 [7th Cir 2005] [*Tex. Indep. Producers*]), the United States Court of Appeals for the

Seventh Circuit agreed with the dissenting judge in *EDC* that NOIs are not subject to the Clean Water Act's public participation requirements for NPDES permit applications. As mentioned earlier (*see* n 3, [*393] *supra*), EPA's Phase I stormwater regulations addressed construction activities involving five or more acres, and its Phase II stormwater regulations addressed construction sites that disturb one to five acres (as well as small MS4s). EPA eventually promulgated a general permit for stormwater discharges from both large and small construction sites in those jurisdictions where it had not authorized the state or an Indian tribe to administer the NPDES program. This general permit required operators to submit an NOI to acquire coverage; a responsible corporate officer to certify the basis for eligibility for coverage; creation, maintenance and implementation of a site-specific Storm Water [***283] [**793] Pollution Prevention Plan (SWPPP), also to be certified by a corporate official; and implementation of best management practices necessary to comply with water quality standards, assure weekly site inspections and document those inspections, including detailing weather conditions.

In its petition for review, NRDC attacked the general permit's failure to make NOIs and SWPPPs available to the public and afford the opportunity for a public hearing, citing 33 USC §§ 1342 (j) and 1342 (a) (1)¹³. EPA responded that these provisions did not apply to NOIs and SWPPPs because NOIs and SWPPPs were not permits or permit applications. The Seventh Circuit concluded that because the Clean Water Act spoke only of permits and permit applications, not NOIs or SWPPPs, the statute was silent or ambiguous for purposes of *Chevron* analysis. Accordingly, the court was called upon to decide whether EPA had reasonably construed the relevant provisions of the Clean Water Act.

13 Section 1342 (j) of the Clean Water Act provides that "[a] copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction"; section 1342 (a) (1) authorizes the EPA "after opportunity for public hearing, [to] issue a permit for the discharge of any pollutant, or combination of pollutants" (*see* Environmental Conservation Law § 17-0805 [1] for the cognate provisions in state law).

In support of its interpretation, EPA "stressed" that general NPDES permitting did not "make use of a permit application"; rather, general permits were proposed through a notice in the Federal Register to solicit public comment, and "[i]t [was] at that time that the public [had] the opportunity to request a public hearing" (*id.* at 978). Once EPA issued the general permit as a final rule, a discharger intending to operate under the general permit's authority was required to comply with [*394] that permit's already established terms; therefore, "there [was] no need for additional public comment or a notice period," and potentially requiring a public hearing for individual NOIs and SWPPPs risked "eviscerat[ing] the administrative efficiency inherent in the general permitting concept, in effect making the general permit scheme no different from the process for obtaining individual permits[, which] would be inconsistent with Congress' intent to allow for the use of general permits" (*id.* [internal citations omitted]).

Calling these rationales "eminently reasonable," the Seventh Circuit concluded that "EPA's interpretation of the terms 'permit application' and 'permit' as not including NOIs and SWPPPs is a permissible construction" (*id.*). In so holding, the court acknowledged that it disagreed with the *EDC* majority and agreed with the dissenting judge in that case, thus creating a split between the circuits (*id.* at 978, n 13).¹⁴

14 The parties disagree about the relevance of a third federal case, *Waterkeeper Alliance, Inc. v EPA* (399 F3d 486 [2d Cir 2005] [*Waterkeeper Alliance*]), which the United States Court of Appeals for the Second Circuit handed down after *EDC* and before *Tex. Indep. Producers*. This decision invalidated portions of EPA's 2003 regulations governing NPDES permitting for concentrated animal feeding operations (CAFOs), which are variously-sized but large-scale enterprises that raise animals like cows and pigs in confined quarters. *Waterkeeper Alliance*, however interpreted, does not eliminate the circuit split.

In sum, then, the federal circuit courts are split on the question of whether EPA has permissibly interpreted the Clean Water Act to mean that an NOI is not a "permit application."¹⁵ And we obviously [***284] [**794] may not engage in *Chevron* analysis to review EPA's interpretation, which underlies the corresponding,

although not identical, parts of the 2010 General Permit to [*395] which NRDC objects. The federal courts and EPA will have to sort this out¹⁶. In that regard, NRDC has recently filed a petition for a writ of mandamus in the Ninth Circuit in the *EDC* case, asking that court to order EPA to amend its 1999 regulations within six months to provide individualized review of NOIs with notice and opportunity for public hearings. This is all the more reason, DEC argues, to reject "NRDC's attempt to litigate an underlying dispute with EPA by ordering relief against DEC for *complying* with EPA's regulations." We agree. Unless and until EPA revises its 1999 regulations, DEC's SPDES general permitting program for small MS4s must comply with them (as it concededly does), and DEC need not go beyond the specifications of those regulations unless New York law requires it to do so.

15 We recognize that at least one statement in EPA's 1999 regulations does not appear facially consistent with its position in the *EDC* and *Tex. Indep. Producers* lawsuits. The *EDC* majority remarked that "[t]he text of [EPA's] Rule itself acknowledges that a Phase II NOI is a permit application that is, *at least in some regards*, functionally equivalent to a detailed application for an individualized permit" (*EDC*, 344 F3d at 853 [emphasis added]). In support of this proposition, the *EDC* majority (and the dissent; *see* dissenting op at 42, n 10) cite 40 CFR 122.34 (d) (1), which starts out by stating "[i]n your permit application (either a notice of intent for coverage under a general permit or an individual permit application)." Section 122.34 is written in a "readable regulation" format as an answer to the question "As an operator of a regulated small MS4, what will my NPDES storm water permit require?" It is the task of the federal courts, not this Court, to figure out whether section 122.34 (d) (1) or anything else in EPA's 1999 regulations is inconsistent with the Agency's litigation posture in *EDC* and *Tex. Indep. Producers* and, if so, the significance of the inconsistency.

16 The dissent protests that our "hands-off" approach would leave this court with no authority to consider the legality of state agency conduct, [which is] most certainly not the law, as made plain by [our] administrative law jurisprudence" (dissenting op at 42). The dissent then cites four cases, only one of which -- *Seittelman v Sabol* (91 NY2d 618, 697 N.E.2d 154, 674 N.Y.S.2d 253

[1998]) -- involves federal law, and in *Seittelman*, the issue was whether we owed deference to a State agency's interpretation of a federal statute. Here, NRDC is asking us to decide that a federal agency -- EPA -- has improperly interpreted the statute it is tasked with administering. This is quite different from *Seittelman*. DEC operates the SPDES program as EPA's NPDES delegee, and is bound to follow EPA's interpretation of the Clean Water Act, here expressed, as challenged, in EPA's 1999 regulations. Federal law vests exclusive jurisdiction to review those regulations in the federal circuit courts (*see* 33 USC § 1369; *see also Amer. Frozen Food Inst. v Train*, 539 F2d 107, 124, 176 U.S. App. D.C. 105 [DC Cir 1976]). Under the dissent's view and notwithstanding section 1369 of title 33, the highest court in every state that administers the NPDES permit program would be empowered to second-guess EPA's governing regulations, creating an obvious impediment to implementation of a coherent nationwide NPDES permitting scheme.

The Environmental Conservation Law

A SPDES general permit covers multiple entities with similar characteristics and minimal impacts (*see* Environmental Conservation Law § 70-0117 [6] [a]). SPDES general permitting allows DEC to avoid detailed review where it is not warranted and thereby frees up finite regulatory resources for the individual SPDES permitting of entities with greater impact on the environment. These were the reasons that DEC gave the Legislature when it sought SPDES general permitting authority in 1988, after Congress endorsed NPDES general permitting in the Water Quality Act, and the explanations that the legislation's sponsors gave when [*396] the Environmental Conservation Law was amended to empower DEC to issue SPDES general permits.

[***285] [**795] The Legislature has exhibited a continuing willingness to simplify and streamline the SPDES permitting process to reduce or eliminate administrative complexities that burden DEC and the regulated community alike in ways that do not benefit the environment. For example, in 1994 the Legislature amended the Environmental Conservation Law to expand general permitting and require DEC to develop a priority

ranking system for individual SPDES permits in order to carry out an "Environmental Benefit Permit Strategy" (EBPS) (*see* L 1994, ch 701). Broadly described, the EBPS prioritizes SPDES permits for full technical review and, when necessary, modification, in order to insure that those point source discharges presenting the greatest risk to the environment receive the most expedient and detailed regulatory attention (*see generally* TOGS 1.2.2 [Administrative Procedures and the Environmental Benefit Permit Strategy for Individual SPDES Permits," issued June 2003; revised Jan. 2012]; *see also* Environmental Conservation Law § 17-0805 [1] [b] [making a SPDES permit's priority ranking subject to an opportunity for a public hearing]).

NRDC and the dissent blur the distinction between SPDES general and individual permits by seeking to require DEC to undertake an undefined more comprehensive review of NOIs (and, apparently, to review SWMPs), and to provide an opportunity for a public hearing on NOIs/SWMPs. Thus, NRDC would like DEC to treat an NOI as though it were, or at least more like, an application for an individual SPDES permit *to be issued* rather than what it really is -- a request for coverage under a general SPDES permit that has *already been issued* pursuant to the full panoply of article 70 procedures (*see* Environmental Conservation Law § 70-0117 [6] [e]; 6 NYCRR part 621)¹⁷. But the Environmental Conservation Law does not obligate DEC to conduct SPDES [*397] general permitting for small MS4s in accordance with NRDC's and the dissent's policy preferences. SPDES general and individual permits represent *alternative* ways for small MS4s to obtain authorization for their stormwater discharges. To the extent the courts force DEC to apply the same or similar procedures for both alternatives, the resource-conserving benefits sought by the Legislature when it enacted the 1988 legislation are compromised, if not altogether lost.

17 In fact, the public enjoyed opportunities to participate in the development of the 2010 General Permit which exceed article 70's requirements. In the Fact Sheet issued with the 2010 General Permit, DEC explained that, in response to "significant public interest" in the 2008 General Permit, it limited that Permit's term to two years and embarked on an 18-month post-issuance review process. All commenters on the 2008 General Permit were invited to

participate, and DEC conducted nine monthly topic meetings to address Green Infrastructure, Intermunicipal Cooperation, Stormwater Retrofits, Public Participation, Numeric Effluent Limits, MS4 Funding, Steep Slopes, Riparian Buffers, Total Maximum Daily Loads and Impaired Waters. Following these meetings, working drafts of a revised general permit and revised chapters of DEC's Stormwater Management Design Manual were reviewed with the participants. Meetings were held to discuss proposed changes to the Design Manual and the general permit; participants were invited to submit comments on the working drafts. DEC incorporated beneficial provisions identified during this 18-month review in the 2010 General Permit.

Here, DEC has determined that examining NOIs for completeness constitutes a sufficient level of technical regulatory review to qualify a small MS4 for initial coverage under the 2010 General Permit; and that the 2010 General Permit's public [***286] [**796] participation requirements for NOIs (i.e., notices in the Environmental Notice Bulletin to let the public know when a small MS4's NOI has been submitted to DEC and where the NOI and SWMP are physically located and may be inspected; making the NOI, which DEC posts on its website, subject to a pre-authorization 28-day public comment period) are sufficient. These are reasonable judgments that DEC possesses the discretion and expertise to make in furtherance of its responsibilities under the Environmental Conservation Law to regulate stormwater discharges from small MS4s (*see Matter of Howard v Wyman*, 28 NY2d 434, 438, 271 N.E.2d 528, 322 N.Y.S.2d 683 [1971] ["It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld"]; *Matter of Davis v Mills*, 98 NY2d 120, 125, 778 N.E.2d 540, 748 N.Y.S.2d 890 [2002] ["(T)his Court treads gently in second-guessing the experience and expertise of state agencies charged with administering statutes and regulations"]).

We have reviewed NRDC's other challenges to the lawfulness of the 2010 General Permit and consider them likewise to be without merit. Accordingly, the order of the Appellate Division, insofar as appealed from, should be affirmed, with costs.

Matter of Natural Resources Defense Council, Inc., et al. v New York State Department of Environmental Conservation

DISSENT BY: RIVERA (In Part)

DISSENT

RIVERA, J.(dissenting in part):

Petitioners are nine organizations or corporations, including lead petitioner, the not-for-profit Natural Resources Defense Council, Inc., whose several members use and enjoy New York State water bodies. Petitioners challenge New York's statewide general permit which allows [*398] storm water pollutant discharges from small Municipal Storm Sewer Systems. I concur with the majority to the extent it affirms dismissal of petitioners' claims as related to the "no net increase" provision and monitoring. However, because I conclude that the State's general permit as currently implemented fails to comply in several respects with federal and state statutory and regulatory mandates, I dissent.

I.

A. *Water Pollution Control and the Clean Water Act*

Long-standing concerns over contamination of New York's and the nation's waters have led to over a century of governmental controls and prohibitions on water pollution. As far back as 1903, New York State prohibited sewage and waste discharge into public waters (*see* L. 1903, ch. 468). There was also early federal concern with contamination of New York's water, as reflected by Congressional passage of laws in 1886 and 1888 prohibiting discharges of certain pollutants and refuse into New York Harbor (*see* L. 1886, ch. 929, § 3).

The Rivers and Harbors Appropriation Act of 1899 was the first statute to consolidate these and other prior federal prevention efforts, in order to establish nationwide water pollution controls. The Act prohibited discharge of "any refuse matter of any kind or description whatsoever," into any navigable water of the United States without approval or a permit from the United States Army Corps of Engineers (*see* William L. Andreen, *The Evolution of Water Pollution Control in the United States-State, Local, and Federal Efforts, 1789-1972: Part II*, 22 Stan Envtl LJ 215, 220 [2003]; Section of Natural Resources, Energy, and Environmental

Law, American Bar Association, *The Clean Water Act Handbook*, at 1 [3d Edition] [hereinafter "Clean Water Act Handbook"].

Water pollution, however, remained unabated and continued to present serious [***287] [**797] public health issues (*see* Andreen at 222; 9 N.Y.Prac., Environmental Law and Regulation in New York § 6:2 [2d ed.]). Congress eventually passed the Federal Water Pollution Control Act in 1948 (FWPCA) to address stream pollution which, as a result of World War II, had intensified due to "increased industrial activity and dramatically lower expenditures on wastewater treatment" (Andreen at 235). Under the FWPCA, the states bore primary responsibility for water pollution within their jurisdictions, and federal enforcement was limited (*see* Andreen at 238; *see also* 80 Cong. Ch. 758, June 30, 1948, 62 Stat. 1155). [*399] Over time, Congress amended the FWPCA to provide financial assistance to municipalities in the form of grants to construct sewage treatment plants and to shore up federal enforcement (*see* Andreen at 240; 62 Stat. 1158).

As national concern increased over environmental degradation and the adverse impacts of water pollution on society and the economy, Congress established the Federal Water Pollution Control Administration (*see* Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903), and the Environmental Protection Agency (EPA) (*see* 42 USC § 4321 [Reorganization Plan No. 3 of 1970 establishing the EPA]). It also enacted the Water Quality Act of 1965 and the Water Quality Improvement Act of 1970. This administrative and regulatory framework was intended to ensure the adoption and enforcement of appropriate water quality standards and pollution controls.

After these efforts failed to protect the nation's waters from dangerous levels of contamination, or to halt the continued decline of water quality, Congress passed a comprehensive revision and recodification of the FWPCA in 1972 (*see* Pub. L. No. 92-500, October 18, 1972 86 Stat. 816 [codified as amended at 33 USC §§ 1251-1376 (2000)]). These amendments form the basis for what is best known as the Clean Water Act.

B. *The Clean Water Act and the National Pollutant Discharge Elimination System*

The Clean Water Act (CWA) heralded the modern era of federal water pollution control, with the stated

objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and the goal of eliminating water pollution (*see* 33 USC § 1251 [a]). It provided for more robust federal enforcement of pollution controls and the development and implementation of waste treatment programs (*see* Andreen at 239-24). It also declared unlawful "the discharge of any pollutant by any person," to "navigable waters" from a "point source" (*see* 33 USC § 1311 [a]) unless authorized by federal permit, in accordance with the newly established national pollutant discharge elimination system (NPDES) (*see* 33 USC § 1342 [a]).¹

1 The CWA defines point sources as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged" (33 USC § 1362 [14]; *see also* 40 CFR 122.2).

This federal permit scheme, central to the CWA and administered by the EPA, subjects permit holders to pollutant discharge [*400] limitations as well as mandatory monitoring and reporting requirements (*see* 33 USC § 1311 [b] [1] [A]; 33 USC § 1342 [b] [1] [A] [requiring SPDES permits to comply with § 1311]; *see also* Andreen at 261; Jeffrey M. Gaba, *Generally Illegal: Npdes General Permits Under* [***288] [**798] *the Clean Water Act*, 31 Harv Envtl L Rev 409, 410 [2007]). While the NPDES permit "authoriz[es] some water pollution, [it] place[s] important restrictions on the quality and character of that licit pollution" (*Waterkeeper Alliance, Inc. v U.S. E.P.A.*, 399 F3d 486, 491 [2d Cir 2005]).

The CWA imposes effluent limitations, which are "restriction[s]... on [the] quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters" (*id.*, citing *South Florida Water Mgt. Dist. v Miccosukee Tribe of Indians*, 541 U.S. 95, 100, 124 S. Ct. 1537, 158 L. Ed. 2d 264 [2004]). The CWA defines effluent limitations as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of

compliance" (33 USC § 1362 [11]). Certain effluent limitations are technology based, meaning they are "established in accordance with various technological standards that the [CWA] statutorily provides and that . . . vary depending upon the type of pollutant involved, the type of discharge involved, and whether the point source in question is new or already existing" (*Waterkeeper*, 399 F3d at 491). The CWA also provides for more stringent water quality-based effluent limitations when necessary to ensure state water quality standards (*see* 33 USC § 1311 [b] [C]). The technology-based and water quality-based limitations are generally represented as numerical limits on specific pollutant discharges (*see Waterkeeper*, 399 F3d at 491).

A permit is issued "upon condition that such [pollutant] discharge will meet . . . all applicable requirements including the effluent limitations statutorily required" by the CWA (*id.* at 498 [brackets omitted]). Thus, under the CWA's NPDES permit structure, "a discharger's performance is now measured against strict technology-based effluent limitations specified levels of treatment to which it must conform, rather than against limitations [*401] derived from water quality standards to which it and other polluters must collectively conform" (*Environmental Protection Agency v California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 204-05, 96 S. Ct. 2022, 48 L. Ed. 2d 578 [1976] [hereinafter "EPA"]). As described by the United States Supreme Court

"[a]n NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits . . . In short, the permit defines, and facilitates compliance with, and enforcement of a preponderance of a discharger's obligations under the [Clean Water Act] Amendments"

(*id.* at 205 [internal citations omitted]).

The CWA itself "imposes only limited procedural obligations on the issuance of NPDES permits" (Gaba at 417). The process for obtaining a permit is specifically set forth in EPA regulations (*see* 40 CFR 122.21, *et seq.*). As a general matter, an applicant must file an EPA permit application form (*see* 40 CFR 122.21 [a] [2]). The application must be submitted at least 180 days before the

applicant intends to commence discharging (*see* 40 CFR 122.21 [c] [1]), and no permit will issue if an application is deemed incomplete by the EPA (*see* 40 CFR 122.21 [e] [1]).

The CWA anticipates and requires certain opportunities for public participation. [***289] [**799] As prominently set forth in the CWA Declaration of Goals and Policy, "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the [EPA] or any State . . . shall be provided for, encouraged, and assisted by the [EPA] and the States" (33 USC § 1251 [e]). The EPA may issue a NPDES permit only "after opportunity for public hearing" (33 USC § 1342 [a] [1]), and "a copy of each permit application and permit issued . . . shall be available to the public" (33 USC § 1342 [j]). In addition, the EPA regulations provide for public participation in the issuance of NPDES permits, including requiring notice and opportunity for comment on the denial of permit applications or the issuance of draft permits (*see* 40 CFR 124.10 [a] [i], [ii]), and the opportunity for a public hearing at the request of interested parties (*see* 40 CFR 124.11). The Administrator of the EPA shall hold a hearing where the Administrator "finds, on the basis of [*402] requests, a significant degree of public interest in a draft permit(s)" (40 CFR 124.12 [a] [1]), or "at [the Administrator's] discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision" (40 CFR 124.12 [a] [2]).

Maximization of public involvement as a federally recognized goal is illustrated not only by the CWA's public participation requirement, but also by its statutory provisions authorizing private civil suits (*see* 33 USC § 1365). Under the CWA, a person may commence a civil suit against individual polluters as well as federal and state government entities for failure to act in accordance with the law (*see* 33 USC §§ 1365 (a) (1),(a) (2)). Private actors have actively litigated the proper enforcement of the CWA and compliance with NPDES permits (*see e.g. Los Angeles County Flood Control Dist. v Natural Resources Defense Council, Inc.*, 133 S Ct 710, 184 L. Ed. 2d 547 [2013] [environmental organizations brought action against California municipal entities, alleging that they were discharging urban stormwater runoff into navigable waters in violation of the CWA]; *Decker v Northwest Env'tl. Defense Ctr.*, 133 S Ct 1326, 185 L. Ed. 2d 447 [2013] [environmental organization brought

action against Oregon officials and timber companies, alleging that they violated the CWA by discharging stormwater from ditches alongside logging roads in state forest without NPDES permits]).

C. State Pollutant Discharge Elimination System

The CWA also allows for a federally-authorized, EPA-approved state to issue permits "for discharges into navigable waters within" the state's jurisdiction (33 USC § 1342 [b]). Currently, a majority of states are EPA-approved to operate their own state pollutant discharge elimination system (SPDES). The laws of such state must "provide adequate authority to carry out the [permit] program" (33 USC § 1342 [b]), and the permits issued pursuant to this EPA authorization, must "apply, and insure compliance with, any applicable [CWA effluent limitations and standards]" (33 USC § 1342 [b] [1] [A]).

In 1975, the EPA authorized New York to issue permits under the state's SPDES, established pursuant to Article 17 of New York's Environmental Conservation Law. Thus, discharges or pollutants from point sources into the waters of the state are prohibited, unless authorized under New York's SPDES permit program (*see* ECL 17-0803; *see also* 33 USC § 1311 [a]). In accordance [*403] with the ECL, any discharges allowed by these permits shall

"conform to and meet all applicable requirements of the [CWA] ... and rules, [***290] [**800] regulations, guidelines, criteria, standards and limitations adopted pursuant thereto relating to effluent limitations, water quality related effluent limitations, new source performance standards, toxic and pretreatment effluent limitations, ocean discharge criteria, and monitoring, and to participate in the [NPDES] created by the [CWA]"

(ECL § 17-0801). In addition to applicable federal requirements, such permits are also subject to regulations issued by DEC (*see* 6 NYCRR 750, *et seq.*).

In New York, in order to obtain a permit, an interested party must file an application (*see* ECL § 17-0803; 6 NYCRR 750-1.4 [a]). The applicant must secure the permit prior to actual discharge of any prohibited pollutant (ECL § 17-0803 ["it shall be unlawful to discharge . . . without a SPDES permit"]; 6 NYCRR 750-1.4 [a] ["no person shall discharge . . . without a SPDES permit"]). As required by law, DEC

reviews and, where appropriate, approves the permit and issues a draft permit setting forth the effluent limitations and other conditions applicable to the discharger (ECL § 17-0809 [1]; 6 NYRR 750-1.10 [a]).

Public participation under New York's SPDES permit program is advanced through public notice requirements and an opportunity for public hearing on the permit application (*see* ECL § 17-0805 [b]; *see also* 6 NYCRR 750-1.12 [a] [requiring notice]). The DEC must provide notice of every draft SPDES permit, describing its terms and conditions, and must allow for a minimum 30-day public comment period (ECL § 17-0805 [b]). During the comment period, "[t]he department may, in its discretion, provide an opportunity for the applicant or any interested agency, person or group of persons to request or petition for a public hearing" (*id.*).

D. General Permits

As an alternative to the NPDES permit established by the CWA, the EPA passed regulations allowing the issuance of general permits "to cover one or more categories or subcategories of discharges . . . within a geographical area" (40 CFR § 122.28 [a] [1]). [*404] A general permit "is a single NPDES permit that covers a number of individual discharges that would otherwise require individual NPDES permits" (*Ohio Val. Envtl. Coalition v Horinko*, 279 F Supp 2d 732, 758 [SDW Va 2003], citing 40 CFR 122.28; *see also Environmental Defense Ctr., Inc. v U.S. E.P.A.*, 344 F3d 832, 853 [9th Cir 2003] ["A general permit is a tool by which EPA regulates a large number of similar dischargers"] [Hereinafter *EDC*]). Unlike the single-applicant NPDES permit process, under the general permit scheme, the permitting authority may issue a general permit "containing a common set of effluent limitations and other permit conditions that will apply to a potentially large number of point sources" (Gaba at 419). As such, it provides for certain efficiencies and reduces the administrative burdens associated with an individual permit process (*see Natural Resources Defense Council, Inc. v Costle*, 568 F2d 1369, 1381, 186 U.S. App. D.C. 147 [DC Cir 1977] ["Area-wide regulation is one well-established means of coping with administrative exigency"]).

With the exception of the CWA's authorization for general permits allowing discharges of "dredged or fill material" (*see* 33 USC § 1344 [e] [1]), the CWA contains no special provisions for a category of "general permits,"

thus leaving the procedures and substantive contours of a general permit scheme to the EPA (*see* 40 CFR 122.28 [b])². [***291] [**801] Those EPA regulations allow states to issue general permits through their SPDES programs, in accordance with federal regulatory provisions (*see* 40 CFR 123.1 [c] ["The (EPA) Administrator will approve State programs which conform to the applicable requirements of this part"]). All general permits, whether issued by the EPA or by an authorized state, must comply with the CWA and federal regulations (*see* 40 CFR § 123.25 [a]).

2 Hence, explaining 1991 legislation wherein Congress mandated that the EPA "issue final regulations with respect to general permits for stormwater discharges associated with industrial activity on or before February 1, 1992" (Pub. L. No. 102-240, December 18, 1991, 105 Stat 1914). In response, EPA implemented a general permit system for stormwater discharges from industrial activities (*see* National Pollutant Discharge Elimination System General Permits and Reporting Requirements for Storm Water Discharges Associated With Industrial Activity, 56 FR 40948-01).

Since under a general permit program the permit is not issued for individual dischargers, but rather sets forth requirements that all applicants must satisfy in order to lawfully discharge pollutants, public participation under this scheme is provided through a notice and comment period directed at [*405] soliciting public comments on the contents of the general permit (*see* 40 CFR 124.10 [requiring notice]; 40 CFR 124.11 [allowing comment and requests for a hearing]). Once the general permit is finalized and approved, applicants for whom the general permit is designed may submit a Notice of Intent (NOI) to comply with the permit and thus acquire coverage thereunder (*see* 40 CFR 122.28 [b] [2] [i]).

New York State implements a general permit program (*see* 6 NYCRR 750-1.21 [a]). As defined in the ECL, a general permit "cover[s] a category of point sources of one or more discharges within a stated geographical area which (i) involve the same or substantially similar types of operations, (ii) discharge the same types of pollutants, (iii) requires the same effluent limitations or operating conditions, (iv) require the same or similar monitoring, and (v) which will result in minimal adverse cumulative impacts" (ECL 70-0117

[6][a]; *see also* 6 NYCRR 750-1.21).

II.

A. Stormwater Pollutant Discharges

Congress amended the CWA in 1987 to provide for regulation of municipal and industrial stormwater discharges under the NPDES program (*see* 33 USC § 1342 [p]). Stormwater, from rain and snow, is a highly significant source of water pollution, because it flows across all types of surfaces and washes various contaminants into municipal storm sewer systems which then drain into local water bodies. According to the EPA,

"[s]torm water runoff continues to harm the nation's waters. Runoff from lands modified by human activities can harm surface water resources in several ways[,] including by changing natural hydrologic patterns and by elevating pollutant concentrations and loadings. Storm water runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients, heavy metals, pathogens, toxins, oxygen-demanding substances, and floatables"

(40 CFR 122.30 [c]). Regulation of stormwater discharges are particularly challenging because of the ever present rain and snow that lead to stormwater runoff, and the fact that third-parties may be the [*406] source of illicit discharges to storm sewer systems (*see* 64 Fed Reg 68, 789 ["EPA acknowledges the [***292] [**802] need to devise a regulatory program that is both flexible enough to accommodate the episodic nature, variability and volume of wet weather discharges and prescriptive enough to ensure protection of the water resource"])).

As provided under the CWA, the NPDES permit for municipal storm sewer discharges "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions the [EPA] Administrator or the State determines appropriate for the control of such pollutants" (*see* 33 USC § 1342 [p] [3] [B] [iii]). The CWA does not define the maximum extent practicable standard. However, it appears to provide broad authority to agencies to control stormwater pollution.

In 1990 and 1999, the EPA adopted rules regulating Municipal Separate Storm Sewer Systems ("MS4s"),

which are systems designed to carry stormwater (*see* 40 CFR 122.26 [b] [8]). The problems associated with regulating small MS4s are complex because of these municipalities' limited resources, the sheer numbers and diversity of the localities impacted by the general permit system, and the opportunity for an MS4 drainage system to cross geographic boundary lines, thus implicating multiple government entities.

The federal regulations authorize state agencies to issue general permits for such discharges (*see* 40 CFR 122.26 [a] [5], 122.28 [a] [2] [i]). According to the EPA regulations, the state general permit must require that the MS4 "develop, implement and enforce a storm water management program designed to reduce the discharge of pollutants from [the] MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the [CWA]" (*see* 40 CFR 122.34 [a]). Further, the MS4's stormwater management program (SWMP) "must include the minimum control measures" set forth in the EPA regulations (*id.*). The EPA has also concluded that with respect to MS4s

"narrative effluent limitations requiring implementation of best management practices (BMPs) are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements (including reductions of pollutants to [*407] the maximum extent practicable) and to protect water quality. Implementation of best management practices consistent with the provisions of the storm water management program required pursuant to this section and the provisions of the permit required pursuant to § 122.33 constitutes compliance with the standard of reducing pollutants to the 'maximum extent practicable'"

(40 CFR 122.34 [a]).

B. New York State's MS4 SPDES Stormwater Discharges General Permit

In 2003, DEC issued a General Permit For Stormwater Discharges for MS4s ("General Permit"), which applies to small municipalities as defined in the federal regulations (*see* 40 CFR 122.26 [16]). The General Permit was renewed for two years in 2008, and renewed again for five years in 2010³. This single General Permit currently covers 559 municipal separate storm sewer systems, statewide.

3 In anticipation of the General Permit's expiration on April 30, 2010, DEC sent a public notice of an interim draft renewal, effective for two years.

The General Permit authorizes stormwater discharges by small MS4 operators covered by the permit. Coverage is effective once the MS4 submits, and the State [***293] [**803] accepts as complete, an NOI (*see* NYS DEC SPDES General Permit, Permit No. GP-0-10-002, at 2, [hereinafter "General Permit"]) ["Authorization under this SPDES General Permit is effective upon written notification from the [DEC] of the receipt of a complete NOI"]. The New York NOI is a form document filled out by an MS4. It contains the MS4's affirmances that it will comply with the general permit requirements, and that it has developed an initial SWMP to be implemented in accordance with the terms of the General Permit.

Under the General Permit scheme, an MS4

"must develop (for newly authorized MS4s, implement), and enforce a SWMP designed to reduce the discharge of pollutants from small MS4s to the [*408] maximum extent practicable ("MEP") in order to protect water quality and to satisfy the appropriate water quality requirements of the ECL and the CWA. The objective of the permit is for the MS4s to assure achievement of the applicable water quality standards"

(General Permit, "Part IV. Stormwater Management Program (SWMP)," Subsection A, "SWMP Background," at 14). The General Permit requires the SWMP contain the six mandatory minimum control measures set forth in the General Permit, and which mirror those contained in the EPA regulations. These control measures are titled: (1) public education and outreach on stormwater; (2) public participation in the development, implementation and review of the MS4's SWMP; (3) development of a program for detecting and eliminating "illicit discharges"; (4) development of a program to control construction site stormwater runoff; (5) post-construction stormwater management; and (6) pollution prevention for municipal operations (General Permit, "Part VIII. Minimum Control Measures - Traditional Non-land Use and Non-traditional MS4s," at 49-67; *see also* CFR §§ 122.34 [b] [1]-[6]).

Also, DEC has identified for each minimum control, certain mandatory "best management practices," to be

utilized by the MS4 "to prevent or reduce the pollution of waters of the state" (General Permit, "Part X. Acronyms and Definitions," at 88). The MS4's SWMP must specifically set forth "measurable goals" for each management practice (*see id.* at 95). An MS4 documents the developed, planned, and implemented SWMP elements in a SWMP Plan (Plan),⁴ which "describe[s] how pollutants in stormwater runoff will be controlled" (*id.* at 96).

4 The Plan may be created individually or with a group of covered municipalities, and is a separate document, not to be submitted with the NOI (*see* General Permit, "Part X. Acronyms and Definitions," at 96).

In addition to the minimum controls and management practices identified by the DEC, an MS4 "must comply with all applicable technology-based effluent standards or limitations promulgated by EPA pursuant to" the CWA (General Permit, "Part VI. Standard Permits and Conditions," Subsection E. "Technology Standards," at 22). Further, "[i]f an effluent standard or limitation more stringent than any effluent limitation in the SPDES general permit or controlling a pollutant not limited in the permit is promulgated or approved after the permit is [***294] [**804] issued, the SWMP [*409] plan shall be promptly modified to include that effluent standard or limitation" (*id.*)

The ECL further requires that SPDES permits "insure compliance with water quality standards adopted pursuant to state law" (ECL § 17-0811 [5]). The EPA regulations also prohibit issuance of SPDES permits that do not "ensure compliance with applicable water quality requirements of all affected States" (*see* 40 CFR §§ 122.4 [d], 123.25 [a] [1], 122.44 [1], 123.25 [a] [15]).

The CWA requires a state to establish, as effluent limitations, water quality standards for the state's water bodies by designating uses for every waterway and the amount of permissible pollutants that may be present without impairing those designated uses (*see* 33 USC § 1313 [c] [2] [A]). Where current technology-based pollution controls are ineffective to attain or retain water quality standards for a water body, then that body is considered "impaired" (*see* 33 USC § 1311 [d]). The CWA requires that the states priority rank these impaired waters, "taking into account the severity of the pollution and the uses to be made of such waters" (*see* 33 USC § 1311 [d] [1] [A]), and calculate for each the total

maximum daily load (TMDL) for the relevant pollutants that the water body may receive from all sources while still maintaining its water quality standards for any particular pollutant (*id.*). The states must set reductions for sources responsible for discharging pollutants in order for the dischargers to meet the TMDL (*see* 33 USC § 1311 [d] [1] [C]). As petitioners and the state recognize, it can take years to determine a TMDL.

For those impaired waters in New York that do not have a TMDL, the state's General Permit has established interim measures to address stormwater discharges pending designation of the applicable TMDL. In particular, effective the date the MS4 attains permit coverage, the MS4 must ensure "no net increase" in its discharge for certain pollutants, referred to as "pollutants of concern" and which are identified in the General Permit (*see* General Permit, "Part III. Special Conditions," Subsection B., "Impaired Waters," at 11, 101-108). The General Permit includes pollutant load reductions for various water bodies in the state (General Permit, "Part IX. Watershed Improvement Strategy Requirements," Subsection C., "Pathogen Impaired Watershed MS4s," at 78). Further, the MS4 must take all necessary actions to ensure future discharges do not cause or contribute to any existing violation of water quality standards. In other words, the General [*410] Permit requires the MS4 maintain the pollutant level at status quo. With respect to those water bodies for which New York has established a TMDL, the General Permit requires that the MS4 comply with the discharge reduction as "defined by the TMDL program" (General Permit, "Part III. Special Conditions," Subsection B "Impaired Waters," Subpart 2, "Watershed Improvement Strategies," at 12).

The MS4's affirmative agreement to comply with the General Permit requirements is represented in the NOI form, which consists mainly of a simplified checklist of the minimum control measures and management practices. In other words, the MS4 selects from a "menu" of required and optional management practices, and thus indicates which items the MS4 will employ to meet a given minimum control measure⁵. In order to select from [***295] [**805] the list, the MS4 need only fill in the circle corresponding to each management practice. The NOI form also provides for a narrative description of "measurable goals," with start and end dates "that will be used for each best management practice for each of the minimum control measures" (NOI at 12-13).

5 For example, with respect to the minimum control measure "Illicit Discharge Detection and Elimination," the NOI form requires the MS4 include in its SWMP the following management practices:

"Develop, implement and enforce a program to detect and eliminate illicit discharges to the MS4"

"Outfall and storm sewershed boundary mapping"

"field verify outfalls"

"outfall reconnaissance inventory"

"prohibit illicit discharges"

"Public, employees, business informed of hazards of illicit discharge"

"Adopt and enforce local law to prohibit illicit discharges"

"Adopt available mechanisms for to prohibit illicit discharges"(see NYS DEC Phase II SPDES General Permit for Storm Water Discharge from MS4s Notice of Intent, at 8 [hereinafter "NOI"]).

In addition to the required practices, the NOI lists, by short phrases, several optional management practices for the applicant to consider adopting:

"System mapping"

"address exempt non-stormwater discharges as necessary"

"Dye testing"

"shoreline surveys"

"system surveys"

(*id.* at 8).

[*411] III.

Petitioners filed this hybrid CPLR article 78 proceeding and declaratory judgment action challenging portions of the General Permit as inconsistent with

federal and state law. Petitioners requested the court remand the General Permit to DEC, with instructions that DEC modify the permit to conform with all applicable legal requirements.

Our scope of review requires that we determine whether DEC's issuance of the General Permit "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" to the extent that the permit's requirements violate state and federal law (CPLR 7803 [3]). Contrary to the majority, I conclude that DEC is in violation of applicable mandatory statutory and regulatory requirements on two grounds. First, DEC improperly grants coverage under the General Permit to an MS4, without a pre-coverage substantive review of the MS4's intended storm water discharge control measures. Second, the state's General Permit scheme fails to provide members of the public with an opportunity to request a hearing on the contents of a MS4's NOI and SWMP.

A. New York's Small MS4 General Permit

Petitioners allege that the General Permit relies on an impermissible self-regulatory system, one that is dependent on the MS4 implementing pollution controls unverified by DEC for compliance with federal and state requirements. Specifically, petitioners claim that under federal law, the General Permit must contain effluent limitations that reduce pollutant discharges to the "maximum extent practicable," and also ensure compliance with water quality standards. Petitioners explain that New York's General Permit scheme fails to ensure the adoption of legally sufficient pollution controls because DEC authorizes an MS4 to develop and implement a stormwater discharge management program, without DEC first making an administrative determination that the specific measures chosen by the MS4 will satisfy statutory pollutant reduction standards.

DEC responds that by requiring an MS4 to adopt the six minimum control measures [***296] [**806] and certain best management practices, DEC has set the benchmark for compliance with the CWA's "maximum extent practicable" standard. According to [*412] DEC, so long as the MS4 agrees to the minimum control measures and management practices, the MS4 has chosen a course of action that meets legal requirements.

The majority concludes that the General Permit is in compliance with the CWA and ECL, and that the

petitioners merely seek for this Court to hold the SPDES General Permit to the same standards applicable to a SPDES individual permit, in contravention of the state legislature's intent (*see* majority op at 27-29). Essentially, the majority adopts DEC's position that the stormwater general permit scheme is lawful because it complies with EPA stormwater regulations and ECL requirements, and reflects the legislative preference for a streamlined regulatory process which reduces or eliminates administrative burdens (*see id.* at 27).

I agree with the majority that the General Permit is designed to reduce the administrative burdens associated with the SPDES individual permit program, and that our analysis of petitioners' claims must consider that these are different permitting schemes. Where I disagree with the majority is with its conclusion that the state's stormwater General Permit complies with the CWA and ECL when it does no more than allow those who seek to discharge pollutants to determine for themselves the pollution controls that satisfy the federal standard, and as a consequence insulate themselves from liability should they fall short of the federal mandate to reduce discharges to the "maximum extent practicable."

DEC's own description of the General Permit and its regulatory efforts establishes that DEC has created an impermissible scheme that allows pollution without first ensuring that the MS4s' pollution controls comply with the CWA and ECL. While the General Permit sets forth certain control measures and management practices that every MS4 must incorporate as part of its pollutant discharge control program, the MS4 is wholly responsible for the task of identifying, developing and implementing the activities and measurable goals necessary to achieve the reduction of stormwater discharges to the "maximum extent practicable." This is not itself unlawful because DEC could reasonably conclude there are administrative and substantive benefits associated with allowing the state's several hundred municipalities to develop pollution control programs designed to address local circumstances. However, by leaving to an MS4 the development and adoption of its pollutant discharge controls, and granting General Permit coverage [*413] without DEC having reviewed the MS4's program to ensure compliance with the CWA and ECL, the state has abdicated its essential regulatory role, in violation of the CWA and ECL.⁶

6 DEC contends it reviews every NOI before

accepting it. However, DEC can point to only three instances in which it has rejected an NOI under the 2010 General Permit. In all three, the offending MS4 failed to identify certain best management practices that it is implementing or intends to implement. Stated differently, DEC has only rejected NOIs where the MS4 left portions of the NOI's menu blank. Despite DEC's contention to the contrary, this "review" hardly amounts to anything more than a "rubber stamp."

The mechanics of the General Permit scheme are undisputed. The General Permit replaces the individual permit system with a single permit applicable to a class of dischargers. New York's General Permit [***297] [**807] contains the six minimum control measures identified by the EPA as appropriate to reducing pollutant discharges to the maximum extent practicable. DEC contends that it has determined that these measures can be achieved by application of certain best management practices and has included those in the General Permit, grouped according to their corresponding control measure. Thus, the measures, as expanded by the specified management practices, are the foundation of the DEC's approach to ensuring an MS4's reduction of stormwater pollutant discharges within the mandates of the CWA.

In directing an MS4 to employ these control measures and management practices in order to achieve compliance with the "maximum extent practicable" standard, the General Permit does little to explain the standard, other than to state that if an MS4 utilizes all the applicable management practices it will satisfy the federal standard. However, the text of the controls and management practices lacks the type of quantitative explication of objective standards which an MS4 can apply to assess whether its stormwater system's protocols actually reduce pollutant discharges to a legally sufficient level.

For example, the minimum control measure titled "Illicit Discharge Detection and Elimination," which refers to mixed stormwater discharges such as sanitary sewage, garage drain effluent, and waste motor oil, requires as a management practice that an MS4 "develop, implement and enforce a program to detect and eliminate illicit discharges to the MS4" (*see* General Permit, "Part VII. Minimum Control Measures - Traditional Land Use Control," Subsection A "Traditional Land-Use Control

MS4 Minimum Control Measures," Subpart [*414] 3 "Illicit Discharge Detection and Elimination [IDDE] - SWMP Development/Implementation, at 34-35). This, of course, says nothing more than that the MS4 must establish a program to comply with the law. This is but one example of the vague management practices that provide little by way of instruction on how an MS4 develops and implements specific controls to achieve sufficient reduction of discharge levels.

Each and every one of those six control measures requires that the MS4 "develop (for newly authorized MS4s), record, periodically assess, and modify as needed, measurable goals," and also that the MS4 "select and implement appropriate ... [activities or best management practices] and measurable goals to ensure the reduction of all [pollutants of concern] in stormwater discharges to the [maximum extent practicable]" (General Permit, "Part VII. Minimum Control Measures - Traditional Land Use Control" at 29, 33, 35, 39, 46). As the General Permit requires, the SWMP "describe[s] the best management practice/measurable goal, "identif[ies] time lines/schedules and milestones for development and implementation"; includes "quantifiable goals to assess progress over time"; and describes "how the covered entity will address pollutants of concern" (General Permit, "Part X, Acronyms and Definitions," at 95). These are hardly the type of "highly specific" controls DEC claims them to be.

While the General Permit references other guidance, the guidance is non-binding. Moreover, it is still the case that the MS4 could choose to ignore the guidance, believing it has complied with the maximum extent practicable standard only to learn later that it has violated the CWA. This is not a merely speculative assessment of the General Permit structure because as the permit itself states

"[i]f a covered entity chooses only a few of the least expensive methods, it is [***298] [**808] likely that MEP has not been met. On the other hand, if a covered entity employs all applicable BMPs except those where it can be shown that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard. MEP required covered entities to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, [*415] the BMPs would not be technically feasible, or the cost would be prohibitive"

(General Permit, "Part X. Acronyms and Definitions," at 91). As this suggests, something less than adoption of all of the management practices may comply with the maximum extent practicable standard, but when that would be the case and under what circumstances is uncertain and subject to the particularities of the MS4.

More significant than the opportunity for an MS4 to select additional management practices -- or even substitute mandatory best management practices with management practices the MS4 determines on its own are better suited or economically feasible, and yet still designed to ensure achieve reduction to the maximum extent practicable -- is the fact that, even if the mandatory management practices were clearer and specific, the General Permit does not, alone, set the limitations that each MS4 will implement. Instead, DEC delegated that task to the MS4. The General Permit requires that in order to utilize the measures and management practices, the MS4 must determine the details and logistics of the management practices it has selected. Thus, the General Permit scheme depends on each MS4's determination and eventual adoption of the most efficacious practices that the MS4 will apply to achieve the statutory goal of pollutant discharge reductions to the maximum extent practicable.

To that end, the General Permit specifically requires that the MS4 develop and implement a SWMP "designed to reduce the discharge of pollutants from the small MS4 to the maximum extent practicable [], to order to protect water quality, and to satisfy the appropriate water quality requirements of the ECL and [CWA]" (*see* General Permit, "Part IV. Stormwater Management Program (SWMP) Requirements," Subsection A. "SWMP Background," at 14). Although the General Permit requires the SWMP contain the six measures and the mandatory management practices, the SWMP does more than merely recite them. Rather, the SWMP expounds upon them, and thus reflects the MS4's determination of the appropriate limits necessary to achieve CWA compliance.

That determination is set forth in the "measurable goals" the MS4 develops for each of the management practices. These goals are intended to "help the covered entities assess the [*416] status and progress of their program" (General Permit, "Part X, Acronyms and Definitions," at 95). They "should reflect the needs and characteristics of the covered entity and the areas served

by its small MS4. Furthermore, the goals should be chosen using an integrated approach that fully addresses the requirements and intent of the [minimum control measures]" (*id.* at 91).

This is not a static process, because as the General Permit indicates, "[t]he assumption is that the program schedules would be created over a 5 year period and goals would be integrated into that time frame" (*id.*). Particularly troubling is the fact that DEC does not review the SWMP or the Plan. In fact, it appears DEC has gone to great lengths to avoid formal consideration of both by prohibiting inclusion of the SWMP with the MS4's NOI, and by allowing up to 3 years after the effective [***299] [**809] date of permit coverage for the MS4 to develop and implement the Plan.

If, as DEC argues, all that is required to result in discharge reductions sufficient to comply with the CWA is the employment of the minimum control measures and the mandatory management practices, there would be no need for municipal development and articulation of "activities," "measurable goals" and "other techniques." In reality, the MS4 is left to details where none have been provided, and to craft a SWMP and Plan to guide the implementation of its storm water discharge reduction efforts. Notably, DEC anticipates that those efforts will change over time, and thus allows the Plan to be developed and implemented up to three years after the MS4 gains coverage under the General Permit.

The majority concludes that "[t]here is no doubt that the 2010 General Permit complies with EPA's 1999 regulations" (majority op at 18). However, those very same federal regulations for small municipal separate storm sewer systems were deemed to violate the CWA in *EDC* because they failed to provide for meaningful administrative review (*see* 344 F3d 832, 856 [9th Cir 2003]). In that case, the Ninth Circuit Court of Appeals considered a challenge to the EPA's Storm Water Phase II Rule, under which small MS4s were authorized by an NPDES general permit to immediately commence the discharge of storm water after submitting an NOI. Unlike the "traditional general permitting model," the court explained, "the Phase II Rule requires that each NOI contain information on an [*417] individualized pollution control program that addresses each of the six general criteria specified in the Minimum Measures" (*id.* at 853). Under the Rule, the EPA was not required to conduct a review of each NOI prior to discharge

authorization, as it is required to conduct before granting an application for an individual permit (*id.* at 854-856). The Ninth Circuit held that the permitting scheme violated 33 USC § 1342 (p) (3) (B) (iii) because "nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce the discharges by far less than the maximum extent practicable" (*EDC*, 344 F3d at 855). Moreover, "in order to receive the protection of a general permit, the operator of a small MS4 needs to do nothing more than decide for itself what reduction in discharges would be the maximum practical reduction. No one will review that operator's decision to make sure that it was reasonable, or even good faith" (*id.*). As a consequence, the "EPA would allow permits to issue that would do less than *require* controls to reduce the discharge of pollutants to the maximum extent practicable" (*id.* [emphasis in original]). Accordingly, the court remanded that aspect of the Rule.

The Second Circuit applied similar reasoning to reject EPA's NPDES permitting scheme, albeit in a case involving different water pollutants, namely emissions from concentrated animal feeding operations (CAFOs) proscribed by the EPA's CAFO Rule. In *Waterkeeper*, the Circuit Court concluded that the CAFO Rule did not require NPDES permitting authorities to review the management plans to ensure that the plans were developed and implemented so as to reduce discharges as required by the federal regulations (*Waterkeeper*, 399 F3d at 500).

New York's General Permit similarly fails for the reasons articulated by the Circuit Courts in *EDC* and *Waterkeeper*. Although the Appellate Division concluded that the General Permit "includes[s] a variety [***300] [**810] of enforcement measures that are sufficient to comply with the maximum extent practicable standard" (*Natural Resources Defense Council, Inc.*, 120 AD3d at 1243), that is besides the point because the issue is not the propriety of the measures or the management practices, [*418] because those alone do not establish the details of any particular MS4's stormwater discharge program. Indeed, petitioners do not challenge DEC's choice of minimum controls or management practices. Rather, they challenge DEC's failure to assess for legal adequacy the pollutant discharge proscriptions actually developed by the municipalities, and intended to be applied by the MS4s.

The fact that DEC provides a menu of management practices cannot save the General Permit scheme because "nothing requires that the combination of items that the operator of a small MS4 selects from this 'menu' will have the combined effect of reducing discharges to the maximum extent practicable" (*EDC*, 344 F3d 832, n 32). Moreover, it is not the amount of choices that matters here--as the DEC suggests by arguing that it imposes forty four mandatory management practices--because more practices are meaningless if there is no assessment as to whether the MS4 understands how those practices work and how to apply them to ensure pollutant discharge reduction to the level required by the CWA. This is certainly the case here where the CWA's maximum extent practicable standard is intentionally undefined, and where DEC's management practices are vague and generalized, often redundant of the minimum controls.

The majority appears to marginalize the decision in *EDC*, characterizing it as part of a Federal Circuit Court split (see majority op at 25)⁷. However, in *EDC*, the Ninth Circuit vacated the EPA regulations to the extent they did "allow permits to issue that would do less than *require* controls to reduce the discharge of pollutants to the maximum extent practicable" (*EDC*, 344 F3d at 855-56, citing 64 Fed. Reg. at 68753). Rather than a division among the Circuit Courts, the Ninth Circuit decision is the only Circuit decision on the validity of the regulations' content. While the United States Supreme Court is the final word on the proper interpretation of the CWA and the EPA regulations, that Court has chosen not to take up the case (*see Texas Cities Coalition on Stormwater v E.P.A.*, 541 U.S. 1085, 124 S. Ct. 2811, 159 L. Ed. 2d 246 [2004] [denying petition for writ of certiorari]). Moreover, the Ninth Circuit decision has affected the EPA's application of the regulations. Indeed, the EPA issued post-EDC guidance to Water [*419] Management Division Directors stating that "[t]he permitting authority will need to conduct an appropriate review of Phase II MS4s' NOIs to ensure consistency with the permit."⁸

⁷ The majority treats *Waterkeeper* similarly, relegating it to a footnote because that decision, "however interpreted, does not eliminate the circuit split" (*see* majority op at 25 n 14).

⁸ This guidance pre-dates the Seventh Circuit's decision in *Texas Ind. Producers and Royalty Owners Assn. v E.P.A.* (410 F3d 964 [7th Cir

2005]) which held, contrary to the Ninth Circuit, that NOIs are not subject to the CWA public participation requirements. However, the EPA guidance has not been rescinded and there is nothing to suggest the obsolescence of the guidance with respect to agencies ensuring consistency with the permit and compliance with the CWA.

Even assuming we could simply ignore that the EPA regulations have been vacated [***301] [**811] in relevant part, notwithstanding the majority's conclusion that the state's General Permit "concededly" complies with the EPA regulations, the fact is that the EPA regulations require implementation of best management practices consistent with the SWMP (*see* 40 CFR 122.34 [a] ["Implementation of best management practices consistent with the provisions of the storm water management program required pursuant to this section and the provisions of the permit required pursuant to § 122.33 constitutes compliance with the standard of reducing pollutants to the 'maximum extent practicable'"]). Therefore, so long as DEC allows General Permit coverage to an MS4 without ensuring the intended consistency between management practices and the individualized protocols set forth in the SWMP, the state is in violation of the CWA (*see* 33 USC § 1342 [p] [3] [B] [iii] [providing that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants"]]).

It is undeniable that DEC has made efforts to adopt a general permit scheme that complies with the CWA and ECL, and which provides an administratively feasible approach to the difficult task of reducing stormwater pollutant discharges. Nevertheless, DEC's current approach is legally impermissible. Of course, it is for the state, and not the judiciary, to establish the state's review and assessment protocols (*see Akpan v Koch*, 75 NY2d 561, 570, 554 N.E.2d 53, 555 N.Y.S.2d 16 [1990] ["courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or to choose among alternatives"]). It very well [*420] may be that the state determines, as have other jurisdictions,⁹ that review of the SWMP and the Plan is but one way by which the state may

comprehensively and expeditiously comply with its regulatory mandate. How best to address this issue should be left to New York.

9 Texas and Mississippi, for example, require the submission of a full SWMP contemporaneously with the filing of an NOI for substantive review (*see* Texas Commission on Environmental Quality, General Permit to Discharge Under the Texas Pollutant Discharge Elimination System, § II.E.1 [2013] available at https://www.tceq.texas.gov/assets/public/permitting/stormwater/tx_r040000_issued_permit.pdf [accessed April 13, 2015]; Mississippi Department Environmental Quality, Separate Storm Sewer System (MS4) General Permit, Condition S-1. [2009] available at [http://www.deq.state.ms.us/mdeq.nsf/pdf/epd_MS4PhaseIIStormWaterGeneralPermit/\\$File/22General.pdf?OpenElement](http://www.deq.state.ms.us/mdeq.nsf/pdf/epd_MS4PhaseIIStormWaterGeneralPermit/$File/22General.pdf?OpenElement) [accessed April 14, 2015]).

B. Public Participation Requirements

Petitioners argue that DEC violates statutory public participation requirements by failing to provide an opportunity for public comment and to request a public hearing on a MS4's NOI and SWMP, prior to DEC's authorization of coverage under the General Permit. DEC currently provides a full public notice and comment period and an opportunity to request a public hearing on the General Permit, and DEC also affords an additional 28 day pre-coverage public comment period with respect to each NOI (*see* General Permit, "Part II. Obtaining Permit Coverage," at 8). The majority concludes this meets all applicable legal requirements. I disagree and would find that the CWA and ECL require more pre-coverage public participation. Specifically, because the NOI and SWMP must contain the MS4s' pollution controls, and the SWMP must be [***302] [**812] developed in advance of the NOI, which is then submitted to obtain coverage under the General Permit, DEC must provide an opportunity to request a public hearing for any particular NOI and SWMP.

Congress explicitly sought to encourage public participation in the development and implementation of the nation's water pollution control measures, and required that the EPA and the states provide for, encourage, and assist with "public participation in the development, revision and enforcement of any regulation,

standard, effluent limitation, plan or program established by the [EPA] or any State" (33 USC § 1251 [e]). The intended transparency of the process is reflected in the CWA [*421] requirement that permit applications, and the NPDES and SPDES permits themselves be made public (*see* 33 USC § 1342 [j]). With respect to the demand for administrative hearings, the CWA provides that the EPA may issue a permit "*after* an opportunity for public hearing" (*see* 33 USC § 1342 [a] [1] [emphasis added]).

The ECL also mandates public participation with respect to SPDES coverage. State law requires "[p]ublic notice of a complete application for a SPDES permit" (ECL § 17-0805 [1] [a]), which shall include "a statement that written comments or requests for a public hearing on the permit application ... may be filed by a time and at a place specified" (ECL 17-0805 [a] [ix]). The public comment shall last "not less than thirty days following the date of the public notice . . . during which time interested persons may submit their written views with respect to the application and the priority ranking of the permit" (ECL § 17-0805 [1] [b]).

Petitioners argue that the public should have the opportunity to request a hearing on the contents of the NOI and SWMP because both contain the MS4's pollution controls. Petitioners are correct that an MS4 must identify and list in the NOI its chosen management practices, and it must include in the SWMP the controls to reduce the discharge pollutants in accordance with the maximum extent practicable standard. Thus, the NOI and SWMP not only affirm that the MS4 will comply with the General Permit's terms, but they also explain how the MS4s will meet legal requirements, based on the localities' unique circumstances. Indeed, to ensure for itself that an MS4 understands its duties and obligations, the DEC must refer to the NOI and SWMP.

Here, DEC issued a General Permit for the specific purpose of allowing storm water pollutant discharges by a covered MS4, where an MS4 has agreed to meet conditions set forth in the CWA, ECL, federal and state regulations, and the General Permit. A cursory review of the General Permit makes clear that it is not specific to any particular MS4, but rather it is generic, intended to set forth the minimum requirements identified by DEC, which must be complied with by every MS4 seeking coverage under the General Permit. However, as DEC has vigorously contended, General Permit coverage is not

automatic, but requires that the MS4 submit an NOI which DEC must then accept as complete.

[*422] According to the General Permit, the NOI affirms that a SWMP has been developed. As the parties concede, the NOI and SWMP contain what DEC considers to be the mandatory limitations and measurable goals an MS4 proposes to implement in order to ensure stormwater pollutant discharge reduction to the maximum extent practicable, as required by the CWA. Clearly, then, submission of a completed NOI, based as it is on an initial SWMP, is the MS4's entree to the General Permit system, and is a necessary step to securing authorization to lawfully discharge pollutants in accordance with the [***303] [**813] CWA and ECL. If the NOI, and the prerequisite SWMP, do not constitute a permit application, then what other avenue does an MS4 have to secure permit coverage and authorization to lawfully discharge pollutants? The NOI and SWMP constitute an application in everything but name.

The DEC argues that the CWA and ECL public hearing requirements apply only to individual permit applications, and that public participation requirements are satisfied because the public has the opportunity to submit comments and request a public hearing regarding the General Permit itself. The EPA similarly argued in *Texas Ind. Producers and Royalty Owners Assn. v E.P.A.* (410 F3d 964 [7th Cir 2005]). In that case, the Seventh Circuit Court of Appeals agreed with the EPA that the CWA did not require the agency to provide a comment period or an opportunity to request a public hearing on NOIs and Storm Water Pollution Prevention Plans (SWPPP) submitted under the EPA's "Final National Pollutant Discharge Elimination System General Permit for Storm Water Discharges From Construction Activities." The Court concluded that the CWA was ambiguous as to whether NOIs and SWPPPs are "permits" or "permit applications", and in accordance with *Chevron, U.S.A., Inc. v Natural Resources Defense Council, Inc.* (467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 [1984]), judicially deferred to the EPA's interpretation of those statutory terms (*see Texas Ind. Producers*, 410 F3d at 978). The Court accepted as reasonable EPA's argument that individual public hearings for NOIs and SWPPPs would eviscerate the administrative efficiency of the general permit scheme (*id.*).

In contrast, in *EDC*, the Ninth Circuit had previously

rejected the EPA's argument that the CWA public hearing opportunity requirement did not apply to NOIs because they are not "permits". Instead, the Ninth Circuit held that the "NOI establishes what the discharger will do to reduce discharges to [*423] the 'maximum extent practicable'" and therefore is "functionally equivalent to a detailed application for an individualized permit" (344 F3d at 853).

The majority contends that the federal courts will have to resolve this "circuit split," and concludes that DEC's general permit scheme is permissible because it complies with the EPA's regulations and New York's law does not require more. I disagree because the majority's conclusion is unsupportable on the record before us.

Notably, the EPA's position in both cases is counter to the EPA's own description in its stormwater regulations that a permit application is inclusive of "a notice of intent for coverage under a general permit" (40 CFR 122.34). This inconsistently alone undermines the state's argument that the NOI is something other than a permit or permit application.¹⁰

10 The majority holds that while 40 CFR 122.34 "does not appear facially consistent" with the EPA's position in *EDC* and *Texas Ind. Producers*, that section of the EPA's regulations is part of a "question and answer" format intended to clarify requirements applicable to regulated small MS4s (*see* majority op at 25 n 15). Therefore, according to the majority, it is for the federal courts to determine whether the regulations are inconsistent with the EPA's position in those federal cases. However, whether the EPA has taken a position at odds with what DEC now asserts is the correct and intended interpretation of the federal regulations is, of course, relevant to this Court's analysis of DEC's defense to petitioners' claims. Turning to the regulations, it is clear from the text of 40 CFR 122.34 (d) (1) that a small MS4's NOI is a general permit application. Notwithstanding the majority's word play, there is no avoiding that the federal regulations are inconsistent with the EPA's position in *EDC* and *Texas Ind. Producers*.

[***304] [**814] Additionally, the majority's "hands-off" approach would leave this court with no authority to consider the legality of state agency conduct. That is most certainly not the law, as made plain by this Court's administrative law jurisprudence (*see Seittelman*

v Sabol, 91 NY2d 618, 625, 697 N.E.2d 154, 674 N.Y.S.2d 253 [1998] [invalidating state regulation that was "inconsistent with the controlling Federal statute it was intended to implement"]; *see also Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459, 403 N.E.2d 159, 426 N.Y.S.2d 454 [1980][the Court affords an agency *no* deference if its interpretive regulations "run[] counter to the clear wording of a statutory provision"]; *Raritan Dev. Corp. v. Silva*, 91 NY2d 98, 689 N.E.2d 1373, 667 N.Y.S.2d 327 [1997] [holding that "when an [agency] interpretation is contrary to the plain meaning of the statutory language," the Court may overrule and "decline to enforce an agency's conflicting application thereof"]; *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of [*424] Health & Mental Hygiene*, 23 NY3d 681, 992 N.Y.S.2d 480, 16 N.E.3d 538 [2014] [striking down the New York City Board of Health's restriction on soda portions as exceeding its regulatory authority given by the legislature)]¹¹. Moreover, absent binding precedent from the United States Supreme Court, there is no legal impediment to this Court interpreting federal law (*see Flanagan v Prudential-Bache Sec., Inc.*, 67 NY2d 500, 506, 495 N.E.2d 345, 504 N.Y.S.2d 82 [1986] ["When there is neither decision of the Supreme Court nor uniformity in the decisions of the lower Federal courts . . . a State court required to interpret [a] Federal statute has the same responsibility as the lower Federal courts and is not precluded from exercising its own judgment . . ."]).

11 The majority argues that DEC, as the permitting agency, must follow the EPA's interpretation of the CWA, but contends that I suggest every state's high court may second-guess the EPA (*see* majority op at 27 n 16). However, my point is not that we can decide counter to the EPA, but rather that the Ninth Circuit already has, and we cannot ignore that fact or the Ninth Circuit's analysis, even if DEC and the majority would have it otherwise.

There is also no support for the majority's concern that our review poses a potential "impediment to implementation of a coherent nationwide NPDES permitting scheme" (*id.*). The EPA provides that while SPDES permits must comply with federal regulations and the CWA, "[n]othing in the [regulations] precludes a State from . . . [a]dopting or enforcing requirements which are more stringent or more extensive than

those required [by the EPA]" (40 CFR 123.1 [h] [i] [1]). Nor is there a legal impediment to "[o]perating a program with greater scope of coverage than that required [by the federal regulations]" (40 CFR § 123.1 [h] [i] [2]). Indeed, the EPA expressly requires MS4s to "comply with any more stringent effluent limitations in [their State-issued] permit" (40 CFR 122.34 [e] [1]). It would appear, then, that differences among the Circuit Courts are the more likely obstacles to national uniformity.

We should reject DEC's argument because under the general permit scheme the NOI and SWMP replace an individual permit application. To adopt approvingly DEC's position, and EPA's argument in *Texas Ind. Producers*, fails to sufficiently interrogate the general permit regulatory scheme, or fully appreciate the role of the general public in the general permitting process. Moreover, the court's conclusion that requiring public hearings for each individual NOI and SWPPP would be inconsistent with Congressional intent is not supported by the language of the CWA. The stated purpose of that statute is to restore and maintain the integrity of the [***305] [**815] nation's waters, eliminate the discharge of pollutants into navigable waters, and ensure public participation in the development and implementation of any "plan or program" administered under the CWA by the states. While there may be administrative efficiencies [*425] supporting the use of a general permit scheme, they do not outweigh the explicit objectives and goals of the CWA to protect the country's waters. In any event, because the EPA regulations allow for individual permits even where a general permit is in place, the efficiency argument propounded by the DEC and EPA is underwhelming (*see* 40 CFR 122.28 [b] [3] [i]).

What is actually counter to the intent of the CWA is to provide an opportunity to request a public hearing in cases involving individual permits, while denying the

same under a statewide general permit scheme involving pollutant discharges from hundreds of MS4s. The latter potentially implicates the integrity of local water bodies more significantly than the actions of any single polluter, and therefore requires the type of public scrutiny and engagement envisioned by the CWA (*see* 33 USC § 1342 [a] [1] [the EPA may issue a NPDES permit only "after opportunity for public hearing"]).

Therefore, DEC's determination that neither the CWA nor the ECL requires an opportunity for a public hearing on the NOIs and SWMPs, prior to DEC granting permit coverage, ignores the obvious purpose and role of these documents, and undermines the CWA's public participation requirement. As such, DEC's interpretation is not entitled to deference, and is, for the reasons I have stated, arbitrary and capricious. Therefore, the NOI and SWMP should be subject to statutory public participation requirements that include the opportunity to request a public hearing.

III.

Accordingly, the 2010 General Permit does not provide for adequate review of NOIs or meaningful public participation in accordance with the CWA. Thus, I would modify the Appellate Division order to remit the Permit to DEC for compliance. I agree with the majority that petitioners' remaining contentions are without merit (*see* majority op at 30).

* * * * *

Order, insofar as appealed from, affirmed, with costs. Opinion by Judge Read. Judges Pigott, Abdus-Salaam and Stein concur. Judge Rivera dissents in part in an opinion in which Chief Judge Lippman and Judge Fahey concur.

Decided May 5, 2015

VOLUME III

TAB 14

LEXSEE

**MARYLAND DEPARTMENT OF THE ENVIRONMENT, ET AL. v.
ANACOSTIA RIVERKEEPER, ET AL.**

No. 2199, September Term, 2013

COURT OF SPECIAL APPEALS OF MARYLAND

222 Md. App. 153; 112 A.3d 979; 2015 Md. App. LEXIS 37; 45 ELR 20077

April 2, 2015, Filed

SUBSEQUENT HISTORY: Writ of certiorari granted Md. Dep't of the Env't v. Anacostia Riverkeeper, 443 Md. 734, 118 A.3d 861, 2015 Md. LEXIS 534 (2015) Reversed by, Remanded by Md. Dep't of the Env't v. Riverkeeper, 2016 Md. LEXIS 97 (Md., Mar. 11, 2016)

PRIOR HISTORY: Appeal from the Circuit Court for Montgomery County, Ronald B. Rubin, Judge. Riverkeeper v. Md. Dep't of the Env't, 2013 Md. Cir. Ct. LEXIS 12 (2013)

DISPOSITION: JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED AND CASE REMANDED TO THE MARYLAND DEPARTMENT OF THE ENVIRONMENT FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANTS.

Gansler, Attorney General on the brief) all of Baltimore, MD. Walter Wilson (Marc P. Hansen, County Attorney, Edward B. Lattner, Chief on the brief) all of Rockville, MD, for Appellant.

Argued by: Jennifer C. Chavez (Khushi K. Desai, Earthjustice on the brief) all of Washington, D.C., for Appellee.

JUDGES: [***1] Nazarian, Leahy, Friedman, JJ. Opinion by Nazarian, J.

OPINION BY: Nazarian

OPINION

[**981] [*156] Opinion by Nazarian, J.

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COUNSEL: Argued by: Nancy W. Young (Douglas F.

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This case arises out of protracted litigation over the terms of the stormwater management [***2] permit (the "Permit") that the Maryland Department of the Environment ("the Department") issued to Montgomery County (the "County") in 2010. The County and Department appeal the decision of the Circuit Court for Montgomery County remanding the Permit to the Department "for further proceedings to allow the agency to comply with Maryland law, the Clean Water Act, and federal regulations consistent with" the court's interpretation of the governing law and regulations. We agree that the Permit must be revised, and so we affirm the circuit court's decision to remand. Importantly, though, we hold that the Department and the County had the law right: the Permit falls short not for failing to hold the County to State water quality standards, as the challengers urge,¹ but because it did not [**982] afford an appropriate opportunity for public notice and comment and because it lacks crucial details that would explain the County's stormwater management obligations.

1 The challengers include Anacostia Riverkeeper and other self-described "local and regional environmental groups dedicated to restoring and protecting waters that flow through Montgomery County," who challenged the Permit based on a number of [***3] concerns including those we will describe below.

I. BACKGROUND

Stormwater is what the word suggests: water from rain- or other storm events that, as it (over)flows into

streams and [*158] rivers, picks up and carries large quantities of pollutants that evade Mother Nature's filtration process. The pollutants can include anything from road detritus--trash, road salts, grease, and other materials from cars--to pesticides, to natural materials, such as fecal bacteria from animal waste.

The County collects stormwater through a municipal separate storm sewer system (the County's is big enough to qualify as an "MS4," a term we will define later) that covers a nearly-500-square-mile area. After it falls from the sky, stormwater flows, in higher volumes and at higher speeds, through natural outfalls or through the County's sewer pipes and wastewater treatment facilities, then into the Middle Potomac and Patuxent River basins. Everyone agrees that this is bad for the rivers: in its comments during the Permit application process, the Department recognized that interested parties saw stormwater as "the ' . . . biggest form of pollution affecting the Anacostia River. . . ' carrying trash and accumulated pollutants [***4] and causing flooding in low-lying areas of various watersheds throughout the County. . . . It becomes fairly easy for all organizations, individuals, and government agencies to agree that urban stormwater is a problem that must be addressed." And just as everything else in life flows downhill, the pollution (and corresponding degradation of water quality) flows downstream into the waters of the District of Columbia and Prince George's County, and eventually into the Chesapeake Bay.

The Clean Water Act (the "Act"), along with its Maryland counterpart and overlapping layers of regulations,² regulates and seeks to limit water pollution from stormwater runoff into municipal sewer systems

that discharge into rivers. This case involves a successful challenge to the terms of the stormwater permit the Department issued to the County in 2010. We begin by discussing the statutory requirements, then walk [*159] through the process the County went through with the Department to obtain the Permit, then summarize the proceedings that culminated in this appeal.

2 Despite our best efforts to avoid jargon and acronyms, the Act, its state law counterpart, and the various regulations rely on them in abundance. Fortunately, [***5] the law, the parties, and the record all seem to use terms consistently, and we will follow suit.

A. Statutory Background.

1. The Clean Water Act and federal permit requirements.

The Act was passed in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a). The Act presumptively prohibits the discharge of pollutants, *id.* § 1251(a)(1), and renders any discharge unlawful, *id.* § 1311(a), unless the discharging party obtains a permit under the "National Pollutant Discharge Elimination System" ("NPDES"). *Id.* § 1342(a)(1).

As initially drafted, § 1311 limited the amount of pollutants that could enter the water from a particular source. The Act [***983] imposes "effluent limitations" on discharges from any "point source" (a term we will get to momentarily) by requiring the source to use "the best practicable control technology ["BPT"] currently available." 33 U.S.C. § 1311(b)(1)(A)(i). When first enacted, the Act required effluent limitations to be in place by July 1, 1977. *Id.* § 1311(b)(1)(A). Section 1311 also required compliance with any "more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations." *Id.* § 1311(b)(1)(C) (emphasis added); *see also Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (noting too that "although the [***6] BPT requirement takes into account issues of practicability," the EPA nonetheless requires the level of controls necessary to "implement existing water quality standards" (quoting *Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990))).

At its inception, the Act directed its efforts primarily

at the most obvious "point source" pollution. The term "point source" was defined within the Act in a technical way that aimed to capture a broad universe of potential pollution sources:

[*160] The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C.A. § 1362(14); *see also* 40 C.F.R. § 122.2. The parties don't dispute that a sewage system like the County's qualifies as a network of point sources, but that point has not been altogether obvious since the Act came about. The Act did not purport initially to regulate stormwater discharge, and in fact exempted stormwater separate from industrial or commercial activity. *See Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1372 n.5, 186 U.S. App. D.C. 147 (D.C. Cir. 1977) (citing 40 C.F.R. § 125.4 (1975)); *see also* Jeffrey G. Miller, *The Supreme Court's Water Pollution Jurisprudence: Is the [***7] Court All Wet?*, 24 Va. Env'tl. L.J. 125, 131-32 (2005); *The Clean Water Act Handbook* at 167 (Mark A. Ryan ed. 2011) ("Stormwater runoff in the early days of the NPDES program was treated as a diffuse source of *nonpoint source pollution*. This may have seemed logical because most runoff cannot efficiently be controlled using the strict end-of-pipe effluent limitations that are effective in regulating traditional industrial and municipal discharges." (emphasis added)). But in 1987, Congress amended the Act to bring stormwater discharge specifically within its reach, and since then storm sewer discharge has been treated as a point source and covered by the NPDES permit requirements. *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1296 & n.5 (9th Cir. 1992).³ *See* 33 U.S.C. § 1342(p)(3)(B); [*161] *see also Browner*, 191 F.3d 1159. The amendments applied discharge limitations to MS4 systems that serve a population of [***984] 100,000 or more,⁴ 33 U.S.C. § 1342(p)(2)(C), (D):

Permits for discharges from municipal storm sewers . . . (iii) *shall require controls to reduce the discharge of pollutants to the maximum extent*

practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

33 U.S.C. §1342(p)(3)(B) (emphasis added).

3 The amendments came about in part because of a 1977 court decision that [***8] held that the EPA lacked the authority to exempt *any* particular category of point source (such as MS4s) from the Act's reach. *See Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1379, 186 U.S. App. D.C. 147 (D.C. Cir. 1977) ("[T]he existence of uniform national effluent limitations is not a necessary precondition for incorporating into the NPDES program pollution from . . . storm water runoff point sources. The technological or administrative infeasibility of such limitations may result in adjustments in the permit programs, . . . but it does not authorize the Administrator to exclude the relevant point source from the NPDES program.").

4 The County's system here falls within that description.

The Act also raises standards for permits where the "effluent limitations [imposed by § 1311] are not stringent enough to implement any water quality standard applicable to such waters." *Id.* § 1313(d). A state must establish a total maximum daily load ("TMDL") for those pollutants that keep it from meeting water quality standards; the TMDL "is the sum of pollutants a body of water can absorb from all point and non-point sources, plus a margin of safety, and still meet water quality standards for its designated uses." *Assateague Coastkeeper v. Maryland Dep't of the Env.*, 200 Md. App. 665, 675 n.8, 28 A.3d 178 (2011). So, for example, the EPA has issued a TMDL for the Chesapeake Bay that applies expressly [***9] to this Permit, in addition to other local TMDLs. As the Chesapeake Bay Foundation explains it,⁵ "Maryland's ability to comply with the Bay TMDL pollution reduction requirements relies heavily on reducing pollutants from urban stormwater," and "*the ability to track and confirm progress*" on that reduction "through public participation, monitoring, and [*162] setting and using interim benchmarks *is of the utmost importance*" (emphasis added).

5 The Foundation sought permission to file an *amicus curiae* brief and we granted its request on August 15, 2014.

The "maximum extent practicable" language in § 1342 leaves altogether unclear, though, who *deems* a measure maximally practicable. And although that concept differs from the prior standard, and relieves municipal systems of the burden to meet specific water quality standards (a burden that still applies to private sources), it leaves open whether MS4s also must comply with the "effluent limitations" (and concomitant BPT standard) in § 1311. Add to this mix the state environmental regulations we discuss next, and the picture (like the water) becomes murkier.

2. The role of the States and Maryland's permit requirements.

The Act recognizes the "responsibilities and [***10] rights" of the various states to respond to System requirements, *id.* § 1251(b), and the EPA has delegated to Maryland the right to issue permits, *see Assateague Coastkeeper*, 200 Md. App. at 677-78 n.10, a task that it in turn has delegated to the Department. The Environment Article to the Maryland Code declares pollution to be "a menace to public health and welfare," and declares the State's policies regarding water pollution and water quality:

(1) To improve, conserve, and manage the quality of the waters of this State;

(2) To protect, maintain, and improve the quality of water for public supplies, propagation of wildlife, fish, and aquatic life, and domestic, agricultural, industrial, recreational, and other legitimate beneficial uses;

(3) To provide that no waste is discharged into any waters of this State without first receiving necessary treatment [**985] or other corrective action to protect the legitimate beneficial uses of the waters of this State;

(4) Through innovative and alternative methods of waste and wastewater treatment, to provide and promote prevention, [*163] abatement,

and control of new or existing water pollution; and

(5) To promote and encourage the use of reclaimed water in order to conserve water supplies, facilitate the indirect recharge of groundwater, and develop an alternative to discharging wastewater [***11] effluent to surface waters, thus pursuing the goal of the Clean Water Act to end the discharge of pollutants and meet the nutrient reduction goals of the Chesapeake Bay Agreement.

Md. Code (1996, 2007 Repl. Vol.), § 9-302(b) of the Environment Article ("Envir."). Like the Act, Maryland law prohibits discharges generally (providing that "a person may not discharge any pollutant into the waters of this State," *id.* § 9-322), but allows for a discharge permit to issue from the Department, *id.* § 9-323, and specifies both what a permit must contain and how it must be obtained:

(a) Subject to the provisions of this section, the Department may issue a discharge permit if the Department finds that the discharge meets:

(1) All applicable State and federal water quality standards and effluent limitations; and

(2) All other requirements of this subtitle.

* * *

(d) The Department shall give public notice of each application for a discharge permit as required by Title 1, Subtitle 6 of this article, and *by making available to the public appropriate documents, permit applications, supporting material, plans, and other relevant information.*

Id. § 9-324 (emphasis added).

The statute also allows the Department to "adopt rules and regulations that set, for the waters [***12] of this State, water quality standards and effluent standards":

(a) These standards shall be designed to protect:

(1) The public health, safety, and welfare;

(2) Present and future use of the waters of this State for public water supply;

[*164] (3) The propagation of aquatic life and wildlife;

(4) Recreational use of the waters of this State; and

(5) Agricultural, industrial, and other legitimate uses of the waters of this State.

(b) *The rules and regulations adopted under this section shall include at least the following:*

(1) *Water quality standards* that specify the maximum permissible short term and long term concentrations of pollutants in the water, the minimum permissible concentrations of dissolved oxygen and other desirable matter in the water, and the temperature range for the water.

(2) *Effluent standards* that specify the maximum loading or concentrations and the physical, thermal, chemical, biological, and radioactive properties of wastes that may be discharged into the waters of this State.

* * *

(c) *Effluent standards set under this section shall be at least as stringent as [**986] those specified by the National Pollutant Discharge Elimination System.*

Id. § 9-314 (emphasis added).

This background establishes the simple [***13] premise that federal and state laws and regulations limit a county or other governmental entity from letting stormwater runoff go unchecked into our waters, and give that entity the flexibility to devise maximally practicable measures to deal with the problem. Turning that seemingly straightforward anti-pollution premise into real-life permits, however, is a challenging task.

B. The Permit.

In 1996, the Department issued the County its first municipal separate storm sewerage system ("MS4") permit, for a five-year term. The permit reissued in 2001 and at least once after.⁶ In 2009, after the renewal application process for the [*165] most recent permit was underway, the Department recognized the need for strict monitoring of stormwater discharge. In its response to comments to the proposed permit, the Department stated that the new Permit would require the County to intensify its efforts, that it would

force [the County] to make major strides toward controlling urban runoff better than ever before. New conditions such as . . . requiring an additional twenty percent of the County's impervious area to be restored are major additions. Additionally, a firm commitment for TMDL implementation according [***14] to the plan that the County is required to develop within one year of permit issuance is the strongest evidence yet of what MDE believes will move these programs forward toward the ultimate goal of meeting water quality standards.

⁶ The Department states in its brief that the Permit was reissued in 2006 as well. Anacostia disagrees, although it claims (without citing any authority) that the renewal took place in 2010, "more than three years *after* it was scheduled to expire." (Emphasis added.) This dispute doesn't matter to our analysis.

This response came after public comment on a "tentative determination to issue permit" that the Department had issued in September 2008. The appellees filed timely comments on December 1, 2008, and

complained (among other arguments) that the draft permit did not include enforceable language or deadlines, did not link in a meaningful way to water quality standards or TMDLs, did not allow for meaningful public participation or review of the County Stormwater Management Program, and lacked adequate monitoring and reporting requirements. After receiving additional comments from other interested parties, the Department issued a notice of final determination [***15] to issue the Permit (the "Notice") on March 4, 2009 without substantial changes, and it issued the Permit itself on February 16, 2010, for a five-year period that expired on February 15, 2015.⁷

⁷ We asked at oral argument whether this appeal would be moot if this litigation weren't resolved by the Permit's then-impending (and now past) expiration date. The Department responded, and we are comfortable, that the disputes remain live after February 15 for two reasons. *First*, as we discuss in detail below, the Permit requires that "the County must *submit* an implementation plan for complying with the requirement for [twenty] percent restoration within the 5-year term of the [P]ermit" (emphasis added), but does not seem expressly to require that the plan be *executed* fully by then, so it is still subject to revision after it nominally expires. *Second*, the Department advised us that the application for the succeeding permit had not yet begun at the time of argument, that the process (including notice and comment periods) for a new permit could not be completed before this one expired, and that the terms of the existing Permit would remain in place until superseded.

[**987] [*166] The final Permit specifically required [***16] the County to "implement or install best management practices on twenty percent of the impervious surfaces within the County in an effort to restore the pollution reduction functions performed by undeveloped land," which in turn required the County to submit "a long-term schedule for the completion of detailed assessments of each watershed in the County." (This requirement comes into play below, we will refer to it from here as the "twenty percent requirement"). The Permit calls for pollution controls that include implementation of "management programs . . . designed to control stormwater discharges to the maximum extent practicable." And the stormwater management program

requires that the County, at a minimum, "[c]onduct preventative maintenance" by inspecting "all stormwater management facilities at least on a triennial basis"; "[i]mplement the stormwater management design policies, principles, methods, and practices found in the 2000 *Maryland Stormwater Design Manual*" (the "Manual"); and "[m]aintain programmatic and implementation information according to the requirements established as part of [the Department's] triennial stormwater program review."

C. The Proceedings.

This case began not with the current appeal, [***17] but an earlier one. After the Department filed the Notice, Anacostia requested a contested case hearing on March 18, 2009. (At the time, *Envir.* § 1-605(a) allowed for a contested case proceeding.) An administrative law judge ("ALJ") concluded that Anacostia lacked standing to challenge the Permit because it [*167] had no special interest to protect beyond that of the general public. Anacostia sought judicial review in July 2009 in the Circuit Court for Baltimore County, which later transferred the case to the Circuit Court for Montgomery County. That court upheld the ALJ's decision, but we reversed, holding that Anacostia did in fact have standing, and we remanded for consideration of the underlying substantive issues. *Anacostia Riverkeeper v. Md. Dep't of the Envir.*, Sept. Term 2011, No. 2107 (filed January 7, 2013) ("*Anacostia I*"), slip op. at 22.

Round Two took a slightly different path because in 2009, the General Assembly changed the procedures for challenging a permit. Section 1-601 of the Environment Article now allows direct judicial review of agency permitting decisions. (It also broadens the class of people who can bring such a challenge, and formed part of our basis for reversing the ALJ's decision in *Anacostia I*. See *Anacostia I*, slip op. at 20.) So once we remanded *Anacostia* [***18] *I*, the circuit court took the case directly and held a hearing on the merits on November 20, 2013 (the "Hearing"). Anacostia argued there that the Permit failed to require compliance with Maryland's water quality standards or applicable TMDLs, and that by allowing for the specific development of so many implementation plans outside the four corners of the Permit, the Department allowed the Permit to escape meaningful public participation or judicial review.

The Department responded that the Permit contained all that it needed in requiring the County "to install best

management practices" to restore twenty percent of impervious surfaces and meet certain wasteload allocations. It also argued that the policies and provisions of the Manual and the Maryland Stormwater Management Act of 2007 were properly referenced in the Permit.

The trial judge expressed frustration with the Department's position at the Hearing, both as to the vagueness of the [**988] term "best management practices" and the Permit's references to so many outside sources. The court ultimately held, both in a ruling from the bench and in a written order two weeks later, [*168] that the Permit had to comply with sections 1311 and 1342 of the Act, along with [***19] state law requirements under *Envir.* § 9-324, and that the Permit fell short of these standards (we omit the paragraph numbering):

After reviewing the permit and the administrative record, the Court is unable to understand why [the Department] adopted the terms in the permit, or how those terms meet the requirements of the law. The permit does not state with clarity what the permittees will do, how they are to do it, what standards apply, or how one will measure compliance or noncompliance. The permit lacks ascertainable metrics for meeting water quality standards that can either be met or not met.

The Court finds that it is not sufficient for the permit to require that permittees engage in best management practices and file annual reports on their activities. Manuals and policies that exist outside of the permit change frequently, and do not inform the public or the Court of what the permit specifically requires. While it is allowable for the permit to require best management practices, specific requirements for meeting water quality standards must be stated in the permit.

The Court finds that the permit's requirement to restore 20% of impervious surface is simply too general to show how the permittees [***20] will meet water

quality standards. It does not explain what the permittee is to do or how its performance is to be measured.

Federal regulations require that the permit include a monitoring program for representative data collection for the term of the permit, including a program to monitor and control pollutants in storm water discharges from sites that are contributing a substantial pollutant loading. 40 C.F.R. § 122.26(d). The permit requires monitoring in one tributary, and requires the permittees to submit an annual report to MDE regarding all activities under the permit. [*169] The Court finds that these requirements are not sufficient to meet the applicable requirements for monitoring.

This timely appeal followed.

II. DISCUSSION

This appeal presents one overarching question with numerous sub-questions that make it more complex: is the Permit legal? To answer the broader question, we analyze the Permit's near-twenty-year history against the statutory and regulatory lattice. And perhaps counterintuitively, we find that the Department's expertise (which on review of agency decisions so often gives us reason to defer to an agency) and intimacy with the process and available technology may well be the Permit's [***21] undoing. There may be rational reasons for requiring the County to prepare plans after approval and incorporate outside materials into the Permit by reference. But those reasons are difficult to discern for anyone who did not live deeply in the weeds of negotiating and preparing it, and because many of the Permit's terms are structured as obligations to develop plans, they are insulated from effective review.

We hold *first* that Congress, by adding § 1342 the 1987 amendments to the Act, intended to treat MS4s differently and regulate them separately from, or in conjunction with, the existing requirements of § 1311. *Second*, we analyze what exactly the § 1342 "maximum extent practicable" and "best management practices" language [**989] requires of a state attempting to enforce environmental laws, and how state environmental regulations pick up on that language. That hardly ends the

story, though: although we agree with the Department that Congress relieved it of the more stringent requirement of § 1311, we conclude *third* that this Permit effectively cuts off public commentary on important components by glossing important requirements and deadlines and incorporating outside sources in a manner that leaves the Permit's [***22] operative terms too difficult to find and know.

[*170] A. Standard of Review.

Our review of an agency decision is highly deferential. We look through the decision of the circuit court and use the same standard of review that the circuit court did. *Kim v. Maryland State Bd. of Physicians*, 423 Md. 523, 32 A.3d 30 (2011) (citing *People's Counsel for Baltimore County v. Surina*, 400 Md. 662, 681, 929 A.2d 899 (2007)). In a case like this, we review the agency decision at two levels: *first*, to determine whether the record contains substantial evidence to support the agency decision and *second*, to determine whether the decision is legally correct. *Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 173, 12 A.3d 1255 (2011) (citation omitted).

For reasons we will explain in Part II.B, we start with the second step--whether the Department was legally correct in its decision to issue the Permit. We are "under no constraints in reversing an administrative decision which is premised solely on an erroneous conclusion of law." *People's Counsel for Baltimore Cnty. v. Maryland Marine Mfg. Co.*, 316 Md. 491, 497, 560 A.2d 32 (1989); *see also HNS Dev., LLC v. People's Counsel for Baltimore Cnty.*, 425 Md. 436, 449, 42 A.3d 12 (2012). A reviewing court should respect "the expertise of an agency in its own field," *Board of Phys. Quality Assur. v. Banks*, 354 Md. 59, 69, 729 A.2d 376 (1999) (citations omitted), and the Department correctly points out that an agency's authority "may include a broad power to promulgate legislative-type rules or regulations" to assist in implementing applicable statutes. *Christ v. Dep't of Natural Res.*, 335 Md. 427, 445, 644 A.2d 34 (1994). Agencies "'are created in order to perform activities which the Legislature deems desirable and necessary [***23] to further the public health, safety, welfare, and morals,'" and "'[t]he powers vested in the courts, by statute or inherence, to review administrative decisions does not carry with it the right to substitute its fact-finding process for that of an agency.'" *Northwest Land Corp. v. Maryland Dep't of Env.*, 104

Md. App. 471, 488, 656 A.2d 804 (1995) (quoting *Sec'y of Health & Mental Hygiene v. Crowder*, 43 Md. App. 276, 281, 405 A.2d 279 (1979)).

[*171] As to the substantial evidence component of our review, *Najafi* directs a generous level of deference:

In applying the substantial evidence test, a reviewing court decides "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court "must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence" and to draw inferences from that evidence.

Id. at 173 (quoting *Maryland Aviation Admin v. Noland*, 386 Md. 556, 571-72, 873 A.2d 1145 (2005)). And where an agency is acting within its discretion, [*990] we will overturn its decision only where we find that its action is arbitrary and capricious. *Md. Board of Phys. v. Elliott*, 170 Md. App. 369, 406, 907 A.2d 321 (2006); *see also* Md. Code (1984, 2009 Repl. Vol.), § 10-222(h)(3)(vi) of the State Government Article ("S.G."). But we owe no deference to an agency whose conclusions have gone [***24] unsupported "by competent and substantial evidence, or where the agency draws impermissible or unreasonable inferences and conclusions from undisputed evidence." *Stansbury v. Jones*, 372 Md. 172, 184, 812 A.2d 312 (2002); *see also Mayor and Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 395, 396 A.2d 1080 (1979) ("When reviewing an administrative decision for arbitrariness or capriciousness, a court must first determine whether the question before the agency was fairly debatable," and if not it is not arbitrary and capricious.). For an issue to be "fairly debatable," "the administrative agency overseeing the . . . decision must have "substantial evidence" on the record supporting its decision." *Mills v. Godlove*, 200 Md. App. 213, 224, 26 A.3d 1034 (2011) (quoting *White v. North*, 356 Md. 31, 44, 736 A.2d 1072 (1999)).

B. The Permit Is Subject To § 1342, Not § 1311.

At the threshold, the parties dispute which of the various federal and state laws drive the requirements the [*172] Permit must fulfill. The Department argues that the Act does not require an MS4 to comply with the water quality standards articulated in § 1311 because the 1987 amendments replaced those standards "with the maximum-extent-practicable standard, and replaced numerical effluent limitations with 'management practices,' 'control techniques,' 'systems, design and engineering methods,' and other provisions that the State 'determines appropriate.'" Anacostia argues that the Permit continues [***25] to be subject to the technology-based limitations of § 1311 *in addition to* "any more stringent limitation necessary to assure compliance with water quality standards for the receiving waters." We disagree, and hold that the Permit is *not* subject to the technology-based discharge limitations ("TBDLs") of § 1311(a), but rather to § 1342(p)(3)(B), which in turn requires the County to adhere to the TMDL limits imposed by state law via § 1313(d)(1)(C).

When first passed in 1972, the Act regulated big municipal stormwater systems. With the benefit of hindsight, it appears that that approach was not practical for MS4s. We agree with the Department that the 1987 amendments, and § 1342 in particular, imposed different and *alternative* standards on MS4s, standards that state broader principles rather than prescriptive requirements.

But although § 1342(p)(3)(B) imposed new requirements for MS4s that differed from the technology-based requirements of § 1311, the amendments did not state whether MS4 permits *also* had to comply with water quality standards under § 1311(b)(1)(C). In 1991, the EPA's General Counsel interpreted the "MEP" standard to modify the technology-based requirements of § 1311, but he did not believe that the MEP language displaced the general water quality standards imposed [***26] by § 1311. *See* Memorandum from E. Donald Elliott, Ass't Admin'or & General Counsel, EPA, to Nancy Marvel, Regional Counsel, January 9, 1991, "Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems," 1991 W.L. 326640 (the "Elliott Memorandum") at *2.⁸ Then, in 1996, the EPA [**991] issued a [*173] Notice outlining an "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits," 61 Fed. Reg. 43761-01 (Aug. 26, 1996), in which it likewise approved use of BMPs while leaving room for improvement:

The interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards. In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate. *This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effluent limitations.*

Id. (emphasis added). [***27]

8 It doesn't matter for our purposes whether the broader question raised by and answered in the Elliott Memorandum--whether the term "water quality standards" (which can be, but is not always, used as a term of art to describe specific standards) still applies with equal force to MS4s. Anacostia argued that the distinction between state and federal water quality standards is not material here, and we are inclined to agree. The Department is not arguing that the Permit need not attempt to *meet* TMDL requirements as part of broader water quality standards, but that the Permit adequately spells out how the County must do so, and by when.

Several years later, the United States Court of Appeals for the Ninth Circuit held in *Browner* that Congress intended § 1342(p)(3)(B) to treat MS4s *differently*--no longer to require strict compliance with state water-quality standards (as industrial discharges had to comply with under § 1311), but instead to impose the maximum-extent-practicable standard. 191 F.3d at 1165. After reviewing the legislative history that culminated in the 1987 amendments, the Ninth Circuit held that § 1342(p)(3) specifically treats industrial discharges differently from municipal discharges, and held the former to the more stringent [***28] § 1311 requirements. 191 F.3d at 1165 ("[I]ndustrial discharges must comply strictly with state water quality standards.").

Municipal discharges, on the other hand, [*174] lacked any such requirement, and Congress instead imposed the MEP requirement in § 1342(p)(3)(B)(iii).

As such, the Ninth Circuit held, Congress intended in § 1342 to *not* require municipal stormwater discharges to comply with § 1311. 191 F.3d at 1165 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) (citation and internal quotation marks omitted))). The Court also noted that interpreting § 1342 to include the requirements of § 1311 would render § 1342 superfluous: because the latter is less strict, reading it to include § 1311's requirements would really just fold it into § 1311, "a result that we prefer to avoid so as to give effect to all provisions that Congress has enacted." 191 F.3d at 1165; *see also Koste v. Town of Oxford*, 431 Md. 14, 25-26, 63 A.3d 582 (2013) ("The primary goal of statutory construction is 'to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision[.]' In so doing, we look first to the 'normal, plain meaning of the language of the [***29] statute,' read as a whole so that 'no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory[.]' (citations omitted) [***92] (emphasis added)). Other courts have followed suit. *See, e.g., Divers' Env'tal Cons. Org. v. State Water Resources Control Bd.*, 145 Cal. App. 4th 246, 51 Cal. Rptr. 3d 497, 504 (2006) ("In regulating storm water permits the EPA has repeatedly expressed a preference for doing so by way of BMPs, rather than by way of imposing either technology-based or water quality-based numeric limitations"⁹); *NRDC v. New York State Dep't of Env'tal Cons.*, 120 A.D.3d 1235, 994 N.Y.S.2d 125 (2d App. Div. 2014) (assessing MEP standard as the appropriate one for municipal discharges); [*175] *Tualatin Riverkeepers v. Oregon Dep't of Env'tal Quality*, 235 Ore. App. 132, 230 P.3d 559, 564 n.10 (Ore. App. 2010) (citing *Defenders of Wildlife* with approval and noting the lesser MEP standard in § 1342 that applies to municipal stormwater discharges); *but see Building Indus. Ass'n of San Diego Cnty. v. State Water Resources Control Bd.*, 124 Cal. App. 4th 866, 22 Cal Rptr. 3d 128, 141 (reading § 1342 not specifically to replace or not replace § 1311 as it related to municipal discharge, but seeing the significance of Congress adding the MEP language "to

strengthen the [Act] by making its mandate correspond to the practical realities of municipal storm sewer regulation").

9 *Divers* also pointed to the relevant federal regulations as giving wiggle room to the states to apply BMPs when other approaches aren't feasible. *See id.* at 506-07 (quoting 40 C.F.R. § 122.44(k)).

It falls to the Department, then, to translate these concepts into real-life permits. Over a decade ago, the [***30] EPA issued a memorandum (included here in the Department's record extract) designed to harmonize the BMP concept and the "maximum extent practicable" language. *See* November 22, 2002, Memorandum from Robert H. Wayland, III, Director, Office of Wetlands, Oceans and Watersheds, EPA, to Water Division Directors, Regions 1-10. This memorandum counseled in favor of "an iterative approach to control pollutants in storm water discharges," and recognized that "storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized," therefore making it difficult to establish hard, numeric limits. In turn, it viewed BMPs as "an appropriate form of effluent limits" to control pollutants, *see* 40 CFR § 122.44(k)(2), (3). But the EPA did not leave it at that--it stated its express expectation that agencies granting permits will ensure that BMPs are appropriately tailored:

EPA expects that the NPDES permitting authority will review the information provided by the TMDL, *see* 40 C.F.R. § 122.44(d)(1)(vii)(B), and determine whether the effluent limit is appropriately expressed using a BMP approach (including an iterative BMP approach) or a numeric limit. Where BMPs are used, EPA recommends that the [***31] permit provide a mechanism to require use of expanded or better-tailored BMPs when monitoring demonstrates they [*176] are necessary to implement the WLA and protect water quality.

This guidance frames the issue here. Although our analysis relieves the Department and the County of their obligations to comply with § 1311, the Permit cannot

satisfy the alternative standard simply by parroting broad principles of best practices, especially given that State law applies as well.

C. The Permit Does Not Comply With State Law Regarding The Permitting Process.

Even under the standards imposed by § 1342, the Permit fails at two separate levels. *First*, it does not comply with the statutory procedural requirements [**993] of notice and public comment. To be clear, the Permit might have complied from a *technical* point of view (by, for example, posting the required notice at the required time), but it failed to comply from a *practical* point of view because it omits or obscures important elements, leaving anyone not an expert unable to decipher it. The Permit contains aspirational goals rather than particularized objectives, and it refers to and relies on too much information that falls wholly outside of its terms (which makes [***32] it impossible to figure out what the Permit requires without hunting for the underlying information in a way that requires far more expertise than one could reasonably expect). We also find it impossible to discern from the Permit when the County would have to complete critical tasks. *Second*, the Permit fails as a *substantive* matter because it does not contain ascertainable metrics that define how the County must comply, or whether at some point it has complied, with what all agree are two of the Permit's most important terms: regulation of TMDLs and the twenty percent requirement. We recognize the tension between the desire for specificity (both in tactics and in metrics) and the reality of achieving that granularity across a system as large as the County's, and so we acknowledge that these competing objectives must be balanced. That said, they need to be balanced in a way that allows meaningful public comment and [*177] participation and meaningful review of the Permit's compliance with the law.

1. The Permit does not give meaningful opportunity for notice and comment, and eludes judicial review.

a. The Environment Article requires that the public have an opportunity for notice and comment.

Section 9-324 of the Environment Article requires explicitly [***33] that "[t]he Department shall give public notice of each application for a discharge permit as required by Title 1, Subtitle 6." Subtitle 6, in turn, requires that the public have a full opportunity to

participate in the permitting process. Envir. § 1-601(a)(3). The notice of an application for a permit, for example, must include certain basic information:

(i) The name and address of the applicant;

(ii) A description of the location and the nature of the activity for which the permit has been sought;

(iii) A reference to the applicable statutes or regulations governing the application process;

(iv) The time and place of any scheduled informational meeting or public hearing, or a description of where this information can be found;

(v) A description of where further information about the permit application can be found; and

(vi) Any other information that the Department determines is necessary.

Id. § 1-602(b)(2) (emphasis added). The statute no longer provides for a contested case hearing, *id.* § 1-601(b), but does authorize judicial review on behalf of a party that, as Anacostia has, "[p]articipated in a public participation process through the submission of written or oral comments." *Id.* § 1-601(c)(2)(ii). And although the subtitle limits judicial review to the administrative [***34] record and objections raised before the Department, it permits review when:

(i) The objections were not reasonably ascertainable during the comment period; or

[*178] (ii) Grounds for the objections arose after the comment period.

Id. § 1-601(d)(1).

Transparency is essential to effectuating the goals of the Act. "Public participation [**994] in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the [EPA] or any State . . . shall be provided for, encouraged, and assisted by the [EPA] and

the States." 33 U.S.C. § 1251(e). The Supreme Court has acknowledged that NPDES permits "defin[e], and facilitat[e] compliance with, and enforcement of, a preponderance of a discharger's obligations under the [Act]." *EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 205, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976). A permit should translate big-picture environmental goals into specific obligations and measurable objectives for each applicant, and provide a way to hold permit-holders accountable--at least theoretically. This permit does not.

b. Specific shortcomings of the Permit.

i. The public can't comment about decisions that have yet to be made.

To be sure, the process leading up to the Permit ostensibly allowed for several "public participation" opportunities. But the Permit deferred the process [***35] of defining important substantive provisions (TMDL implementation plans, SWMP plans, etc.) until well *after* approval. This creates an obvious flaw: the public can't comment on a program that doesn't yet exist, and by the time the program *did* exist, the time for comment on it had passed.¹⁰

10 This also means that we can't tell from the Permit's terms whether it should be reviewed under § 1-601(d)(1)(ii), which allows for judicial review, even if objections weren't raised during a comment period, where the "[g]rounds for the objections arose after the comment period." *Id.* This Permit could well qualify because so many of its substantive terms weren't defined until after the comment period had passed.

[*179] Under the terms of the Permit, the Department effectively can approve new requirements and management projects without public comment because the County was not required to develop impervious surface restoration plans and TMDL implementation plans until after the Permit was approved. The Permit itself does not include the substantive contents of each program, nor does it require that the programs even be made available to the public for review after the fact. Part E of the Permit, for example, states broad requirements [***36] that the County must satisfy in developing, implementing, and maintaining its programs. But that approach is inconsistent with the emphasis on public participation in the Act, which requires permits to include effluent limitations so that

citizens can enforce their terms, requirements, and restrictions. 33 U.S.C. § 1365(a).

In order to be measurable, a permit must articulate what the County must do, how much of each task the County must do, where the County needs to perform those tasks, and by when the County must complete them.¹¹ For each Permit requirement, the "what" is usually the BMP or activity required, the "how much" is the performance standard the County is expected to meet, the "when" is the specific time (or frequency) the BMP or activity should be complete, and the "where" is the location where the activity must be performed. Unless discernible requirements are contained in the permit itself, the public will have no way to know its terms or to [**995] assist the Department in the enforcement of the Permit, nor will the County know exactly what the Permit requires of it. And although there may be value in deferring the definition of certain terms until later, that deferral cannot deprive the public of [***37] notice and an opportunity to comment--that opportunity must somehow be replicated as those plans are developed and approved, at whatever point in time.

11 For the EPA's guidance in this regard, *see* Laura Gentile and John Tinger, U.S. E.P.A. Region IX, Stormwater Phase I MS4 Permitting: Writing More Effective, Measurable Permits, 135 (February 2003), http://water.epa.gov/polwaste/nps/stormwater/upload/2003_03_26_NPS_natlstormwater_03_13Gentile.pdf (last viewed February 19, 2015).

[*180] **ii. The Permit is not specific enough.**

The Permit eludes notice and comment because there is not enough *in* it for the public fairly to comment *on* it. The Act requires that a state permit specify the "type, intervals, and frequency sufficient to yield data which are representative of the monitored activity." 40 C.F.R. § 122.48(b), 122.44(i)(1). Under § 1342, a permit such as this is also subject to EPA regulations governing permit applications, 33 U.S.C. § 1342(p)(4)(A), which require a "proposed monitoring program for representative data collection for the term of the permit," 40 C.F.R. § 122.26(d)(2)(iii)(D), and which describe the necessary data. This Permit, however, requires monitoring only in the Lower Paint Branch watershed, one of many affected by the County's system.¹² And although, as the Department argues in its brief, the Permit "requires the

County [***38] to *assess* all of its watersheds" (emphasis added), the Permit itself requires the County only to "provide a long-term schedule for the completion of detailed assessments of each watershed in Montgomery County." That "long-term schedule" is not due until a year into the Permit's five-year lifespan, though, and the Permit says nothing about whether that schedule must require assessments before the Permit expires. And, again, the process defined in the Permit leaves no opportunity for public comment or judicial review of the schedule once the County proposes it.

12 We do not mean to suggest that a single watershed cannot qualify as a representative sample, but the Department hasn't made or supported that argument here, either in general or for the Lower Paint Branch watershed in particular.

The Department argues that *prior* iterations of the Permit required broader monitoring, and it may be that the Permit could satisfy its monitoring obligations by building on and incorporating monitoring work done previously. But if that is what the Department intended, the terms of the Permit need to reflect that so that the Permit's overall compliance with the Act's monitoring obligations can be understood [***39] and tested.

[*181] The Permit is similarly quiet about the County's reporting requirements. In the absence of specifics, the Department points to the BMPs in the Manual, which "are *designed* to be flexible so that regulatory agencies may adapt them to the highly variable nature of stormwater discharges." (Emphasis in original.) That may be so, but the Department must demonstrate in the Permit *which* of these BMPs it is choosing--otherwise, we are left with a Permit that is simply a now-fifteen-year-old (and very long) Manual.¹³ We understand the need for flexibility, but someone seeking to understand the Permit's terms, [**996] or a reviewing body seeking to review it, is left at a total loss to understand how the County will proceed, either at the inception of the Permit period or during the five years (or more) it remains in effect.

13 Counsel for the Department pointed out in response to the court's questioning at the Hearing that stormwater management facilities have to "install BMPs" as specifically required by the Permit, and she referred to the provision in the "Management Programs" section under the Permit

that requires the County at a minimum to "implement the stormwater management design policies, [***40] principles, methods, and practices found in the [Manual] and the provisions of Maryland's Stormwater Management Act of 2007." As counsel put it, these would be the "only BMPs allowed or acceptable."

iii. The Permit overrelies on incorporation by reference.

The Permit's generality is compounded by the way it incorporates outside sources by reference. There is nothing wrong *per se* with that approach, but the result here is that someone outside the negotiations can't tell where to look to understand the Permit or how to challenge its terms. This is particularly true with regard to the Manual, a 589-page list of "best management practices." Chapter 1 of the Manual states that "[o]ver the last 14 years, tens of thousands of [BMPs] have been constructed in an attempt to meet program mandates." After the County selects appropriate BMPs, the Manual is meant to help in the process of actually implementing the practices, by

provid[ing] design guidance on the most effective planning techniques, and nonstructural and structural BMPs for development [*182] sites, and to improve the quality of BMPs that are constructed in the [s]tate, specifically with regard to performance, longevity, safety, ease of maintenance, community acceptance [***41] and environmental benefit.

Chapter 3 of the Manual identifies five groups of structural water quality Stormwater BMPs: (1) ponds, (2) wetlands, (3) infiltration practices, (4) filtering systems, and (5) open channels. The chapter goes on to discuss "sets of BMP performance criteria" for each BMP listed above. Of course, if the County opts to implement a new BMP, it must submit monitoring data to demonstrate that it meets these performance criteria. The Manual might provide some understanding, for example, of why the County would choose "ponds" for a given location, and why that strategy may or may not be successful in reducing pollution to the maximum extent practicable. But in the context of this Permit, there is no way of knowing which BMPs the County will select.¹⁴ And that

leaves no way to know what the County will be required to do until after the County does it, and no way to apply even an appropriately deferential level of review to the Department's substantive directions to the County.

14 Like the chapter preceding it, Chapter 4, "Guide to BMP Selection and Location in Maryland" may well be useful to those charged with designing the various management plans. The Chapter outlines the [***42] "process for selecting the best BMP or group of BMPs for a development site and provides guidance on facts to consider when deciding where to locate them." Again, had the Permit identified the BMPs to be used in each program, the Manual would explain the details in a useful way; without that information, it is academically interesting but not helpful to understanding this Permit.

We see compelling similarities to the permit in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005), in which the United States Court of Appeals for the Second Circuit held that NPDES permits for concentrated animal feeding operations ("CAFOs") lacked "any meaningful review of the nutrient management plans" developed by the applicants, and also "fail[ed] to require that the terms of the nutrient management plans be included in the NPDES permits." *Id.* at 498. The court held that regulation of the CAFO nutrient plans [*183] (which strike us as analogous to the MS4 regulatory program here) had to be incorporated into a facility's NPDES permit because a permit that omitted specific waste application rates did "nothing to ensure that each Large CAFO has, in fact, developed a nutrient management plan [**997] that satisfies [applicable federal regulations]." *Id.* at 499 (emphasis in original).

There is [***43] no doubt that under the CAFO Rule, the only restrictions actually imposed on land application discharges are those restrictions imposed by the various terms of the nutrient management plan, including the waste application rates developed by the Large CAFOs pursuant to their nutrient management plans. Indeed, the requirement to develop a nutrient management plan constitutes a restriction on land application discharges only to the extent that the nutrient

management plan actually *imposes* restrictions on land application discharges.

Id. at 502 (emphasis added).

Like the nutritional plans discussed in *Waterkeeper Alliance*, the Management Plans the Permit requires the County to develop represent the only restrictions on stormwater pollutants flowing into and from this MS4. For that reason, it is not enough for the Permit simply to require the County to develop plans consistent with the Manual and leave it at that. The Permit must at least allow the County and the public to understand how the County plans to restrict stormwater discharges and, subject to the appropriately deferential standard, to challenge the Department's ultimate directions.

iv. The Permit contains no meaningful deadlines or ways [*44] to measure compliance.**

The Permit purports to require, within a year of its effective date, implementation plans that include "the actions and deadlines by which those actions must be taken to meet the required pollutant load reduction benchmarks and [wasteload allocations] within the specified time frame." Determining the means to the ends, including TMDLs and SWMPs, has been left to the County, which gets one year out of the five-year lifespan of the Permit simply to *devise* implementation plans. [*184] In layman's terms, the Permit seems to say that the County has a deadline of a year to set its deadlines. But as a practical matter, that open-ended, goal-oriented statement articulates no specific method within the Permit (like setting out those benchmarks, for example) for achieving those goals or measuring progress. Put another way, the County seemingly could be in compliance if, within a year of the Permit's issuance, it laid out a plan with deadlines of twenty years from now. The Permit imposes no timeframe for executing the plans, and there are not clear requirements for what the aspirational plans must include.

Without measurable commitments, anything could be deemed "in compliance" [***45] with the Permit. And without deadlines for compliance and implementation, the County could plan while postponing implementation, an outcome that effectively would circumvent the NDPEs permitting program. This is not to say that the Permit must list and measure minute details or water quality standards, only that it must contain some discernible and meaningful milestones of planning,

implementation, or achievement that can be understood and measured and, to our earlier point, that the public can review and comment upon.

The description of "Management Programs" in the Permit is also insufficient to allow meaningful evaluation of any monitoring. These programs appear to be an important aspect of the Permit, but are not incorporated as enforceable conditions. The Permit connects no specific or measurable BMPs to the various management programs. It requires no justification for why a given BMP or strategy was selected, and how that program or strategy will reduce discharges to the maximum extent [**998] practicable. The Permit contains no information about how the County must select, implement, maintain, and monitor BMPs, and most importantly, it contains no deadlines by which the County must actually [***46] implement the programs it designs.

This lack of meaningful deadlines was illustrated well at oral argument, when we asked counsel for Montgomery County [*185] whether the County had actually approved a plan that the Department then approved. Counsel first responded that yes, a plan "would have been" submitted. When pressed, counsel responded with continued hedging: "I will say that they would have approved it." The fact that counsel for the *County* couldn't even tell us the status of the Permit's progress highlights the toothlessness of the Permit's terms and the difficulty for anyone to know (or ask) whether the County is complying with them.

2. The agency decision to issue the Permit was unsupported by substantial evidence with respect to TMDLs and the twenty percent requirement.

Once the County reworks the Permit in a way that allows for meaningful notice and comment, it still must address the absence of objective metrics for what the parties agree are two of its most important elements: the twenty percent requirement and setting TMDLs.¹⁵

15 This failing can be viewed in one of three ways: (1) the Department's decision to issue the Permit was legally incorrect because the Permit fails to require [***47] compliance with 33 U.S.C. § 1342(p)(3)(B) and Envir. § 9-324; (2) the Department's decision to issue the Permit was unsupported by substantial evidence that it complied with these statutory requirements; and (3) the Department's decision to issue the Permit

was arbitrary and capricious because it was made without any factual support based on the record before it. Whichever the analytical path (and any is legally correct), the fact remains that neither the TMDL requirement nor the twenty percent requirement are laid out with sufficient clarity in the Permit.

a. The twenty percent requirement.

The Department argues that the Permit appropriately "requires the County to install controls on twenty percent of impervious surfaces and to regularly review and refine its [BMPs] to achieve steady and measured reductions in pollutants." But we see nothing in the Permit that explains how we or anyone can define the universe of impervious surfaces. Only one of the three sources the Department cites sends us to the Permit itself; the pages cited to govern "Watershed Restoration" (Part III.G), "Assessment of Controls" (Part [*186] III.H), "Program Funding," (Part III.I), and "TMDLs" (Part III.J). None of these gives any guidance as to exactly what [***48] constitutes "impervious surfaces." The Department claims that the twenty percent requirement is "specific, measurable, and enforceable," and it purports to lay out how the twenty percent is calculated, based on using the acreage designations from the *prior* permit's designation of ten percent of impervious surfaces in the County (in turn citing not even to the outdated permit, but to the "Annual Report for 2006 NPDES Municipal Separate Storm Sewer System Permit" that is included in the record extract):

The permit requires the County to implement controls on 20 percent of its previously uncontrolled impervious areas. Because the prior permit required the County to install best management practices on 10 percent of its impervious areas, the County already has in place a mechanism for calculating the total acreage of land that does not have stormwater controls. That acreage comes to 21,458 acres - which excludes the 10 percent [**999] already controlled under the prior permit - and 20 percent of that amount comes to 4,292.

It cannot be that the universe of impervious surfaces

has remained constant since 2006; by 2009, when this permitting process began, this information was already three years old. [***49] So the Department's calculation is grounded in outdated calculations and, therefore, unsupported by substantial evidence.¹⁶

16 This failing also goes to the problems with public notice and comment. Although the Department has advanced this numerical calculation, we see no evidence that it was made apparent to anyone in the course of the permitting process. That means that, even if the Department could demonstrate to us now that the calculation is supported by substantial evidence, the public never had a meaningful opportunity to comment on that calculation at the appropriate time.

Anacostia is also correct that the Permit does not actually impose restoration of twenty per cent of *all* impervious surfaces within the County, but only mandates restoration of twenty percent of "impervious surface area *that is not restored to the MEP [maximum extent practicable].*" As with so many other parts of the Permit, this definition requires [*187] another subjective calculation--where someone will need to determine what has not been restored to the maximum extent practicable--that is completely unreviewable.

The Department also contends broadly that the standards it applies for BMPs must be flexible "so that regulatory [***50] agencies may adapt them to the highly variable nature of stormwater discharges." We don't disagree with this proposition, and we are keenly aware that the Department has the expertise (far beyond the ken of this or any court) to determine these standards. But even those flexible standards have to be expressed in a way that gives meaning to the Permit, and that allows non-expert reviewing bodies to do their jobs.

The Department claims that the Permit articulates sufficiently specific BMPs for impervious surfaces by incorporating the Manual and other documents, and it argues that the BMPs in the Manual "have measurable outcome[s];" it points in particular to "general performance standards for stormwater management in Maryland" that appear in two pages of the Manual. The Manual is one of the three "scientific texts developed by the Department" that it claims encapsulates twenty-seven years of research. The others are a "BMP Assessment" (a March 21, 2009 report whose full title is "Developing Nitrogen, Phosphorus and Sediment Reduction

Efficiencies for Tributary Strategies, BMP Assessment: Final Report, 3/31/2009"), and a manual entitled "Accounting for Stormwater Wasteload Allocations and Impervious [***51] Acres Treated" (with the ambiguous date of "June (*Draft*) 2011" (emphasis added), which we will short-form as the "2011 Manual"). The Department says that it standardized best management practices in the Manual, and has technical guidelines "in place" based on the BMP Assessment and the 2011 Manual. But the Department's arguments are indecipherable. The "general performance standards" to which it cites don't appear, to us at least, to articulate useful or enforceable numbers, and a broad citation to three manuals (dated four, six, and fifteen years ago) leave the contours of the twenty percent requirement unclear.

[*188] **b. The TMDL requirement.**

Anacostia argues that the Permit lacks the necessary clarity for attaining TMDL requirements, and that its provisions are not supported by facts or explanations. We agree. Part III.J requires the County [**1000] to design a TMDL implementation plan that "includes estimates of pollutant loading reductions (benchmarks) to be achieved by specific deadlines and describe those actions necessary to meet the storm drain system's share of WLAs and EPA approved TMDLs." But the County is left to design these implementation programs *after* the final Permit is approved, and [***52] the TMDL plans do not become an enforceable condition of the Permit. Putting aside the notice problem, there are no enforceable minimum requirements for these plans, and they generally require no particular outcome from the measures that the County identifies in its TMDL implementation plans. The only hard-and-fast requirement is that the County submit a *proposed plan* to the Department for review within one year (and as we explained above, that proposed plan need contain no deadlines of its own).

The Permit incorporates, by reference, pollutant-loading limits (called Waste Load Allocations, or "WLAs") in approved TMDLs. It does not require the County to demonstrate that its TMDL implementation plans will meet the required pollution reductions or defend them against challenge, and it doesn't specify any interim or final deadlines for meeting those reductions. The County is left to set its own deadlines, without any outside limits. In the event that "WLAs are not being met according to the benchmarks and deadlines contained in

the County's TMDL implementation plans, an iterative approach shall be used where additional or alternative Stormwater controls are proposed and implemented in [***53] order to achieve WLAs." It is hard to know what this means (and it is the language that was the source of palpable frustration on the part of the trial judge), but we know that there are no specific guidelines for implementing these "adaptive management activities," and no elaboration on what they might entail.

[*189] Perhaps inadvertently, the Department identified the problem best at oral argument: when the Court criticized the TMDL plan because it can't be challenged by the public, counsel answered that TMDLs are "on the MDE website," and that "there's a separate TMDL process." But that advice leads to a thicket: a search of the term "TMDL" on the MDE website yielded 771 results, the first of which purports to explain "TMDL Implementation in Maryland" from a 2006 issue of an "e-MDE" publication. *See* <http://mde.maryland.gov/programs/ResearchCenter/ReportsandPublications/Pages/ResearchCenter/publications/general/emde/vol1no9/tmdl.aspx> (last viewed February 19, 2015). And although there may be a "TMDL process," that process leaves anyone seeking to know what TMDLs are at issue in this Permit completely in the dark.

* * *

It may be that the actions and standards that the Department and County have in mind under this Permit satisfies the requirements that the Act imposes on both, and we agree with the Department about what the [***54] law generally requires. But there is no way for the public or for us to know from the Permit itself whether they do or not, and we agree with the circuit court that the Permit must be revised accordingly. We recognize the Department's expertise in this area, and we know that it is not our role to dictate precisely how the Department must balance the complex realities of managing pollution in a large stormwater system against the important public policies of transparency, public participation, and meaningful judicial review. It seems, though, that the more details are framed as future obligations to plan or propose plans, the harder it will be for the public to participate [**1001] and for courts to review the Permit, even deferentially.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED AND

CASE REMANDED TO THE MARYLAND DEPARTMENT OF THE ENVIRONMENT FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANTS.

VOLUME III
TAB 15

LEXSEE

TUALATIN RIVERKEEPERS, an Oregon non-profit corporation; WILLAMETTE RIVERKEEPER, an Oregon non-profit corporation; COLUMBIA RIVERKEEPER, an Oregon non-profit corporation; and LIZ CALLISON, Petitioners-Appellants, v. OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, an Agency of the State of Oregon; and OREGON ENVIRONMENTAL QUALITY COMMISSION, a Commission of the State of Oregon, Respondents-Respondents, and CLEAN WATER SERVICES, CITY OF PORTLAND, PORT OF PORTLAND, COUNTY OF MULTNOMAH, COUNTY OF CLACKAMAS, CLACKAMAS COUNTY SERVICE DISTRICT NUMBER ONE, SURFACE WATER MANAGEMENT AGENCY OF CLACKAMAS COUNTY, CITY OF GLADSTONE, CITY OF HAPPY VALLEY, CITY OF LAKE OSWEGO, CITY OF MILWAUKIE, CITY OF OREGON CITY, CITY OF RIVER GROVE, CITY OF WEST LINN, CITY OF WILSONVILLE, OAK LODGE SANITARY DISTRICT, CITY OF GRESHAM, and CITY OF FAIRVIEW, Intervenor-Respondents.

A136050

COURT OF APPEALS OF OREGON

235 Ore. App. 132; 230 P.3d 559; 2010 Ore. App. LEXIS 465

May 11, 2009, Argued and Submitted

April 28, 2010, Filed

SUBSEQUENT HISTORY: Review denied by Riverkeepers v. Or. Dep't of Env'tl. Quality, 2010 Ore. LEXIS 803 (Or., Oct. 21, 2010)

PRIOR HISTORY: [***1]

Multnomah County Circuit Court 060100752. Christopher J. Marshall, Judge.

DISPOSITION: Affirmed.

COUNSEL: Christopher Winter argued the cause for appellants. With him on the joint briefs were Crag Law Center and Brent Foster.

Erin C. Lagesen, Assistant Attorney General, argued the cause for respondents. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Jay T. Waldron argued the cause for intervenor-respondents. With him on the joint brief were Laura Maffei, Andrew J. Lee and Schwabe, Williamson

& Wyatt, P.C.; G. Kevin Kiely, James Kincaid, Carla Scott, and Cable Huston Benedict Haagensen & Lloyd LLP; David Doughman and Beery Elsner & Hammond LLP; and David Ris and Gresham City Attorney's Office.

James J. Nicita filed the brief *amicus curiae* for Northwest Environmental Defense Center, Northwest Environmental Advocates, Native Fish Society, Friends of the Clackamas River, and Barbara Kemper.

JUDGES: Before Wollheim, Presiding Judge, and Brewer, Chief Judge, and Sercombe, Judge. *

* Brewer, C. J., *vice* Edmonds, P. J.

OPINION BY: SERCOMBE

OPINION

[**560] [*135] SERCOMBE, J.

Petitioners sought judicial review of several municipal storm water permits issued by respondent ¹

pursuant to ORS 468B.050 and the federal [***2] Clean Water Act, *see* 33 USC § 1342. ² They appeal following the trial court's grant of summary judgment in favor of respondent, contending that, in issuing the permits, respondent acted inconsistently with the requirements of ORS 468B.025(1)(b) and OAR 340-045-0015(5)(c), [**561] as well as ORS 468B.050 and OAR 340-042-0080. We affirm.

1 For ease of reference, we refer to Oregon Department of Environmental Quality (DEQ) and Oregon Environmental Quality Commission (EQC), collectively, as "respondent."

2 The Federal Water Pollution Control Act, 33 USC §§ 1251 - 1376, is generally referred to as the Clean Water Act. National Pollutant Discharge Elimination System permits are issued pursuant to the Clean Water Act. They are specifically provided for in 33 USC section 1342.

The storm water permits at issue are all National Pollutant Discharge Elimination System (NPDES) permits, issued by respondent as part of the state's implementation of the Clean Water Act. *See* ORS 468B.035 (EQC "may perform or cause to be performed any acts necessary to be performed by the state to implement" the provisions of the Clean Water Act). Although municipal storm water was not initially regulated pursuant to the NPDES program, [***3] ³ eventually, the Clean Water Act was amended to explicitly require regulation of certain storm water discharges. *See American Min. Congress v. U.S.E.P.A.*, 965 F2d 759, 763 (9th Cir 1992) (discussing amendments to Clean Water Act requiring that regulation). After those amendments but prior to 1994, most discharges composed entirely of storm water did not require an NPDES permit. 33 USC § 1342(p)(1). However, discharges from municipal separate storm sewer systems ⁴ serving populations of more than 100,000 people were subject to a permit [*136] requirement. 33 USC § 1342(p)(2)(C) - (D). The permit requirement now applies to an even larger range of municipal storm water dischargers: OAR 340-045-015(2) provides that, "[w]ithout first obtaining an NPDES permit, a person may not discharge into navigable waters * * * storm water subject to permit requirements in 40 CFR § 122.26 or § 122.33, including storm water from large, medium, and regulated small municipal separate storm sewer systems[.]"

3 For example, 40 CFR section 125.4(f) (1975) provided that, generally, no NPDES permit was required for "uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by [***4] any industrial or commercial activity[.]"

4 A municipal separate storm sewer is

"a conveyance or system of conveyances including roads with drainage systems, municipal streets, catch basins, curbs, gutter[s], ditches, manmade channels, or storm drains that is owned or operated by a state, city, county, district, association, or other public body; is designed or used for collecting or conveying storm water; and is not a combined sewer or part of a Publicly Owned Treatment Works as defined in 40 CFR § 122.2."

OAR 340-045-0010(10); *see also* OAR 340-045-0010(11) ("Municipal Separate Storm Sewer System or MS4' means all municipal separate storm sewers that are defined as 'large,' 'medium,' or 'small' municipal separate storm sewers systems in 40 CFR § 122.26(b).").

The NPDES permits at issue in this case were issued by respondent and authorize the municipal permittees, who are intervenors in this judicial review proceeding, to

"implement a storm water management program to reduce the contribution of pollutants in storm water to the maximum extent practicable (MEP), to address where applicable TMDL [total maximum daily load] wasteload allocations, and to discharge storm water to waters of the [***5] State, in conformance with all the requirements and conditions set forth in the attached schedules * * *." ⁵

5 The permit issued to Clean Water Services contains slightly different language.

The permits mandate that the permittees "implement

all applicable provisions in the Storm Water Management Plan (SWMP) as the associated Monitoring Program" and incorporate the SWMP by reference.

"The SWMP and associated Monitoring Program include best management practices (BMPs), monitoring triggers, narrative conditions, adaptive management and other elements designed to reduce the introduction of pollutions into the waters of the State from [municipal separate storm sewer systems] to the maximum extent practicable (MEP). The SWMP also includes evaluation and reporting requirements designed to measure the effectiveness of BMPs and other programs."

[*137] Pursuant to those permits, the municipal permittees discharge storm water into a number of rivers and streams, including the Columbia, Willamette, and Tualatin Rivers.

Although the permits are extensive, it is undisputed that that they do not contain conditions stating that the storm water discharges must comply with state water quality standards. In addition, [***6] the permits do not specify wasteload allocations⁶ in the form of [**562] numeric effluent limits; they instead incorporate benchmarks. They also require compliance with the SWMP, which, in turn, incorporates best management practices. It is the permits' lack of numeric limits and conditions requiring compliance with state water quality standards that gave rise to this case.

⁶ "Wasteload Allocation" refers to the portion of receiving water's loading capacity that is allocated to a particular source of pollution. *See* OAR 340-042-0040(4)(g) (a wasteload allocation "determines the portions of the receiving water's loading capacity that are allocated to existing point sources of pollution, including all point source discharges regulated under the Federal Water Pollution Control Act Section 402 (33 USC Section 1342)" (emphasis omitted)); OAR 340-041-0002(67) (defining wasteload allocation).

On summary judgment, the trial court concluded that "the agency did not erroneously interpret a provision of

law in issuing the final orders before the Court, that the agency's exercise of discretion was not inconsistent with an agency rule, and the agency's discretion was not outside the range of discretion delegated [***7] to the agency by law[.]" Accordingly, it entered a general judgment affirming the permits and dismissing the judicial review proceeding with prejudice. Petitioners seek review of that dismissal.

ORS 183.484(5) provides the criteria for judicial review of orders in other than contested cases:⁷

"(a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

"(A) Set aside or modify the order; or

"(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.

[*138] "(b) The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

"(A) Outside the range of discretion delegated to the agency by law;

"(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or

"(C) Otherwise in violation of a constitutional or statutory provision.

"(c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial [***8] evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding."

⁷ The storm water permits at issue are orders in other than a contested case. *See Wilbur Residents*

v. *DEQ*, 176 Ore. App. 353, 354, 30 P3d 1228, *rev den*, 333 Ore. 73, 36 P.3d 974 (2001).

We review the trial court's judgment to determine whether it correctly assessed respondent's actions under the standards set forth in ORS 183.484(5). *See G.A.S.P. v. Environmental Quality Commission*, 198 Ore. App. 182, 187, 108 P.3d 95, *rev den*, 339 Ore. 230, 119 P.3d 790 (2005) (we review to determine compliance with the standards set forth in ORS 183.484(5)). The issues presented in this case are purely legal in nature. Thus, we review to determine whether, in issuing the permits, respondent "erroneously interpreted a provision of law" and whether respondent exercised its discretion "outside the range of discretion delegated" by law, or acted "inconsistent[ly] with an agency rule" or "otherwise in violation of * * * a statutory provision." ORS 183.484(5). Specifically, we examine the requirements of the statutory and regulatory provisions that petitioners contend respondent violated in issuing [***9] the permits.

In their first assignment of error, petitioners assert that, because the permits "do not ensure that the [allowed] discharges will comply with and protect Water Quality Standards," respondent's issuance of those permits violated the requirements of ORS 468B.025(1)(b) and OAR 340-045-0015(5)(c).⁸ [**563] In essence, petitioners contend that, in light of [*139] ORS 468B.025, respondent was required to impose stricter permit requirements on municipal storm water discharges than are required pursuant to the federal scheme. We look first at the statute, which we construe by examining its text, context, and any legislative history submitted by the parties, giving the legislative history the weight, if any, that we conclude it merits. *State v. Gaines*, 346 Ore. 160, 171-72, 206 P3d 1042 (2009).

⁸ Petitioners do not contend that the municipal storm water permits violate the requirements of federal law. In *Defenders of Wildlife v. Browner*, 191 F3d 1159, 1163 (9th Cir 1999), the court explained the background of the regulation of municipal storm water and explained the requirements of federal law with respect to such storm water and state water quality standards. The court held that permits providing [***10] for discharges of municipal storm water need not require strict compliance with state water quality standards under the federal law. Although the

Environmental Protection Agency (EPA) has discretion to require such compliance as it determines appropriate, the federal statutory scheme requires only that municipal storm water dischargers "reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and other such provisions as the Administrator * * * determines appropriate for the control of such pollutants." *Id.* at 1165 (quoting 33 USC § 1342(p)(3)(B)(iii) (omission in original)).

ORS 468B.025 provides:

"(1) Except as provided in ORS 468B.050 or 468B.053, no person shall:

"(a) Cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means.

"(b) Discharge any wastes into the waters of the state if the discharge reduces the quality of such waters below the water quality standards established by rule for such waters by the Environmental Quality Commission.

"(2) [***11] No person shall violate the conditions of any waste discharge permit issued under ORS 468B.050.

"(3) Violation of subsection (1) or (2) of this section is a public nuisance."

ORS 468B.050, in turn, authorizes DEQ to issue permits and sets out circumstances in which a permit is required. *See also EQC v. City of Coos Bay*, 171 Ore. App. 106, 110, 14 P3d 649 (2000) ("ORS 468B.050(1)(a) specifies when it is necessary to obtain a permit[.]").

On its face, ORS 468B.025 does not set forth standards for the issuance of permits or describe what conditions a permit must contain. Instead, it lists several activities that [*140] "no person shall" engage in. Those are (1) violating the conditions of a permit issued pursuant to ORS 468B.050; (2) except as provided in ORS 468B.050 or ORS 468B.053, causing pollution of

the waters of the state, or causing waste to be placed in a location where it is likely to enter the waters of the state; and (3) except as provided in ORS 468B.050 or ORS 468B.053, discharging waste into the waters of the state if the discharge reduces the quality of those waters below state water quality standards. None of those provisions directly governs DEQ's issuance of permits.

Furthermore, [***12] pursuant to the plain text of the statute at issue, in context, the prohibition on discharges that reduce the receiving water below state water quality standards is not absolute. On the contrary, as noted, ORS 468B.025(1)(b) specifically refers to the permit section of the statute, providing that, "[e]xcept as provided in ORS 468B.050 or 468B.053," persons may not discharge waste into the water if those discharges reduce the water quality below applicable state water quality standards. (Emphasis added.) Under ORS 468B.050, DEQ is authorized to issue a permit allowing the discharge of wastes into the waters of the state. Alternatively, under ORS 468B.053, EQC may exempt *de minimis* discharges (and other specified discharges not relevant here) from the permits "required under ORS 468B.025 or 468B.050[.]"⁹ Read together, the statutes prohibit any person from discharging wastes into the waters of the state if those discharges would reduce the quality of that water below the state's water quality standards *unless* the person has a permit from DEQ specifically authorizing the discharge at issue. Neither statute requires that permits [**564] issued must contain provisions mandating compliance with [***13] water quality standards.¹⁰ Instead of placing that type of limitation on respondent's ability to determine and impose [*141] appropriate permit conditions, the statutes generally give respondent discretion in those areas. Indeed, the only express requirement included in ORS 468B.050 as to the issuance of permits thereunder is that such permits "shall specify applicable effluent limitations."

⁹ Specifically, pursuant to ORS 468B.053(2), EQC may exempt "from permit requirements subsurface injection of fluids that are authorized under the underground injection control program of" DEQ. Also, ORS 468B.050 references ORS 468B.215, pursuant to which, "[e]xcept for an animal feeding operation subject to regulation under 33 USC 1342, a fee shall not be assessed to nor permit required under ORS 468B.050(1)(d) of confined animal feeding operations of four

months or less duration or that do not have waste water control facilities."

¹⁰ Federal law generally requires that discharges pursuant to NPDES permits must strictly comply with state water quality standards. 33 USC § 1311(b)(1)(C); *see Defenders of Wildlife*, 191 F3d at 1163. However, under 33 USC section 1342(p)(3)(B), dischargers of municipal storm [***14] water are not subject to that requirement. *See Defenders of Wildlife*, 191 F3d at 1165-66. Instead, federal law requires that NPDES permits relating to municipal storm water discharges require reduction of "the discharge of pollutants to the maximum extent practicable." 33 USC § 1342(p)(3)(B)(iii); *see Defenders of Wildlife*, 191 F3d at 1165 ("§ 1342(p)(3)(B)(iii) creates a lesser standard than § 1311").

Petitioners, citing ORS 468B.030, suggest that an effluent limitation, by definition, must mandate compliance with state water quality standards. That is not the case. ORS 468B.030 provides, in relevant part:

"In relation to waters of the state, the [EQC] by rule may establish effluent limitations, as defined in [the Clean Water Act], and other minimum requirements for disposal of wastes, minimum requirements for operation and maintenance of disposal systems, and all other matters pertaining to standards of quality for the waters of the state."

The Clean Water Act, in turn, defines "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from [***15] point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 USC § 1362(11) (emphasis added).¹¹ Thus, although a permit must include restrictions on discharges of pollutants into the water, the applicable statute does not specify what form they must take. "Best management practices," such as those incorporated in the permits at issue in this case, are a type of effluent limitation. *See* 40 CFR § 122.44(k)(2) - (3) (best management practices are to be used in NPDES permits where authorized pursuant to 33 USC § 1342(p) for the control of storm water discharges or where numeric effluent limits are infeasible); *see also*

Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water [*142] *Permits*, 61 Fed Reg 43,761-01 (Aug 26, 1996) (EPA considers the use of best management practices appropriate in permitting of municipal storm water based on typical lack of information on which to base numeric water quality-based effluent limitations). In short, petitioners incorrectly equate effluent limitations with state water quality standards. A statutory requirement that storm water permits include effluent limitations [***16] is not the same as a requirement that the permits mandate compliance with state water quality standards.

11 Effluent limitations can be water-quality based, *see, e.g.*, OAR 340-041-0002(67) (a WLA is a water-quality-based effluent limitation) or technology based, *see, e.g.*, 40 CFR § 125.3 (discussing technology-based effluent limitations).

Petitioners urge that the context of the statute supports their assertion that ORS 468B.025(1)(b) should be read to require the inclusion of specific terms mandating compliance with state water quality standards in any permit issued by respondent.¹² We disagree. In fact, our review of the statutory context confirms our determination that, rather than imposing that specific limitation on respondent's authority to issue the type of permits at issue, the legislature delegated broad discretion to the agency. ORS 468B.015 sets forth the policies of the state to [**565] (1) conserve the waters of the state, (2) protect and improve water quality, (3) provide for treatment or other corrective action before waste is discharged into the water, (4) prevent and control pollution, and (5) cooperate with other agencies, states, and the federal government.¹³ In order to [***17] carry out that policy, the legislature granted broad authority to respondent:

"(2) In order to carry out the public policy set forth in ORS 468B.015, [DEQ] shall take such action as is necessary for the prevention of new pollution and the abatement of existing pollution by:

[*143] "(a) Fostering and encouraging the cooperation of the people, industry, cities and counties, in order to prevent, control and reduce pollution of waters of the state; and

"(b) Requiring the use of *all available and reasonable methods necessary* to achieve the purposes of ORS 468B.015 and to conform to the standards of water quality and purity established under ORS 468B.048."

ORS 468B.020 (emphasis added); *see also Springfield Education Assn. v. Springfield School Dist.*, 290 Ore. 217, 228, 621 P.2d 547 (1980) (Terms such as "unreasonable" or "public convenience and necessity" are delegative in nature and give an agency "authority, responsibility and discretion for refining and executing generally expressed legislative policy."); ORS 468B.048 (authorizing the agency to "establish standards of quality and purity for waters of this state"); ORS 468.065(1) (providing that all permits shall be "in a form prescribed by" the agency and shall [***18] "specify its duration, and the conditions for compliance with the rules and standards, if any, adopted by the [EQC] pursuant to * * * ORS chapters 468 * * * and 468B"). Those statutes, taken together, make clear that, instead of including many specific requirements regarding the issuance of permits, the legislature intended to delegate the responsibility for appropriately implementing its policies to the agency. That context, in turn, supports our conclusion that the plain text of ORS 468B.025(1)(b) does not require respondent to include in its storm water permits specific conditions mandating compliance with state water quality standards.¹⁴ In light of the foregoing, we conclude that respondent's issuance of the permits in this case did not violate ORS 468B.025(1)(b).¹⁵

12 Petitioners also point to our decision in *EQC v. City of Coos Bay*, 171 Ore. App. 106, 14 P3d 649 (2000), in support of their first assignment of error. However, that case does not inform our decision here. There, we considered whether ORS 468B.025 and ORS 468B.050 authorized EQC to impose penalties on a permittee that violated the terms of its permit and concluded that only ORS 468B.025 prohibited violations of [***19] permit conditions. We did not address the question whether ORS 468B.025 required particular conditions mandating compliance with water quality standards to be included in NPDES permits issued by DEQ.

13 ORS 468B.015 was amended in 2009. Or Laws 2009, ch 248, § 1. That amendment does not significantly modify the statute's language and, in

any event, is not relevant to this case.

14 We note that we have considered the legislative history submitted by petitioners but did not find it helpful in resolving the issue presented.

15 We further note, parenthetically, that petitioners' argument, if extended to ORS 468B.025(1)(a), would lead to an absurd result. That section of the statute prohibits any person from, among other things, causing "pollution of any waters of the state" except as provided by ORS 468B.050 or ORS 468B.053. As noted, ORS 468B.050, in turn, provides for the issuance of permits. Under petitioners' reasoning, however, the issuance of permits that would allow for pollution of waters of the state would be impermissible. As a result, NPDES permits, which allow for pollution by their terms, could never be issued.

Petitioners next assert that the permits are inconsistent with the requirements [***20] of OAR 340-045-0015(5)(c). [*144] According to petitioners, that rule creates "a distinct and specific regulatory requirement that permits for municipal stormwater discharges comply with Water Quality Standards." We are not persuaded.

"Administrative rules are interpreted under the same analytical framework we apply when construing statutes." *Birmingham v. Department of Forestry*, 209 Ore. App. 736, 743-44, 149 P.3d 600 (2006), *rev den*, 342 Ore. 644, 158 P.3d 507 (2007). We defer to an agency's interpretation of its own rule if that interpretation is plausible and not inconsistent with the text of the rule, its context, or some other source of law. *Don't Waste Or. Comm. v. Energy Facility Siting Council*, 320 Ore. 132, 142, 881 P.2d 119 (1994).

Pursuant to OAR 340-045-0015(5):

"Each person required by sections (1) and (2) of this rule to obtain a permit must:

"(a) Promptly apply to the Department for the permit;

[**566] "(b) Fulfill all terms and conditions of the permit issued;

"(c) Comply with applicable federal

and state requirements, effluent standards, and limitations including but not limited to those contained in or promulgated pursuant to Sections 204, 301, 302, 304, 306, 307, 402, and 403 of the [Clean Water Act] and [***21] applicable federal and state water quality standards[.]"

The permittees in this case are required to obtain permits pursuant to OAR 340-045-0015(2), which provides:

"Without first obtaining an NPDES permit, a person may not discharge into navigable waters pollutants from a point source or storm water subject to permit requirements in 40 CFR § 122.26 or § 122.33, including storm water from large, medium, and regulated small municipal separate storm sewer systems and storm water associated with industrial or construction activity."

Like ORS 468B.025, the text of OAR 340-045-0015(5), does not, by its terms, regulate the issuance of permits by the agency. Instead, it requires persons who must obtain permits pursuant to sections (1) and (2) of the rule to do certain things. Namely, those persons must apply for the [*145] required permit promptly, fulfill the terms and conditions of the permit, and comply with applicable federal and state requirements and standards. On its face, the rule says nothing about what must be included in a permit, nor does it impose particular conditions on the issuance of permits. In contrast, other rules do impose requirements on respondent with respect to the issuance [***22] of permits. *See, e.g.*, OAR 340-045-0027 (public notice and participation requirements for permitting actions); OAR 340-045-0033 (requirements for general permits). Indeed, OAR 340-045-0035, which governs the issuance of the type of permit at issue in this case, imposes specific requirements on respondent.

Furthermore, OAR 340-045-0015(5) does not itself make state water quality standards applicable to storm water dischargers. Instead, it simply requires compliance with "applicable" federal and state water quality standards. The text of the provision, thus, only requires that permittees comply with legal standards that some other source makes applicable to them. As we have observed, pursuant to federal and state statutes, permits for the discharge of municipal storm water, unlike other NPDES permits, need not incorporate provisions

requiring compliance with state water quality standards. In the context of storm water, permittees must implement best management practices to reduce the discharge of pollutants in storm water to the maximum extent practicable. OAR 340-045-0015(5) does not impose a stricter requirement. Instead, it simply requires that, to the extent that state water quality [***23] standards otherwise apply, a permittee must comply with them. Because those standards are not otherwise strictly applicable to storm water, the rule does not, itself, make them applicable. In sum, we are not persuaded by petitioners' assertion that, because they do not contain specific conditions requiring compliance with in-stream state water quality standards, the permits violate the requirements of OAR 340-045-0015(5).

In their second assignment of error, petitioners argue that respondent acted inconsistently with ORS 468B.050 and OAR 340-042-0080 when it issued the permits "because the [p]ermits do not incorporate wasteload allocations as enforceable effluent limitations." Petitioners' argument suggests that wasteload allocations should be set forth [*146] as numeric limits within the permits and that the benchmarks incorporated into the permits are impermissible.

In their argument regarding the statute, petitioners suggest that the permits are inconsistent with the requirements of ORS 468B.050 and point to that statute's general requirement that permits "shall specify applicable effluent limitations." As discussed above, that statute does not mandate that such effluent limitations take [***24] a particular form. A best management practices requirement is a type of effluent limitation. In this case, the permits included such a limitation (set forth in detail in the incorporated storm water management plans). We reject petitioners' assertion that the permits violate ORS 468B.050.

[**567] We turn to petitioners' assertion that the permits violate OAR 340-042-0080. That rule is part of a set of rules adopted by respondent relating to "total maximum daily loads (TMDLs)." A TMDL is

"a written quantitative plan and analysis for attaining and maintaining water quality standards and includes the elements described in OAR 340-042-0040. These elements include a calculation of the maximum amount of a pollutant that a

waterbody can receive and still meet state water quality standards, allocations of portions of that amount to the pollutant sources or sectors, and a Water Quality Management Plan to achieve water quality standards."

OAR 340-042-0030(15). TMDLs are established for pollutants in waters of the state that are identified, pursuant to 33 USC section 1313(d), as being water quality impaired. OAR 340-042-0040(1); *see* 33 USC § 1313(d). Among other things TMDLs must include loading capacities [***25] (the amount of a pollutant that a waterbody can receive and still meet water quality standards), wasteload allocations (the portions of the receiving water's loading capacity allocated to particular point sources), and a water quality management plan (a framework of management strategies to attain and maintain water quality standards, including proposed strategies to meet wasteload allocations in the TMDL). OAR 340-042-0040(4).

As part of the implementation of TMDLs, "[f]or sources subject to permit requirements in ORS 468B.050, [*147] wasteload allocations and other management strategies will be incorporated into permit requirements." OAR 340-042-0080(4). In relation to TMDLs, the term "wasteload allocation" is defined, by rule, to mean "the portion of [the] receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. [Wasteload allocations] constitute a type of water quality-based effluent limitation." OAR 340-041-0002(67). However, the rule does not specifically provide the manner in which those wasteload allocations must be implemented. Petitioners' argument raises the question whether wasteload allocations have been incorporated into [***26] the permits in a meaningful way. We conclude that they have.

The applicable TMDLs in this case set forth specific wasteload allocations for municipal storm water. The permits at issue, in turn, indicate the bodies of water for which TMDLs and wasteload allocations have been established and reference the specific TMDL for those bodies of water. The permits provide in the "adaptive management" section that, "[w]here TMDL wasteload allocations have been established for pollutant parameters associated with the permittee's [municipal separate storm sewer system] discharges, the permittee must use the estimated pollutant load reductions (benchmarks)

established in the [storm water management plan] to guide the adaptive management process." Furthermore, they include a section that specifically addresses the TMDL wasteload allocations. The section is intended to "ensure pollutant discharges for those parameters listed in the TMDL are reduced to the [maximum extent practicable]. Adequate progress toward achieving assigned wasteload allocations * * * will be demonstrated through the implementation of best management practices that are targeted at TMDL-related pollutants." Pursuant to that section, [***27] permittees must evaluate progress toward reducing pollutant loads "through the use of performance measures and pollutant load reduction benchmarks developed and listed in the [storm water management plan]." ¹⁶ The storm water management [*148] plan describes a program, including best management practices, designed to achieve reductions in TMDL pollutants. Failure to meet an approved benchmark is not, itself, a violation of permit conditions. However, such a failure gives rise to an obligation on the part of the permittee to follow the adaptive management [**568] process to improve the storm water management plan. Failure to engage in that process would be a violation of the permits.

16 A benchmark is defined in the permit as

"a total pollutant load reduction estimate for each parameter or surrogate, where applicable, for which a [wasteload allocation] is established at the time of permit issuance. A benchmark is used to measure the overall effectiveness of the storm water management plan in making progress toward the wasteload allocation * * * and is intended to be a tool for guiding the adaptive management activities."

In our view, the provisions of the permits are sufficient to meet the requirement [***28] of OAR

340-042-0080(4) that wasteload allocations be incorporated into permit requirements. The agency has interpreted what it means to "incorporate" wasteload allocations through its implementation of that rule in the issuance of permits, and that interpretation is a reasonable one. Although the permits do not themselves include numeric wasteload allocations like those set forth in the TMDLs, the TMDL wasteload allocations are clearly referenced in the permits, and the permits require implementation of best management practices, set forth in the storm water management plans, to make progress toward meeting those wasteload allocations. Again, best management practices are a type of effluent limitation that is used in municipal storm water permits. *See* 40 CFR § 122.44(k)(2) - (3). Furthermore, the permits incorporate benchmarks, through incorporation of the storm water management plan, which are specific pollutant load reduction goals for the permittees. Those measures are "permit requirements" that properly incorporate the TMDL wasteload allocations.

As well, contrary to petitioners' assertion, the permits incorporate wasteload allocations in a way that is enforceable. Although the [***29] failure to reduce pollutants to the extent set forth in a particular benchmark is not itself a violation of the permit, it gives rise to specific obligations on the part of the permittee. Furthermore, the requirement that permittees implement best management practices that are set out in their approved storm water management plan is an enforceable requirement. Looking at the permits in light of [*149] the requirements of the regulatory scheme, we conclude that their provisions are sufficient to meet the requirement of OAR 340-042-0080 that "wasteload allocations * * * be incorporated into permit requirements."

In light of the foregoing discussion, we conclude that the permits do not violate ORS 468B.025, ORS 468B.050, OAR 340-045-0015, or OAR 340-042-0080. Accordingly, the trial court did not err in granting summary judgment in favor of respondent.

VOLUME III
TAB 16

LEXSEE

**BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY et al.,
Plaintiffs and Appellants, v. STATE WATER RESOURCES CONTROL BOARD et
al., Defendants and Respondents; SAN DIEGO BAYKEEPER et al., Interveners and
Respondents.**

D042385

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,
DIVISION ONE**

**124 Cal. App. 4th 866; 22 Cal. Rptr. 3d 128; 2004 Cal. App. LEXIS 2073; 2004 Cal.
Daily Op. Service 10694; 2004 Daily Journal DAR 14492; 34 ELR 20149**

December 7, 2004, Filed

NOTICE:

As modified Jan. 4, 2005. [***1] CERTIFIED
FOR PARTIAL PUBLICATION ¹

¹ Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Discussion parts III, IV, V, VI and VII.

SUBSEQUENT HISTORY: Modified by, Rehearing denied by Building Industry Assn. v. State Water Resources Control Bd., 2005 Cal. App. LEXIS 7 (Cal. App. 4th Dist., Jan. 4, 2005)
Time for Granting or Denying Review Extended Building Industry Assn. of San Diego v. Calif Regional Water Qlty Bd., 2005 Cal. LEXIS 2502 (Cal., Feb. 24, 2005)
Review denied by, Request denied by Building Industry Association of San Diego County v. California Regional Water Quality Control Board, 2005 Cal. LEXIS 3489 (Cal., Mar. 30, 2005)

PRIOR HISTORY: Superior Court of San Diego County, No. GIC 780263, Wayne L. Peterson, Judge.

DISPOSITION: Affirmed.

COUNSEL: Latham & Watkins, David L. Mulliken, Eric M. Katz, Paul N. Singarella, Kelly E. Richardson and Daniel P. Brunton for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Mary Hackenbracht, Assistant Attorney General, Carol A. Squire, David Robinson and Deborah Fletcher, Deputy Attorneys General, for Defendants and Respondents.

David S. Beckman, Heather L. Hoecherl, Anjali I. Jaiswal and Dan L. Gildor for Interveners and Respondents.

Marco Gonzalez for Intervener and Respondent San Diego BayKeeper.

Law Offices of Rory Wicks and Rory R. Wicks for Surfrider Foundation, Waterkeeper Alliance, The Ocean Conservancy, Heal the Bay, Environmental Defense Center, Santa Monica BayKeeper, Orange County CoastKeeper, Ventura CoastKeeper, Environmental Health Coalition, CalBeach Advocates, San Diego Audubon Society, Endangered Habitats League and Sierra Club as Amici Curiae on behalf [***2] of Defendants and Respondents and Interveners and Respondents.

JUDGES: Haller, J., with Benke, Acting P. J., and Aaron, J., concurring.

OPINION BY: HALLER [*871]

OPINION

[**130] **HALLER, J.**--This case concerns the environmental regulation of municipal storm sewers that

carry excess water runoff to lakes, lagoons, rivers, bays, and the ocean. The waters flowing through these sewer systems have accumulated numerous harmful pollutants that are then discharged into the water body without receiving any treatment. To protect against the resulting water quality impairment, federal and state laws impose regulatory controls on storm sewer discharges. In particular, municipalities and other public entities are required to obtain, and comply with, a regulatory permit limiting the quantity and quality of water runoff that can be discharged from these storm sewer systems.

In this case, the California Regional Water Control Board, San Diego Region, (Regional Water Board) conducted numerous public hearings and then issued a comprehensive municipal storm sewer permit governing 19 local public entities. Although these entities did not bring an administrative challenge to the permit, one business organization, the Building Industry [***3] Association of San Diego County (Building Industry), filed an administrative appeal with the State Water Resources Control Board (State Water Board). After making some modifications to the permit, the State Water Board denied the appeal. Building Industry then petitioned for a writ of mandate in the superior court, asserting numerous claims, including that the permit violates state and federal law because the permit provisions are too stringent and impossible to satisfy. Three environmental groups intervened as defendants in the action. After a hearing, the trial court found Building Industry failed to prove its claims and entered judgment in favor of the administrative agencies (the Water Boards) and the intervenor environmental groups.

(1) On appeal, Building Industry's main contention is that the regulatory permit violates federal law because it allows the Water Boards to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable." (33 U.S.C. § 1342(p)(3)(B)(iii).)² [**131] In the published portion of this opinion, we reject this contention, and conclude the Water Boards had the authority to include [***4] a permit provision requiring compliance with state water quality standards. In the unpublished portion of the opinion, we find Building Industry's additional contentions to be without merit. We affirm the judgment.

² Further statutory references are to title 33 of the United States Code, unless otherwise specified.

[*872] RELEVANT BACKGROUND INFORMATION

I. Summary of Relevant Clean Water Act Provisions

Before setting forth the factual background of this particular case, it is helpful to summarize the federal and state statutory schemes for regulating municipal storm sewer discharges.³

³ The systems that carry untreated urban water runoff to receiving water bodies are known as "[m]unicipal separate storm sewer" systems (40 C.F.R. § 122.26(b)(8)), and are often referred to as "MS4s" (40 C.F.R. § 122.30). For readability, we will identify these systems as municipal storm sewers. To avoid confusion in this case, we will generally use descriptive names, rather than initials or acronyms, when referring to parties and concepts.

[***5] A. Federal Statutory Scheme

When the United States Congress first enacted the Federal Water Pollution Control Act in 1948, the Congress relied primarily on state and local enforcement efforts to remedy water pollution problems. (*Middlesex Cty. Sewerage Auth. v. Sea Clammers* (1981) 453 U.S. 1, 11 [69 L. Ed. 2d 435, 101 S. Ct. 2615]; *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal. App. 3d 1421, 1433 [259 Cal. Rptr. 132].) However, by the early 1970's, it became apparent that this reliance on local enforcement was ineffective and had resulted in the "accelerating environmental degradation of rivers, lakes, and streams" (*Natural Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1371 (*Costle*); see *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 203 [48 L. Ed. 2d 578, 96 S. Ct. 2022].) In response, in 1972 Congress substantially amended this law by mandating compliance with various minimum technological effluent standards established by the federal government and creating a comprehensive regulatory scheme to implement these laws. (See *EPA v. State Water Resources Control Board, supra*, 426 U.S. at pp. 204-205.) [***6] The objective of this law, now commonly known as the Clean Water Act, was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (§ 1251(a).)

(2) The Clean Water Act employs the basic strategy of prohibiting pollutant emissions from "point sources"⁴

unless the party discharging the pollutants obtains a permit, known as an NPDES⁵ permit. (See *EPA v. State Water Resources Control Board*, *supra*, 426 U.S. at p. 205.) It is "unlawful [*873] for any person to discharge a pollutant without obtaining a permit and complying with its terms." (*Ibid.*; see § 1311(a); *Costle, supra*, 568 [**132] F.2d at p. 1375.) An NPDES permit is issued by the United States Environmental Protection Agency (EPA) or by a state that has a federally approved water quality program. (§ 1342(a), (b); *EPA v. State Water Resources Control Board*, *supra*, 426 U.S. at p. 209.) Before an NPDES is issued, the federal or state regulatory agency must follow an extensive administrative hearing procedure. (See 40 C.F.R. §§ 124.3, 124.6, 124.8, 124.10; see generally Wardzinski et al., *National Pollutant Discharge Elimination System [***7] Permit Application and Issuance Procedures*, in *The Clean Water Act Handbook* (Evans edit., 1994) pp. 72-74 (Clean Water Act Handbook).) NPDES permits are valid for five years. (§ 1342(b)(1)(B).)

4 The Clean Water Act defines a "point source" to be "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." (§ 1362(14).)

5 NPDES stands for National Pollution Discharge Elimination System.

(3) Under the Clean Water Act, the proper scope of the controls in an NPDES permit depends on the applicable state water quality standards for the affected water bodies. (See *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092 [1 Cal. Rptr. 3d 76].) Each state is required to develop water quality standards that establish " 'the desired [***8] condition of a waterway.' " (*Ibid.*) A water quality standard for any given water segment has two components: (1) the designated beneficial uses of the water body; and (2) the water quality criteria sufficient to protect those uses. (*Ibid.*) As enacted in 1972, the Clean Water Act mandated that an NPDES permit require compliance with state water quality standards and that this goal be met by setting forth a specific "effluent limitation," which is a restriction on the amount of pollutants that may be discharged at the point source. (§§ 1311, 1362(11).)

Shortly after the 1972 legislation, the EPA promulgated regulations exempting most municipal storm sewers from the NPDES permit requirements. (*Costle, supra*, 568 F.2d at p. 1372; see *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1163 (*Defenders of Wildlife*).) When environmental groups challenged this exemption in federal court, the Ninth Circuit held a storm sewer is a point source and the EPA did not have the authority to exempt categories of point sources from the Clean Water Act's NPDES permit requirements. (*Costle, supra*, 568 F.2d at pp. 1374-1383.) [***9] The *Costle* court rejected the EPA's argument that effluent-based storm sewer regulation was administratively infeasible because of the variable nature of storm water pollution and the number of affected storm sewers throughout the country. (*Id.* at pp. 1377-1382.) Although the court acknowledged the practical problems relating to storm sewer regulation, the court found the EPA had the flexibility under the Clean Water Act to design regulations that would overcome these problems. (*Id.* at pp. 1379-1383.)

[*874] During the next 15 years, the EPA made numerous attempts to reconcile the statutory requirement of point source regulation with the practical problem of regulating possibly millions of diverse point source discharges of storm water. (*Defenders of Wildlife, supra*, 191 F.3d at p. 1163; see Gallagher, *Clean Water Act in Environmental Law Handbook* (Sullivan edit., 2003) p. 300 (Environmental Law Handbook); Eisen, *Toward a Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff* (1995) 48 Wash. U. J. Urb. & Contemp. L. 1, 40-41 (*Regulation of Urban Stormwater Runoff*).)

(4) Eventually, in 1987, Congress amended the [***10] Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. (§ 1342(p); see *Defenders of Wildlife, supra*, [**133] 191 F.3d at p. 1163; *Natural Resources Defense Council v. U.S. E.P.A.* (1992) 966 F.2d 1292, 1296.) In these amendments, enacted as part of the Water Quality Act of 1987, Congress distinguished between industrial and municipal storm water discharges. With respect to *industrial* storm water discharges, Congress provided that NPDES permits "shall meet all applicable provisions of this section and section 1311 [requiring the EPA to establish effluent limitations under specific timetables]" (§ 1342(p)(3)(A).) With respect to *municipal* storm water discharges, Congress clarified

that the EPA had the authority to fashion NPDES permit requirements to meet water quality standards without specific numerical effluent limits and instead to impose "controls to reduce the discharge of pollutants to the maximum extent practicable" (§ 1342(p)(3)(B)(iii); see *Defenders of Wildlife, supra*, 191 F.3d at p. 1163.) Because the statutory language pertaining to municipal [***11] storm sewers is at the center of this appeal, we quote the relevant portion of the statute in full:

"(B) ... Permits for discharges from municipal storm sewers--

"(i) may be issued on a system- or jurisdiction-wide basis;

"(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

"(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (§ 1342(p)(3)(B).) To ensure this scheme would be administratively workable, Congress placed a moratorium on many new types of required stormwater permits until 1994 (§ 1342(p)(1)), and created a phased approach to necessary municipal [*875] stormwater permitting depending on the size of the municipality (§ 1342(p)(2)(D)). (See *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir. 2003) 344 F.3d 832, 841-842.)

B. State Statutory Scheme

Three years before the 1972 Clean Water Act, the California Legislature enacted [***12] its own water quality protection legislation, the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), seeking to "attain the highest water quality which is reasonable" (Wat. Code, § 13000.) The Porter-Cologne Act created the State Water Board to formulate statewide water quality policy and established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (Wat. Code, §§ 13100, 13140, 13200, 13201, 13240, 13241, 13243.) The Porter-Cologne Act identified these permits as "waste discharge requirements," and provided that the

waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (Wat. Code, §§ 13263, subd. (a), 13377, 13374.)

Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added chapter 5.5 to the Porter-Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (Wat. Code, § 13370, subd. (c).) As part of these amendments, the Legislature provided that the state and regional water boards "shall, as required or authorized [***13] by the [Clean Water Act], issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions [***134] [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." (Wat. Code, § 13377.) Water Code section 13374 provides that "[t]he term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the [Clean Water Act]."

(5) California subsequently obtained the required approval to issue NPDES permits. (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1453 [126 Cal. Rptr. 2d 389].) Thus, the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (Wat. Code, § 13374.)

II. The NPDES Permit at Issue in this Case

Under its delegated authority and after numerous public hearings, in February 2001 the Regional Water Board issued a 52-page NPDES permit [*876] and Waste Discharge Requirements (the Permit) governing municipal storm sewers owned [***14] by San Diego County, the San Diego Unified Port District, and 18 San Diego-area cities (collectively, Municipalities).⁶ The first 10 pages of the Permit contain the Regional Water Board's detailed factual findings. These findings describe the manner in which San Diego-area water runoff absorbs numerous harmful pollutants and then is conveyed by municipal storm sewers into local waters without any treatment. The findings state that these storm sewer discharges are a leading cause of water quality impairment in the San Diego region, endangering aquatic life and human health. The findings further state that to achieve applicable state water quality objectives, it is necessary not only to require municipalities to comply

with existing pollution-control technologies, but also to require compliance with applicable "receiving water limits" (state water quality standards) and to employ an "iterative process" of "development, implementation, monitoring, and assessment" to improve existing technologies.

6 Under the Clean Water Act, entities responsible for NPDES permit conditions pertaining to their own discharges are referred to as "copermittees." (40 C.F.R. § 122.26(b)(1).) For clarity and readability, we shall refer to these entities as Municipalities.

[***15] Based on these factual findings, the Regional Water Board included in the Permit several overall prohibitions applicable to municipal storm sewer discharges. Of critical importance to this appeal, these prohibitions concern two categories of restrictions. First, the Municipalities are prohibited from discharging those pollutants "which have not been reduced to the *maximum extent practicable*" ⁷ (Italics added). Second, the Municipalities [**135] are prohibited from discharging pollutants "which cause or contribute to exceedances of receiving water quality objectives ... " and/or that "cause or contribute to the violation of water quality standards" This second category of restrictions (referred to in this opinion as the Water Quality Standards provisions) essentially provide that a municipality may not discharge pollutants if those pollutants would cause the receiving water body to exceed the applicable water quality standard. It is these latter restrictions that are challenged by Building Industry in this appeal.

7 The Permit does not precisely define this phrase, and instead, in its definition section, contains a lengthy discussion of the variable nature of the maximum extent practicable concept, referred to as MEP. A portion of this discussion is as follows: "[T]he definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their [local storm sewer plan]. Their total collective and individual activities conducted pursuant to the [plan] becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for municipal separate storm sewer maintenance). In the absence of a proposal acceptable to the

[Regional Water Board], the [Regional Water Board] defines MEP." The definition also identifies several factors that are "useful" in determining whether an entity has achieved the maximum extent practicable standard, including "Effectiveness," "Regulatory Compliance," "Public Acceptance," "Cost," and "Technical Feasibility."

[***16] [*877] Part C of the Permit (as amended) qualifies the Water Quality Standards provisions by detailing a procedure for enforcing violations of those standards through a step-by-step process of "timely implementation of control measures ...," known as an "iterative" process. Under this procedure, when a municipality "caus[es] or contribute[s] to an exceedance of an applicable water quality standard," the municipality must prepare a report documenting the violation and describing a process for improvement and prevention of further violations. The municipality and the regional water board must then work together at improving methods and monitoring progress to achieve compliance. But the final provision of Part C states that "Nothing in this section shall prevent the [Regional Water Board] from enforcing any provision of this Order while the [municipality] prepares and implements the above report."

In addition to these broad prohibitions and enforcement provisions, the Permit requires the Municipalities to implement, or to require businesses and residents to implement, various pollution control measures referred to as "best management practices," which reflect techniques for preventing, [***17] slowing, retaining or absorbing pollutants produced by stormwater runoff. These best management practices include structural controls that minimize contact between pollutants and flows, and nonstructural controls such as educational and public outreach programs. The Permit also requires the Municipalities to regulate discharges associated with new development and redevelopment and to ensure a completed project will not result in significantly increased discharges of pollution from storm water runoff.

III. *Administrative and Trial Court Challenges*

After the Regional Water Board issued the Permit, the Building Industry, an organization representing the interests of numerous construction-related businesses, filed an administrative challenge with the State Water

Board. Although none of the Municipalities joined in the administrative appeal, Building Industry claimed its own independent standing based on its assertion that the Permit would impose indirect obligations on the regional building community. (See Wat. Code, § 13320 [permitting any "aggrieved person" to challenge regional water board action].) Among its numerous contentions, Building Industry argued that the Water [***18] Quality Standards provisions in the Permit require strict compliance with state water quality standards beyond what is "practicable" and therefore violate federal law.

In November 2001, the State Water Board issued a written decision rejecting Building Industry's appeal after making certain modifications to the Permit. (Cal. Wat. Resources Control Bd. Order WQ2001-15 (Nov. 15, 2001).) Of particular relevance here, the State Water [*878] Board modified the Permit to make clear that the iterative enforcement process applied to the Water Quality Standards provisions in the Permit. But the State Water Board did not delete the Permit's [**136] provision stating that the Regional Water Board retains the authority to enforce the Water Quality Standards provisions even if a Municipality is engaged in this iterative process.

Building Industry then brought a superior court action against the Water Boards, challenging the Regional Board's issuance of the Permit and the State Water Board's denial of Building Industry's administrative challenge.⁸ Building Industry asserted numerous legal claims, including that the Water Boards: (1) violated the Clean Water Act by imposing a standard greater [***19] than the "maximum extent practicable" standard; (2) violated state law by failing to consider various statutory factors before issuing the Permit; (3) violated the California Environmental Quality Act (CEQA) by failing to prepare an environmental impact report (EIR); and (4) made findings that were factually unsupported.

⁸ Several other parties were also named as petitioners: Building Industry Legal Defense Foundation, California Business Properties Association, Construction Industry Coalition for Water Quality, San Diego County Fire Districts Association, and the City of San Marcos. However, because these entities were not parties in the administrative challenge, the superior court properly found they were precluded by the

administrative exhaustion doctrine from challenging the administrative agencies' compliance with the federal and state water quality laws. Although these entities were named as appellants in the notice of appeal, they are barred by the exhaustion doctrine from asserting appellate contentions concerning compliance with federal and state water quality laws. However, as to any other claims (such as CEQA), these entities are proper appellants. For ease of reference and where appropriate, we refer to the appellants collectively as Building Industry.

Three environmental organizations, San Diego BayKeeper, Natural Resources Defense Council, and California CoastKeeper (collectively, Environmental Organizations), [***20] requested permission to file a complaint in intervention, seeking to uphold the Permit and asserting a direct and substantial independent interest in the subject of the action. Over Building Industry's objections, the trial court permitted these organizations to file the complaint and enter the action as parties-interveners.

After reviewing the lengthy administrative record and the parties' briefs, and conducting an oral hearing, the superior court ruled in favor of the Water Boards and Environmental Organizations (collectively, respondents). Applying the independent judgment test, the court found Building Industry failed to meet its burden to establish the State Water Board abused its discretion in approving the Permit or that the administrative findings are contrary to the weight of the evidence. In particular, the court found Building Industry failed to establish the Permit requirements were "impracticable under federal law or unreasonable under state law," and noted that there was evidence showing the Regional Water Board considered many practical aspects of the regulatory [*879] controls before issuing the Permit. Rejecting Building Industry's legal arguments, the court also stated that [***21] under federal law the Water Boards had the discretion "to require strict compliance with water quality standards" or "to require less than strict compliance with water quality standards." The court also sustained several of respondents' evidentiary objections, including to documents relating to the legislative history of the Clean Water Act.

Building Industry appeals, challenging the superior court's determination that the Permit did not violate the

federal Clean Water Act. In its appeal, Building Industry does not reassert its claim that the Permit violates state law, except for its contentions pertaining to CEQA.

DISCUSSION

I. Standard of Review

(6) A party aggrieved by a final decision of the State Water Board may obtain review of the decision by filing a timely [*137] petition for writ of mandate in the superior court. (Wat. Code, § 13330, subd. (a).) Code of Civil Procedure section 1094.5 governs the proceedings, and the superior court must exercise its independent judgment in examining the evidence and resolving factual disputes. (Wat. Code, § 13330, subd. [***22] (d).) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817 [85 Cal. Rptr. 2d 696, 977 P.2d 693].)

(7) In reviewing the trial court's factual determinations on the administrative record, a Court of Appeal applies a substantial evidence standard. (*Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 824.) However, in reviewing the trial court's legal determinations, an appellate court conducts a de novo review. (See *Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 129 [133 Cal. Rptr. 2d 249].) Thus, we are not bound by the legal determinations made by the state or regional agencies or by the trial court. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8 [78 Cal. Rptr. 2d 1, 960 P.2d 1031].) But we must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute.⁹ (*Ibid.*)

9 We note that in determining the meaning of the Clean Water Act and its amendments, federal courts generally defer to the EPA's statutory construction if the disputed portion of the statute is ambiguous. (See *Chevron U.S.A. v. Natural Res. Def. Council, Inc.* (1984) 467 U.S. 837, 842-844 [81 L. Ed. 2d 694, 104 S. Ct. 2778] (*Chevron*)). However, the parties do not argue this same principle applies to a *state agency's* interpretation of the Clean Water Act.

Nonetheless, under governing state law principles, we do consider and give due deference to the Water Boards' statutory interpretations in this case. (See *Yamaha Corp. of America v. State Bd. of Equalization*, *supra*, 19 Cal.4th at pp. 7-8.)

[***23]

[*880] II. Water Boards' Authority to Enforce Water Quality Standards in NPDES Permit

Building Industry's main appellate contention is very narrow. Building Industry argues that two provisions in the Permit (the Water Quality Standards provisions) violate federal law because they prohibit the Municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law.¹⁰ Building Industry contends that under federal law the "maximum extent practicable" standard is the "exclusive" measure that may be applied to municipal storm sewer discharges and a regulatory agency may not require a Municipality to comply with a state water quality standard if the required controls exceed a "maximum extent practicable" standard.

10 These challenged Permit provisions state "Discharges from [storm sewers] which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited" (Permit, § A.2), and "Discharges from [storm sewers] that cause or contribute to the violation of water quality standards ... are prohibited" (Permit, § C.1).

[***24] In the following discussion, we first reject respondents' contentions that Building Industry waived these arguments by failing to raise a substantial evidence challenge to the court's factual findings and/or [*138] to reassert its state law challenges on appeal. We then focus on the portion of the Clean Water Act (§ 1342(p)(3)(B)(iii)) that Building Industry contends is violated by the challenged Permit provisions. On our de novo review of this legal issue, we conclude the Permit's Water Quality Standards provisions are proper under federal law, and Building Industry's legal challenges are unsupported by the applicable statutory language, legislative purpose, and legislative history.

A. Building Industry Did Not Waive the Legal Argument

Respondents (the Water Boards and Environmental Organizations) initially argue that Building Industry waived its right to challenge the Permit's consistency with the maximum extent practicable standard because Building Industry did not challenge the trial court's *factual* findings that Building Industry failed to prove any of the Permit requirements were "impracticable" or "unreasonable."

In taking this position, respondents misconstrue the [***25] nature of Building Industry's appellate contention challenging the Water Quality Standards provisions. Building Industry's contention concerns the scope of the authority given to the Regional Water Board under the Permit terms. Specifically, [*881] Building Industry argues that the Regional Water Board does not have the authority to require the Municipalities to adhere to the applicable water quality standards because federal law provides that the "maximum extent practicable" standard is the exclusive standard that may be applied to storm sewer regulation. This argument--concerning the proper scope of a regulatory agency's authority--presents a purely legal issue, and is not dependent on the court's factual findings regarding the practicality of the specific regulatory controls identified in the Permit.

Respondents alternatively contend that Building Industry waived its right to challenge the propriety of the Water Quality Standards provisions under federal law because the trial court found the provisions were valid under state law and Building Industry failed to reassert its state law challenges on appeal. Under the particular circumstances of this case, we conclude Building Industry did [***26] not waive its rights to challenge the Permit under federal law.

(8) Although it is well settled that the Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law (§ 1370; see *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 705 [128 L. Ed. 2d 716, 114 S. Ct. 1900]; *Northwest Environmental Advocates v. Portland* (9th Cir. 1995) 56 F.3d 979, 989), and California law specifically allows the imposition of controls more stringent than federal law (Wat. Code, § 13377), the Water Boards made a tactical decision in the superior court to assert the Permit's validity based solely on federal law, and repeatedly made clear they were not seeking to justify the Permit requirements based on the Boards' independent authority to act under state law. On

appeal, the Water Boards continue to rely primarily on federal law to uphold the Permit requirements, and their assertions that we may decide the matter based solely on state law are in the nature of asides rather than direct arguments. On this record, it would be improper to rely solely on state law to uphold the challenged Permit provisions. [***27]

B. *The Water Quality Standards Requirement Does Not Violate Federal Law*

We now turn to Building Industry's main substantive contention on appeal-- [*139] that the Permit's Water Quality Standards provisions (fn. 10, *ante*) violate federal law. Building Industry's contention rests on its interpretation of the 1987 Water Quality Act amendments containing NPDES requirements for municipal storm sewers. The portion of the relevant statute reads: "(B) ... Permits for discharges from municipal storm sewers ... [¶] ... [¶] (iii) shall require controls to reduce the discharge of pollutants to the *maximum extent practicable, including* management practices, control techniques and [*882] system, design and engineering methods, and such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." (§ 1342(p)(3)(B)(iii), italics added.)

1. *Statutory Language*

Focusing on the first 14 words of subdivision (iii), Building Industry contends the statute means that the maximum extent practicable standard sets the upper limit on the type of control that can be used in an NPDES permit, and that each of the phrases following the [***28] word "*including*" identify examples of "maximum extent practicable" controls. (§ 1342(p)(3)(B)(iii), italics added.) Building Industry thus reads the final "and such other provisions" clause as providing the EPA with the authority only to include *other* types of "maximum extent practicable" controls in an NPDES storm sewer permit.

Respondents counter that the term "including" refers only to the three identified types of pollution control procedures--(1) "management practices"; (2) "control techniques"; and (3) "system, design and engineering methods"--and that the last phrase, "*and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants,*" provides the EPA (or the approved state regulatory agency) the specific authority to go beyond the maximum extent

practicable standard to impose effluent limitations or water-quality based standards in an NPDES permit. In support, respondents argue that because the word "system" in section 1342(p)(3)(B)(iii) is singular, it necessarily follows from parallel-construction grammar principles that the word "system" is part of the phrase "system, design and engineering methods" rather [***29] than the phrase "control techniques and system." Under this view and given the absence of a comma after the word "techniques," respondents argue that the "and such other provisions" clause cannot be fairly read as restricted by the "maximum extent practicable" phrase, and instead the "and such other provisions" clause is a separate and distinct clause that acts as a second direct object to the verb "require" in the sentence. (§ 1342(p)(3)(B)(iii).)

Building Industry responds that respondents' proposed statutory interpretation is "not logical" because if the "and such other provisions" phrase is the direct object of the verb "require," the sentence would not make sense. Building Industry states that "permits" do not generally "require" provisions; they "include" or "contain" them.

(9) As a matter of grammar and word choice, respondents have the stronger position. The second part of Building Industry's proposed interpretation--"control techniques and system, design and engineering methods"--without a comma after the word "techniques" does not logically serve as a [*883] parallel construct with the "and such other provisions" clause. Moreover, we disagree that the "and such other provisions" [***30] clause cannot be a direct object to the word "require." (§ 1342(p)(3)(B)(iii).) Although it is not the clearest way of articulating the concept, the language of section 1342(p)(3)(B)(iii) does communicate the [**140] basic principle that the EPA (and/or a state approved to issue the NPDES permit) retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of " 'maximum extent practicable.' " (*Defenders of Wildlife, supra*, 191 F.3d at pp. 1165-1167.) We find unpersuasive Building Industry's reliance on several statutory interpretation concepts, *ejusdem generis*, *noscitur a sociis*, and *expressio unius est exclusion alterius*, to support its narrower statutory construction.

2. Purpose and History of Section 1342(p)(3)(B)(iii)

(10) Further, "[w]hile punctuation and grammar should be considered in interpreting a statute, neither is

controlling unless the result is in harmony with the clearly expressed intent of the Legislature." (*In re John S.* (2001) 88 Cal.App.4th 1140, 1144, fn. 1 [106 Cal. Rptr. 2d 476]; see *Estate of Coffee* (1941) 19 Cal.2d 248, 251 [120 P.2d 661].) If the statutory language is susceptible [***31] to more than one reasonable interpretation, a court must also "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340 [14 Cal. Rptr. 3d 857, 92 P.3d 350].)

(11) The legislative purpose underlying the Water Quality Act of 1987, and section 1342(p) in particular, supports that Congress intended to provide the EPA (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES permit, particularly where, as here, that compliance will be achieved primarily through an iterative process.

Before section 1342(p) was enacted, the courts had long recognized that the EPA had the authority to require a party to comply with a state water quality standard even if that standard had not been translated into an effluent limitation. (See *EPA v. State Water Resources Control Board, supra*, 426 U.S. at p. 205, fn. 12; *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology, supra*, 511 U.S. at p. 715; [***32] *Northwest Environmental Advocates v. Portland* (9th Cir. 1995) 56 F.3d 979, 987; *Natural Resources Defense Council v. U.S.E.P.A.* (9th Cir. 1990) 915 F.2d 1314, 1316.) Specifically, section 1311(b)(1)(C) gave the regulatory agency the authority to impose "any more stringent limitation, including those necessary to meet water quality standards," and section 1342(a)(2) provided that "[t]he [EPA] Administrator shall [**884] prescribe conditions for [NPDES] permits to assure compliance" with requirements identified in section 1342(a)(1), which encompass state water quality standards. The United States Supreme Court explained that when Congress enacted the 1972 Clean Water Act, it retained "[w]ater quality standards ... as a supplementary basis for effluent limitations, ... so that numerous point sources despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels. ..." (*EPA v. State Water Resources Control Board, supra*, 426 U.S. at p. 205, fn. 12; see also *Arkansas v. Oklahoma* (1992)

503 U.S. 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046].)

There [***33] is nothing in section 1342(p)(3)(B)(iii)'s statutory language or legislative history showing that Congress intended to eliminate this discretion when it amended the Clean Water Act in 1987. [**141] To the contrary, Congress added the NPDES storm sewer requirements to strengthen the Clean Water Act by making its mandate correspond to the practical realities of municipal storm sewer regulation. As numerous commentators have pointed out, although Congress was reacting to the physical differences between municipal storm water runoff and other pollutant discharges that made the 1972 legislation's blanket effluent limitations approach impractical and administratively burdensome, the primary point of the legislation was to address these administrative problems while giving the administrative bodies the tools to meet the fundamental goals of the Clean Water Act in the context of stormwater pollution. (See *Regulation of Urban Stormwater Runoff*, *supra*, 48 Wash. U. J. Urb. & Contemp. L. at pp. 44-46; Environmental Law Handbook, *supra*, at p. 300; Clean Water Act Handbook, *supra*, at pp. 62-63.) In the 1987 congressional debates, the Senators and Representatives emphasized the need to prevent the widespread and escalating problems [***34] resulting from untreated storm water toxic discharges that were threatening aquatic life and creating conditions dangerous to human health. (See Remarks of Sen. Durenberger, 133 Cong. Rec. 1279 (Jan. 14, 1987); Remarks of Sen. Chaffee, 133 Cong. Rec. S738 (daily ed. Jan 14, 1987); Remarks of Rep. Hammerschmidt, 133 Cong. Rec. 986 (Jan. 8, 1987); Remarks of Rep. Roe, 133 Cong. Rec. 1006, 1007 (Jan. 8, 1987); Remarks of Sen. Stafford, 132 Cong. Rec. 32381, 32400 (Oct. 16, 1986).) This legislative history supports that in identifying a maximum extent practicable standard Congress did not intend to substantively bar the EPA/state agency from imposing a more stringent water quality standard if the agency, based on its expertise and technical factual information and after the required administrative hearing procedure, found this standard to be a necessary and workable enforcement mechanism to achieving the goals of the Clean Water Act.

To support a contrary view, Building Industry relies on comments by Minnesota Senator David Durenberger during the lengthy congressional [*885] debates on the 1987 Water Quality Act amendments.¹¹ (132 Cong. Rec. 32400 (Oct. 16, 1986); 133 Cong. Rec. S752 (daily

[***35] ed. Jan. 14, 1987.) In the cited portions of the Congressional Record, Senator Durenberger states that NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable. Such controls include management practices, control techniques and systems, design and engineering methods, and such other provisions, as the Administrator determines appropriate for the control of pollutants in the stormwater discharge." (*Ibid.*) When viewing these statements in context, it is apparent that the Senator was merely paraphrasing the words of the proposed statute and was not intending to address the issue of whether the maximum extent practicable standard was a regulatory ceiling or whether he believed the proposed amendments limited the EPA's existing discretion.¹²

11 We agree with Building Industry that the trial court's refusal to consider this legislative history on the basis that it was not presented to the administrative agencies was improper. However, this error was not prejudicial because we apply a de novo review standard in interpreting the relevant statutes.

[***36]

12 In the cited remarks, Senator Durenberger in fact expressed his dissatisfaction with the EPA's prior attempts to regulate municipal storm sewers. He pointed out, for example, that "[r]unoff from municipal separate storm sewers and industrial sites contain significant values of both toxic and conventional pollutants," and that despite the Clean Water Act's "clear directive," the EPA "has failed to require most stormwater point sources to apply for permits which would control the pollutants in their discharge." (133 Cong. Rec. 1274, 1279-1280 (daily ed. Jan. 14, 1987).)

[**142] Building Industry's reliance on comments made by Georgia Representative James Rowland, who participated in drafting the 1987 Water Quality Act amendments, is similarly unhelpful. During a floor debate on the proposed amendments, Representative Rowland noted that cities have "millions of" stormwater discharge points and emphasized the devastating financial burden on cities if they were required to obtain a permit for each of these points. (133 Cong. Rec. 522 (daily ed. Feb. 3, 1987).) Representative Rowland then explained [***37] that the amendments would address this problem by "allow[ing] communities to obtain far less costly single jurisdictionwide permits." (*Ibid.*) Viewed in context,

these comments were directed at the need for statutory provisions permitting the EPA to issue jurisdiction-wide permits thereby preventing unnecessary administrative costs to the cities, and do not reflect a desire to protect cities from the cost of complying with strict water quality standards when deemed necessary by the regulatory agency.

3. Interpretations by the EPA and Other Courts

(12) Our conclusion that Congress intended section 1342(p)(3)(B)(iii) to provide the regulatory agency with authority to impose standards stricter than a "maximum extent practicable" standard is consistent with interpretations by [*886] the EPA and the Ninth Circuit. In its final rule promulgated in the Federal Register, the EPA construed section 1342(p)(3)(B)(iii) as providing the administrative agency with the authority to impose water-quality standard controls in an NPDES permit if appropriate under the circumstances. Specifically, the EPA stated this statutory provision requires "controls to reduce the discharge of pollutants to the [***38] maximum extent practicable, *and where necessary water quality-based controls ...*" (55 Fed.Reg. 47990, 47994 (Nov. 16, 1990), italics added.) We are required to give substantial deference to this administrative interpretation, which occurred after an extensive notice and comment period. (See *ibid.*; *Chevron, supra*, 467 U.S. at pp. 842-844.)

The only other court that has interpreted the "such other provisions" language of section 1342(p)(3)(B)(iii) has reached a similar conclusion. (*Defenders of Wildlife, supra*, 191 F.3d at pp. 1166-1167.) In *Defenders of Wildlife*, environmental organizations brought an action against the EPA, challenging provisions in an NPDES permit requiring several Arizona localities to adhere to various best management practice controls without requiring numeric effluent limitations. (*Id.* at p. 1161.) The environmental organizations argued that section 1342(p) did not allow the EPA to issue NPDES permits without requiring strict compliance with effluent limitations. (*Defenders of Wildlife, supra*, at p. 1161.) Rejecting this argument, the Ninth Circuit found section 1342(p)(3)(B)(iii)'s statutory language "unambiguously [***39] demonstrates that Congress did not require [**143] municipal storm-sewer discharges to comply strictly" with effluent limitations. (*Defenders of Wildlife, supra*, at p. 1164.)

But in a separate part of the opinion, the *Defenders*

of Wildlife court additionally rejected the reverse argument made by the affected municipalities (who were the interveners in the action) that "the EPA may not, under the [Clean Water Act], require strict compliance with state water-quality standards, through numerical limits or otherwise." (*Defenders of Wildlife, supra*, 191 F.3d at p. 1166.) The court stated: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], § 1342(p)(3)(B)(iii) states that '[p]ermits for discharges from municipal storm sewers ... shall require ... *such other provisions as the Administrator ... determines appropriate for the control of such pollutants.*' (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. ... [¶] *Under that discretionary provision, the EPA has the authority to determine that ensuring [***40] strict compliance with state water-quality standards is necessary to control pollutants.* The EPA also has the authority to require less than strict compliance with state water-quality standards Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion. [Citations.]" (*Defenders of Wildlife, supra*, 191 F.3d at pp. 1166-1167, second italics added.) Although dicta, this [*887] conclusion reached by a federal court interpreting federal law is persuasive and is consistent with our independent analysis of the statutory language.¹³

13 Building Industry's reliance on two other Ninth Circuit decisions to support a contrary statutory interpretation is misplaced. (See *Natural Res. Def. Council, Inc. v. U.S.E.P.A., supra*, 966 F.2d at p. 1308; *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir. 2003) 344 F.3d 832.) Neither of these decisions addressed the issue of the scope of a regulatory agency's authority to exceed the maximum extent practicable standard in issuing NPDES permits for municipal storm sewers.

[***41] To support its interpretation of section 1342(p)(3)(B)(iii), Building Industry additionally relies on the statutory provisions addressing nonpoint source runoff (a diffuse runoff not channeled through a particular source), which were also part of the 1987 amendments to the Clean Water Act. (§ 1329.) In particular, Building Industry cites to section 1329(a)(1)(C), which states, "The Governor of each State

shall ... prepare and submit to the [EPA] Administrator for approval, a report which ... [¶] ... [¶] describes the process ... for identifying best management practices and measures to control each [identified] category ... of nonpoint sources and ... to reduce, to the *maximum extent practicable*, the level of pollution resulting from such category" (Italics added.) Building Industry argues that because this "nonpoint source" statutory language expressly identifies only the maximum extent practicable standard, we must necessarily conclude that Congress meant to similarly limit the storm sewer point source pollution regulations to the maximum extent practicable standard.

The logic underlying this analogy is flawed because the critical language in the [***42] two statutory provisions is different. In the nonpoint source statute, Congress chose to include only the maximum extent practicable standard (§ 1329(a)(1)(C)); whereas in the municipal storm sewer provisions, Congress elected to include the "and such other provisions" clause (§ 1342(p)(3)(B)(iii)). This difference leads to the reasonable inference that Congress had a different intent when it enacted the two statutory provisions. Moreover, because of a fundamental difference between point and nonpoint source pollution, Congress has historically treated the two types of pollution differently and has subjected each type to entirely different requirements. (See *Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123, 1126-1127.) Given this different treatment, it would be improper to presume Congress intended to apply the same standard in both statutes. Building Industry's citation to comments during the 1987 congressional debates regarding nonpoint source regulation does [**144] not support Building Industry's contentions.

[*888] 4. *Contention that it is "Impossible" for Municipalities to Meet Water Quality Standards*

We also reject Building Industry's arguments woven throughout [***43] its appellate briefs, and emphasized during oral arguments, that the Water Quality Standards provisions violate federal law because compliance with those standards is "impossible." The argument is not factually or legally supported.

(13) First, there is no showing on the record before us that the applicable water quality standards are unattainable. The trial court specifically concluded that Building Industry failed to make a factual showing to support this contention, and Building Industry does not

present a proper appellate challenge to this finding sufficient to warrant our reexamining the evidence. All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error. (14) (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373 [110 P.2d 58].) A party challenging the sufficiency of evidence to support a judgment must summarize (and cite to) *all* of the material evidence, not just the evidence favorable to his or her appellate positions. (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888 [160 Cal. Rptr. 516, 603 P.2d 881]; *People v. Dougherty* (1982) 138 Cal. App. 3d 278, 282 [188 Cal. Rptr. 123].) Building Industry has made [***44] no attempt to comply with this well-established appellate rule in its briefs.

In a supplemental brief, Building Industry attempted to overcome this deficiency by asserting that "[t]he record clearly establishes that [the Water Quality Standards provisions] are unattainable during the period the permit is in effect." This statement, however, is not supported by the proffered citation or by the evidence viewed in the light most favorable to the respondents. Further, the fact that many of the Municipalities' storm sewer discharges currently violate water quality standards does not mean that the Municipalities cannot comply with the standards during the five-year term of the Permit. Additionally, Building Industry's assertions at oral argument that the trial court never reached the impossibility issue and/or that respondents' counsel conceded the issue below are belied by the record, including the trial court's rejection of Building Industry's specific challenge to the proposed statement of decision on this very point. ¹⁴

14 Because we are not presented with a proper appellate challenge, we do not address the trial court's factual determinations in this case concerning whether it is possible or practical for a Municipality to achieve any specific Permit requirement.

[***45] (15) We reject Building Industry's related argument that it was respondents' burden to affirmatively show it is feasible to satisfy each of the applicable Water Quality Standards provisions. The party challenging the scope of an administrative permit, such as an NPDES, has the burden of [*889] showing the agency abused its discretion or its findings were unsupported by the facts. (See *Fukuda v. City of Angels, supra*, 20 Cal.4th at p.

817; *Huntington Park Redevelopment Agency v. Duncan* (1983) 142 Cal. App. 3d 17, 25 [190 Cal. Rptr. 744].) Thus, it was not respondents' burden to affirmatively demonstrate it was possible for the Municipalities to meet the Permit's requirements.

Building Industry alternatively contends it was not required to challenge the facts underlying the trial court's determination that the Permit requirements were feasible [**145] because the court's determination was wrong as a matter of law. Specifically, Building Industry asserts that a Permit requirement that is more stringent than a "maximum extent practicable" standard is, by definition, "not practicable" and therefore "technologically impossible" to achieve under any circumstances. Building [***46] Industry relies on a dictionary definition of "practicable," which provides that the word means "something that can be done; feasible," citing the 1996 version of "Webster's Encyclopedic Unabridged Dictionary."

(16) This argument is unpersuasive. The federal maximum extent practicable standard is not defined in the Clean Water Act or applicable regulations, and thus the Regional Water Board properly included a detailed description of the term in the Permit's definitions section. (See *ante*, fn. 7.) As broadly defined in the Permit, the maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. This definition conveys that the Permit's maximum extent practicable standard is a term of art, and is not a phrase that can be interpreted solely by reference to its everyday or dictionary meaning. Further, the Permit's definitional section states that the maximum extent practicable standard "considers economics and is generally, but not necessarily, *less* stringent than BAT." (Italics added.) BAT is an acronym [***47] for "best available technology economically achievable," which is a technology-based standard for industrial storm water dischargers that focuses on reducing pollutants by treatment or by a combination of treatment and best management practices. (See *Texas Oil & Gas Ass'n v. U.S. E.P.A.* (5th Cir. 1998) 161 F.3d 923, 928.) If the maximum extent practicable standard is generally "less stringent" than another Clean Water Act standard that relies on available technologies, it would be unreasonable to conclude that anything more stringent than the maximum extent practicable standard is necessarily

impossible. In other contexts, courts have similarly recognized that the word "practicable" does not necessarily mean the most that can possibly be done. (See *Nat. Wildlife Federation v. Norton* (E.D.Cal. 2004) 306 F. Supp. 2d 920, 928, fn. 12 ["[w]hile the meaning of the term 'practicable' in the [Endangered Species Act] is not entirely clear, the term does not simply equate to 'possible' "]; *Primavera Familienstiftung v. Askin* (S.D.N.Y. 1998) 178 F.R.D. [*890] 405, 409 [noting that "impracticability does not mean impossibility, but rather difficulty [***48] or inconvenience"].)

We additionally question whether many of Building Industry's "impossibility" arguments are premature on the record before us. As we have explained, the record does not support that any required control is, or will be, impossible to implement. Further, the Permit allows the Regional Water Board to enforce water quality standards during the iterative process, but does not impose any obligation that the board do so. Thus, we cannot determine with any degree of certainty whether this obligation would ever be imposed, particularly if it later turns out that it is not possible for a Municipality to achieve that standard.

Finally, we comment on Building Industry's repeated warnings that if we affirm the judgment, all affected Municipalities will be in immediate violation of the Permit because they are not now complying with applicable water quality standards, subjecting them to immediate and substantial civil penalties, and leading to a potential "shut down" of public operations. These doomsday arguments are unsupported. The Permit makes clear that Municipalities [**146] are required to adhere to numerous specific controls (none of which are challenged in this case) and [***49] to comply with water quality standards through "timely implementation of control measures" by engaging in a cooperative iterative process where the Regional Water Board and Municipality work together to identify violations of water quality standards in a written report and then incorporate approved modified best management practices. Although the Permit allows the regulatory agencies to enforce the water quality standards during this process, the Water Boards have made clear in this litigation that they envision the ongoing iterative process as the centerpiece to achieving water quality standards. Moreover, the regulations provide an affected party reasonable time to comply with new permit requirements under certain circumstances. (See 40 C.F.R. § 122.47.) There is nothing

in this record to show the Municipalities will be subject to immediate penalties for violation of water quality standards.

We likewise find speculative Building Industry's predictions that immediately after we affirm the judgment, citizens groups will race to the courthouse to file lawsuits against the Municipalities and seek penalties for violation of the Water Quality Standards provisions. 15 As noted, the applicable [***50] laws provide time for an affected entity to comply with new standards. Moreover, although we do not reach the enforcement issue in this case, we note the [*891] Permit makes clear that the iterative process is to be used for violations of water quality standards, and gives the Regional Water Board the discretionary authority to enforce water quality standards during that process. Thus, it is not at all clear that a citizen would have standing to compel a municipality to comply with a water quality standard despite an ongoing iterative process. (See § 1365(a)(1)(2).) [***51]

15 The Clean Water Act allows a citizen to sue a discharger to enforce limits contained in

NPDES permits, but requires the citizen to notify the alleged violator, the state, and the EPA of its intention to sue at least 60 days before filing suit, and limits the enforcement to nondiscretionary agency acts. (See § 1365(a)(1)(2).)

III.-VII.* [NOT CERTIFIED FOR PUBLICATION]

* See footnote, *ante*, page 866.

DISPOSITION

Judgment affirmed. Appellants to pay respondents' costs on appeal.

Benke, Acting P. J., and Aaron, J., concurred.

A petition for a rehearing was denied January 4, 2005, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied March 30, 2005. Baxter, J., and Brown, J., were of the opinion that the petition should be granted. [***52]

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VOLUME IV
TAB 1

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
ORDER WQ 2015-0075

In the Matter of Review of

Order No. R4-2012-0175, NPDES Permit No. CAS004001

**WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL SEPARATE STORM SEWER
SYSTEM (MS4) DISCHARGES WITHIN THE COASTAL WATERSHEDS OF
LOS ANGELES COUNTY, EXCEPT THOSE DISCHARGES ORIGINATING FROM THE
CITY OF LONG BEACH MS4**

Issued by the
California Regional Water Quality Control Board,
Los Angeles Region

SWRCB/OCC FILES A-2236 (a)-(kk)

BY THE BOARD:

In this order, the State Water Resources Control Board (State Water Board) reviews [Order No. R4-2012-0175](#) (NPDES Permit No. CAS004001) adopted by the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) on November 8, 2012. Order No. R4-2012-0175 regulates discharges of storm water and non-storm water from the municipal separate storm sewer systems (MS4s) located within the coastal watersheds of Los Angeles County, with the exception of the City of Long Beach MS4, and is hereinafter referred to as the “Los Angeles MS4 Order” or the “Order.” We received 37 petitions challenging various provisions of the Los Angeles MS4 Order. For the reasons discussed herein, we generally uphold the Los Angeles MS4 Order, but with a number of revisions to the findings and provisions in response to issues raised in the petitions and as a result of our own review of the Order.

I. BACKGROUND

The Los Angeles MS4 Order regulates discharges from the MS4s operated by the Los Angeles County Flood Control District, Los Angeles County, and 84 municipal permittees (Permittees) in a drainage area that encompasses more than 3,000 square miles and multiple watersheds. The Order was issued by the Los Angeles Water Board in

accordance with section 402(p)(3)(B) of the Clean Water Act¹ and sections 13263 and 13377 of the Porter-Cologne Water Quality Control Act (Porter-Cologne Act),² as a National Pollutant Discharge Elimination System (NPDES) permit to control storm water and non-storm water discharges that enter the area's water bodies from the storm sewer systems owned or operated by the multiple governmental entities named in the Order. The Los Angeles MS4 Order superseded Los Angeles Water Board [Order No. 01-182](#) (2001 Los Angeles MS4 Order), and is the fourth iteration of the NPDES permit for MS4 discharges in the relevant area.

The Los Angeles MS4 Order incorporates most of the pre-existing requirements of the 2001 Los Angeles MS4 Order, including the water quality-based requirement to not cause or contribute to exceedances of water quality standards in the receiving water. The Los Angeles MS4 Order also requires Permittees to comply with new water quality-based requirements to implement 33 watershed-based total maximum daily loads (TMDLs) for the region. The Order links both of these water quality-based requirements to the programmatic elements of the Order by allowing Permittees to comply with the water quality-based requirements, in part, by developing and implementing a watershed management program (WMP) or enhanced watershed management program (EWMP), as more specifically defined in the Order.

Following adoption of the Los Angeles MS4 Order, we received 37 timely petitions challenging various provisions of the Order and, in particular, the provisions implementing TMDLs and integrating water quality-based requirements and watershed-based program implementation. Several petitioners asked that their petitions be held in abeyance;³ however, due to the number of active petitions also seeking review, we declined to hold those petitions in abeyance at that time.⁴ Five petitioners additionally requested that we partially stay the Los Angeles MS4 Order. Following review, the Executive Director of the State Water Board denied the stay requests for failure to comply with the prerequisites for a stay as specified in California Code of Regulations, title 23, section 2053.

¹ 33 U.S.C. § 1342(p)(3)(B).

² Wat. Code, §§ 13263, 13377.

³ See Cal. Code Regs., tit. 23, § 2050.5, subd. (d).

⁴ By letter dated January 30, 2013, we provided an opportunity for petitioners to submit an explanation for why a petition should be held in abeyance notwithstanding the existence of the active petitions. In response, two petitioners, City of Signal Hill and the City of Claremont, argued that their petitions raised unique issues not common to the remaining petitions and therefore appropriate for abeyance. We thereafter denied their requests on July 29, 2013, finding that the unique issues could nevertheless be resolved concurrently with the issues in the other petitions. On October 9, 2013, the City of Claremont withdrew two of the claims in its petition.

We deemed the petitions complete by letter dated July 8, 2013, and, as permitted under our regulations,⁵ consolidated the petitions for review.

An issue front and center in the petitions is the appropriateness of the approach of the Los Angeles MS4 Order in addressing what we generally refer to as “receiving water limitations.” Receiving water limitations in MS4 permits are requirements that specify that storm water and non-storm water discharges must not cause or contribute to exceedances of water quality standards in the waters of the United States that receive those discharges. In precedential State Water Board [Order WQ 99-05](#) (*Environmental Health Coalition*), we directed that all MS4 permits contain specific language that explains how the receiving water limitations will be implemented. (For clarity, we refer to MS4 permit language that relates to implementation of the permit’s receiving water limitations as “receiving water limitations provisions.”) We held a workshop on November 20, 2012, concerning receiving water limitations in MS4 permits. The purpose of the workshop was to receive public comment on an issue paper discussing several alternatives to the receiving water limitations provisions currently included in MS4 permits as directed by Order WQ 99-05 (Receiving Water Limitations Issue Paper).⁶

Because the Los Angeles MS4 Order contains new provisions that authorize the Permittees to develop and implement WMP/EWMPs in lieu of requiring compliance with the receiving water limitations provisions, we view our review of the Order as an appropriate avenue for resolving some of the issues raised in our November 20, 2012 workshop. Through notice to all interested persons, we bifurcated the responses to the petitions and solicited two separate sets of responses: (1) Responses to address issues related to whether the WMP/EWMP alternatives contained in the Los Angeles MS4 Order are an appropriate approach to revising the receiving water limitations provisions in MS4 permits (August 15, 2013 Receiving Water Limitations Submissions); and (2) Responses to address all other issues raised in the petitions (October 15, 2013 Responses).⁷ We held a workshop on October 8, 2013, to hear public comment on the first set of responses.

⁵ Cal. Code Regs., tit. 23, § 2054.

⁶ Information on that workshop is available at http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml (as of Nov 18, 2014).

⁷ We requested the bifurcated responses initially by letter dated July 15, 2013. Subsequent letters on July 29, 2013, and September 18, 2013, clarified the nature of the submissions and extended the submission deadline for the second response.

State Water Board regulations generally require final disposition on petitions within 270 days of the date a petition is deemed complete.⁸ However, in this case, we required additional time to review the large number of issues raised in the petitions. When the State Water Board anticipates addressing a petition on the merits after the review period passes, it may indicate that it will review the matter on its own motion.⁹ On April 1, 2014, we adopted [Order WQ 2014-0056](#) taking up review of the issues in the petitions on our own motion.¹⁰

We now resolve the issues in the petitions with this order.

II. ISSUES AND FINDINGS

The 37 petitions raise over sixty contentions claiming deficiencies in the Los Angeles MS4 Order. This Order addresses the most significant contentions. To the extent petitioners raised issues that are not discussed in this Order, such issues are dismissed as not raising substantial issues appropriate for State Water Board review.¹¹

Before proceeding to the merits of the petitions, we will resolve several procedural issues.

Requests to Take Official Notice or Supplement the Record with Additional Evidence

We received a number of requests to take official notice of documents not in the administrative record of the adoption of the Los Angeles MS4 Order by the Los Angeles Water Board (hereinafter Administrative Record)¹² and a number of requests to admit supplemental evidence not considered by the Los Angeles Water Board.¹³ We reviewed the requests with

⁸ Cal. Code Regs., tit. 23, § 2050.5, subd. (b).

⁹ See Wat. Code, § 13320, subd. (a); Cal. Code Regs., tit. 23, § 2050.5, subd. (c).

¹⁰ To avoid premature litigation on the petition issues as a result of our review extending past the 270 day-regulatory review period, at our suggestion most of the petitioners asked that their petitions be placed in abeyance until adoption by the State Water Board of a final order. We granted those requests. Simultaneously with adopting this order, we are removing the petitions from abeyance and acting upon them.

¹¹ *People v. Barry* (1987) 194 Cal.App.3d 158, 175-177; *Johnson v. State Water Resources Control Bd.* (2004) 123 Cal.App.4th 1107, 1114; Cal. Code Regs., tit. 23, § 2052, subd. (a)(1).

¹² The Administrative Record was prepared by the Los Angeles Water Board and is available at <http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/AdminRecordOrderNoR4_2012_0175/index.shtml> (as of Nov. 18, 2014).

¹³ Several requests for official notice or to admit supplemental evidence were received concurrently with submission of the petitions, with the August 15, 2013 Receiving Water Limitations Submissions, and with the October 15, 2013 Responses. Additional requests for official notice were submitted concurrently with comments on first and revised public drafts of this order and were opposed by several parties. (Request for Official Notice, Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay, Jan. 21, 2015; Request for Official Notice, Natural Resources Defense Council, Los Angeles Waterkeeper and Heal the Bay, June 2, 2015.) Although we have reviewed these additional requests for official notice, we have not granted the requests for the various reasons articulated in this section, in Section II.B.8, and in footnote 74.

consideration of whether they were appropriate for notice or admission based on the legal standards governing our proceedings¹⁴ and whether the documents would materially aid in our review of the issues in the proceedings. We grant the requests with regard to documents 1-7 below, and additionally take official notice on our own motion of documents 8, 9, and 10.¹⁵

1. [Order No. 2013-0001-DWQ](#), NPDES Permit for Storm Water Discharges from Small MS4s, adopted by State Water Board, February 5, 2013;¹⁶
2. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia issued by the United States Environmental Protection Agency (USEPA), November 9, 2012, and a responsiveness summary issued in support of its original adoption of the permit, October 7, 2011;¹⁷
3. Administrative Procedures Update Number 90-004 on Antidegradation Policy Implementation for NPDES Permitting, issued by the State Water Board, July 2, 1990;¹⁸
4. Chapter 7 of the NPDES Permit Writers' Manual, updated by USEPA, September 2010;¹⁹
5. Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA, August 8, 2012;²⁰

¹⁴ For official notice see Cal. Code Regs., tit. 23, § 648.2; Gov. Code, § 11515; Evid. Code, § 452. For admission of supplemental evidence see Cal. Code Regs., tit. 23, § 2050.6.

¹⁵ We note that two documents for which we received requests for official notice are already in the administrative record: USEPA, Memorandum Setting Forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (Nov. 12, 2010) (Administrative Record, section 10.II, RB-AR23962-23968); USEPA, Chapter 6 of the NPDES Permit Writers' Manual (updated Sept. 2010) (Administrative Record, section 10.IV, RB-AR24905-24932).

¹⁶ County of Los Angeles October 15, 2013 Response, Att. C; also available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/phsii2012_5th/order_final.pdf> (as of Nov. 18, 2014).

¹⁷ Los Angeles Water Board Request for State Water Board to Take Official Notice of Or Accept as Supplemental Evidence Exhibit A through SS (Oct. 15, 2013) (Los Angeles Water Board Request for Official Notice), Exh.'s A, B; also available at <http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/MS4FinalLimitedModDocument/FinalModifiedPermit_10-25-12.pdf> and <http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/FinalPermit2011/DCMS4FINALResponsivenessSummary093011.pdf> (as of Nov. 18, 2014).

¹⁸ Los Angeles Water Board Request for Official Notice, Exh.C; also available at <http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/apu_90_004.pdf> (as of Nov. 18, 2014).

¹⁹ Chapter 7 of USEPA's NPDES Permit Writers' Manual, EPA-833-K-10-001, September 2010 (NPDES Permit Writers' Manual) was submitted as Exhibit C to Natural Resources Defense Council, Los Angeles Waterkeeper and Heal the Bay Request for Official Notice (Dec. 10, 2012) (Environmental Petitioners' Request for Official Notice). The chapter may additionally be accessed through links at <<http://water.epa.gov/polwaste/npdes/basics/NPDES-Permit-Writers-Manual.cfm>> (as of Nov. 18, 2014).

6. Memorandum to the Water Management Division Directors, Regions I-X, and NPDES State Directors, issued by USEPA, 1989;²¹
7. “Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12,” issued by USEPA, Region 9, June 3, 1987;²²
8. [Order WQ 2014-0077-DWQ](#), amending NPDES Statewide Storm Water Permit for State of California Department of Transportation, [Order 2012-0011-DWQ](#), adopted by State Water Board, May 20, 2014;²³
9. Statement from USEPA soliciting comments on the USEPA Memorandum Setting forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (November 12, 2010), issued March 17, 2011.²⁴
10. Memorandum, “Revisions to the November 22, 2002 Memorandum ‘Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,’” issued by USEPA, November 26, 2014.²⁵

In addition, we are incorporating the administrative record of the November 20, 2012 workshop on receiving water limitations, including the Receiving Water Limitations Issue Paper and comments by interested persons, into our record for the petitions on the Los Angeles MS4 Order.²⁶

(continued from previous page)

²⁰ Environmental Petitioners’ Request for Official Notice, Exh.B, available at <http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf> (as of Nov. 18, 2014).

²¹ Environmental Petitioners’ Request for Official Notice, Exh.D; also available at <<http://www.epa.gov/npdes/pubs/owm0231.pdf>> (as of Nov. 18, 2014).

²² Environmental Petitioners’ Request for Official Notice, Exh.E; available at <http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf> (as of Nov. 18, 2014).

²³ Available at <http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2014/wqo2014_0077_dwq.pdf> (as of Nov. 18, 2014).

²⁴ Available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf> (as of Nov. 18, 2014).

²⁵ Available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA_SW_TMDL_Memo.pdf> (as of March 30, 2015).

²⁶ The Receiving Water Limitations Issue Paper and comments and workshop presentations by interested person are available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml>.

Among other requests, we are not granting the requests to take official notice of or supplement the Administrative Record with the notices of intent, workplans, draft programs, and other documents filed by Permittees toward development of WMPs/EWMPs and associated monitoring programs following adoption of the Los Angeles MS4 Order or comments submitted on those documents, or the conditional approvals of several of the programs. With regard to factual evidence regarding actions taken by Permittees to comply with the Los Angeles MS4 Order after it was adopted, we believe it appropriate to close the record with the adoption of the Los Angeles MS4 Order. However, we are keenly aware that the success of the Los Angeles MS4 Order in addressing water quality issues depends primarily on the careful and effective development and implementation of programs consistent with the requirements of the Order; we speak to that issue later in our discussion.

City of El Monte's Amended Petition

Petitioner City of El Monte (El Monte) timely filed a petition on December 10, 2012, challenging a number of provisions of the Los Angeles MS4 Order. Thereafter, on February 19, 2013, El Monte filed an amended petition, based on information it asserted was not available prior to the deadline for submission of the petition.

Water Code section 13320, subdivision (a) provides that a petition for review of a regional water quality control board (regional water board) action must be filed within 30 days of the regional water board's action.²⁷ The State Water Board interprets that requirement strictly and petitions filed more than 30 days from regional water board action are rejected as untimely. El Monte asserted that the two additional arguments raised in the amended petition were based on information that was not available prior to the deadline for submitting the petition and were therefore appropriate for State Water Board consideration.

Even if we were required by statute or regulation to accept amended petitions based on new information, here, El Monte's new arguments are not supported by information previously unavailable. First, El Monte argues that the Supreme Court's decision in *Los Angeles County Flood Control District v. Natural Resources Defense Council* (2013) 133 S.Ct. 710 invalidated certain provisions of the Los Angeles MS4 Order that require compliance with water quality standards and total maximum daily load requirements through receiving water monitoring. Contrary to El Monte's assertion, the decision by the Supreme Court did not invalidate any requirements of the Los Angeles MS4 Order and did not result in any changes to

²⁷ See also Cal. Code Regs., tit. 23, § 2050.

the Order. The Supreme Court decision, to the extent it applies to the legal issues before us in this matter, constitutes precedential case law and must be considered in our review of the Los Angeles MS4 Order, but it does not constitute new information that supports an amended petition.²⁸

Second, El Monte argues that the Los Angeles Water Board failed to consider various provisions of the California Watershed Improvement Act of 2009²⁹ when it adopted the Los Angeles MS4 Order. To the extent El Monte believed that the California Watershed Improvement Act was relevant to adoption of the Los Angeles MS4 Order, El Monte had the opportunity to raise that issue in comments before the Los Angeles Water Board and in its timely petition to the State Water Board. Having failed to raise the issue before the Los Angeles Water Board and in its timely petition, El Monte cannot raise the issue in an amended petition.³⁰

We reject El Monte's amended petition as untimely.

Environmental Petitioners' Motion to Strike

Petitioners Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay (Environmental Petitioners), submitted a motion on November 11, 2013, requesting that the State Water Board strike sections of the October 15, 2013 Responses by six petitioners (Motion to Strike). The relevant sections respond to a collateral estoppel argument made by the Environmental Petitioners in their August 15, 2013 Receiving Water Limitations Submission to the State Water Board. Several parties asserted in their petitions that requiring compliance with water quality standards in MS4 permits violates federal law or conflicts with prior State Water Board precedent. The Environmental Petitioners responded in their August 15, 2013 Receiving Water Limitations Submission that these arguments were barred by collateral estoppel because the claims were settled in prior court cases challenging the 2001 Los Angeles MS4 Order. Six of the October 15, 2013 Responses, namely those by the Cities of

²⁸ We note that the State Water Board has the option of allowing additional briefing when there are material legal developments concerning issues raised in a petition, but we did not find such briefing would aid review of the petitions in this case.

²⁹ Wat. Code, § 16100 et seq.

³⁰ In addition to being untimely, El Monte's argument lacks merit. The California Watershed Improvement Act of 2009 grants authority to local government permittees regulated by an MS4 permit to develop and implement watershed improvement plans, but does not limit the authority of a regional water board to impose terms related to watershed management in an MS4 permit. Further, the terms of the WMPs/EWMPs are largely consistent with the watershed improvement plans authorized by the Act, so a permittee can comply with the Los Angeles MS4 Order while also using the authority provided by the California Watershed Improvement Act of 2009 if it so chooses.

Arcadia, Claremont, Covina, Duarte and Huntington Park, San Marino et al.,³¹ and Sierra Madre, incorporated a response to the collateral estoppel argument.

We stated in a July 15, 2013 letter that “[i]nterested persons may not use the [October 15]³² deadline for responses on the remaining petition issues as an opportunity to respond to comments filed on the receiving water limitations approach.” We clarified further in a July 29, 2013 letter: “[W]hen submitting subsequent responses to the petitions in accordance with the [October 15] deadline, petitioners and interested persons should not raise new issues related to the specific questions regarding the watershed management program/enhanced watershed management program or respond to any August 15, 2013, submissions; however petitioners and interested persons will not be precluded from responding to specific issues raised in the original petitions on grounds that the issues are related to the receiving water limitations language.”

We find that the collateral estoppel responses by the six petitioners are disallowed by the direction we provided in our July 15 and July 29, 2013 letters. However, as will be apparent in our discussion in section II.A, we do not rely on the Environmental Petitioners’ collateral estoppel argument in resolving the petitions. Our determination that portions of the October 15, 2013 Responses are disallowed is, therefore, immaterial to the resolution of the issues.³³

Having resolved the procedural issues, we turn to the merits of the Petitions.

A. Implementation of the Iterative Process as Compliance with Receiving Water Limitations

The Los Angeles MS4 Order includes receiving water limitations provisions that are consistent with our direction in Order WQ 99-05 in Part V.A of the Los Angeles MS4 Order. Part V.A. provides, in part, as follows:

1. Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited.

³¹ The cities of San Marino, Rancho Palos Verdes, South El Monte, Norwalk, Artesia, Torrance, Beverly Hills, Hidden Hills, Westlake Village, La Mirada, Vernon, Monrovia, Agoura Hills, Commerce, Downey, Inglewood, Culver City, and Redondo Beach submitted a joint October 15, 2013 Response.

³² The July 15, 2013 letter set a deadline of September 20, 2013, which was subsequently extended to October 15, 2013.

³³ In a November 21, 2013 letter, we indicated that we would consider the Motion to Strike concurrently with drafting of this Order, but that we would not accept any additional submissions in this matter, including any responses to the Motion to Strike. City of San Marino objected to the letter and submitted an opposition to the Motion to Strike. Several petitioners submitted joinders in City of San Marino’s motion. For the same reasons articulated above, we are not accepting these submissions; they would not affect our resolution of the issues.

2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible [footnote omitted], shall not cause or contribute to a condition of nuisance.
3. The Permittees shall comply with Parts V.A.1 and V.A.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications. . . .³⁴

The petitioners that are permittees (hereinafter referred to as “Permittee Petitioners”)³⁵ argue that the above language either means, or should be read and/or clarified to mean, that good faith engagement in the requirements of Part V.A.3, traditionally referred to as the “iterative process,” constitutes compliance with Parts V.A.1. and V.A.2. The position put forth by Permittee Petitioners is one we took up when we initiated a process to re-examine the receiving water limitations and iterative process in MS4 permits statewide with our Receiving Water Limitations Issue Paper and the November 20, 2012 workshop. We summarize the law and policy regarding Permittee Petitioners’ position again here and ultimately disagree with Permittee Petitioners that implementation of the iterative process does or should constitute compliance with receiving water limitations.

The Clean Water Act generally requires NPDES permits to include technology-based effluent limitations and any more stringent limitations necessary to meet water quality standards.³⁶ In the context of NPDES permits for MS4s, however, the Clean Water Act does not explicitly reference the requirement to meet water quality standards. MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP) in all cases, but requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency.³⁷ Specifically the Clean Water Act states as follows:

Permits for discharges from municipal storm sewers –

. . .

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

³⁴ Los Angeles MS4 Order, Part V.A, pp. 38-39.

³⁵ For ease of reference, where an argument is made by multiple Permittee Petitioners, even if not by all, we attribute that argument to Permittee Petitioners generally, and do not list which of the 37 Permittee Petitioners in fact make the argument. Where only one or two Permittee Petitioners make a particular argument, we have identified the specific Permittee Petitioner(s).

³⁶ 33 U.S.C. §§ 1311, 1342(a).

³⁷ 33 U.S.C. § 1342(p)(3)(B); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as . . . the State determines appropriate for the control of such pollutants.³⁸

Thus, a permitting agency imposes requirements related to attainment of water quality standards where it determines that those provisions are “appropriate for the control of [relevant] pollutants” pursuant to the Clean Water Act municipal storm water provisions.

Under the Porter-Cologne Act, waste discharge requirements must implement applicable water quality control plans, which include the beneficial uses to be protected for a given water body and the water quality objectives reasonably required for that protection.³⁹ In this respect, the Porter-Cologne Act treats MS4 dischargers and other dischargers even-handedly and anticipates that all waste discharge requirements will implement the water quality control plans. However, when implementing requirements under the Porter-Cologne Act that are not compelled by federal law, the State Water Board and regional water boards (collectively, “water boards”) have some flexibility to consider other factors, such as economics, when establishing the appropriate requirements.⁴⁰ Accordingly, since the State Water Board has discretion under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, the State Water Board may also utilize the flexibility under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.

We have previously exercised the discretion we have under federal law in favor of requiring compliance with water quality standards, but have required less than strict compliance. We have directed, in precedential orders, that MS4 permits require discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters,⁴¹ but have prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements. That iterative process involves reporting of the violation, submission of a report describing proposed improvements to BMPs

³⁸ 33 U.S.C. § 1342(p)(3)(B).

³⁹ Wat. Code, § 13263. The term “water quality standards” encompasses the beneficial uses of the water body and the water quality objectives (or “water quality criteria” under federal terminology) that must be met in the waters of the United States to protect beneficial uses. Water quality standards also include the federal and state antidegradation policy.

⁴⁰ Wat. Code, §§ 13241, 13263; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.

⁴¹ State Water Board Orders WQ 98-01 (*Environmental Health Coalition*), WQ 99-05 (*Environmental Health Coalition*), WQ 2001-15 (*Building Industry Association of San Diego*).

expected to better meet water quality standards, and implementation of these new BMPs.⁴² The current language of the existing receiving waters limitations provisions was actually developed by USEPA when it vetoed two regional water board MS4 permits that utilized a prior version of the State Water Board's receiving water limitations provisions.⁴³ In State Water Board Order WQ 99-05, we directed that all regional boards use USEPA's receiving water limitations provisions.

There has been significant confusion within the regulated MS4 community regarding the relationship between the receiving water limitations and the iterative process, in part because the water boards have commonly directed dischargers to achieve compliance with water quality standards by improving control measures through the iterative process. But the iterative process, as established in our precedential orders and as generally written into MS4 permits adopted by the water boards, does not provide a "safe harbor" to MS4 dischargers. When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process.⁴⁴

The position that the receiving water limitations are independent from the provisions that establish the iterative process has been judicially upheld on several occasions. The receiving water limitations provisions of the 2001 Los Angeles MS4 Order specifically have been litigated twice, and in both cases, the courts upheld the provisions and the Los Angeles Water Board's interpretation of the provisions. In a decision resolving a challenge to the 2001 Los Angeles MS4 Order, the Los Angeles County Superior Court stated: "[T]he Regional [Water] Board acted within its authority when it included [water quality standards compliance] in

⁴² State Water Board Order WQ 99-05, pp. 2-3; see also State Water Board Order WQ 2001-15, pp. 7-9. Additionally, consistent with federal law, we found it appropriate to require implementation of BMPs in lieu of numeric water quality-based effluent limitations to meet water quality standards. See State Water Board Orders WQ 91-03 (*Citizens for a Better Environment*), WQ 91-04 (*Natural Resources Defense Council*), WQ 98-01, WQ 2001-15. This issue is discussed in greater detail in Section II.C. of this order.

⁴³ See State Water Board Orders WQ 99-05, WQ 2001-15.

⁴⁴ Several Permittee Petitioners have argued that the State Water Board's opinion in State Water Board Order WQ 2001-15 must be read to endorse a safe harbor in the iterative process. We disagree. Regardless, the State Water Board's position that the iterative process of the subject permit did not create a "safe harbor" from compliance with receiving water limitations was clearly established in subsequent litigation on that order. (See *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (Super. Ct. 2003, No. GIC780263), aff'd. *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866.)

the Permit without a ‘safe harbor,’ whether or not compliance therewith requires efforts that exceed the ‘MEP’ standard.”⁴⁵ The lack of a safe harbor in the iterative process of the 2001 Los Angeles MS4 Order was again acknowledged in 2011 and 2013, this time by the Ninth Circuit Court of Appeal. In these instances, the Ninth Circuit was considering a citizen suit brought by the Natural Resources Defense Council against the County of Los Angeles and the Los Angeles County Flood Control District for alleged violations of the receiving water limitations of that order. The Ninth Circuit held that, as the receiving water limitations of the 2001 Los Angeles MS4 Order (and accordingly as the precedential language in State Water Board Order WQ 99-05) was drafted, engagement in the iterative process does not excuse liability for violations of water quality standards.⁴⁶ The California Court of Appeal has come to the same conclusion in interpreting similar receiving water limitations provisions in MS4 Orders issued by the San Diego Regional Water Quality Control Board in 2001 and the Santa Ana Regional Water Quality Control Board in 2002.⁴⁷

While we reiterate that the judicial rulings have been consistent with the water boards’ intention and position regarding the relationship between the receiving water limitations and the iterative process, we acknowledge that some in the regulated community perceived the 2011 Ninth Circuit opinion in particular as a re-interpretation of that relationship. Our Receiving Water Limitations Issue Paper and subsequent workshop reflected our desire to re-examine the issue in response to concerns expressed by the regulated community in the aftermath of that ruling.

As stated above, both the Clean Water Act and the Porter-Cologne Act afford some discretion to not require strict compliance with water quality standards for MS4 discharges. In each of the discussed court cases above, the court’s decision is based on the specific permit language; thus the cases do not address our authority with regard to requiring compliance with water quality standards in an MS4 permit as a threshold matter, and they do not require us to continue to exercise our discretion as we decided in State Water Board Order

⁴⁵ *In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-5, 7. The decision was affirmed on appeal (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985); however, this particular issue was not discussed in the court of appeal’s decision.

⁴⁶ *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d. 880, rev’d on other grounds sub nom. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2013) 133 S.Ct. 710, mod. by *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135.

⁴⁷ *Building Industry Assn. of San Diego County, supra*, 124 Cal.App.4th 866; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377.

WQ 99-05. Although it would be inconsistent with USEPA's general practice of requiring compliance with water quality standards over time through an iterative process,⁴⁸ we may even have the flexibility to reverse⁴⁹ our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will either no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance.⁵⁰

However, with this Order, we now decline to do either. As the storm water management programs of municipalities have matured, an increasing body of monitoring data indicates that many water quality standards are in fact not being met by many MS4s. The iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards. Compliance with water quality standards is and should remain the ultimate goal of any MS4 permit. We reiterate and confirm our determination that provisions requiring compliance with receiving water limitations are "appropriate for the control of . . . pollutants" addressed in MS4 permits and that therefore, consistent with our authority under the Clean Water Act, we will continue to require compliance with receiving water limitations.⁵¹

⁴⁸ See, e.g. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia, *supra*, fn. 17.

⁴⁹ Of course any change of direction would be subject to ordinary principles of administrative law. (See Code Civ. Proc., § 1094.5, subd. (b).)

⁵⁰ As such, it is not necessary to address the collateral estoppel arguments raised by the Environmental Petitioners and opposed by Permittee Petitioners. We agree that it is settled law that we have the discretion to require compliance with water quality standards in an MS4 permit under federal and state law. We also agree that it is settled law that the receiving water limitations provisions currently spelled out in our MS4 permits do not carve out a safe harbor in the iterative process. But the question for us is whether we should continue to exercise our discretion to utilize the same approach to receiving water limitations established under our prior precedent, or proceed in a new direction.

⁵¹ Several Permittee Petitioners argued in comments submitted on the first draft of this order that, because we find that we have some discretion under Clean Water Act section 402(p)(3) to not require compliance with receiving water limitations, the Los Angeles Water Board's action in requiring such compliance -- and our action in affirming it -- is pursuant to state authority. (See, e.g., Cities of Arcadia, Claremont, and Covina, Comment Letter, Jan. 21, 2015.) The Permittee Petitioners argue that the action is therefore subject to evaluation in light of the factors set out in Water Code section 13263 and 13241 pursuant to *City of Burbank*, *supra*, 35 Cal.4th 613. Under *City of Burbank*, a regional water board must consider the factors specified in section 13241 when issuing waste discharge requirements under section 13263, subdivision (a), but only to the extent those waste discharge requirements exceed the requirements of the federal Clean Water Act. (35 Cal.4th at 627.) Nowhere in our discussion in this section do we mean to disavow either that the Los Angeles Water Board acted under federal authority to impose "such other provisions as . . . determine[d] appropriate for the control of . . . pollutants" in adopting the receiving water limitations provisions of the Los Angeles MS4 Order in the first instance or that we are acting under federal authority in upholding those provisions. (33 U.S.C. § 1342(p)(3)(B)(iii).) The receiving water limitations provisions do not exceed the requirements of federal law. We nevertheless also point out that the Los Angeles Water Board engaged in an analysis of the factors under section 13241 when adopting the Order. (See Los Angeles MS4 Order, Att. F, Fact Sheet, pp. F-139 to F-155.)

As we explained in 2001, “[u]rban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses.”⁵² More than a decade later, this is still true. By definition, many of our urban waterways will never attain water quality standards and fully realize their beneficial uses if municipal runoff is allowed to continue to cause or contribute to exceedances of water quality standards. Further, the efforts of other dischargers who are required to not cause or contribute to exceedances of water quality standards would be largely in vain if we did not regulate MS4 dischargers with a somewhat even hand.

Such an approach is additionally consistent with the Porter-Cologne Act’s emphasis on water quality control plans as the cornerstone of water quality planning and regulation and the act’s expectation that all waste discharge requirements will implement the water quality control plans. We believe that direct enforcement of water quality standards is necessary to protect water quality, at a minimum as a back-stop where dischargers fail to meet requirements of the Order designed to achieve progress toward meeting the standards. We will not reverse our precedential determination in State Water Board Order WQ 99-05 that established the receiving water limitations provisions for MS4 permits statewide and reiterate that we will continue to read those provisions consistent with how the courts have: engagement in the iterative process does not excuse exceedances of water quality standards. We accordingly also decline to direct any revisions to the receiving water limitations provisions of the Los Angeles MS4 Order, which are consistent with our precedential language.⁵³

Yet, we are sympathetic to the assertions made by MS4 dischargers that the receiving water limitations provisions mandated by our Order WQ 99-05 may result in many years of permit noncompliance, because it may take years of technical efforts to achieve compliance with the receiving water limitations, especially for wet weather discharges.

⁵² State Water Board Order WQ 2001-15, p. 7.

⁵³ We disagree with Permittee Petitioners’ argument that the receiving water limitations in Part V.A of the Los Angeles MS4 Order are confusing, unclear, or overbroad, because they prohibit causing or contributing to a violation of a receiving water limitation rather than a violation of water quality standards. The Los Angeles Water Board defines “receiving water” as “[a] ‘water of the United States’ in to which waste and/or pollutants are or may be discharged.” (Los Angeles MS4 Order, Att. A., p. A-16.) The Los Angeles Water Board further defines “receiving water limitations” as “[a]ny applicable numeric or narrative water quality objective or criterion, or limitation to implement the applicable water quality objective or criterion, for the receiving water as contained in Chapter 3 or 7 of the Water Quality Control Plan for the Los Angeles Region (Basin Plan), water quality control plans or policies adopted by the State Water Board, or federal regulations, including but not limited to, 40 CFR §131.38.” (*Ibid.*) Receiving water limitations are therefore the water quality standards, including water quality objectives and criteria, that apply to the receiving water as expressed in the water quality control plan for the region, statewide water quality control plans that specify objectives for water bodies in the region, State Water Board policies for water quality control, and federal regulations.

Accordingly, we believe that the MS4 permits should incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.

With the WMP/EWMP provisions of the Los Angeles MS4 Order, the Los Angeles Water Board is striving to allow one such alternative compliance path. As such, the fundamental issue for review before us in this matter is whether the Los Angeles MS4 Order's WMP/EWMP provisions constitute a legal and technically sound compliance alternative for achieving receiving water limitations. We discuss and resolve this issue in the next section.

B. WMP/EWMP as Alternative Compliance Options for Complying with Receiving Water Limitations

The WMP/EWMP provisions allow Permittees to choose an integrated and collaborative watershed-based approach to meeting the requirements of the Los Angeles MS4 Order, including the receiving water limitations. Permittees develop a plan, either collaboratively or individually, that addresses water quality priorities within a watershed. Permittees first prioritize water quality issues within each watershed. Permittees may use the WMP/EWMP to address water body-pollutant combinations for which a TMDL has been developed, giving highest priority to those with interim and final compliance deadlines within the permit term. Permittees may also address water body-pollutant combinations for which no TMDL has been developed, but where the water body is impaired or shows exceedances of the standards for the relevant pollutant from an MS4 source. Once prioritization is completed, Permittees assess the sources of the pollutants and select watershed strategies that are designed to eliminate non-storm water discharges to the MS4 that are a source of pollutants, that meet all applicable TMDL-derived interim and final water quality-based effluent limitations (WQBELs) and/or limitations to be met in the receiving water (referred to herein as "other TMDL-specific limitations")⁵⁴ pursuant to corresponding compliance schedules, and that ensure that discharges from the MS4 do not cause or contribute to exceedances of receiving water limitations. Except as described below for storm water retention projects, Permittees conduct a "reasonable assurance analysis" for each water body-pollutant combination incorporated into the

⁵⁴ Some of the TMDL limitations of the Los Angeles MS4 Order are expressed not as WQBELs but as standards to be met in the receiving water. The Los Angeles MS4 Order refers to these limitations as "receiving water limitations;" however, in order to avoid confusion with the general receiving water limitations in Part V.A., we will use the term "other TMDL-specific limitations." Accordingly, while the Los Angeles MS4 Order uses the term "receiving water limitations" to refer to both the receiving water limitations in part V.A and some of the TMDL-based requirements in Attachments L-R, when we use the term we refer only to the receiving water limitations in part V.A.

WMP/EWMP to demonstrate the ability of the program to meet those objectives. Permittees additionally implement an integrated monitoring and assessment program to determine progress, adapting strategies and measures as necessary.⁵⁵

In addition to all the requirements above, for those Permittees that choose to develop and implement an EWMP, the EWMP provisions also require that Permittees collaborate on multi-benefit regional projects and, wherever feasible, retain all non-storm runoff, as well as all storm water runoff from the 85th percentile 24-hour storm event (hereinafter “storm water retention approach”) for the drainage areas tributary to the projects.⁵⁶

The primary controversy concerning the WMP/EWMP provisions of the Los Angeles MS4 Order is the manner in which they interact with the receiving water limitations and the WQBELs and other TMDL-specific limitations. Under certain conditions detailed in the Order, Permittees may be deemed in compliance with the receiving water limitations and the WQBELs and other TMDL-specific limitations by fully implementing the WMP/EWMP, rather than by demonstrating that the receiving water limitations and the WQBELs and other TMDL-specific limitations have actually been achieved. Specifically:

1. Permittees that develop and implement a WMP/EWMP and fully comply with all requirements and dates of achievement for the WMP/ EWMP as established in the Los Angeles MS4 Order, are deemed to be in compliance with the receiving water limitations in Part V.A for the water body-pollutant combinations addressed by the WMP/EWMP.⁵⁷

2. Permittees fully in compliance with the requirements and dates of achievement of the WMP/EWMP are deemed in compliance with the *interim* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the WMP/EWMP.⁵⁸

3. Permittees implementing an EWMP and utilizing the storm water retention approach in a drainage area tributary to the applicable water body are deemed in compliance with the *final* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the storm water retention approach.⁵⁹

⁵⁵ Los Angeles MS4 Order, Part VI.C., pp. 49-67.

⁵⁶ *Id.*, Part VI.C.1.g., pp. 48-49.

⁵⁷ *Id.*, Part VI.C.2.b., p. 52.

⁵⁸ *Id.*, Parts VI.C.3.a., p. 53, VI.E.2.d.i.4., pp. 143-44. The Los Angeles MS4 Order establishes separate requirements for Trash TMDLs and the WMP/EWMP are not a means of achieving compliance with the Trash TMDL provisions. (See Part VI.E.5, pp. 147-154.) References to TMDLs in this section exclude the Trash TMDLs.

⁵⁹ *Id.*, Part VI.E.2.e.i.(4), p. 145. As with Part VI.E.2.d.i.4, this Part does not apply to Trash TMDLs.

4. Because the Order additionally provides that full compliance with the general TMDL requirements in Part VI.E and the WQBELs and other TMDL-specific limitations in Attachments L through R constitutes compliance with the receiving water limitations in V.A for the specific pollutants addressed by the relevant TMDL,⁶⁰ provisions 2 and 3 above also constitute compliance with the receiving water limitations for the particular water body-pollutant combinations.

5. Finally, Permittees that have declared their intention to develop a WMP/EWMP may be deemed in compliance with receiving water limitations and with interim WQBELs with compliance deadlines occurring prior to approval of the WMP/EWMP if they meet certain conditions during the development phase.⁶¹

Both Environmental Petitioners and Permittee Petitioners put forth a number of arguments to the effect that the WMP/EWMP provisions of the Los Angeles MS4 Order are contrary to federal and state law or reflect poor policy. We discuss each argument below.

1. Anti-backsliding

The Environmental Petitioners argue that the inclusion of the WMP/EWMP in the Los Angeles MS4 Order violates the anti-backsliding provisions of the Clean Water Act and of the federal regulations.⁶² The Clean Water Act generally prohibits the relaxation of an effluent limitation established in an NPDES permit when that permit is renewed; the federal regulations include similar provisions. The Environmental Petitioners argue that the WMP/EWMP of the Los Angeles MS4 Order, by allowing a discharger to be deemed in compliance with receiving water limitations, even where a discharger may in fact be causing or contributing to an exceedance of a water quality standard, represent a relaxation of the receiving water limitations provisions contained in the 2001 Los Angeles MS4 Order.⁶³

We do not agree with the Environmental Petitioners that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the anti-backsliding provisions of either the Clean Water Act or the federal regulations. Anti-backsliding provisions are an important aspect

⁶⁰ *Id.*, Part VI.E.2.c.ii., p. 143. Although this provision reflects a departure from provisions in previous MS4 permits, the provision has not generated controversy and has not been contested in the petitions. The State Water Board supports this provision in MS4 permits, as discussed at section II.B.5.b. of this order.

⁶¹ *Id.*, Parts VI.C. 2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.

⁶² 33 U.S.C. § 1342(o); 40 C.F.R. §122.44(f).

⁶³ The receiving water limitations of the 2001 Los Angeles MS4 Order (like the receiving water limitations in Section V.A. of the Los Angeles MS4 Order) were modeled on the precedential language in State Water Board Order WQ 99-05.

of the Clean Water Act that generally promote continued progress toward clean water, but the provisions do not apply in all circumstances and are subject to certain exceptions. The 2001 Los Angeles MS4 Order required compliance with receiving water limitations, directed Permittees to achieve those limitations through the iterative process, but retained the Los Angeles Water Board's discretion to enforce compliance with the receiving water limitations at any time. The Los Angeles MS4 Order requires compliance with receiving water limitations, but allows implementation of control measures through the WMPs/EWMPs to constitute such compliance, and reserves direct enforcement of the receiving water limitations to situations where a permittee fails to comply with the WMP/EWMP provisions. The approaches under the prior and current orders are designed to achieve the same results – compliance with receiving water limitations – but through distinct paths that are not easily comparable for purposes of the specific, technical anti-backsliding requirements laid out in federal law.⁶⁴ We nevertheless discuss the provisions below.

The Clean Water Act contains both statutory anti-backsliding provisions in section 402(o) and regulatory anti-backsliding provisions in 40 C.F.R. section 122.44(f). The Clean Water Act's statutory prohibition against backsliding applies under a narrow set of criteria specified in Clean Water Act section 402(o). First, section 402(o) prohibits relaxing effluent limitations originally established based on best professional judgment, when there is a newly revised effluent limitation guideline.⁶⁵ The WMP/EWMP is not derived from an effluent limitation guideline, so this first prohibition is inapplicable. Second, section 402(o) prohibits relaxing effluent limitations imposed pursuant to Clean Water Act sections 301(b)(1)(C) or 303(d) or (e).⁶⁶ The receiving water limitations provisions in the 2001 Los Angeles MS4 Order were not

⁶⁴ Responding to an argument that NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia violated anti-backsliding requirements by removing certain numeric limitations in the prior permit, USEPA stated: "The Commenter implies that a Permit that replaces a numeric effluent limit with a non-numeric one is somehow automatically less stringent on that parameter. However, the narrative requirement only violates the anti-backsliding prohibition if the two provisions are comparable. . . . In this case, the two provisions are not comparable: EPA has determined that compliance with the performance standards in the Final Permit will result in more water quality protections for the DC MS4's receiving streams than did the previous aggregate numeric limit." (Responsiveness Summary, p. 84, *supra*, fn.17, citing *Communities for a Better Environment v. State Water Resources Control Bd.* (2005) 132 Cal. App. 4th 1313.)

⁶⁵ 33 U.S.C. § 1342(o)(1) ("In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314 (b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.").

⁶⁶ *Ibid.* ("In the case of effluent limitations established on the basis of section 1311 (b)(1)(C) or section 1313 (d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313 (d)(4) of this title.").

established based on either section 301(b)(1)(C) or section 303(d) or (e), so this prohibition on backsliding is inapplicable.⁶⁷ The receiving water limitations provisions in MS4 permits are imposed under section 402(p)(3)(B) of the Clean Water Act rather than under section 301(b)(1)(C),⁶⁸ and are accordingly not subject to the anti-backsliding requirements of section 402(o).

With respect to the regulatory anti-backsliding provisions in 40 Code of Federal Regulations section 122.44(l), the non-applicability is less clear cut. USEPA promulgated 40 Code of Federal Regulations section 122.44(l)(1) and its predecessor anti-backsliding regulations prior to the Water Quality Act of 1987, which established the municipal permitting requirements of section 402(p)(3)(B). There is ample regulatory history to demonstrate USEPA's intent in establishing the anti-backsliding policy and regulations with respect to evolving technology standards for traditional point sources.⁶⁹ We have found no definitive guidance, however, since that time from USEPA or the courts applying the general provisions of section 122.44(l) in the context of municipal storm water permits.⁷⁰ Further, we have previously noted that anti-backsliding principles may be difficult to assess in the context of non-

⁶⁷ The Environmental Petitioners do not argue that the Los Angeles MS4 Order is contrary to Clean Water Act section 303(d)(4) (33 U.S.C. § 1313(d)(4)), which also sets out anti-backsliding requirements. Section 303(d)(4) sets out the conditions under which effluent limitations based on TMDL wasteload allocations may be relaxed. Specifically, effluent limitations for a discharge impacting an impaired water body where standards have not yet been attained may only be relaxed if either the cumulative effect of the revisions still assures the attainment of the water quality standards or the designated use that is not being attained is removed. (33 U.S.C. § 1313(d)(4)(A).) Where a water body has attained standards, effluent limitations may only be relaxed consistent with the federal antidegradation policy. (33 U.S.C. § 1313(d)(4)(B).)

⁶⁸ *Defenders of Wildlife, supra*, 191 F.3d at pp. 1165-1166.

⁶⁹ See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979) (describing codification of predecessor regulation codified at 40 C.F.R. 122.15(i).) In the context of municipal storm water, the MEP standard is the technology standard; the record here supports that MEP, as reflected in the permit conditions, has evolved since the issuance of the 2001 Los Angeles MS4 Order to become more stringent. (See, e.g., Los Angeles MS4 Order, Part VI.D.9.h.vii., p.132, compared to 2001 Los Angeles MS4 Order, Part 4.F.5.c., pp.48-49 [trash controls]; Los Angeles MS4 Order, Part VI.D.7.c., pp. 97-109, as compared to 2001 Los Angeles MS4 Order, Part 4.D.3., pp.36-37 [new development/redevelopment project performance criteria]; Los Angeles MS4 Order, Part VI.D.8.d., pp.113-114, as compared to 2001 Los Angeles MS4 Order, Part 4.E., pp.42-45 [requirements for construction sites less than one acre].)

⁷⁰ As requested by the Environmental Petitioners, we took official notice of a Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA Region III on August 8, 2012. (See fn. 19). We acknowledge that the letter states at page 3 that a provision in the Prince George County, Maryland, Phase I MS4 draft permit allowing for more time to complete tasks that were required under the previous permit constituted backsliding. The letter refers in passing to section 122.44(l)(1), but the letter has no regulatory effect and, further, is devoid of any analysis. The Environmental Petitioners have also pointed us to discussion of the regulatory anti-backsliding provisions in the NPDES Permit Writers' Manual. (NPDES Permit Writers' Manual, p. 7-4.) The relevant section of the NPDES Permit Writers' Manual does not explicitly distinguish between municipal storm water permits and traditional NPDES Permits in its discussion of the applicability of regulatory anti-backsliding provisions; however, nor does it specifically direct application of the anti-backsliding regulatory provisions to municipal storm water permits. We do not find this discussion to be to be determinative on the issue.

quantitative, non-numeric requirements such as BMPs and plans.⁷¹ It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because, assuming for the sake of argument they do apply, the WMP/EWMP provisions would qualify for an exception to backsliding as discussed below.

Even if the receiving water limitations in MS4 permits could be considered subject to the anti-backsliding requirements of the Clean Water Act or the federal regulations, backsliding would be permissible based on the new information available to the Los Angeles Water Board when it developed and adopted the Los Angeles MS4 Order. The Clean Water Act and federal regulations contain exceptions to the anti-backsliding requirements where new information is available to the permitting authority that was not available at the time of the issuance of the prior permit and that would have justified the imposition of less stringent effluent limitations at that time.⁷² The Los Angeles Water Board makes a compelling argument in its October 15, 2013 Response that the development of 33 watershed-based TMDLs adopted since 2001, the inclusion and implementation of three of those TMDLs in the 2001 Los Angeles MS4 Order, and the TMDL-specific and general monitoring and analysis during implementation, have made new information available to the Los Angeles Water Board that fundamentally shaped the WMP/EWMP alternative of the Los Angeles MS4 Order. The Los Angeles Water Board states that the new information resulted in a new understanding that “time to plan, design, fund, operate and maintain [best management practices (BMPs)] is necessary to attain water quality improvements, and these BMPs are best implemented on a watershed scale.”⁷³ The Los Angeles Water Board further points out that, in terms of water supply, there has been a paradigm shift in the last decade from viewing storm water as a liability to viewing it as a regional asset, and that the Los Angeles MS4 Order was drafted to incorporate this new paradigm into its structure.

The WMP/EWMP approach represents a comprehensive attempt to implement the Board’s new understanding regarding how to make progress toward achieving water quality

⁷¹ See Order WQ 96-13 (*Save San Francisco Bay Association*) at pp. 8-10. Although the relevant portion of that decision primarily concerned Clean Water Act section 402(o), its analysis is equally instructive with respect to 40 C.F.R. section 122.44(l). (In passing, we note that the order appears to assume that the permit’s water quality-based requirements for the MS4 permit were derived pursuant to section 301(b)(1)(C); however, that assumption is in error based on the *Defenders of Wildlife* decision and subsequent State Water Board precedent.)

⁷² See 33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(1) (anti-backsliding does not apply if the circumstances on which the previous permit was based have materially and substantially changed and would constitute cause for permit modification under 40 C.F.R. section 122.62); 40 C.F.R. § 122.62(a)(2) (stating that new information not available at the time the previous permit was issued is cause for modification); see also 40 C.F.R. §122.44(l)(2)(i)(B)(1).

⁷³ Los Angeles Water Board October 15, 2013 Response, p. 51.

standards as well as supporting the development of new water supplies.⁷⁴ The anti-backsliding requirements of the Clean Water Act and the federal regulations thus did not foreclose the incorporation of the WMP/EWMP alternatives into the Los Angeles MS4 Order even though the alternatives allow additional time to achieve receiving water limitations as compared to the immediate compliance required under the 2001 Los Angeles MS4 Order.

We shall amend Finding II.N. and Part III.D.4, page F-20, of Attachment F, Fact Sheet, as follows:

Finding II.N:

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

Attachment F, Fact Sheet, Part III.D.4:

4. Anti-Backsliding Requirements. Sections 402(o)(2) and 303(d)(4) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. ~~All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous permit.~~ **While this Order allows implementation of Watershed Management Plans/EWMPs to constitute compliance with receiving water limitations under certain circumstances, the availability of that alternative and the corresponding availability of additional time to come into compliance with receiving water limitations, does not violate the anti-backsliding provisions. The receiving**

⁷⁴ The Environmental Petitioners argue that information relied on to develop the WMP/EWMP approach was available to the Los Angeles Water Board at the time of the issuance of the 2001 Los Angeles MS4 Order, since regional and watershed based strategies and technologies in storm water planning, as well as the potential benefits of storm water for water supply, were considered prior to the last permit cycle. Similarly, the Environmental Petitioners argue that some of the data gathered through TMDL development was through the process of assessing impairments and through preparing drafts of the TMDL and was therefore available to the Los Angeles Water Board in 2001. (Environmental Petitioners, Written Comments, Jan. 21, 2015, pp. 15-17, 23-25.) The Environmental Petitioners have asked us to take official notice of several documents that support these assertions. It is not necessary for us to do so because we do not disagree with the Environmental Petitioners that some of the information that the Los Angeles Water Board has cited in support of an exception to the anti-backsliding requirements was available at the time of the adoption of the 2001 Los Angeles MS4 Order. We nevertheless concur with the Los Angeles Water Board that the more than a decade of implementation of storm water requirements, as well as the development and implementation of TMDL requirements, since 2001, has, as a whole, fundamentally reshaped our understanding of the physical and time scale on which such measures must be implemented to bring MS4s into compliance with receiving water limitations. Further, we find that all regional water boards are informed by the information gained in the Los Angeles region, so that any regional water board that adopts an alternative compliance path in a subsequent Phase I permit would not be in violation of anti-backsliding requirements, regardless of the particular storm water permitting history of that region.

water limitations provisions of this Order are imposed under section 402(p)(3)(B) of the Clean Water Act rather than based on best professional judgment, or based on section 301(b)(1)(C) or sections 303(d) or (e), and are accordingly not subject to the anti-backsliding requirements of section 402(o). Although the non-applicability is less clear with respect to the regulatory anti-backsliding provisions in 40 Code of Federal Regulations section 122.44(l), the regulatory history suggests that USEPA’s intent was to establish the anti-backsliding regulations with respect to evolving technology standards for traditional point sources. (See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979)). It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because the WMP/EWMP provisions qualify for an exception to backsliding as based on new information. The Watershed Management Plan/EWMP provisions of this Order were informed by new information available to the Board from experience and knowledge gained through the process of developing 33 watershed-based TMDLs and implementing several of the TMDLs since the adoption of the previous permit. In particular, the Board recognized the significance of allowing time to plan, design, fund, operate and maintain watershed-based BMPs necessary to attain water quality improvements and additionally recognized the potential for municipal storm water to benefit water supply. Thus, even if the receiving water limitations are subject to anti-backsliding requirements, they were revised based on new information that would support an exception to the anti-backsliding provisions. (33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(1); 40 C.F.R. §122.44(l)(2)(i)(B)(1)).

2. Antidegradation

The Environmental Petitioners argue that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the federal and state antidegradation policies.⁷⁵ The federal and state antidegradation policies generally require that the existing quality of water bodies be maintained, unless degradation is justified through specific findings. At a minimum, any degradation may not lower the quality of the water below the water quality standards.⁷⁶

The federal and state antidegradation policies are not identical; however, where the federal antidegradation policy is applicable, the State Water Board has interpreted State Water Board Resolution No. 68-16, the state antidegradation policy, to incorporate the federal antidegradation policy.⁷⁷ In the context of the Los Angeles MS4 Order, a federal NPDES permit, compliance with the federal antidegradation policy would require consideration of the following: First, the Los Angeles MS4 Order must ensure that “existing instream uses and the level of

⁷⁵ 40 C.F.R. § 131.12; State Water Board Resolution No. 68-16, Statement of Policy with Respect to Maintaining High Quality Waters in California (State Water Board Resolution No. 68-16).

⁷⁶ *Ibid.*

⁷⁷ State Water Board Order WQ 86-17 (*Fay*), pp. 16-19.

water quality necessary to protect the existing uses” is maintained and protected.⁷⁸ Second, if the baseline quality of a water body for a given constituent “exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected” through the requirements of the Los Angeles MS4 Order unless the Los Angeles Water Board makes findings that (1) any lowering of the water quality is “necessary to accommodate important economic or social development in the area in which the waters are located;” (2) “water quality adequate to protect existing uses fully“ is assured; and (3) “the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control” are achieved.⁷⁹

The Los Angeles MS4 Order must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy.⁸⁰ In particular, the Los Angeles Water Board must find that not only present, but also anticipated future uses of water are protected, and must ensure “best practicable treatment or control” of the discharges.⁸¹ The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.⁸²

⁷⁸ 40 C.F.R. § 131.12(a)(1). This provision has been interpreted to mean that, “[i]f baseline water quality is equal to or less than the quality as defined by the water quality objective, water quality shall be maintained or improved to a level that achieves the objectives.” (State Water Board, Administrative Procedures Update, Antidegradation Policy Implementation for NPDES Permitting, 90-004 (APU 90-004), p. 4.) This provision is completely consistent with, and implemented by, the receiving water limitations provisions discussed above.

⁷⁹ 40 C.F.R. § 131.12(a)(2); see also State Water Board Resolution No. 68-16, Resolve 2. The federal regulations additionally require strict maintenance of water quality for “outstanding national resources.” (40 C.F.R. § 131.12(a)(3).) There are no designated outstanding national resource waters covered by the Los Angeles MS4 Order.

⁸⁰ See State Water Board Order WQ 86-17 (*Fay*), p. 23, fn. 11.

⁸¹ State Water Board Resolution No. 68-16, Resolve 2. Best practicable treatment or control is not defined in Resolution No. 68-16; however, the State Water Board has evaluated what level of treatment or control is technically achievable using “best efforts.” (See State Water Board Orders WQ 81-5 (*City of Lompoc*), WQ 82-5 (*Chino Basin Municipal Water District*), WQ 90-6 (*Environmental Resources Protection Council*).) A Questions and Answers document on Resolution No. 68-16 by the State Water Board states as follows: “To evaluate the best practicable treatment or control method, the discharger should compare the proposed method to existing proven technology; evaluate performance data, e.g. through treatability studies; compare alternative methods of treatment or control; and/or consider the method currently used by the discharger or similarly situated dischargers . . . The costs of the treatment or control should also be considered . . .” (Questions and Answers, Resolution No. 68-16, State Water Board (Feb. 16, 1995), pp. 5-6.)

⁸² APU 90-004, p.4. The baseline for application of the federal antidegradation policy is 1975. For state antidegradation requirements, see also *Asociacion de Gente Unida por el Agua v. Central Valley Water Board* (2012) 210 Cal.App.4th 1255,1270. The baseline for the application of the state antidegradation policy is generally the highest water quality achieved since 1968. However, where a water quality objective for a particular constituent was adopted after 1968, the baseline for that constituent is the highest water quality achieved since the adoption of the (*Continued*)

The Los Angeles MS4 Order contains a conclusory antidegradation finding, but the Fact Sheet contains additional discussion.⁸³ The Fact Sheet discussion essentially conveys that, where there are high quality waters in the region, the antidegradation requirements are met because the Order requires best practicable treatment or control in the form of MEP and water quality standards compliance and, further, where the water quality is already impaired, the Order requires implementation of TMDL requirements to achieve water quality standards over time. The Fact Sheet also finds that the Los Angeles MS4 Order does not authorize an increase in waste discharges. The Los Angeles Water Board argues that it was not required to make more detailed findings because, using its best professional judgment and available data, it concluded that the Los Angeles MS4 Order would prevent any degradation. For this proposition, the Los Angeles Water Board cites to State Water Board guidance from 1990 (APU 90-004).⁸⁴ The guidance may be construed to exempt the Los Angeles Water Board from conducting an extensive pollutant by pollutant analysis for each water body in the region, but it does not exempt the Board from clearly stating its basis for finding that its action is consistent with the antidegradation policies.

The Los Angeles Water Board has provided a more extensive analysis of why the Los Angeles MS4 Order complies with the antidegradation policies in its October 15, 2013 Response. The Los Angeles Water Board argues that most of the water bodies impacted by the Los Angeles MS4 Order are already impaired for multiple constituents and that, even if some of these water bodies may have been higher quality in 1968, a scenario largely contradicted by the available data,⁸⁵ the appropriate baseline for the quality of such waters is the level of control achieved under the prior permit. The Los Angeles Water Board further argues that the Los Angeles MS4 Order has provisions that are equally or more stringent than those of the

(continued from previous page)

objective. Resolution 68-16 requires a comparison of the existing quality to “the quality established in policies as of the date on which such policies become effective.” (Resolution 68-16, Resolve 1.)

⁸³ Los Angeles MS4 Order, Finding II.M; Fact Sheet, Att. F, pp. F19-F20.

⁸⁴ APU 90-004, p. 2.

⁸⁵ We reviewed the Administrative Record, including the 1998 Clean Water Act section 303(d) List (May 12, 1999) (Administrative Record, section 10.VI.E., RB-AR35684-35733), the 2010 Clean Water Act section 303(d) List (Oct. 11, 2011) (Administrative Record, section 10.VI.E., RB-AR35734-35785), Santa Monica Bay Restoration Project, An Assessment of Inputs of Fecal Indication Organisms and Human Enteric Viruses from Two Santa Monica Bay Storm Drains (1990) (Administrative Record, section 10.VI.E, RB-AR43363-43413), Toxic Substances Monitoring Program, 10 Year Summary Report 1978-1987 (Administrative Record, Order No. 01-182, R0044602-0045053) and comments submitted by interested persons to the Los Angeles Water Board (Administrative Record RB-AR1006-1038, RB-AR1100-1128, RB-AR1768-2119, RB-AR2653-2847, RB-AR5642-17888). We found no specific evidence presented to the Los Angeles Water Board of high quality waters in the region with regard to pollutants typically associated with storm water discharges; however, we also recognize that in the absence of specific evidence of high quality waters, a blanket statement that there are no high quality water body-pollutant combinations may be overbroad.

2001 Los Angeles MS4 Order and therefore will not allow water quality to degrade below the level of control achieved under the prior permit.

We agree with the Los Angeles Water Board that the Los Angeles MS4 Order maintains and improves the level of control achieved under the 2001 Los Angeles MS4 Order. We expect that the Los Angeles MS4 Order's TMDL requirements and receiving water limitations, which may be implemented through the WMP/EWMP provisions, will be the means for achieving water quality standards for the majority of degraded water bodies in the region. To assert, as the Environmental Petitioners do, that compliance with the receiving water limitations provisions of the 2001 Los Angeles Order is more stringent than establishing specific implementation requirements with clear deadlines for TMDL and receiving water limitations compliance is misguided. We are concerned with the totality of the provisions in the two permits and find that, viewed from that broader perspective, the Los Angeles MS4 Order is at least as stringent in addressing degradation as its predecessor.⁸⁶ The Los Angeles MS4 Order improves on past practices that have been inadequate to protect water quality, and includes a monitoring and assessment program that will identify any changes in water quality.⁸⁷ In general, under the Los Angeles MS4 Order, we expect to see a trajectory away from any past degradation, even if there may be some continued short-term degradation.

We are not persuaded, however, that the level of control achieved under the 2001 Los Angeles MS4 Order necessarily represents the baseline for purposes of an antidegradation analysis. The 2001 Los Angeles MS4 Order had only minimal findings regarding antidegradation and it is not apparent that any degradation that may have continued under the conditions of the 2001 Los Angeles MS4 Order was anticipated by the Los Angeles Water Board and supported with appropriate analysis regarding economic and social benefits⁸⁸ and best practicable treatment or control. We therefore find that the appropriate baseline remains 1968 or the highest quality of receiving waters attained since 1968. We acknowledge

⁸⁶ In making this finding we also recognize that the Permittees may be deemed in compliance with receiving water limitations prior to approval of the WMP/EWMP. (Los Angeles MS4 Order Parts VI.C.2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.) As discussed further under section II.B.6., we find that the Los Angeles Water Board reasonably exercised its discretion in allowing for compliance during the program development phase and further that the program development phase does not detract from the overall effectiveness of the permit provisions.

⁸⁷ See *Asociacion de Gente Unida, supra*, 210 Cal.App.4th at p. 1278.

⁸⁸ We note that the administrative record provides evidence that some discharge of storm water is to the maximum benefit of the people of the state because such discharge is necessary for flood control and public safety and helps accommodate development. (See, e.g., Administrative Record, section 10.VI.C, RB-AR30101; RB-AR32557-32558.)

that the evidence in the record indicates that it is unlikely that many water bodies were high quality even as far back as 1968, but we cannot make a blanket statement to that effect.⁸⁹

Despite this conclusion, we will not remand the antidegradation issue to the Los Angeles Water Board for further consideration, but will make the findings ourselves based on the record before us. Our findings are necessarily made at a generalized level. Even if the directive of APU 90-004 to carry out a complete antidegradation analysis for each water body-pollutant combination is applicable here, there is simply insufficient data available (to us or the Los Angeles Water Board) to make such findings. The APU 90-004 contemplates the appropriate antidegradation analysis for a discrete discharge or facility. It has limited value when considering antidegradation in the context of storm water discharges from diffuse sources, conveyed through multiple outfalls, with multiple pollutants impacting multiple water bodies within a municipality, or in this case, region, especially given that reliable data on the baseline water quality from 1968 is not available.⁹⁰

The Environmental Petitioners propose that antidegradation be addressed in subsequent actions of the Los Angeles Water Board by requiring that the reasonable assurance analysis (discussed in greater detail in section II.B.4.c. of this Order) supporting a WMP/EWMP also demonstrate that the proposed control measures will maintain high quality of waters with regard to pollutants for which they are not impaired. We reject this approach for two reasons. First, the Los Angeles Water Board was required under the federal and state antidegradation policies to evaluate whether permit conditions would lead to degradation of high quality waters at the time of permit issuance. Second, requiring Permittees to incorporate an evaluation of all water body-pollutant combinations, including those where there are no impairments or exceedances, would require them to expand the reasonable assurance analysis beyond its useful function and manageable scope.

We shall amend Finding II.M and Part D.3 at pages F-19 to F-20 of Attachment F, the Fact Sheet, as follows:

⁸⁹ See fn. 85.

⁹⁰ We note that USEPA did not conduct a detailed antidegradation analysis in issuing NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia, presumably for similar reasons. The court in *Asociacion de Gente Unida* relied on APU 90-004 in part in rejecting an antidegradation analysis conducted by the Central Valley Regional Water Quality Control Board for discharges of pollutants to groundwater from dairy facilities region-wide, but the court's objection was to the regional water board's reliance on an illusory prohibition of discharge to groundwater in finding that no antidegradation analysis was required, not to the sufficiency of any generalized antidegradation analysis the Board might have conducted in lieu of its reliance on the prohibition. (210 Cal.App.4th at pp. 1271-1273.)

Finding II. M.

M. Antidegradation Policy

40 CFR section 131.12 requires that state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. Resolution No. 68-16 requires that existing water quality be maintained unless degradation is justified based on specific findings. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the state and federal antidegradation policies. The permitted discharge is consistent with the antidegradation provision of section 131.12 and State Water Board Resolution No. 68-16 **as set out in the Fact Sheet.**

Attachment F, Fact Sheet Part III.D.3.

3. Antidegradation Policy. 40 CFR section 131.12⁴ requires that the state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in [State Water Board Resolution No. 68-16](#) ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the State and federal antidegradation policies. Resolution No. 68-16 and 40 CFR section 131.12 require the Regional Water Board to maintain high quality waters of the State **unless degradation is justified based on specific findings. First, the Board must ensure that "existing instream uses and the level of water quality necessary to protect the existing uses" are maintained and protected. Second, if the baseline quality of a water body for a given constituent exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected through the requirements of the Order unless the Board makes findings that (1) any lowering of the water quality is necessary to accommodate important economic or social development in the area in which the waters are located; (2) water quality adequate to protect existing uses fully is assured; and (3) the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control are achieved. The Board must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy. In particular, the Board must find that not only present, but also anticipated future uses of water are protected, and must ensure best practicable treatment or control of the discharges. The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.** until it is demonstrated that any change in quality will

~~be consistent with maximum benefit to the people of the State, will not unreasonably affect beneficial uses, and will not result in water quality less than that described in the Regional Water Board's policies. Resolution 68-16 requires that discharges of waste be regulated to meet best practicable treatment or control to assure that pollution or nuisance will not occur and the highest water quality consistent with the maximum benefit to the people of the State be maintained.~~

The discharges permitted in this Order are consistent with the antidegradation provisions of 40 CFR section 131.12 and Resolution 68-16 **as set out in the Findings below:-**

1. Many of the water bodies within the area covered by this Order are of high quality. The Order requires the Permittees to meet best practicable treatment or control to meet water quality standards. As required by 40 CFR section 122.44(a), the Permittees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p). Many of the waters within the area covered by this Order are impaired and for multiple pollutants discharged through MS4s and are not high quality waters with regard to these pollutants. In most cases, there is insufficient data to determine whether these water bodies were impaired as early as 1968, but the limited available data shows impairment dating back for more than two decades. Many such water bodies are listed on the State's CWA Section 303(d) List and either the Regional Water Board or USEPA has established TMDLs to address the impairments. This Order ensures that existing instream (beneficial) water uses and the level of water quality necessary to protect the existing uses is maintained and protected. This Order requires the Permittees to comply with permit provisions to implement the WLAs set forth in the TMDLs in order to restore the beneficial uses of the impaired water bodies consistent with the assumptions and requirements of the TMDLs. This Order further requires compliance with receiving water limitations to meet water quality standards in the receiving water either by demonstrating compliance pursuant to Part V.A and the Permittee's monitoring and reporting program pursuant to Part VI.B or by implementing Watershed Management Programs/EWMPs with a compliance schedule. This Order includes requirements to develop and implement storm water management programs, achieve water quality-based effluent limitations, and effectively prohibit non-storm water discharges through the MS4.

2. To the extent that some of the water bodies within the jurisdiction are high quality waters with regard to some constituents, this Order finds as follows:

a. Allowing limited degradation of high quality water bodies through MS4 discharges is necessary to accommodate important economic or social development in the area and is consistent with the maximum benefit to the people of the state. The discharge of storm water in certain circumstances is to the maximum benefit to the people of the state because it can assist with maintaining instream flows that support beneficial uses, may spur the development of multiple-benefit projects, and may be necessary for flood control, and public safety as well as to accommodate development in the

area. The alternative – capturing all storm water from all storm events – would be an enormous opportunity cost that would preclude MS4 permittees from spending substantial funds on other important social needs. The Order ensures that any limited degradation does not affect existing and anticipated future uses of the water and does not result in water quality less than established standards. The Order requires compliance with receiving water limitations that act as a floor to any limited degradation.

b. The Order requires the highest statutory and regulatory requirements and requires that the Permittees meet best practicable treatment or control. The Order prohibits all non-storm water discharges, with a few enumerated exceptions, through the MS4 to the receiving waters. As required by 40 CFR section 122.44(a), the Permittees must comply with the “maximum extent practicable” technology-based standard set forth in CWA section 402(p), and implement extensive minimum control measures in a storm water management program. Recognizing that best practicable treatment or control may evolve over time, the Order includes new and more specific requirements as compared to Order No. 01-182. The Order incorporates options to implement Watershed Management Programs or EWMPs that must specify concrete and detailed structural and non-structural storm water controls that must be implemented in accordance with an approved time schedule. The Order contains provisions to encourage, wherever feasible, retention of the storm water from the 85th percentile 24-hour storm event.

~~The issuance of this Order does not authorize an increase in the amount of discharge of waste. The Order includes new requirements to implement WLAs assigned to Los Angeles County MS4 discharges that have been established in 33 TMDLs, most of which were not included in the previous Order.~~

3. Compliance Schedules and the Appropriateness of Enforcement Orders

The Environmental Petitioners concede that immediate compliance with receiving water limitations is not achievable in many instances and that some additional time to reach compliance is warranted. They have proposed an alternative to the WMP/EWMP that would incorporate many of the provisions of those programs but require implementation through the mechanism of a time schedule order or other enforcement order rather than as permit conditions. The Los Angeles MS4 Order already provides that Permittees who are out of compliance with final WQBELs and other TMDL-specific limitations may request a time schedule order.⁹¹ Under the alternative proposed by the Environmental Petitioners, all Permittees that are currently out of compliance with receiving water limitations not addressed by a TMDL as well as with interim TMDL requirements with passed compliance deadlines, would be issued a time schedule order or other enforcement order not to exceed the five year term of

⁹¹ Los Angeles MS4 Order, Part VI.E.4., pp.146-147.

the permit. The Permittees would then implement a WMP/EWMP type plan to achieve compliance with the appropriate limitations within the confines of the enforcement order.

In the prior two sections, we found that the WMP/EWMP provisions are not contrary to the anti-backsliding or antidegradation requirements of federal and state law. We therefore disagree with the Environmental Petitioners that the relevant provisions must be stricken from the Order and incorporated instead into an enforcement order for those reasons. We also find that, given that strict compliance with water quality standards is discretionary in MS4 permits, the Los Angeles Water Board was not restricted to limiting the schedule for compliance with receiving water limitations to the term of the Los Angeles MS4 Order.

Further, from a policy perspective, we find that the MS4 Permittees that are developing and implementing a WMP/EWMP should be allowed additional time to come into compliance with receiving water limitations and interim and final TMDLs through provisions built directly into their permit, rather than through enforcement orders. Building a time schedule into the permit itself, as the Los Angeles MS4 Order does, is appropriate because it allows a more efficient regulatory structure compared to having to issue multiple enforcement orders. More importantly, it is appropriate to regulate Permittees in a manner that allows them to strive for compliance with the permit terms, provided no provision of law otherwise precludes including the schedule in the NPDES permit. For example, for traditional point source discharges subject to strict compliance with water quality standards pursuant to section 301(b)(1)(C), the terms of a compliance schedule are dictated by our compliance schedule policy (State Water Board Resolution 2008-0025) and any additional time for compliance could only be under the auspices of an enforcement order outside the permit.⁹²

The WMP/EWMP provisions constitute an effort to set ambitious, yet achievable, targets for Permittees; receiving water limitations, on the other hand, while the ultimate goal of MS4 permitting, may not in all cases be achievable within the five-year permit cycle. Generally, permits are best structured so that enforcement actions are employed when a discharger shows some shortcoming in achieving a realistic, even if ambitious, permit condition and not under circumstances where even the most diligent and good faith effort will fail to achieve the required condition. We add that it is our intention to encourage a watershed-based approach to addressing storm water issues going forward and that it would be contrary to that intention to

⁹² We also note that the State Water Board's Policy for the Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (2005) (State Implementation Policy) and the CTR itself (40 C.F.R. § 131.38(e)) restrict the scope of compliance schedules for effluent limitations addressing the discharge of toxic pollutants; however the policy does not apply to storm water discharges. (State Implementation Policy, p.3, fn.1.)

structure the watershed-based requirements as an enforcement order. We will not require Permittees that propose and timely implement a WMP/EWMP to request time schedule orders or other enforcement orders as a precondition of being in compliance with the receiving water limitations or interim TMDL requirements of the Los Angeles MS4 Order.

While declining to structure the WMP/EWMP provisions generally as an enforcement order, we acknowledge that time schedule orders are appropriate under some circumstances. We have already noted that the Los Angeles MS4 Order allows a Permittee to request a time schedule order where a final compliance deadline for a state-adopted TMDL has passed and the Permittee believes that additional time to comply with the requirement is necessary.⁹³ We expect that a Permittee will request a time schedule order also if the Permittee fails to meet a final compliance deadline for a TMDL after the adoption date of the Los Angeles MS4 Order. We will also provide that a Permittee may request a time schedule order if the Permittee fails to meet a final compliance deadline for a receiving water limitation set in the Permittee's WMP/EWMP.

We shall add a new Part VI.C.6.b and revise Part VI.E.4.b as follows:

Part VI.C.6

b. Where a Permittee believes that additional time to comply with a final receiving water limitation compliance deadline set within a WMP/EWMP is necessary, and the Permittee fails to timely request or is not granted an extension by the Executive Officer, a Permittee may, no less than 90 days prior to the final compliance deadline, request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.

Part VI.E.4

b. Where a Permittee believes that additional time to comply with the final water quality-based effluent limitations and/or receiving water limitations is necessary, a Permittee may within 45 days of Order adoption, **or no less than 90 days prior to the final compliance deadline if after adoption of the Order,** request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.

4. Rigor and Accountability in the WMPs/EWMPs

We now turn to a consideration, from a technical as well as policy lens, as to whether the WMPs/EWMPs are structured in a manner that will maximize the likelihood of

⁹³ *Ibid.*

reaching the ultimate goal of the compliance alternative – achieving receiving water limitations.⁹⁴ We can support an alternative approach to compliance with receiving water limitations only to the extent that that approach requires clear and concrete milestones and deadlines toward achievement of receiving water limitations and a rigorous and transparent process to ensure that those milestones and deadlines are in fact met. Conversely, we cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations.

We find below that the WMP/EWMP provisions generally ensure the appropriate rigor, transparency, and accountability, and that, with the few revisions we direct, are designed to lead to achievement of receiving water limitations.⁹⁵

a. Milestones and Compliance Deadlines

We first consider whether the WMP/EWMP provisions require clear, concrete, and finite milestones and deadlines.

For water body-pollutant combinations addressed by TMDLs, the Los Angeles MS4 Order requires the Permittees to incorporate the compliance schedules found in Attachments L through R of the Order, which reflect previously adopted TMDL-based requirements, into the WMP/EWMP, and, as necessary, to develop interim milestones and dates for their achievement.⁹⁶ A Permittee that does not thereafter comply with the approved compliance schedule must instead demonstrate compliance with the WQBELs and other TMDL-specific limitations of the Order.⁹⁷ For water body-pollutant combinations not addressed by a TMDL, but where the relevant pollutant is one for which the water body is identified as impaired on the Clean Water Act section 303(d) List and the pollutant is in the same class as a TMDL pollutant, the Order requires that the WMP/EWMP incorporate a schedule consistent with the TMDL schedule for the same class pollutant.⁹⁸ A Permittee that does not thereafter comply with

⁹⁴ From a legal standpoint, our analysis serves to verify that the Los Angeles MS4 Order's alternative compliance approach through WMPs/EWMPs is supported by the findings and by evidence in the record. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.)

⁹⁵ We do not agree with Permittee Petitioners that the WMP/EWMP provisions are precluded by the program requirements of 40 Code of Federal Regulations section 122.26. Nor do we agree that the requirements are vague or lack definition. The WMP/EWMP provisions of the Order are guidelines for development of a subsequent program with more specificity to be approved by the Los Angeles Water Board or its Executive Officer.

⁹⁶ Los Angeles MS4 Order, Part VI.C.5.c., pp.64-65.

⁹⁷ *Id.*, Part VI.E.2.d.i(4)(c), p.144.

⁹⁸ *Id.*, Part VI.C.2.a.i., pp. 49-50.

the approved compliance schedule must instead demonstrate immediate compliance with the receiving water limitations in Part V.A.⁹⁹ We will not disturb these provisions.

With regard to exceedances of receiving water limitations not addressed by a TMDL, and where the pollutant is not in the same class as a pollutant addressed by a TMDL, the Order requires that the WMP/EWMP include milestones based on measurable criteria or indicators and a schedule for achieving the milestones. The WMP/EWMP must also incorporate a final date for achievement of receiving water limitations, but that date is circumscribed simply as “as soon as possible.”¹⁰⁰ Parts VI.C.2.a.ii.(4) and VI.C.2.a.iii.(2)(c) help clarify the meaning of “as soon as possible:”

Permittees shall identify enforceable requirements and milestones and dates for their achievement to control MS4 discharges such that they do not cause or contribute to exceedances of receiving water limitations within a timeframe(s) that is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary. The time between dates shall not exceed one year. Milestones shall relate to a specific water quality endpoint (e.g., x% of the MS4 drainage area is meeting the receiving water limitations) and dates shall relate either to taking a specific action or meeting a milestone.¹⁰¹

We will make a revision to the compliance schedule provisions to make it clear that the term “as soon as possible” is to be interpreted consistent with the more specific direction cited above. However, because the WMP/EWMP, and therefore the proposed compliance schedule, is subject to public review and comment and approval by the Los Angeles Water Board or its

⁹⁹ *Id.*, Part VI.C.2.c., p.52.

¹⁰⁰ *Id.*, Part VI.C.5.c.iii.(3), p. 65. If the pollutant is not in the same class as those addressed in a TMDL, but the water body is still identified as impaired for that pollutant, the WMP/EWMP must either have a final compliance deadline within the 5 year permit term or Permittees are expected to initiate development of a stakeholder-proposed TMDL and incorporate a compliance schedule consistent with the TMDL. (*Id.*, Part VI.C.2.a. ii., pp. 50-51) (If the exceedances are in a drainage area implementing the storm water retention approach, there is no requirement to initiate the TMDL development process.) The requirement to address receiving water limitations is ongoing. As exceedances are found through monitoring for water body-pollutant combinations not identified on the 303(d) List, Permittees must either meet receiving water limitations or include the water body-pollutant combination in the WMP/EWMP and set enforceable requirements and milestones and dates for their achievement within a time frame that is as short as possible. (*Id.*, Part VI.C.2.a.iii, pp. 51-52.) Permittees are deemed in compliance with receiving water limitations only for water body-pollutant combinations addressed in the WMP/EWMPs. Thus, as pointed out by several interested parties, for lower priority water body-pollutant combinations not incorporated into a WMP/EWMP for which exceedances are detected, Permittees may be in violation of the receiving water limitations. A Permittee always has the ability to reprioritize a water body-pollutant combination from low priority to high priority and amend its WMP/EWMP to incorporate measures to address that water body-pollutant combination.

¹⁰¹ *Id.*, Parts VI.C.2.a.ii.4, p. 50, VI.C.2.a.iii.(2)(c), p. 51 (identical language).

Executive Officer,¹⁰² we do not find it necessary to constrain the determination of milestones and dates for the achievement of receiving water limitations any further.

We shall amend Part VI.C.5.c.iii.(3)(b) as follows:

- (b) A final date for achieving the receiving water limitations as soon as possible, **consistent with Parts VI.C.2.a.ii.(4) & VI.C.2.a.iii.(2)(c).**

b. Constraints on Extension of Deadlines

The fact that the Los Angeles MS4 Order requires the establishment of concrete and rigorous deadlines within the WMP/EWMP for the achievement of receiving water limitations is critical to ensuring progress on such achievement; however, the Order also contemplates that the deadlines, with the exception of those compliance deadlines established in a TMDL, may be extended.¹⁰³ The WMP/EWMP is subject to an adaptive management process. Based on the results of that process the Permittees may propose modifications, including modifications to compliance deadlines and interim milestones, in the Annual Report.¹⁰⁴

The potential for multiple extensions is nevertheless ameliorated by the fact that extensions of compliance deadlines and interim milestones require Los Angeles Water Board Executive Officer approval,¹⁰⁵ and are accordingly, subject to a 30-day public comment period.¹⁰⁶ The public comment period will allow all other interested persons to weigh in on the appropriateness of any requested extensions. If thereafter dissatisfied with the determination made by the Executive Officer, interested persons may additionally seek review of the Executive Officer's decision by the Los Angeles Water Board.¹⁰⁷ Of course, in cases where no extension

¹⁰² *Id.*, Part VI.C.4.c., p.56, Table 9, p. 54, Part VI.A.5.b., p. 42, Att. F, Fact Sheet, p. F-42. Under Part VI.A.5.b, “[a]ll documents submitted to the Regional Water Board Executive Officer for approval shall be made available to the public for a 30-day period to allow for public comment.”

¹⁰³ *Id.*, Parts VI.C.7, p.66, VI.C.8, pp.66-67.

¹⁰⁴ *Id.*, Part, VI.C.8, p.67. Under another provision of the Order, Permittees may at any time request an extension of deadlines for achievement of interim milestones established to address exceedances of receiving water limitations not otherwise addressed by a TMDL. (*Id.*, Part VI.C.6.a., p.65.) (We note that the cited provision refers to “milestones established pursuant to Part VI.C.4.c.ii.(3),” but the intent appears to have been to reference Part VI.C.5.c.iii.(3).) But as we read the Los Angeles MS4 Order, extensions of not just interim deadlines for achievement of milestones but also final compliance deadlines to achieve receiving water limitations are already allowed under the adaptive management provisions of Part VI.C.8.a.ii.: “Based on the results of the adaptive management process, Permittees shall report any modifications, including where appropriate *new compliance deadlines* and interim milestones, with the exception of those compliance deadlines established in a TMDL, necessary to improve the effectiveness of the Watershed Management Program or EWMP, in the Annual Report” (Emphasis added.)

¹⁰⁵ *Id.*, Parts VI.C.8, p.67, VI.C.6.a., p.65. We recognize that as currently written the adaptive management provisions in effect deem any modifications to the WMPs/EWMPs approved if the Executive Officer “expresses no objections” within 60 days. (*Id.*, Part VI.C.8.a.iii., p. 67.) With our revisions, any deadline extensions must be affirmatively approved by the Executive Officer.

¹⁰⁶ *Id.*, Part VI.A.5.b, p. 42.

¹⁰⁷ *Id.*, Part VI.A.6, p.42.

is available, as with final deadlines established in TMDLs,¹⁰⁸ or where no extension is requested or granted, failure to meet a deadline means that the Permittee will have to comply from that time forward with the receiving water limitations or WQBELs and other TMDL-specific limitations or request a time schedule order. Therefore, Permittees cannot rely on the certainty of a deadline extension, and Permittees have a strong incentive to implement control measures that will in fact get them to compliance by the established deadline. Given that the Permittees and the Los Angeles Water Board are working with limited data¹⁰⁸ regarding storm water impacts and control measure performance, especially where TMDLs have not been developed, we are hesitant to remove all flexibility for deadline extensions, and find that the Order strikes an appropriate balance.

Permittee Petitioners seek even greater flexibility under the WMP/EWMP provisions for adjusting approved control measures and time lines. They advocate for amendments that would allow a Permittee to propose alternative controls or time lines upon a demonstration that required controls for timely achievement of a limitation are either technically infeasible or otherwise constitute a substantial hardship to the Permittee. We have found above that, in the case of final deadlines set in the WMP/EWMP for achievement of receiving water limitations not otherwise addressed in a TMDL, the Los Angeles MS4 Order already provides for an opportunity to propose new deadlines through the adaptive management process. We will make a clarifying revision below to confirm that Permittees may ask for extensions in meeting receiving water limitations not addressed by a TMDL. Technical infeasibility or substantial hardship may be grounds for such a request. The Los Angeles Water Board Executive Officer, in turn, may, after allowing for public review and comment, choose to (1) extend the deadline, (2) decline the extension but approve any time schedule order requested by the Permittee, or (3) decline the extension and not approve a time schedule order, with the result that the Permittee will be out of compliance with the provision of the WMP/EWMP and therefore the receiving water limitations of Part V.A. As stated previously, interested persons may thereafter ask the Los Angeles Water Board to review the Executive Officer's determination.¹⁰⁹

With regard to final deadlines for WQBELs and other TMDL-specific limitations, we will not amend the WMP/EWMP provisions to add flexibility for extensions. We find that the only option appropriately available to a Permittee unable to meet final deadlines that are set out in a TMDL and incorporated into the Los Angeles MS4 Order and the WMP/EWMPs, is to

¹⁰⁸ *Id.*, Part VI.C.8.a.ii., p.67.

¹⁰⁹ *Id.*, Part VI.A.6, p.42.

request a time schedule order, consistent with Part VI.E.2.e. of the Order, as that Part was amended in section II.B.3. above.¹¹⁰

We shall amend Part VI.C.6.a as follows:

- a. Permittees may request an extension of deadlines for achievement of interim milestones **and final compliance deadlines** established pursuant to Part VI.C.45.c.iii.(3) ~~only~~, **with the exception of those final compliance deadlines established in a TMDL**. Permittees shall provide requests in writing at least 90 days prior to the deadline and shall include in the request the justification for the extension. Extensions ~~shall be subject to approval by~~ **must be affirmatively approved by** the Regional Water Board Executive Officer, **notwithstanding Part VI.C.8.a.iii.**

c. Rigor and Accountability in the Process

We see three additional components of the WMPs/EWMPs as essential to ensuring that the proposed WMPs/EWMPs are in fact designed to achieve receiving water limitations within the appropriate time frame.

First, as documents to be approved by either the Los Angeles Water Board or its Executive Officer, the WMPs/EWMPs are subject to a public review and comment period.¹¹¹ Such review includes consideration of proposed control measures, deadlines for achievement of final limitations, and the reasonable assurance analysis that supports the WMP/EWMP. We expect this public process to vet the proposed WMPs/EWMPs and facilitate revisions to strengthen the programs as needed, thereby providing some assurance that approved WMPs/EWMPs will achieve the water quality targets set out.

Second, the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP.¹¹² Competent use of the reasonable assurance analysis should facilitate achievement of final compliance within the specified deadlines.¹¹³

¹¹⁰ Final TMDL deadlines are established and incorporated into the Basin Plans during the TMDL development process. That process invites stakeholder participation and the proposed schedule is subject to public review and comment and approval by the relevant regional water board, the State Water Board, and USEPA. The deadlines are established with consideration of the time needed for compliance for all dischargers contributing to an impairment, including industrial and construction storm water dischargers and traditional NPDES dischargers. Although we recognize that it may not always be feasible for municipal storm water dischargers to meet final TMDL deadlines, short of amending the Basin Plan to modify the deadlines (see *California Association of Sanitation Agencies v. State Water Resources Control Board* (2012) 208 Cal.App.4th 1438), we find it appropriate for the dischargers to request time schedule orders rather than be granted an extension within the provisions of the Los Angeles MS4 Order.

¹¹¹ See Los Angeles MS4 Order, Parts VI.C.4.d., p. 57, VI.C.6, p. 65, Table 9, p.54; see also *id.*, Part VI.A.5., p. 42.

¹¹² *Id.*, Part VI.C.5.b.iv.(5), pp. 63-64.

¹¹³ We note that the Los Angeles Water Board has released guidance on the development of a reasonable assurance analysis. The guidance was released after adoption of the Los Angeles MS4 Order and accordingly is not (*Continued*)

Third, the adaptive management provisions of the Order ensure that the Permittees will evaluate monitoring data and other new information every two years and consider progress up to that point on achieving WQBELs and other TMDL-specific limitations. Permittees are required as part of the adaptive management process to propose modifications to improve the effectiveness of the WMP/EWMP and implement those modifications.¹¹⁴

While we are supportive of all of these measures, we find that they should be strengthened. As a preliminary matter, we will require the Permittees to submit specific information, concurrently with the two-year adaptive management process, that will assist the Los Angeles Water Board in determining how effective the WMP/EWMP path is in spurring the completion of on-the-ground structural control measures that lead to measurable water quality improvement. As we discuss further in Section II.B.8 of this Order, we will direct the Los Angeles Water Board to report to the State Water Board periodically on the effectiveness of the WMP/EWMP approach and expect the additional information submitted by the Permittees to inform that report.

More significantly, we will add a provision that requires Permittees to comprehensively update the reasonable assurance analysis and the WMP/EWMP, following an opportunity to implement the adaptive management process. Given the limitations inherent in models, as well as the potential incentive to choose the lowest effort and cost level predicted by the model to achieve receiving water limitations,¹¹⁵ we are concerned that reliance on one initial reasonable assurance analysis is insufficient to ensure that in the long term WMPs/EWMPs will

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part of the Administrative Record. We nevertheless take this opportunity to state that we expect any revisions and updates to the guidance to be subject to a public process as part of reissuance of the Los Angeles MS4 Order.

¹¹⁴ Los Angeles MS4 Order, Part VI.C.8., pp. 66-67. We add that the adaptive management process will also allow Permittees to revise their WMPs/EWMPs to take advantage of funding opportunities as they arise in the future, including funding opportunities through Assembly Bill 2403 (approved by Governor, June 28, 2014 (2013-2014 Reg. Sess.)) and Proposition 1 (approved by ballot Nov. 4, 2014). We are cognizant of criticism that the adaptive management process is just another version of the ineffective iterative process of the receiving water limitations. These arguments are misplaced. Unlike the iterative process of the receiving water limitations, the adaptive management process is only one component of a series of actions required under the WMP/EWMP and acts as a periodic check to ensure that all the other requirements are achieving the stated goals of the WMP/EWMP within clearly stated deadlines. As our discussion above makes clear, we would not endorse an alternative compliance path with the sole requirement to adaptively manage implemented control measures. Further, the adaptive management process in the Los Angeles MS4 Order differs from the iterative process in that Permittees must carry out the adaptive management process every two years, limiting any discretionary determination as to when the program must be evaluated. (Los Angeles MS4 Order, Part VI.C.8.a.)

¹¹⁵ The numerical analysis methods and models approved for use by Permittees for estimating hydrologic conditions and contaminant fate and transport in the watersheds should, in principle, be able to propagate any and all known uncertainty to the outputs and results. It is in the public interest that the Los Angeles Water Board communicate this uncertainty to all stakeholders, as the results in most cases will affect the beneficial uses of California waters. Moreover, it is highly desirable that, to the extent possible, the Los Angeles Water Board define a minimum level of uncertainty (or level of confidence) acceptable for a reasonable assurance analysis to be approved.

achieve relevant water quality goals. . Currently, as stated above, the Permittees are required to implement the adaptive management process every two years from the date of program approval. Under the provision we add, the Permittees will be required to comprehensively update the reasonable assurance analysis (including potentially considering whether the model itself and its assumptions require updating) and the WMP/EWMP after several years of adaptive management, based on previous years' monitoring data and other performance measures. The Permittee will submit a full revised package to the Los Angeles Water Board Executive Officer for approval, following public review.

Given that the WMPs/EWMPs in many cases address water quality targets that are to be achieved a decade or more in the future, a periodic, complete re-consideration and recalibration of the assumptions and predictions that support the proposed control measures and implementation schedule in light of new data, above and beyond the two-year adaptive management requirements of the Los Angeles MS4 Order, is essential, notwithstanding the additional time and effort that Permittees must expend on the update. We also recognize that such review is a staff intensive process for the Los Angeles Water Board, but addressing storm water impacts is a priority for that Board. Although we expect that the update will be necessary in most cases, the new requirements provide that the Executive Officer of the Los Angeles Water Board may waive the requirement for an update if the Permittee demonstrates through water quality monitoring that the WMP/EWMP is meeting appropriate targets. Our direction to require a comprehensive update of the reasonable assurance analyses and the WMPs/EWMPs after several cycles of adaptive management should in no way be construed as limiting the Los Angeles Water Board Executive Officer's discretion to request such updates earlier in the implementation process or the obligation of the Permittees to initiate such updates earlier in the implementation process based on the ongoing adaptive management process.

The second added provision will not be relevant for the permit term of the order before us; however, we anticipate that the next iteration of an MS4 Order for the Los Angeles area will closely track the Los Angeles MS4 Order to allow for continued implementation of the WMP/EWMPs.

We shall amend Part VI.C.8 by adding new subsections a.iv. and b. as follows:

a.

iv. Permittees shall report the following information to the Regional Water Board concurrently with the reporting for the adaptive management process:

(1) On-the-ground structural control measures completed;

(2) Non-structural control measures completed;

- (3) Monitoring data that evaluates the effectiveness of implemented control measures in improving water quality;**
- (4) Comparison of the effectiveness of the control measures to the results projected by the RAA;**
- (5) Comparison of control measures completed to date with control measures projected to be completed to date pursuant to the Watershed Management Program or EWMP;**
- (6) Control measures proposed to be completed in the next two years pursuant to the Watershed Management Program or EWMP and the schedule for completion of those control measures;**
- (7) Status of funding and implementation for control measures proposed to be completed in the next two years.**

b. Watershed Management Program Resubmittal Process

- i. In addition to adapting the Watershed Management Program or EWMP every two years as described in Part VI.C.8.a., Permittees must submit an updated Watershed Management Program or EWMP with an updated Reasonable Assurance Analysis by June 30, 2021, or sooner as directed by the Regional Water Board Executive Officer or as deemed necessary by Permittees through the Adaptive Management Process, for review and approval by the Regional Water Board Executive Officer. The updated Reasonable Assurance Analysis must incorporate both water quality data and control measure performance data, and any other information informing the two-year adaptive management process, gathered through December 31, 2020. As appropriate, the Permittees must consider any new numeric analyses or other methods developed for the reasonable assurance analysis. The updated Watershed Management Program or EWMP must comply with all provisions in Part VI.C. The Regional Water Board Executive Officer will allow a 60-day public review and comment period with an option to request a hearing. The Regional Water Board Executive Officer must approve or disapprove the updated Watershed Management Program or EWMP by June 30, 2022. The Executive Officer may waive the requirement of this provision, following a 60-day public review and comment period, if a Permittee demonstrates through water quality monitoring data that the approved Watershed Management Program or EWMP is meeting appropriate water quality targets in accordance with established deadlines.**

5. Determination of Compliance with Final Requirements

a. Compliance with Final TMDL Requirements¹¹⁶

Part VI.E.2.e.i.4. of the Los Angeles MS4 Order provides that Permittees will be deemed in compliance with the final WQBELs and other TMDL-specific limitations if “[i]n drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water.”¹¹⁷ Part VI.E.2.e.i.4 is one of four options available to the Permittee in Part VI.E.2.e. to be deemed in compliance with WQBELs and other TMDL-specific limitations. The other three options allow a Permittee to establish compliance with a final WQBEL or other TMDL-specific limitation by showing that (1) there are no violations of the final WQBEL; (2) there are no exceedances of the receiving water limitation for the specific pollutant in the receiving water at or downstream of the Permittee’s outfall, or (3) there is no direct or indirect discharge from the Permittee’s MS4 to the receiving water during any relevant time period.¹¹⁸ These three options ensure that either the receiving water limitations or WQBELs and other TMDL-specific limitations are in fact being complied with. In contrast, the storm water retention approach assumes compliance with *final* WQBELs and other TMDL-specific limitations, and accordingly, compliance with the receiving water limitations in Part V for the relevant water body-pollutant combinations,¹¹⁹ even if the final WQBELs and other TMDL-specific limitations are not actually being achieved. The Environmental Petitioners argue that the Los Angeles Water Board has failed to establish through findings and record evidence that the storm water retention approach will in fact achieve compliance with the WQBELs and other TMDL-specific limitations and that the Los Angeles

¹¹⁶ The Los Angeles MS4 Order additionally deems compliance with *interim* WQBELs and other TMDL-specific limitations if the “Permittee has submitted and is fully implementing an approved” WMP/EWMP. (Los Angeles MS4 Order, Part VI.E.2.d.i.(4), p. 143; see also *id.*, Part VI.C.3.a., p. 53.) Because Permittees are required to incorporate into the WMP/EWMP compliance schedules “compliance deadlines occurring within the permit term for all applicable interim . . . water quality-based effluent limitations and/or receiving water limitations in Part VI.E and Attachments L through R,” we expect that in most cases full implementation of the WMP/EWMP necessarily results in compliance with interim WQBELs and other TMDL-specific limitations. However, to the extent this is not the result reached, we find that requiring implementation of the WMP/EWMP with control measures designed to achieve interim WQBELs and other TMDL-specific limitations, in lieu of showing actual compliance with any *interim* numeric requirements, is consistent with the assumptions and requirements of the wasteload allocations of the relevant TMDLs. (40 C.F.R. § 122.44(d)(1)(vii)(B).)

¹¹⁷ Los Angeles MS4 Order, Part VI.E.2.e.i.(4), p. 145.

¹¹⁸ *Id.*, Part VI.E.2.e.i.(1)-(3), pp. 144-45.

¹¹⁹ We note again that Part VI.E.2.c.i. states that Part VI.E establishes the manner of achieving compliance with the receiving water limitations in Part V.A where the receiving water limitations are associated with water body-pollutant combinations addressed in a TMDL.

MS4 Order's reliance on the storm water retention approach for final compliance determination is therefore contrary to the law.

We are supportive of the EWMP's use of the storm water retention approach as a technical requirement. Retention of storm water is likely to be an effective path to water quality improvement. Furthermore, in addition to preventing pollutants from reaching the receiving water except as a result of high precipitation events (which also generally result in significant dilution in the receiving water), the storm water retention approach has additional benefits including recharge of groundwater, increased water supply, reduced hydromodification effects, and creation of more green space to support recreation and habitat.¹²⁰

We have some concerns, however, with the lack of verification in the Los Angeles MS4 Order that final WQBELs and other TMDL-specific limitations or receiving water limitations will in fact be met as a result of implementation of the storm water retention approach. We acknowledge that, in most cases, the final TMDLs have deadlines outside of the permit term for the Los Angeles MS4 Order and that, therefore, with regard to those, our concerns are more theoretical at this point than immediate. Nevertheless, we agree with the Environmental Petitioners that the evidence in the Administrative Record is not sufficient to establish that the storm water retention approach will in all cases result in achievement of final WQBELs and other TMDL-specific limitations and, more importantly, are concerned that the Order itself does not incorporate clear requirements that would provide for such verification in the process of implementation.

With regard to evidence in the Administrative Record, it is clear that the storm water retention approach is a promising approach for achieving compliance with receiving water limitations, with multiple additional environmental benefits. But the research regarding the storm water retention approach is still in early stages and we cannot say with certainty at this point that implementation will lead to compliance with receiving water limitations in all cases.¹²¹

With that conclusion in mind, we look to the Los Angeles MS4 Order itself to determine if there are sufficient additional provisions to assure that, in the long run, the storm water retention approach will achieve the ultimate goal of compliance with receiving water limitations. We first note that the Order does not require a reasonable assurance analysis when

¹²⁰ See e.g. Administrative Record, section 10.VI.C, RB-AR29263-29311, RB-AR32318-32350.

¹²¹ We reviewed the citations to the Administrative Record provided in the Los Angeles Water Board October 15, 2013 Response and in the October 15, 2013 Responses of many of the Petitioners. We find that the cited studies show the storm water retention to be a promising approach to meeting water quality standards, but do not establish, at a sufficiently high level of confidence, that the storm water retention approach will definitively achieve compliance with the receiving water limitations.

a Permittee opts for the storm water retention approach. Permittees are required to conduct a reasonable assurance analysis for each water body-pollutant combination addressed by a WMP, with the objective of demonstrating the ability of the controls to ensure that MS4 discharges achieve applicable WQBELs and do not cause or contribute to exceedances of receiving water limitations.¹²² The relevant provisions reference EWMPs, but elsewhere the Order states that the reasonable assurance analysis is only required for areas covered by the EWMP where retention of the 85th percentile, 24-hour storm event is not feasible.¹²³ The Fact Sheet also implies that the requirement for a reasonable assurance analysis is confined to situations where the storm water retention approach is not feasible.¹²⁴ In sum, then, Permittees that choose to develop and implement an EWMP are required to conduct a reasonable assurance analysis for each waterbody-pollutant combination addressed by the EWMP, except in the drainage areas that are tributary to the storm water retention projects.

The fact that the storm water retention approach does not require a reasonable assurance analysis prior to implementation to demonstrate the ability of the approach to achieve compliance with the limitations is mitigated in part by required monitoring and adaptive management to verify compliance following implementation. Although the provision could be clearer, we read the language “[i]n drainage areas where Permittees are implementing an EWMP” in Part VI.E.2.e.i.(4) to require Permittees to be in compliance with all aspects of the EWMP, including the monitoring and adaptive management provisions of Parts VI.C.7 and 8, to be deemed in compliance with final limitations through the storm water retention approach. As we read the Order, a Permittee’s showing that it has retained all non-storm water and all storm water up to and including the volume equivalent to the 85th percentile, 24-hour event, establishes compliance, but only if the Permittee continues to conduct monitoring and adapt the EWMP in response to the monitoring. The Los Angeles Water Board appears to read the Order the way we do, as it states in its October 15, 2013 Response that “the Permit requires monitoring and adaptive management, which will continue to inform the Los Angeles Water Board regarding the efficacy of this storm water retention approach in conjunction with implementation of the other storm water management program elements and any needed

¹²² Los Angeles MS4 Order, Part VI.C.5.b.iv.(5), pp. 63-64.

¹²³ *Id.*, Part VI.C.1.g., p. 48.

¹²⁴ *Id.*, Att. F, Fact Sheet, p. F-39.

modifications to the approach.”¹²⁵ The Los Angeles Water Board further states in comments submitted on a draft of this order, as follows:

The Los Angeles MS4 Order does not exclude EWMPs or areas within an EWMP where the stormwater retention standard is achieved from the integrated watershed monitoring, assessment and adaptive management processes. Neither does the Los Angeles MS4 Order specify or contemplate an end to the monitoring, assessment and adaptive management processes in the case of a Watershed Management Program (WMP) or EWMP. These required elements, including receiving water and outfall monitoring, evaluation of these monitoring data, and modification of the EWMP to improve its effectiveness, will be continually conducted throughout the Watershed Management Area addressed by the EWMP. . . . The Los Angeles Water Board understood that these regional multi-benefit projects would take time to implement and that Permittees needed to be afforded this time in the Los Angeles MS4 Order. The Los Angeles Water Board will continually evaluate progress during the implementation period. If, as full implementation nears, some Receiving Water Limitations are still not achieved, the Los Angeles Water Board and State Water Board have a variety of tools that can be used at a regional or statewide level including reconsideration of TMDLs, Basin Planning actions, policy development and permitting, among others.¹²⁶

We will make a revision to Part VI.E.2.e.i. to make it clear that the Permittee must be in compliance with all other requirements of the EWMP in addition to implementation of the storm water retention approach in order to be deemed in compliance with the final WQBELs and other TMDL-specific limitations.

With no definitive evidence in the record establishing that the storm water retention approach will achieve final requirements, no reasonable assurance analysis required at the outset, and reliance only on subsequent monitoring and adaptive management to improve results if final limitations are not in fact achieved, the storm water retention approach does not provide a level of assurance of success that would lead us to conclude that its implementation, with nothing else, is sufficient to constitute compliance with final WQBELs and other TMDL-specific limitations. We understand that there are nevertheless very good reasons to encourage its use. Certainly for all non-storm water and for all storm water generated in storms up to the 85th percentile storm, the storm water retention approach achieves compliance because there is no discharge. And there are significant benefits beyond water quality, including most importantly benefits to water supply. We also believe that public projects requiring investment of this magnitude are unlikely to be carried out without a commitment from the water boards that Permittees will be considered in compliance even if the resulting improvement in water quality

¹²⁵ Los Angeles Water Board, October 15, 2013 Response, p. 62.

¹²⁶ Los Angeles Water Board, Comment Letter, January 21, 2015, pp. 2-3.

does not rise all the way to complete achievement of the final WQBELs and other TMDL-specific limitations.

We are not willing to go as far as saying that compliance with the storm water retention approach alone constitutes compliance with final WQBELs and other TMDL-specific limitations for all time, regardless of the actual results.¹²⁷ Nonetheless, we anticipate that implementation of such projects will bring the drainage area most and, in many cases, all of the way to achievement of water quality standards. Where there is still a gap in required water quality improvement, we expect the Executive Officer of the Los Angeles Water Board to require appropriate actions, consistent with the provisions of the Los Angeles MS4 Order and the Los Angeles Water Board's stated interpretation of those provisions,¹²⁸ to close that gap with additional control measures in order for the Permittee to be considered in compliance with the WQBEL or other TMDL-specific limitation. There are various mechanisms to provide assurances that additional control measures will be implemented to achieve the WQBEL or other TMDL-specific limitation, and in some instances, it may be appropriate for the Los Angeles Water Board to issue a time schedule order governing the implementation of further control measures. Further, as acknowledged by the Los Angeles Water Board in its comments, in some circumstances, reconsideration of the underlying TMDLs and the final deadlines within those TMDLs may instead be warranted.¹²⁹ We additionally recognize that municipal storm water management is an area of continued development and, with continued research and data evaluation, water quality standards may evolve and become more nuanced or sophisticated over time.

While we decline to interpret the storm water retention approach to, in and of itself, constitute compliance with final WQBELs and other TMDL-specific limitations, we emphasize here that any additional control measures to reach compliance that may be required by the Los Angeles Water Board must not require changes to installed storm water retention projects. Any revisions should be prospective in nature and should not disturb projects that Permittees have already installed in good faith to comply with the provisions of their EWMP.

¹²⁷ Further, Permittees still have substantial incentive to develop and implement an EWMP. If a permittee pursues an EWMP, it will be deemed in compliance with the receiving water limitations during the EWMP development phase, and it may also recognize significant non-water quality benefits.

¹²⁸ Los Angeles Water Board, Comment Letter, January 21, 2015, pp. 2-3. As explained in footnote 110, at this time we see limited options available to the Los Angeles Water Board in addressing compliance with final deadlines for WQBELs and other TMDL-specific limitations.

¹²⁹ We also acknowledge the need for and commit to supporting state-wide solutions for source reduction as appropriate, similar to the brake pad legislation adopted to address copper discharges. (Senate Bill 346 (approved by the Governor September 27, 2010).)

Ultimately, we must set out to verify through appropriate monitoring that final WQBELs and other TMDL-specific limitations can be achieved through the storm water retention approach, or be willing to revise that approach. However, new or additional measures required at that point should be additive to the storm water retention approach measures already installed.

In sum, despite the uncertainty inherent in allowing the storm water retention approach, we concur in its use in the Los Angeles MS4 Order, with the clarification that ultimate compliance is subject to continued planning, monitoring and adaptive management. We shall amend Part VI.E.2.e.i. as follows:

- i. A Permittee shall be deemed in compliance with an applicable final water quality-based effluent limitation and final receiving water limitation for the pollutant(s) associated with a specific TMDL if any of the following is demonstrated:

...

- (4) In drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water, **and the Permittee is implementing all requirements of the EWMP, including, but not limited to, Parts VI.C.7 and VI.C.8 of this Order.** This provision (4) shall not apply to final trash WQBELs.

b. Compliance with Final Receiving Water Limitations

The Los Angeles MS4 Order states that for receiving water limitations associated with water-body pollutant combinations addressed in a TMDL, compliance with the TMDL requirements of the Order in Part VI.E and Attachments L through R constitutes compliance with the receiving water limitations in Part V.A.¹³⁰ In other words, if there is an exceedance for a pollutant in a water body that has a TMDL addressing that pollutant, as long as the Permittee is complying with the requirements for the TMDL, the Permittee is deemed in compliance with the receiving water limitation. No petitioner has contested this provision and we find that it constitutes an appropriate approach to compliance with receiving water limitations for water body-pollutant combinations that are addressed by a TMDL.

For exceedances of receiving water limitations for a water body-pollutant combination not addressed by a TMDL, as previously discussed, the Permittee must either incorporate control measures to address the exceedances into the Permittee's WMP/EWMP or comply directly with the receiving water limitations provisions of Part V.A of the Order. For

¹³⁰ Los Angeles MS4 Order, Part VI.E.2.c.ii., p. 143.

Permittees that choose the WMP/EWMP approach, the WMP/EWMP must incorporate “a final date for achieving the receiving water limitation.”¹³¹ To the extent the Permittee does not achieve the limitation by that final date and does not request and receive an extension, the Permittee has “fail[ed] to meet [a] requirement or date for its achievement in an approved Watershed Management Program or EWMP”¹³² and is immediately subject to the receiving water limitations provisions of the Order, with the same result that it is out of compliance. In other words, implementation of non-structural and structural control measures in accordance with the timelines established in the WMP/EWMP constitutes compliance with the receiving water limitations up until the final deadline for achievement of the relevant receiving water limitation; however, at the deadline for final compliance, there must be verification of achievement based on the receiving water limitation itself. While we find that the Order provisions lead to this result as written, for the sake of greater clarity, we will specifically state that final compliance with receiving water limitations must be determined through verification that the receiving water limitation is actually being achieved.

We shall amend Part VI.C.2.c. as follows:

- c. If a Permittee fails to meet any requirement or date for its achievement in an approved Watershed Management Program or EWMP, the Permittee shall be subject to the provisions of Part V.A. for the waterbody-pollutant combination(s) that were to be addressed by the requirement. **For water body-pollutant combinations that are not addressed by a TMDL, final compliance with receiving water limitations is determined by verification through monitoring that the receiving water limitation provisions in Part V.A.1 and 2 have been achieved.**

c. Compliance with the Non-Storm Water Discharge Prohibition

The Environmental Petitioners suggest that the Los Angeles MS4 Order is unclear as to whether compliance with the WMP/EWMP may also constitute compliance with the non-storm water discharge prohibition of the Order. We disagree that the Los Angeles MS4 Order is unclear on this issue. The Permittees’ obligation to comply with the receiving water limitations and WQBELs and other TMDL-specific limitations in Parts V.A and VI.E is independent of the Permittees’ obligation to comply with the effective prohibition of non-storm water discharges in Part III.A. The several provisions stating that Permittees will be deemed to be in compliance with the receiving water limitations of the Los Angeles MS4 Order for implementing the WMP/EWMP specifically reference Parts V.A and VI.E of the Order and not

¹³¹ *Id.*, Part VI.C.5.c.iii.(3)(b), p. 65.

¹³² *Id.*, Part VI.C.2.c., p. 52.

III.A.¹³³ This notwithstanding, Parts VI.C.1.d and VI.C.5.b.iv.(2) require that a Permittee's WMP/EWMP include program elements and control measures to effectively prohibit non-storm water discharges consistent with Part III.A and Part VI.D.4.d or VI.D.10. Therefore, a Permittee's implementation of program elements and control measures consistent with Part III.A and Part VI.D.4.d or VI.D.10, through its approved WMP/EWMP, may provide a mechanism for compliance with Part III.A. Although we accordingly see no need to direct revisions to the Order, we provide this clarification here to respond to the Environmental Petitioners' concern and address any confusion that may exist.

6. "Safe Harbor" During the Planning Phase for the WMP/EWMP

Under the Los Angeles MS4 Order, a Permittee that has declared its intention to develop a WMP/EWMP is deemed in compliance with the receiving water limitations and with interim WQBELs with due dates prior to approval of the WMP/EWMP for the water body-pollutant combinations the WMP/EWMP addresses, provided it meets certain conditions, even though the Permittee is developing, not implementing the WMP/EWMP. Specifically, the Permittee is deemed in compliance if the Permittee (1) provides timely notice of its intent to develop a WMP/EWMP; (2) meets all interim and final deadlines for development of a WMP/EWMP; (3) targets implementation of watershed control measures in the existing program

¹³³ Los Angeles MS4 Order, Parts VI.C.2.b., p. 52, VI.C.3.a., p. 53, VI.E.2.c.ii., p. 143, VI.C. 2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144. To the extent that a non-storm water discharge authorized by Part III.A may be causing or contributing to an exceedance of receiving water limitations in V.A, compliance with the WMP/EWMP provisions would constitute compliance with the receiving water limitations and any relevant interim WQBELs and other TMDL-specific limitations, as long as the WMP/EWMP addresses the water body-pollutant combination for that water body. However, the discharger would have to additionally comply with requirements in Part III.A. and Part VI.D.4.d or VI.D.10 through its approved WMP/EWMP for conditionally exempt non-storm water discharges that are found to cause or contribute to an exceedance in the receiving water. (See *id.*, Part III.A.4.c.-e., pp. 31-32.) We disagree that every discharge from a Permittee's MS4 to the receiving water of non-storm water that is not specifically authorized under Part III.A will necessarily be subject to enforcement under the Los Angeles MS4 Order. Section 402(p)(3)(B)(ii) of the Clean Water Act imposes a requirement to "effectively prohibit" non-storm water discharges. Part III.A of the Los Angeles MS4 Order effectuates that requirement with a requirement for the Permittee to prohibit non-storm water discharges: "Each Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters, except where such discharges are . . . [listing exceptions]." (Los Angeles MS4 Order, Part III.A.1, p. 27.) The Los Angeles MS4 Order incorporates a specific and detailed programmatic requirement – the Illicit Connections and Illicit Discharges Elimination Program – for the Permittees to achieve their obligation to effectively prohibit non-storm water discharges. (Los Angeles MS4 Order, Parts VI.D.4.d., pp. 81-86, VI.D.10, pp. 137-141.) We recognize that even the most comprehensive efforts to address unauthorized non-storm water discharges may not eliminate all such discharges. Where a Permittee is fully implementing its Illicit Connections and Illicit Discharges Elimination Program, either pursuant to Parts VI.D.4.d. or VI.D.10, or by incorporation of customized actions into a WMP/EWMP as approved by the Los Angeles Water Board (see Los Angeles MS4 Order Part VI.D.1.a., p. 67), we would expect any enforcement action under Part III.A to be supported by a fact-specific analysis of the nature and source of the unauthorized non-storm water discharge and the efforts of the Permittee to prohibit the discharge.

to address known contributions of pollutants; and (4) receives approval of the WMP/EWMP within the specified time periods.¹³⁴

The Environmental Petitioners object to the availability of a “safe harbor” during the planning phase. We disagree with the Environmental Petitioners that providing a “safe harbor” in the planning phase is disallowed by applicable law -- see our discussion of anti-backsliding requirements in section II.B.1. and antidegradation requirements in section II.B.2. However, we understand that deeming a discharger in compliance with receiving water limitations during the planning phase, not just the implementation phase, could weaken the incentive for Permittees to efficiently and timely seek approval of a WMP/EWMP and to move on to implementation. It is the implementation of the WMP/EWMP that will in fact lead to progress toward compliance with receiving water limitations; the planning phase is essential, but should be only as long as necessary for a well-planned program with carefully analyzed controls to be developed. Given the significance of the water quality issues addressed by the WMP/EWMPs, it is paramount that implementation begin as soon as feasible. Accordingly, the “safe harbor” in the planning phase is appropriate only if it is clearly constrained in a manner that sustains incentives to move on to approval and implementation and is structured with clear, enforceable provisions.

Having reviewed the planning sections of the WMP/EWMP provisions carefully, we find that the Los Angeles MS4 Order does sufficiently constrain the planning phase, so that the “safe harbor” provided is not unreasonable. As already stated, compliance is deemed only if the Permittee is meeting the relevant deadlines for development and approval of the WMP/EWMP.¹³⁵ There are no provisions in the Order that allow for extensions to these deadlines. If a Permittee fails to obtain approval within the allowed number of months for the development of a WMP/EWMP, the Order states that the Permittee must then instead demonstrate actual compliance with receiving water limitations and with applicable interim WQBELs.¹³⁶ The Los Angeles MS4 Order is also clear that achievement of any TMDL-associated final deadlines occurring prior to the approval deadlines for the WMP/EWMP cannot be excused through commitment to planning for a WMP/EWMP.¹³⁷

¹³⁴ *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

¹³⁵ *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

¹³⁶ *Id.*, Part VI.C.4.e., p. 58.

¹³⁷ *Id.*, Parts VI.C.3.c., p. 53, VI.C.4.d.iii, p. 58. Under Part VI.C.4.d.iii., Permittees must ensure that MS4 discharges achieve compliance with interim, in addition to final, trash WQBELs during the planning phase.

Further, Permittees are subject to a number of conditions during the planning phase that will ensure that progress toward achievement of receiving water limitations is not put on hold pending approval of the plan. These include requirements to put in place Low Impact Development (LID) ordinances and green streets policies¹³⁸ and to continue to implement watershed control measures in the existing storm water management programs, including those to eliminate non-storm water discharges,¹³⁹ but in a manner that is targeted to address known pollutants.¹⁴⁰

Given the clear, enforceable requirements limiting the planning phase of the WMP/EWMP provisions, we find that the Los Angeles MS4 Order's inclusion of provisions deeming compliance with the receiving water limitations and with interim WQBELs during development of the programs is reasonable.

In fact, we are concerned that the Los Angeles Water Board has left no room for any deviation from the prescribed development schedule for WMP/EWMPs. A Permittee working in good faith to develop a WMP/EWMP over multiple months may encounter an issue that requires it to ask for a short extension on an interim or final deadline. Under such circumstances, the Los Angeles Water Board should be able to consider the request for the extension, rather than have its hands tied and have to reject a WMP/EWMP based on lack of timeliness. We will add a provision to the Order that provides the Los Angeles Water Board or its Executive Officer discretion in granting such extensions, but the Permittee will not be deemed in compliance with the applicable receiving water limitations and WQBELs during the period of the extension.

We shall add a new Part VI.C.4.g. as follows:

g. Permittees may request an extension of the deadlines for notification of intent to develop a Watershed Management Program or EWMP, submission of a draft plan, and submission of a final plan. The extension is subject to approval by the Regional Water Board or the Executive Officer. Permittees that are granted an extension for any deadlines for development of the WMP/EWMP shall be subject to the baseline requirements in Part VI.D and shall demonstrate compliance with receiving water limitations pursuant to Part V.A. and with applicable interim water quality-based effluent limitations in Part VI.E pursuant to subparts VI.E.2.d.i.(1)-(3) until the Permittee has an approved WMP/EWMP in place.

¹³⁸ *Id.*, Part VI.C.4.c., pp. 56-57.

¹³⁹ *Id.*, Part VI.C.4.d.i.-ii., pp. 57-58.

¹⁴⁰ *Id.*, Parts VI.C.2.d.iii., pp. 52-53, VI.C.3.b.iii., p. 53, VI.E.2.d.i.(4)(d)(3), p. 144.

7. Conclusion

In conclusion, we uphold the WMP/EWMP provisions as a reasonable alternative compliance option for meeting receiving water limitations and uphold the WMP/EWMP provisions in all other aspects, except as specifically stated above. We find that the WMP/EWMP approach is a clearly defined, implementable, and enforceable alternative to the receiving water limitations provisions that we mandated in Order WQ 99-05, and that the alternative provides Permittees an ambitious, yet achievable, path forward for steady and efficient progress toward achievement of those limitations while remaining in compliance with the terms of the permit.

We direct all regional water boards to consider the WMP/EWMP approach to receiving water limitations compliance when issuing Phase I MS4 permits going forward.¹⁴¹ In doing so, we acknowledge that regional differences may dictate a variation on the WMP/EWMP approach, but believe that such variations must nevertheless be guided by a few principles.¹⁴² We expect the regional water boards to follow these principles unless a regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.

1. The receiving water limitations provisions of Phase I MS4 permits should continue to require compliance with water quality standards in the receiving water and should not deem good faith engagement in the iterative process to constitute such compliance. The Phase I MS4 permits should therefore continue to use the receiving water limitations provisions as directed by State Water Board Order WQ 99-05.

¹⁴¹ We acknowledge that small MS4s permitted under the statewide General Permit for WDRs for Storm Water Discharges from Small MS4s (Order No. 2013-0001-DWQ) (General Phase II MS4 Permit) have similar practical issues as Phase I permittees in complying with receiving water limitations. Nevertheless, because the General Phase II MS4 Permit is issued by the State Water Board, not the regional water boards, we limit our guidance to regional water boards to the Phase I permits. The State Water Board is committed to working with small MS4s, the regional water boards, and interested persons in developing an alternative compliance option for the General Phase II MS4 Permit.

¹⁴² In considering appropriate guidance for regional water boards drafting alternative compliance paths in municipal storm water permits, we have reviewed the proposed "strategic compliance program" model language that was submitted by the California Stormwater Quality Association (CASQA) and supported in whole or in part by a number of interested persons. (CASQA August 15, 2013 Receiving Water Limitations Submission, Attachment A, Section E.) While we have not in these proceedings adopted the CASQA language, or, for that matter, any specific language, for alternative compliance path provisions, regional water boards remain free to consider and incorporate the CASQA approach into their municipal storm water permits to the extent they determine and document that the approach, including any modifications, satisfies the principles we set out in this section as well as all other direction we have provided in this order.

2. The Phase I MS4 permits should include a provision stating that, for water body-pollutant combinations with a TMDL, full compliance with the requirements of the TMDL constitutes compliance with the receiving water limitations for that water body-pollutant combination.
3. The Phase I MS4 permits should incorporate an ambitious, rigorous, and transparent alternative compliance path that allows permittees appropriate time to come into compliance with receiving water limitations without being in violation of the receiving water limitations during full implementation of the compliance alternative.
4. The alternative compliance path should encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements.
5. The alternative compliance path should encourage the use of green infrastructure and the adoption of low impact development principles.
6. The alternative compliance path should encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.
7. The alternative compliance path should have rigor and accountability. Permittees should be required, through a transparent process, to show that they have analyzed the water quality issues in the watershed, prioritized those issues, and proposed appropriate solutions. Permittees should be further required, again through a transparent process, to monitor the results and return to their analysis to verify assumptions and update the solutions. Permittees should be required to conduct this type of adaptive management on their own initiative without waiting for direction from the regional water board.

8. Direction to the Los Angeles Water Board to Report to the State Water Board on Implementation

We recognize that our review has been limited to the provisions of the Los Angeles MS4 Order. The success of the WMP/EWMP approach depends in large part on the steps that follow adoption of these provisions, i.e., the effort invested by Permittees in developing WMPs/EWMPs that truly address the stringent provisions of the Order, the precision with which the Los Angeles Water Board reviews the draft programs and requires revisions, and, most importantly, the actual implementation and appropriate enforcement of the programs once approved. The work going forward must ensure that the WMPs/EWMPs in fact exhibit the rigor and accountability the provisions of the Los Angeles MS4 Order demand. We expect that the Los Angeles Water Board will make careful oversight and enforcement a priority and that they will be aided in this process by the public review and comment opportunities built into the terms of the Order.

The process of developing the WMPs/EWMPs is currently ongoing -- the Los Angeles Water Board has been reviewing draft and revised draft WMPs and workplans for EWMPs – and, although we have been asked by the Environmental Petitioners to take official notice of some of the submissions and conditional approvals in the process, it is premature for the State Water Board to speak to the sufficiency of the resulting WMPs/EWMPs until the Los Angeles Water Board, with full input from the stakeholders, has had the opportunity to consider, revise, and finally approve the programs. We note again that all documents submitted to the Los Angeles Water Board Executive Officer for approval are subject to a 30-day public comment period¹⁴³ and that any formal determination or approval by the Executive Officer may be reviewed by the Los Angeles Water Board upon request by an interested person.¹⁴⁴ And an interested person may petition the State Water Board to review an action or failure to act of the Los Angeles Water Board.¹⁴⁵

Once the WMPs/EWMPs are approved, ensuring that they are diligently and timely implemented must remain a top priority for the Los Angeles Water Board. We expect that the Los Angeles Water Board will continue to work cooperatively and closely with the Permittees, the Environmental Petitioners, and other interested persons in this process, but that the Board will also use its enforcement authority to ensure that appropriate progress is made toward water quality goals. We intend to remain involved in this process, as we must learn statewide from the successes and shortcomings of the approach we are endorsing with this order. We accordingly direct the Los Angeles Water Board to report to us on progress in implementation of the WMPs/EWMPs, and progress in improving water quality during this and the next permit term by February 28, 2018, by February 29, 2020, and by March 31, 2022. Specifically, we ask that the Los Angeles Water Board report on region-wide data for the following:

- On-the-ground structural control measures completed;
- Non-structural control measures completed;
- Monitoring data that evaluates the effectiveness of implemented control measures in improving water quality;

¹⁴³ Los Angeles MS4 Order, Part V.A.5.b, p. 42.

¹⁴⁴ *Id.*, Part V.A.6, p. 42.

¹⁴⁵ Wat. Code, § 13320. On April 28, 2015, the Executive Officer of the Los Angeles Water Board conditionally approved several submitted WMPs. On May 28, 2015, the Environmental Petitioners filed a petition challenging the conditional approvals and requesting review by the Los Angeles Water Board and by the State Water Board of the Executive Officer's determination.

- Comparison of the effectiveness of the control measures to the results projected by the reasonable assurance analyses;
- Comparison of control measures completed to date with control measures projected to be completed to date pursuant to the WMPs/EWMPs;
- Control measures proposed to be completed in the next two years pursuant to the WMPs/EWMPs and the schedule for completion of those control measures;
- Status of funding and implementation for control measures proposed to be completed in the next two years;
- Trends in receiving water quality related to pollutants typically associated with storm water;
- Available permit compliance data, including requests for compliance extensions;
- Enforcement actions taken and results.

In addition to covering the above information, the third report shall summarize and reflect the comprehensive information gathered through the updates of the reasonable assurance analyses and WMPs/EWMPs conducted by the Permittees in the second permit term.

C. Appropriateness of TMDL Requirements

Section 303(d) of the Clean Water Act requires the water boards to identify impaired water bodies that do not meet water quality standards after applying required technology-based effluent limitations.¹⁴⁶ TMDLs are developed by either the regional water boards or by USEPA in response to section 303(d) listings of impaired water bodies. A TMDL is defined as the sum of the individual wasteload allocations for point sources of pollution, the load allocations for nonpoint sources of pollution, and the contribution from background sources of pollution,¹⁴⁷ and represents the maximum amount of a pollutant that a water body may receive and still achieve water quality standards. TMDLs developed by regional water boards include implementation provisions¹⁴⁸ and are typically incorporated into the regional water board's water quality control plan.¹⁴⁹ TMDLs developed by USEPA typically contain the total load and load allocations required by section 303(d), but do not set out comprehensive implementation provisions.¹⁵⁰ Most TMDLs are not self-executing, but instead rely upon subsequently-issued permits to impose requirements on discharges that implement the TMDLs' wasteload

¹⁴⁶ 33 U.S.C. § 1313(d).

¹⁴⁷ 40 C.F.R. § 130.2(i).

¹⁴⁸ Wat. Code, §§ 13050, subd. (j), 13242.

¹⁴⁹ See 40 C.F.R. §§ 130.6(c)(1).

¹⁵⁰ *Am. Farm Bureau Fed'n v. U.S. E.P.A.* (M.D. Pa. 2013) 984 F. Supp. 2d 289, 314.

allocations.¹⁵¹ The Los Angeles MS4 Order includes TMDL-specific requirements that implement 33 TMDLs (twenty-five adopted by the Los Angeles Water Board, seven established by USEPA, and one adopted by the Santa Ana Regional Water Quality Control Board that assigned requirements to two Permittees of the Los Angeles MS4 Order) in Part VI.E and in Attachments L-R.

Petitioners raise a number of challenges to the TMDL-based requirements of the Los Angeles MS4 Order. We take up several of those arguments in this section.¹⁵²

1. Inclusion of Numeric WQBELs

Permittee Petitioners argue that the numeric WQBELs incorporated into the Los Angeles MS4 Order as TMDL-based limitations are contrary to the Clean Water Act and to state law and policy. We disagree.

Under the federal regulations implementing the Clean Water Act, effluent limitations in NPDES permits developed to achieve water quality standards must be consistent with the assumptions and requirements of any available wasteload allocation for the discharge.¹⁵³ In addition, the Porter-Cologne Act requires that waste discharge requirements implement any relevant water quality control plans,¹⁵⁴ including TMDL requirements that have been incorporated into the water quality control plans. The Los Angeles MS4 Order incorporates numeric WQBELs and other limitations that the Los Angeles Water Board found are consistent with the TMDL requirements applicable to the Permittees.

Permittee Petitioners argue that there is no requirement under federal law for incorporation of TMDL requirements into an MS4 permit and that the inclusion of the requirements in Part VI.E and in Attachments L-R was therefore at the discretion of the Los Angeles Water Board. They point out, as we acknowledged in section II.A, that MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the MEP, but that requirements to strictly meet water quality standards are at the discretion of the permitting agency.¹⁵⁵ Because TMDL requirements are a path to achieving water quality standards, the Permittee Petitioners argue, the Los Angeles Water Board had the discretion not to include them in the Los Angeles MS4 Order.

¹⁵¹ *City of Arcadia v. EPA* (N.D. Cal. 2013) 265 F.Supp.2d 1142, 1144-1145.

¹⁵² We note that we do not take up any arguments that challenge the terms of the TMDLs. Those arguments should have been made during the public process when the TMDLs were adopted. They are untimely now.

¹⁵³ 40 C.F.R. § 122.44(d)(1)(vii)(B).

¹⁵⁴ Wat. Code, § 13263, subd. (a).

¹⁵⁵ 33 U.S.C. § 1342(p); *Defenders of Wildlife, supra*, 191 F.3d 1159.

Answering the question of whether the Los Angeles Water Board was required under federal law to strictly effectuate TMDL compliance through the Los Angeles MS4 Order is a largely irrelevant exercise because we have already reaffirmed in this order that we will continue to require water quality standards compliance in MS4 permits. Further, given the back-stop nature of TMDLs, and the fact that each set of dischargers must meet their share of the allocation to reach the total reductions set out, a regime in which municipal storm water dischargers were given a pass on TMDL obligations would render the promise of water quality standards achievement through TMDLs illusory. This is especially true in a large urbanized area where pollutants in storm water constitute a significant share of the impairment and where other dischargers would be disproportionately burdened if MS4s were not held to their allocations. Although not dispositive, we also note that USEPA has assumed in guidance (discussed in more detail below) issued on storm water and TMDL implementation that MS4 permits must incorporate effluent limitations consistent with the assumptions and requirements of relevant wasteload allocations.¹⁵⁶ To the extent the TMDL provisions of the Clean Water Act and the federal regulations could be read to preclude mandatory incorporation of wasteload allocations into an MS4 permit, effluent limitations consistent with those load allocations should nevertheless be required under Clean Water Act section 402, subsection (p)'s direction that the MS4 permit shall require "such other controls" as the permitting authority determines "appropriate for the control of such pollutants."¹⁵⁷ Finally, for TMDLs incorporated into water quality control plans, the implementation plan associated with the TMDL applies to all dischargers named, including MS4 permittees, and the MS4 permits must be consistent with the direction in the water quality control plan.¹⁵⁸

Having found that the Los Angeles Water Board acted in a manner consistent with federal and state law when it developed WQBELs to address applicable TMDLs, we next turn to whether *numeric* WQBELs were appropriate. We find that the Los Angeles Water Board

¹⁵⁶ USEPA, Memorandum, "Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs," (Nov. 22, 2002) (2002 USEPA Memorandum); see also USEPA, Memorandum, "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,'" (Nov. 26, 2014) (2014 USEPA Memorandum). The 2014 USEPA Memorandum replaced a memorandum with the same title issued on November 12, 2010, which was subsequently opened to public comment. (USEPA Statement (March 17, 2011), available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf> (as of Nov. 18, 2014).)

¹⁵⁷ 33 U.S.C. § 1342(p)(3)(B)(iii). See, e.g., State Water Board Orders WQ 91-03, WQ 91-04, WQ 98-01, WQ 99-05, WQ 2001-15.

¹⁵⁸ Wat. Code, § 13263, subd. (a); see also *State Water Res. Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 730 (noting the obligation of the water boards to follow the program of implementation included in a water quality control plan).

acted within its legal authority when establishing numeric WQBELs, and further that its choice of numeric WQBELs was a reasonable exercise of its policy discretion.

In the context of MS4 discharges, effluent limitations in NPDES permits may be expressed in the form of either numeric limitations or best management practices (BMPs). The federal regulations specifically state that BMP-based effluent limitations may be used to control pollutants for storm water discharges.¹⁵⁹ USEPA has issued two memoranda, on November 22, 2002 (2002 USEPA Memorandum), and on November 26, 2014 (2014 USEPA Memorandum), providing guidance to the states on translating wasteload allocations for storm water into effluent limitations in NPDES Permits.¹⁶⁰ The 2002 USEPA Memorandum contemplated that “the NPDES permitting authority will review the information provided by the TMDL . . . and determine whether the effluent limit is appropriately expressed using a BMP approach (including an iterative BMP approach) or a numeric limit.”¹⁶¹ The 2002 USEPA Memorandum further stated that “EPA expects that most WQBELs for NPDES-regulated municipal . . . storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances.”¹⁶² The 2014 USEPA Memorandum, after noting the increased information available to the permitting agencies after more than a decade of experience with setting wasteload allocations and effluent limitations, explained that:

Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant loads, the WLA should, where feasible, be translated into effective, measurable WQBELs that will achieve this objective. This could take the form of a numeric limit, or of a measurable, objective BMP-based limit that is projected to achieve the WLA. . . . The permitting authority’s decision as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs, with clear, specific, and measurable elements, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying

¹⁵⁹ 40 C.F.R. § 122.44(k)(2); see also 33 U.S.C. § 1342(p)(3)(B)(iii). 40 Code of Federal Regulations section 122.44(k)(3) further contemplates that BMP-based effluent limitations are appropriate where it is infeasible to develop a numeric effluent limitation.

¹⁶⁰ 2002 USEPA Memorandum; 2014 USEPA Memorandum. In addition to the two memoranda, USEPA published guidance titled “Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits” ((Sept. 1996) 61 Federal Register 57425), which recommended inclusion of BMPs in first-round permits, and expanded or better-tailored BMPs in subsequent permits. In 2005, the State Water Board assembled a blue ribbon panel to address the feasibility of including numeric effluent limits as part of NPDES municipal, industrial, and construction storm water permits. The panel issued a report dated June 19, 2006, which included recommendations as to the feasibility of including numeric limitations in storm water permits. The report concluded that it was not feasible, at that time, to set enforceable numeric effluent limitations for municipal storm water discharges.

¹⁶¹ 2002 USEPA Memorandum, p. 5.

¹⁶² *Id.*, p. 2.

WLA, including the nature of the stormwater discharge, available data, modeling results, and other relevant information.¹⁶³

Both options – to choose BMP-based WQBELs or to choose numeric WQBELs – were legally available to the Los Angeles Water Board. In adopting numeric WQBELs, the Los Angeles Water Board analyzed the specific facts and circumstances surrounding storm water discharges in the region and reasonably concluded that numeric WQBELs were warranted because storm water discharges constituted a significant contributor to the water quality standards exceedances in the area and the exceedances had not been to date resolved through BMP-based requirements. Moreover, the Los Angeles Water Board concluded that it could feasibly develop numeric WQBELs following the extensive work already conducted to develop the TMDLs, which involved analyzing pollutant sources and allocating loads using empirical relationships or quantitative models. We will not second-guess the determination of the Los Angeles Water Board, given its extensive and unique role in developing the TMDLs and the permit to implement the TMDLs, that numeric WQBELs were appropriate for the Los Angeles MS4 Order.¹⁶⁴

We emphasize, however, that we are not taking the position that numeric WQBELs are appropriate in all MS4 permits or even with respect to certain TMDLs within an MS4 permit. In a recent amendment to State Water Board Order 2011-0011-DWQ, NPDES Statewide Storm Water Permit for State of California Department of Transportation (Caltrans),¹⁶⁵ we found BMP-based TMDL requirements to be “consistent with the assumptions and requirements of the WLAs” of the TMDLs applicable to Caltrans. That determination was based on a number of factors including the fact that Caltrans, a single discharger, was named in over 80 TMDLs statewide, the fact that Caltrans had relatively little contribution to the exceedances in each of those TMDLs, and the consideration that there was significant efficiency to be gained by streamlining and standardizing control measure implementation throughout Caltrans’ statewide storm water program. Similarly, regional water boards may find BMP-based requirements to be appropriate based on TMDL-specific, region-specific, or permittee-specific

¹⁶³ 2014 USEPA Memorandum, p. 6.

¹⁶⁴ The Los Angeles Water Board incorporated a discussion in the Fact Sheet of how the TMDL wasteload allocations were translated into numeric WQBELs in order to implement the TMDLs in the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att.F, Fact Sheet, pp. F-89-F-100). See 40 C.F.R. § 124.8. We are not independently reviewing the calculations and analyses underlying the specific numeric limitations arrived at by the Los Angeles Water Board; rather, our review has been limited to a determination of whether the choice of numeric rather than BMP-based limitations was reasonable. To the extent any petitioners asked us to independently review the issue in their petitions seeking review of the Order, the issue is dismissed. See fn. 11.

¹⁶⁵ State Water Board Order WQ 2014-0077-DWQ.

considerations. In many ways, the Los Angeles MS4 Order was uniquely positioned to incorporate numeric WQBELs because of the extensive TMDL development in the region in the past decade and the documented role of MS4 discharges in contributing to the impairments addressed by those TMDLs. Thus, while we decline to remove the numeric WQBELs from the Los Angeles MS4 Order, we also decline to urge the regional water boards to use numeric WQBELs in all MS4 permits.¹⁶⁶

2. Requirement for Reasonable Potential Analysis

The federal regulations implementing NPDES permitting require the permitting authority to establish WQBELs for point source discharges when those discharges cause, have the “reasonable potential” to cause, or contribute to an excursion above water quality standards.¹⁶⁷ Permittee Petitioners argue that the Los Angeles Water Board did not conduct an appropriate reasonable potential analysis prior to imposing numeric WQBELs. The argument is misguided. The Los Angeles Water Board established that the MS4 discharges can cause or contribute to exceedances of water quality standards through the process of developing TMDLs and assigning wasteload allocations. At the permitting stage, the Los Angeles Water Board’s legal obligation was to develop WQBELs “consistent with the assumptions and requirements of any wasteload allocation” in the TMDLs,¹⁶⁸ and not to reconsider reasonable potential.¹⁶⁹

3. USEPA-Established TMDLs

USEPA has established seven TMDLs that include wasteload allocations for MS4 discharges covered by the Los Angeles MS4 Order. In contrast to state-adopted TMDLs, USEPA-established TMDLs do not contain an implementation plan or schedule for achievement of the wasteload allocations,¹⁷⁰ with the effect that Permittees must comply with wasteload allocations immediately. To avoid this result, the regional water board may either adopt a

¹⁶⁶ Relying on the 2014 USEPA Memorandum, Permittee Petitioners also argue that the Los Angeles Water Board was required to disaggregate storm water sources within applicable TMDLs. The 2014 USEPA Memorandum only encourages permit writers to assign specific shares of the wasteload allocation to specific permittees during the permitting process, reasoning that permit writers may have more detailed information than the TMDL writers to assign reductions for specific sources. (2014 USEPA Memorandum, p.8.) In an MS4 system as complex and interconnected as that covered under the Los Angeles MS4 Order, we do not expect the permitting authority to be able to disaggregate wasteload allocations by discharger. Further, as discussed in section II.F. on joint responsibility, the Los Angeles MS4 Order has provided a means for Permittees with commingled discharges to demonstrate that they are not responsible for any given exceedance of a limitation.

¹⁶⁷ 40 C.F.R. § 122.44(d)(1)(iii).

¹⁶⁸ 40 C.F.R. § 122.44(d)(1)(vii)(B).

¹⁶⁹ See USEPA, NPDES Permit Writers Manual (updated September 2010), Chapter 6, section 6.3.3.

¹⁷⁰ See, e.g., *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, *supra*, 984 F. Supp. 2d at p. 314.

separate implementation plan as a water quality control plan amendment¹⁷¹ or issue the Permittee a compliance order with a compliance schedule.¹⁷² For the seven USEPA-established TMDLs applicable to the Permittees, the Los Angeles Water Board authorizes Permittees subject to a wasteload allocation in a USEPA-established TMDL to propose control measures that will be effective in meeting the wasteload allocation, and a schedule for their implementation that is as short as possible, as part of a WMP/EWMP.¹⁷³ Permittees that do not submit an adequate WMP/EWMP are required to demonstrate compliance with the wasteload allocations immediately.¹⁷⁴

Permittee Petitioners argue that the Los Angeles Water Board has acted inconsistently in requiring BMP-based compliance with the USEPA-established TMDLs but requiring numeric WQBELs for the state-established TMDLs. We have already stated above in section C.1 that the permitting authority has discretion to choose between BMP-based and numeric effluent limitations depending on fact-specific considerations. The Los Angeles Water Board was not restricted to choosing one single uniform approach to implementing all 33 TMDLs in the Los Angeles MS4 Order. In fact, straight-jacketing NPDES permit writers to choose one approach to the exclusion of another, even within the confines of a single MS4 permit, would run afoul of USEPA's expectations in the 2014 USEPA Memorandum for a fact-specific, documented justification for the permit requirements included to implement a wasteload allocation.

The Environmental Petitioners argue that the provisions are contrary to law because they excuse Permittees from complying with final numeric wasteload allocations as long as they are implementing the BMPs proposed in the WMP/EWMP. The approach taken by the Los Angeles MS4 Order to compliance here is similar to the provisions for compliance with receiving water limitations that are not otherwise addressed by a TMDL: The Permittee proposes control measures and a timeline that is as short as possible and is considered in compliance with the final numeric limitations while implementing the control measures consistent with the schedule. We find that, given the absence of an implementation plan with final compliance deadlines specified in the Los Angeles Water Board's water quality control

¹⁷¹ Wat. Code, § 13242.

¹⁷² *Id.*, See, e.g., § 13300.

¹⁷³ The Los Angeles MS4 Order's Fact Sheet states that the Los Angeles Water Board may choose to adopt implementation plans or issue enforcement orders in the future. (Los Angeles MS4 Order, Att. F, Fact Sheet, p. F-111.)

¹⁷⁴ Los Angeles MS4 Order, Part VI.E.3., pp. 145-146.

plan, this approach is consistent with the assumptions and requirements of the relevant wasteload allocations. We will not revise the provisions.

D. Non-Storm Water Discharge Provisions

Permittee Petitioners argue that the non-storm water discharge provisions of the Los Angeles MS4 Order are contrary to the Clean Water Act. Specifically, Permittee Petitioners assert that the Los Angeles MS4 Order improperly regulates non-storm water discharges from the MS4 to the receiving waters by imposing the prohibition of discharge “through the MS4 to the receiving waters” and by imposing WQBELs and other numeric limitations, rather than the MEP standard, on dry weather discharges.

The Los Angeles MS4 Order states that “[e]ach Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters” with certain exceptions including discharges separately regulated under an NPDES permit and discharges conditionally exempt from the prohibition consistent with the federal regulations.¹⁷⁵ Permittee Petitioners take issue with the imposition of the prohibition “through the MS4 to receiving waters” because the language does not track the specific requirement of the Clean Water Act that the MS4 permit “include a requirement to effectively prohibit non-stormwater discharges *into the storm sewer.*” (Emphasis added.)¹⁷⁶

We find the variation in language to be a distinction without a difference. Whether the Los Angeles MS4 Order prohibits non-storm water discharges *into* the MS4 or *through* the MS4 to receiving waters, the intent and effect of the prohibition is to prevent non-exempt non-storm water discharges from reaching the receiving waters.¹⁷⁷ The legal standard governing non-storm water – effective prohibition -- is not altered because the Los Angeles MS4 Order imposes the prohibition at the point of entry into the receiving water rather than the point of entry into the MS4 itself. Instructively, USEPA has used the terms “into,” “from,” and “through” interchangeably when describing the prohibition.¹⁷⁸

¹⁷⁵ *Id.*, Part III.A, pp 27-33.

¹⁷⁶ 33 U.S.C. § 1342(p)(3)(B)(ii).

¹⁷⁷ The Los Angeles Water Board notes that the language in the Los Angeles MS4 Order is not significantly changed from the version in the 2001 Los Angeles MS4 Order, which prohibited non-storm water discharges “into the MS4 and watercourses.” The Board additionally asserts that phrasing the prohibition as “through the MS4 to receiving waters” provides Permittees with greater flexibility to use measures that control non-storm water after it enters the MS4, including regional solutions such as low-flow diversions and catch-basin inserts.

¹⁷⁸ See, e.g., 55 Fed. Reg. 47990, 47995-47996 (“Section 402(p)(B)(3) of the CWA requires that permits for discharges *from municipal separate storm sewer systems* require the municipality to ‘effectively prohibit’ non-storm water discharges *from the municipal separate storm sewer*...Ultimately, such non-storm water discharges *through a municipal separate storm sewer* must either be removed from the system or become subject to an NPDES permit. . . . (Continued)

Permittee Petitioners' objection to the phrasing of the prohibition in the Los Angeles MS4 Order appears to be based largely on the assumption that prohibiting non-storm water discharges at the point of entry into the receiving water rather than at the point of entry into the MS4 allows the Los Angeles Water Board to impose requirements on those discharges that would otherwise not be available under the Clean Water Act and federal regulations. We disagree.

As a preliminary matter, regardless of the phrasing of the non-storm water discharge prohibition, MEP is not the standard that governs non-storm water discharges. Permittee Petitioners have asserted that, for non-storm water discharges that enter the MS4, MEP is the governing standard just as it is for storm water discharges. This assertion misinterprets the statute. The Clean Water Act imposes two separate standards for regulation of non-storm water and storm water in an MS4 permit: The MS4 permit "shall include a requirement to effectively prohibit non-stormwater discharges" into the MS4, and "shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . . ." ¹⁷⁹ Although the statute imposes the MEP standard to control of "pollutants" rather than specifically to "pollutants in storm water," any reading of section 402(p)(3)(B)(iii) to apply generally to both non-storm water and storm water would render the effective prohibition of non-storm water in section 402(p)(3)(B)(ii) meaningless. The federal regulations confirm the distinction between the treatment of storm water and non-storm water by establishing requirements to prevent illicit discharges from entering the MS4. ¹⁸⁰ While the regulations have no definition for "non-storm water discharges," illicit discharges most closely represent the statutory term and are defined as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit . . . and discharges resulting from firefighting activities." ¹⁸¹ Further, contrary to assertions by Permittee Petitioners, the definition of storm water in the federal regulations is not inclusive of dry weather discharges. The federal regulations define storm water as "storm water runoff, snow melt runoff, and surface runoff and

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The CWA prohibits the point source discharge of non-storm water not subject to an NPDES permit *through municipal separate storm sewers to waters of the United States.*" (Emphasis added.)

¹⁷⁹ 33 U.S.C. § 1342(p)(3)(b)(iii).

¹⁸⁰ 40 C.F.R. § 122.26(d)(2)(iv)(B).

¹⁸¹ *Id.*, § 122.26(b)(2). The preamble to the regulations states: "Today's rule defines the term 'illicit discharge' to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit." (55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).)

drainage.”¹⁸² Surface runoff and drainage cannot be understood to refer to dry weather discharges where USEPA has specifically stated in the preamble to the relevant regulations that it would not expand the definition of storm water to include “a number of classes of discharges which are not in any way related to precipitation events.”¹⁸³ Accordingly, dry weather discharges are not a component of storm water discharges subject to the MEP standard.¹⁸⁴

Second, the Los Angeles Water Board’s legal authority to impose TMDL-based WQBELs and other limitations on dry weather discharges is derived not from the phrasing of the discharge prohibition in the statute but from the TMDLs themselves, as well as the Clean Water Act direction to require “such other provisions” as the permitting authority “determines appropriate for the control of such pollutants.” We have already found that the Los Angeles MS4 Order reasonably (and legally) incorporated numeric WQBELs and other limitations to implement the TMDLs. The Los Angeles Water Board’s authority to impose the limitations for dry weather conditions is accordingly independent of the provisions establishing the non-storm water effective prohibition.

Permittee Petitioners also assert that requiring compliance with the non-storm water discharge prohibition through and from the MS4 would frustrate enforcement of the illicit connection and illicit discharge elimination programs of the Los Angeles MS4 Order, which continue to require the Permittee to prohibit illicit discharges and connections to the MS4.¹⁸⁵ On this point, we agree with the Los Angeles Water Board that the illicit connection and illicit discharge elimination program is a means to implement the non-storm water prohibition and independently implementable and enforceable. We are more sympathetic to the argument by Permittee Petitioners that, in the context of a complex MS4 system with commingled discharges, the prohibition of discharges through the MS4 to the receiving waters poses greater compliance challenges than a prohibition of discharges into the MS4; however, the Los Angeles MS4 Order’s Monitoring and Reporting Program contains a procedure by which a Permittee will notify the Board and the upstream jurisdiction when non-exempted, non-storm water discharges pose an issue in commingled discharges.¹⁸⁶ Further, the Los Angeles Water Board states in its

¹⁸² 40 C.F.R. § 122.26(b)(13).

¹⁸³ 55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).

¹⁸⁴ We disagree that the phrasing of the non-storm water discharge prohibition in the Los Angeles MS4 Order means that *any* dry weather discharges from the MS4 could be construed as a violation of the Clean Water Act for the same reasons articulated in footnote 133 of this order.

¹⁸⁵ Los Angeles MS4 Order, Parts VI.A.2.a.iii, p. 40, VI.D.4.d., p. 81-86, VI.D.10, p. 137-141.

¹⁸⁶ Los Angeles MS4 Order, Att. E, Monitoring and Reporting Program, Part IX.F.6, p. E-27.

October 15, 2013 Response that the upstream jurisdiction would then have the responsibility to further investigate and address the discharge.¹⁸⁷ The challenge of addressing compliance and enforcement in the context of interconnected MS4s and commingled discharges is a challenge pervasive in the MS4 regulatory structure and not unique to non-storm water discharges. We are not sufficiently persuaded by Permittee Petitioners' arguments regarding compliance to disturb the non-storm water prohibitions as currently established in the Los Angeles MS4 Order.

E. Monitoring Provisions

Relying on Water Code sections 13165, 13225, and 13267, Permittee Petitioners argue that the Los Angeles Water Board was required to conduct a cost-benefit analysis to support the monitoring and reporting requirements of the Los Angeles MS4 Order. Because the monitoring and reporting provisions of the Los Angeles MS4 Order are incorporated pursuant to federal law, the cited provisions are inapplicable here. The monitoring and reporting provisions of the Los Angeles MS4 Order were established under the Clean Water Act and USEPA's regulations.¹⁸⁸ Further, under state law, Water Code section 13383, rather than Water Code section 13267, controls monitoring and reporting requirements in the context of NPDES permitting, and that provision does not include a requirement to ensure that the burden, including costs of the report, bear a reasonable relationship to the need for the report.¹⁸⁹

¹⁸⁷ Los Angeles Water Board, October 15, 2013 Response, p. 33 & fn. 116.

¹⁸⁸ See 33 U.S.C. §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)D, 122.41(h), 122.41(j), 122.41(l), 122.42(c), 122.44(i), 122.48.

¹⁸⁹ Permittee Petitioners argue that the cost considerations of Water Code sections 13225 and 13267 are relevant to the Los Angeles MS4 Order notwithstanding the fact that it was issued under federal authority because the requirements of those section are not inconsistent with the requirements of section 13383. (See Water Code, §13372, subd. (a) ("To the extent other provisions of this division are consistent with the requirements for state programs . . . those provisions apply . . .").) This exact assertion was taken up by the trial court in litigation challenging the 2001 Los Angeles MS4 Order and decided in favor of the Los Angeles Water Board. The trial court stated: "As noted in *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, the Court held, in part: 'state law is still preempted. . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' (464 U.S. at p. 248.) Applying Water Code sections 13225 and 13267 would stand, in the words of *Silkwood* as: 'an obstacle to the accomplishment of the full purposes and objectives of [the federal law].' (Ibid)." (*In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, at pp.19-20 (Administrative Record, section 10.II., RB-AR23197-23198.). Further, we note that Water Code section 13383, subdivision (c) specifically references subdivision (c) of section 13267 when establishing facility inspection requirements; in contrast, section 13383, subdivision (a) does not reference subdivision (b) of section 13267, which incorporates the requirement that "[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." Water Code section 13383, subdivision (a), was therefore arguably intended to stand in place of the requirements in section 13267(b). Finally, even where authority to impose a monitoring and reporting requirement is clearly derived from Water Code section 13267, the provision requires consideration of the costs and benefits of monitoring and reporting, but not a full cost-benefit analysis. We therefore find that the Los Angeles Water Board did not fail to meet its legal obligations by not carrying out a full cost-benefit analysis specific to the monitoring and reporting requirements of the Los Angeles MS4 Order. However, in making this finding, in no way do we mean to disavow the significance of cost consideration in permitting actions, even where not specifically required by law. We note again that the Los Angeles Water Board carefully considered the costs of (Continued)

Moreover, the monitoring and reporting requirements of the Los Angeles MS4 Order do not exceed the requirements of the Clean Water Act and the federal regulations.¹⁹⁰ In particular, we find that the receiving water monitoring requirements of the Order are reasonable in light of the need to identify water quality exceedances and evaluate progress in compliance with water quality standards. The argument made by several Permittee Petitioners that the federal regulations allow only two types of monitoring – effluent and ambient – for compliance is without support in the relevant regulations. The relevant law is clear that the permitting authority is required to incorporate monitoring and reporting requirements sufficient to determine compliance with the permit conditions.¹⁹¹ In contrast, nothing in the Clean Water Act or the regulations states that requiring wet weather receiving water monitoring is beyond the authority of the permitting agency.¹⁹² Further, accepting such a constrained interpretation of the Clean Water Act’s monitoring requirements would undermine storm water permitting assessment. Excluding wet weather receiving water monitoring would preclude storm water dischargers from assessing the impacts of their discharges on waters of the United States during the events for which they are primarily being permitted—storm events. We find nothing in the text or preamble of the federal regulations to support a narrow interpretation of monitoring to exclude wet weather receiving monitoring.

To the extent Permittee Petitioners are arguing that the MEP standard, applied at the outfall, constrains the permitting authority’s discretion to require monitoring beyond the outfall, we also find no support in the law for that proposition. We have already stated that we will continue to require compliance with water quality standards in MS4 permits. Wet weather receiving water monitoring is fundamental to assessing the effects of storm water discharges on water quality and determining the trends in water quality as Permittees implement control

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compliance with the Los Angeles MS4 Order generally as summarized in the Fact Sheet. (See Los Angeles MS4 Order, Att. F, Fact Sheet, pp. F-144-F-149.) Further, the Los Angeles Water Board considered monitoring costs-related comments on earlier drafts of the Los Angeles MS4 Order, and, in a number of cases, where presented with an argument that a cost related to a particular monitoring requirement was not commensurate with the benefits to be received from that requirement, made revisions to the requirement. (See, e.g., Administrative Record, section 8, RB-AR19653-19654, RB-AR19666, RB-AR19674, RB-AR19681.)

¹⁹⁰ The Los Angeles Water Board provided its rationale for the receiving water monitoring requirements in the Fact Sheet of the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att. F, Fact Sheet, F-113-F-137.)

¹⁹¹ See 33 U.S.C. § 1318(a)(2); 40 C.F.R. § 122.26(d)(2)(i)(F). While we do not interpret these requirements to mean that each and every permit condition must have a corresponding monitoring and reporting requirement, neither do we see any constraints on the water boards’ authority to establish monitoring and reporting requirements.

¹⁹² Permittee Petitioners reference language in the federal regulations concerning “effluent and ambient monitoring” (40 C.F.R. § 122.44(d)(1)(vi)(C)(3)) and appear to be using the phrase as support for their argument. That section is inapposite as it applies to situations where a State has not established a water quality objective for a pollutant present in the effluent and instead establishes effluent limitations on an indicator parameter for the pollutant of concern.

measures. Compliance may be determined at the outfall – for example, where a permittee determines that the discharge does not exceed an applicable WQBEL or receiving water limitation – but outfall monitoring alone cannot provide the broader data related to trends in storm water discharge impacts on the receiving water. Accordingly, receiving water monitoring is a legal and reasonable component of the monitoring and reporting program. Further, because Permittees are responsible for impacts to the receiving waters resulting from their MS4 discharges, Permittees may be required to participate in monitoring not only in receiving waters within their jurisdiction but also in monitoring all receiving waters that their discharges impact.

We will make no revisions to the Monitoring and Reporting provisions of the Order.

F. Joint Responsibility

In the extensive and interconnected system regulated by the Los Angeles MS4 Order, discharges originating from one Permittee’s MS4 frequently commingle with discharges from other Permittees’ MS4s within or outside of the Permittee’s jurisdiction. Permittee Petitioners argue that the Los Angeles MS4 Order improperly ascribes responsibility to all Permittees with commingled discharges where those commingled discharges exceed a WQBEL or cause or contribute to exceedances of receiving water limitations. Specifically, Permittee Petitioners take issue with the fact that the Los Angeles MS4 Order ascribes “joint responsibility”¹⁹³ to the co-Permittees without a showing that a particular Permittee has in fact discharged the pollutant causing or contributing to the exceedance.

The Los Angeles Water Board counters that the joint responsibility regime is consistent with the intent of the Clean Water Act and further that it does not compel a Permittee to clean up the discharge of another Permittee. The Los Angeles Water Board points to two provisions for this latter proposition. First, even with joint responsibility, Permittees that have commingled MS4 discharges need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators.¹⁹⁴ Second, even where joint responsibility is presumed, a Permittee may subsequently counter the presumption of joint responsibility by

¹⁹³ “Joint responsibility” is the term used in the Los Angeles MS4 Order. (See Los Angeles MS4 Order, Part II.K.1, p. 23 (“‘Joint responsibility’ means that the Permittees that have commingled MS4 discharges are responsible for implementing programs in their respective jurisdictions, or within the MS4 for which they are an owner and/or operator, to meet the water quality-based effluent limitations and/or receiving water limitations assigned to such commingled MS4 discharges.”) As defined by the Los Angeles Water Board and as discussed below, this term does not have the same meaning and scope as the legal doctrine of “joint liability.”

¹⁹⁴ Los Angeles MS4 Order, Parts II.K.1, pp. 23-24, VI.A.4.a., p. 41; 40 C.F.R. § 122.26(a)(3)(vi); see also, *id.*, Part VI.E.2.b.ii., p. 142 (stating in the context of TMDL requirements that, where discharges are commingled and assigned a joint WLA, “each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.”)

affirmatively demonstrating that its MS4 discharge did not cause or contribute to the relevant exceedances.¹⁹⁵

Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order and the challenges inherent in designing a monitoring program that could parse out responsibility for each individual Permittee, we find that a joint responsibility regime is a reasonable approach to assigning initial responsibility for an exceedance. The Los Angeles MS4 Order provisions addressing TMDLs also appropriately take a joint responsibility approach, given that the wasteload allocations from which the WQBELs and other TMDL-specific limitations are derived are most frequently expressed as joint allocations shared by all MS4 dischargers in the watershed. We further agree with the Los Angeles Water Board that the regime is one that is permissible under applicable law. The Clean Water Act contemplates that MS4 permits may be issued on a system-wide or jurisdiction-wide basis¹⁹⁶ and the federal regulations anticipate the need for inter-governmental cooperation.¹⁹⁷ Further, the United States Court of Appeal, Ninth Circuit, recently stated in *Natural Resources Defense Council v. County of Los Angeles* (2013) 725 F.3d 1194 that the permitting authority has wide discretion concerning the terms of a permit, including the manner in which permittees share liability.¹⁹⁸

Yet, we also find that joint responsibility in an MS4 Order is only appropriate if the ultimate responsibility for addressing an exceedance rests with those permittees that actually cause or contribute to the exceedance in question. The re-issued Los Angeles MS4 Order contains additional specificity and monitoring, beyond that contained in the 2001 Los Angeles MS4 Order, to document compliance and the presence or absence of an individual municipality's contribution of pollutants to the storm water. For this reason, the general reasoning of the Ninth Circuit's 2013 *Natural Resources Defense Council v. County of Los Angeles* decision finding liability based solely on the presence of pollutants above water quality standards in the receiving waters is of limited forward-looking importance. Generally, in the context of MS4 permits, we do not sanction joint responsibility to the extent that that joint

¹⁹⁵ *Id.*, Part VI.E.2., pp.141-42; see also *id.*, Part II.K.1, pp. 23-24.

¹⁹⁶ 33 U.S.C. § 1342(p)(3)(B)(i).

¹⁹⁷ See 40 C.F.R. §§ 122.26(d)(2)(i)(D), 122.26(d)(2)(iv), 122.26(d)(2)(vii).

¹⁹⁸ *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1205, fn. 16, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135. The Ninth Circuit went on to find that, based on the specific language of the 2001 Los Angeles MS4 Order, the Permittees were jointly liable for exceedances detected by mass emissions monitoring.

responsibility would require each Permittee to take full responsibility for addressing violations, regardless of whether, and to what extent, each permittee contributed to the violation.¹⁹⁹

The Los Angeles MS4 Order does not impose such a joint responsibility regime where each Permittee must take full responsibility for addressing other Permittees' violations. In addition to clearly stating that permittees are responsible only for their contribution to the commingled discharges, the Los Angeles MS4 Order provides that Permittees may affirmatively show that their discharge did not cause or contribute to an exceedance. Joint responsibility, as applied by the Los Angeles MS4 Order, is thus consistent with our expectation that ultimate responsibility for addressing an exceedance rests with those Permittees that actually cause or contribute to the exceedance and consistent with the regulatory direction that co-permittees need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators.

While the result is that the burden rests on the Permittee to demonstrate that its commingled discharge is not the source of an exceedance, rather than on the Los Angeles Water Board to demonstrate that a Permittee's commingled discharge is causing or contributing to the exceedance, the result is not contrary to law. The Los Angeles Water Board has the initial burden to show that a violation of the Los Angeles MS4 Order has occurred,²⁰⁰ but the Board can do so by establishing an exceedance of a limitation by jointly responsible Permittees and need not identify the exact source of the exceedance. This scheme represents a reasonable policy approach to a complicated compliance question where the Permittees are more closely familiar than the Los Angeles Water Board with their outfalls and their discharges in the extensive and interconnected MS4 network.

We are, however, concerned that the Los Angeles MS4 Order's treatment of the joint responsibility issue is too narrow. The Los Angeles Water Board addresses the issue of joint responsibility primarily in the context of compliance with the TMDL requirements of the Order. Commingled discharges pose the same questions of assigning responsibility where receiving water limitations are exceeded in water bodies receiving MS4 discharges from multiple jurisdictions, but where the pollutant is not addressed by a TMDL. A similar approach to

¹⁹⁹ In a "joint and several liability" scheme, a plaintiff may collect his or her entire damages from any one defendant, and the defendants must then rely on principles of indemnity or contribution to apportion ultimate liability amongst themselves. (See *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d 578, 586-590.) Because the Los Angeles MS4 Order's joint responsibility scheme does not equate to joint liability, and because we do not find such liability appropriate from a policy perspective, we do not address Petitioners' legal arguments as to whether joint or joint and several liability in the storm water context would be consistent with applicable law.

²⁰⁰ See e.g. *Sackett v. E.P.A.* (9th Cir. 2010) 622 F.3d 1139 rev'd on other grounds *Sackett v. E.P.A.* (2012) 132 S. Ct. 1367.

assigning responsibility for addressing the exceedances is appropriate there. We will add new language to the Los Angeles MS4 Order mirroring Part VI.E.2.b., but applying the principles more generally.

We also take this opportunity to emphasize that all MS4 permits should be drafted to avoid one potential, but likely unintended, result arising from *Natural Resources Defense Council v. County of Los Angeles*. The broadest reading of the Ninth Circuit's holding following remand from the U.S. Supreme Court would assign joint liability to all Permittees for any exceedance at a monitoring location designated for the purpose of compliance determination, even if the particular pollutant is not typically found in storm water and has a likely alternative source such as an industrial discharger or waste water treatment plan. Providing municipalities an opportunity to demonstrate that they did not contribute to a pollutant present in receiving waters above standards will prevent this outcome.

We shall amend Part VI.B. as follows:

B. Monitoring and Reporting Program (MRP) Requirements

- 1.** Dischargers shall comply with the MRP and future revisions thereto, in Attachment E of this Order or may, in coordination with an approved Watershed Management Program per Part VI.C, implement a customized monitoring program that achieves the five Primary Objectives set forth in Part II.A. of Attachment E and includes the elements set forth in Part II.E. of Attachment E.

2. Compliance Determination for Commingled Discharges

- a. For commingled discharges addressed by a TMDL, a Permittee shall demonstrate compliance with the requirements of Part E as specified at Part E.2.b.**
- b. For commingled discharges not addressed by a TMDL, a Permittee shall demonstrate compliance with the requirements of Part V.A as follows:**
 - i. Pursuant to 40 CFR section 122.26(a)(3)(vi), each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.**
 - ii. Where Permittees have commingled discharges to the receiving water, or where Permittees' discharges commingle in the receiving water, compliance in the receiving water shall be determined for the group of Permittees as a whole unless an individual Permittee demonstrates that its discharge did not cause or contribute to the exceedance, pursuant to subpart iv. below.**

- iii. For purposes of compliance determination, each Permittee is responsible for demonstrating that its discharge did not cause or contribute to an exceedance of the receiving water limitation in the target receiving water.
- iv. A Permittee may demonstrate that its discharge did not cause or contribute to an exceedance of a receiving water limitation in one of the following ways:
 - (1) Demonstrate that there was no discharge from the Permittee's MS4 into the applicable receiving water during the relevant time period;
 - (2) Demonstrate that the discharge from the Permittee's MS4 was controlled to a level that did not cause or contribute to the exceedance in the receiving water;
 - (3) Demonstrate that there is an alternative source of the pollutant that caused the exceedance, that the pollutant is not typically associated with MS4 discharges, and that the pollutant was not discharged from the Permittee's MS4; or
 - (4) Demonstrate that the Permittee is in compliance with the Watershed Management Programs provisions under VI.C.

G. Separation of Functions in Advising the Los Angeles Water Board

Petitioners Cities of Duarte and Huntington Park (Duarte and Huntington Park) argue that their rights to due process of law were violated when the same attorneys advised both the Los Angeles Water Board staff and the Board itself in the course of the proceedings to adopt the Los Angeles MS4 Order. We disagree and reaffirm our position that permitting actions do not require the water boards to separate functions when assigning counsel to advise in development and adoption of a permit.

A water board proceeding to adopt a permit, including an NPDES permit, waste discharge requirements, or a waiver of waste discharge requirements, is an adjudicative proceeding subject to the Administrative Procedure Act's administrative adjudication statutes in Government Code section 11400 et seq.²⁰¹ Section 11425.10, part of the "Administrative Adjudication Bill of Rights," provides that "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions with the agency" ²⁰² In accordance with

²⁰¹ See Cal. Code Regs., tit. 23, § 648, subd. (b).

²⁰² Gov. Code, § 11425.10, subd. (a)(4). Subdivision (a)(4) references section 11425.30, which addresses disqualification of a presiding officer that has served as "investigator, prosecutor, or advocate" in the proceeding or its preadjudicative stage or is subject to "the authority, direction, or discretion" of a person who has served in such roles.

this directive, the water boards separate functions in all enforcement cases, assigning counsel and staff to prosecute the case, and separate counsel and staff to advise the board.

In a permitting action, water board counsel have an advisory role, not an investigative, prosecutorial, or advocacy role. Permitting actions are not investigative in nature and there is no consideration of liability or penalties that would make the action prosecutorial in nature. Further, while both counsel and staff are expected to develop recommendations for their boards, the role of counsel and staff is not to act as an advocate for one particular position or party concerning the permitting action, but to advise the board as neutrals, with consideration of the legal, technical, and policy implications of all options before the board. In the case of counsel, such consideration and advice includes not just legal evaluation of the substantive options for permitting but also of procedural issues such as admissibility of the evidence, conduct of the hearing, and avoidance of board member conflicts. Because counsel and staff are advisors to the board rather than advocates for a particular position, the same counsel may advise staff in the course of development of the permit and the board in the adoption proceedings.

A primary purpose of separation of functions in adjudicatory proceedings is the need to prevent improper ex parte communications.²⁰³ The exceptions to the ex parte communications rules further support the position that counsel advising board staff may also advise the board itself. While section 11430.10 of the Government Code generally prohibits communications concerning issues in a pending administrative proceeding between the presiding officer and an employee of the agency that is a party,²⁰⁴ one exception provides that a communication “for the purpose of assistance and advice to the presiding officer,” in this case the board, “from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage” is permissible. Even if board counsel could be considered an advocate in the proceeding, another provision (specifically referencing the water boards) excepts the communication from the general ex parte communications rules. A communication is not an ex parte communication if:

- (c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative hearing that is nonprosecutorial in character:

²⁰³ See *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 9-10.

²⁰⁴ Government Code section 11430.10 prohibits communications between an employee that is a “party” to a pending proceeding and the presiding officer. We disagree that Los Angeles Water Board staff, as an advisor to the Board, was a “party” to the proceedings for adoption of the Los Angeles MS4 Order, but, even if staff could be considered a party, the cited exceptions to the ex parte communications rules would apply.

...
(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.²⁰⁵

The fact that communications that would otherwise be considered prohibited *ex parte* communications are specifically permitted in non-prosecutorial adjudicative proceedings of the water boards further supports the position that the water boards are not obligated by law to separate functions in permitting actions.

We acknowledge that there may be some unique factual circumstances under which a permitting proceeding could violate due process or the Administrative Procedure Act because board counsel either acted or gave the appearance of acting as a prosecutor or advocate. Duarte and Huntington Park point to a writ of mandate issued by the Los Angeles Superior Court in 2010,²⁰⁶ holding that a 2006 proceeding to incorporate provisions of the Santa Monica Bay Beaches TMDL into the 2001 Los Angeles MS4 Order was not fairly conducted because Los Angeles Water Board counsel had acted as an advocate for Board staff, directly examining Board staff witnesses, cross-examining witnesses called by permittees, objecting to questions asked by permittees, and making a closing argument on behalf of Board staff, while simultaneously advising the Board. The proceedings to adopt the Los Angeles MS4 Order did not follow the type of adversarial structure that led the Superior Court to find a violation of separation of functions in the 2006 proceedings.²⁰⁷ Further, nothing in the conduct of the Los Angeles Water Board attorneys in the Los Angeles MS4 Order proceedings leads us to find that they acted as advocates for a particular position or party, rather than as advisors to the Board.

²⁰⁵ Gov. Code, § 11430.30. We note that the Law Revision Commission comments on section 11430.30, subdivision (c), state that “[s]ubdivision (c) applies to nonprosecutorial types of administrative adjudications, such as . . . proceedings . . . setting *water quality protection . . . requirements*.” (Emphasis added.) The notes further state that “[t]he provision recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for any agency to adhere to the restrictions of [ex parte communications], given limited staffing and personnel.” (25 Cal.L.Rev.Comm. Reports 711 (1995).) We agree that the lengthy and complex nature of permitting proceedings, and the limited staffing resources of the water boards, caution against an expansive interpretation of separation of functions in non-prosecutorial adjudications.

²⁰⁶ *County of Los Angeles v. State Water Resources Control Board* (Super. Ct., Los Angeles Co. (June 2, 2010, Minute Order) No. BS122724) (Administrative Record, section 10.II, RB-AR23665-23667.)

²⁰⁷ We also note that, although the writ directed that petitioners were entitled to a new hearing “in which the same person does not act as both an advocate before the Board and an advisor to the Board,” the writ had no direct bearing on the separate proceedings to adopt the Los Angeles MS4 Order. In any case, as discussed, Board attorneys did not act as advocates in the proceedings to adopt the Los Angeles MS4 Order.

The two specific cases pointed to by Duarte and Huntington Park – advice by Board counsel to Board member Mary Ann Lutz regarding recusal due to ex parte communications and advice to the Board generally on the lack of a cost-benefit analysis requirement in federal law – may be contrary to the legal position held by Duarte and Huntington Park, but there is nothing in the record to suggest that the advice was driven by biased advocacy for a Board staff position.²⁰⁸ In the absence of such evidence, we find no reason to depart from the general rule that separation of functions is not required in a permitting proceeding²⁰⁹ and find that Los Angeles Water Board counsel acted in accordance with applicable laws in advising Board staff and the Board itself.

H. Signal Hill's Inclusion in the Order

The City of Signal Hill (Signal Hill) argues that the Los Angeles Water Board acted contrary to relevant law when it issued the system-wide Los Angeles MS4 Order that included Signal Hill, even though Signal Hill had submitted an application for an individual permit.²¹⁰ We disagree.

Signal Hill points out that the federal regulations allow an operator of an MS4 to choose between submitting an application jointly with one or more other operators for a joint permit or individually for a distinct permit.²¹¹ However, the choice of application does not necessarily dictate the type of permit that the permitting authority ultimately deems appropriate. The permitting authority in turn has discretion to determine if the permit should be issued on a

²⁰⁸ See Administrative Record, section 7, RB-AR18309-18316, RB-AR18397-18400 (Transcript of Proceedings on Oct. 4, 2012), section 7, RB-AR18892-18894 (Transcript of Proceedings on Oct. 5, 2012).

²⁰⁹ Although *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731 concerned an enforcement proceeding and therefore is not on point for our legal determination above, we take note of the direction by the California Supreme Court that separation of functions in an administrative tribunal should not be expanded beyond its appropriate scope: “In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular . . . [and where proper procedure is followed and in the absence of a specific demonstration of bias or unacceptable risk of bias] we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions.” (*Morongo Band of Mission Indians, supra*, at pp. 741-742.)

²¹⁰ Signal Hill was one of several permittees under the 2001 Los Angeles MS4 Order that elected not to submit an application jointly with the other permittees for the renewed permit. The other parties have not challenged their inclusion under the Los Angeles MS4 Order. The Los Angeles Water Board rejected Signal Hill's application as incomplete; however, our determination that the Los Angeles Water Board had the discretion to issue the system-wide Los Angeles MS4 Order is not dependent on that fact.

²¹¹ 40 C.F.R. § 122.26(a)(3)(iii). Signal Hill has also cited regulations applicable to Small MS4s at 40 Code of Federal Regulations sections 122.30 through 122.37. These regulations are not applicable here because the Los Angeles Water Board has designated the Greater Los Angeles County MS4, which includes the incorporated cities and the unincorporated areas of Los Angeles County within coastal watersheds, as a large MS4 pursuant to 40 Code of Federal Regulations section 122.26(b)(4).

jurisdictional or system-wide basis.²¹² While the federal regulations do not specifically state that, in exercising that discretion, the permitting authority may override the permit applicant's preference for an individual permit, nothing in the regulations constrains its authority to do so. Section 122.26(a)(3)(iii) of 40 Code of Federal Regulations does not require the permitting authority to take any specific action in response to the submission of an individual application. And sections 122.26(a)(3)(ii) and 122.26(a)(3)(iv) provide that the permitting authority "may issue" system-wide or distinct permits. The preamble to the regulations similarly contemplates wide discretion for the permitting authority to choose system-wide permits, including a permit that would allow an entire system in a geographical region to be designated under one permit.²¹³ Particularly because the option of a system-wide permit would be significantly frustrated if MS4 operators were allowed to opt out at their discretion, the most reasonable reading of the regulations is that the permitting authority, not the applicant, makes the ultimate decision as to the scope of the permit that will be issued. Accordingly, we find that the Los Angeles Water Board had the discretion under the relevant law to issue the Los Angeles MS4 Order with Signal Hill as a permittee.

We also find that the Los Angeles Water Board's decision regarding Signal Hill was appropriately supported by findings in the Order and in the Fact Sheet.²¹⁴ Finding C of the Los Angeles MS4 Order, as well as discussion in the Fact Sheet,²¹⁵ establishes that the Los Angeles Water Board found a system-wide permit to be appropriate for a number of reasons, including that Permittees' MS4s comprise a large interconnected system with frequently commingled discharges, that the TMDLs to be implemented apply to the jurisdictional areas of multiple Permittees, that the passage of Assembly Bill 2554²¹⁶ in 2010 provided a potential means for funding collaborative water quality improvement plans among Permittees, and that the results of an online survey conducted by Los Angeles Water Board staff showed that the

²¹² 33 U.S.C. § 1342(p)(3)(B)(i); 40 C.F.R. § 122.26(a)(1)(v), (a)(3)(ii), (a)(3)(iv).

²¹³ See 55 Fed. Reg. 47990, 48039-48043 (preamble to the Phase I regulations noting that section 122.26(a)(3)(iv) would allow an entire system in a geographical region to be designated under one permit and further discussing that sections 122.26(a)(1)(v) and (a)(3)(ii) allow the permitting authority broad discretion in issuing system-wide permits).

²¹⁴ *Topanga Assn.*, *supra*, 11 Cal.3d at 515.

²¹⁵ Los Angeles MS4 Order, Part II.C., pp. 14-15; *id.*, Att. F, Fact Sheet, pp. F-15-F-18.

²¹⁶ Assembly Bill No. 2554, Chapter 602, an act to amend sections 2 and 16 of the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), relating to the Los Angeles County Flood Control District, Sept. 30, 2010 (Administrative Record, section 10.VI.C., RB-AR29172-29179). The Bill allows the Los Angeles County Flood Control District to assess a property-related fee or charge, subject to voter approval in accordance with proposition 218, for storm water and clean water programs.

majority of Permittees favored either a single MS4 permit for Los Angeles County or several watershed-based permits.

Signal Hill points out that the reasons enumerated by the Los Angeles Water Board as grounds for issuance of a system-wide permit did not preclude the Los Angeles Water Board from issuing an individual permit to the City of Long Beach (Long Beach).²¹⁷ The Los Angeles Water Board has provided the rationale for distinguishing Signal Hill and Long Beach in its October 15, 2013 Response. The Los Angeles Water Board explains that Long Beach has had an individual permit for more than a decade and that, unlike Signal Hill, it was not permitted under the 2001 Los Angeles MS4 Order. The Board's decision to issue a separate permit to Long Beach was originally the result of a settlement agreement that resolved litigation on the MS4 permit issued by the Los Angeles Water Board in 1996, and Long Beach has a proven track record in implementing the individual permit while cooperating with Permittees under the Los Angeles MS4 Order.²¹⁸ We find that the Los Angeles Water Board reasonably distinguished between Long Beach and the Permittees under the Los Angeles MS4 Order in making determinations as to individual permitting. We will not reverse its determination but we will add a brief statement reflecting that reasoning to the Fact Sheet.

We shall amend section III.D.1.a. at page F-18, Attachment F, Fact Sheet, as follows:

The Regional Water Board determined that the cities of Signal Hill and Downey, the five upper San Gabriel River cities, and the LACFCD are included as Permittees in this Order. **In making that determination, the Regional Water Board distinguished between the permitting status of those cities and the permitting status of the City of Long Beach at this time because the City of Long Beach has a proven track record in implementing an individual permit and developing a robust monitoring program under that individual permit, as well as in cooperation with other MS4 dischargers on watershed based implementation. While all other incorporated cities with discharges within the coastal watersheds of Los Angeles County, as well as Los Angeles County and the Los Angeles County Flood Control District, are permitted under this Order,** individually tailored permittee requirements are provided in this Order, where appropriate.

²¹⁷ Signal Hill is located in the geographical middle of Long Beach and is entirely surrounded by that city.

²¹⁸ Los Angeles Water Board, October 15, 2013 Response, p. 25, fn. 78.

III. CONCLUSION

Based on the above discussion, we conclude as follows:

1. Although we are not bound by federal law or state law to require compliance with water quality standards in municipal storm water permits, we will not depart from our prior precedent regarding compliance with water quality standards. The regional water boards shall continue to require compliance with receiving water limitations in municipal storm water permits through incorporation of receiving water limitations provisions consistent with State Water Board Order WQ 99-05.
2. However, we find that municipal storm water dischargers may not be able to achieve water quality standards in the near term and therefore that it is appropriate for municipal storm water permits to incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.
3. We find that the WMP/EWMP provisions of the Los Angeles MS4 Order, with minor revisions that we incorporate herein, are an appropriate alternative to immediate compliance with receiving water limitations. The WMP/EWMP provisions are ambitious, yet achievable, and include clear and enforceable deadlines for the achievement of receiving water limitations and a rigorous and transparent process for development and implementation of the WMPs/EWMPs.
4. We find that the WMP/EWMP provisions do not violate anti-backsliding requirements.
5. We find that the WMP/EWMP provisions do not violate antidegradation requirements; however, we find that the antidegradation findings made by the Los Angeles Water Board are too cursory and revise those findings consistent with the federal and state antidegradation policies.
6. We find that issuance of time schedule orders is appropriate where a final receiving water limitations deadline set in the WMP/EWMP or a final TMDL-related deadline is not met; however we find that the WMP/EWMP compliance schedule need not otherwise be structured as an enforcement order.
7. We clarify the WMP/EWMP provisions to make it clear that final compliance with receiving water limitations and final WQBELs and other TMDL-specific limitations must be verified through monitoring.

8. We clarify the WMP/EWMP provisions to make it clear that Permittees may request extensions of deadlines incorporated into the WMPs/EWMPs except those final deadlines established in a TMDL. However, any deadline extensions must be approved by the Executive Officer after public review and comment.
9. In order to add greater rigor and accountability to the process of achieving receiving water limitations, we revise the WMP/EWMP provisions to add that the Permittees must comprehensively evaluate new data and information and revise the WMPs/EWMPs, including the supporting reasonable assurance analysis, by June 30, 2021, for approval by the Executive Officer.
10. We find that the storm water retention approach is a promising approach to achieving receiving water limitations, but also find that the Administrative Record does not support a finding that the approach will necessarily lead to achievement of water quality standards in all cases. We revise the WMP/EWMP provisions to clarify that, in the case of implementation of an EWMP with the storm water retention approach, if compliance with a final WQBEL or other TMDL-specific limitation is not in fact achieved in the drainage area, a Permittee will be considered in compliance with the relevant limitation only if the Permittee continues to adaptively manage the EWMP to achieve ultimate compliance with the WQBEL or other TMDL limitation.
11. We find reasonable the WMP/EWMP provisions that allow permittees to be deemed in compliance with receiving water limitations during the planning and development phase of the WMP/EWMP. We revise the WMP/EWMP provisions to state that, if a Permittee fails to meet one of the deadlines, the Permittee may still develop a WMP/EWMP for approval by the Los Angeles Water Board or its Executive Officer; however, the Permittee will not be deemed in compliance with receiving water limitations or WQBELs and other TMDL-specific limitations during the subsequent WMP/EWMP development period.
12. We recognize that the Los Angeles MS4 Order WMP/EWMP compliance path alternative may not be appropriate in all MS4 permits. In order to provide guidance to regional water boards preparing Phase I MS4 permits, we lay out several principles to be followed in drafting receiving water limitations compliance alternatives: Phase I MS4 permits should (1) continue to require compliance with water quality standards in accordance with our Order WQ 99-05; (2) allow compliance with TMDL requirements to constitute compliance with receiving water limitations; (3) provide for a compliance

alternative that allows permittees to achieve compliance with receiving water limitations over a period of time as described above; (4) encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements; (5) encourage the use of green infrastructure and the adoption of low impact development principles; (6) encourage the use of multi-benefit regional projects that capture, infiltrate, and reuse storm water; and (7) require rigor, accountability, and transparency in identification and prioritization of issues in the watershed, in proposal and implementation of control measures, in monitoring of water quality, and in adaptive management of the program. We expect the regional water boards to follow these principles unless the regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.

13. We recognize that the success of the WMP/EWMP approach depends in large part on the steps that follow adoption of the provisions, including the development and approval of rigorous WMPs/EWMPs and the implementation and appropriate enforcement of the programs once approved. We direct the Los Angeles Water Board to periodically report specific information to the State Water Board regarding implementation of the WMPs/EWMPs, including on-the-ground structural control measures completed, monitoring data evaluating the effectiveness of such measures, control measures proposed to be completed and proposed funding and schedule, trends in receiving water quality related to storm water discharges, and compliance and enforcement data.
14. We find that the Los Angeles Water Board acted in a manner consistent with the law when establishing numeric WQBELs. We further find that the development of numeric WQBELs was a reasonable exercise of the Los Angeles Water Board's policy discretion, given its experience in developing the relevant TMDLs and the significance of storm water impacts in the region. However, we find that numeric WQBELs are not necessarily appropriate in all MS4 permits or for all parameters in any single MS4 permit.
15. We find that the Los Angeles Water Board's choice of BMP-based WQBELs, to be proposed by the Permittee in the WMP/EWMP to address USEPA-established TMDLs was reasonable.

16. We find that the Los Angeles Water Board did not act contrary to federal law when it prohibited the discharge of non-storm water “through the MS4 to receiving water” instead of “into” the MS4. Regardless of the exact wording of the prohibition, the standard that applies to non-storm water is the requirement of “effective prohibition.” However, the Los Angeles Water Board also has authority to regulate any dry weather discharges from the MS4s under the applicable TMDLs.
17. We find that the monitoring and reporting provisions of the Los Angeles MS4 Order are consistent with applicable law and reasonable.
18. We find that assigning joint responsibility for commingled discharges that cause exceedances is not contrary to applicable law. Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order, the joint responsibility regime also constitutes a reasonable policy choice. The Los Angeles MS4 Order specifically allows a permittee to avoid joint responsibility by demonstrating that its commingled discharge is not the source of an exceedance.
19. We find that representation of the Los Angeles Water Board and the Los Angeles Water Board staff by the same attorneys in the proceedings to adopt the Los Angeles MS4 Order was lawful and reasonable.
20. We find that the Los Angeles Water Board acted in a manner consistent with applicable law and reasonably when it issued a system-wide permit that included Signal Hill.

Addressing the water quality impacts of municipal storm water is a complex and difficult undertaking, requiring innovative approaches and significant investment of resources. We recognize and appreciate the commendable effort of the Los Angeles Water Board to come up with a workable and collaborative solution to the difficult technical, policy, and legal issues, as well as the demonstrated commitment of many of the area’s MS4 dischargers and of the environmental community to work with the Los Angeles Water Board in the development and implementation of the proposed solution. We also recognize the extensive work that interested persons from across the state, including CASQA, have invested in assisting us in understanding how the watershed-based alternative compliance approach developed by the Los Angeles Water Board may inform statewide approaches to addressing achievement of water quality requirements. While storm water poses an immediate water quality problem, we believe that a rigorous and transparent watershed-based approach that emphasizes low impact development, green infrastructure, multi-benefit projects, and capture, infiltration, and reuse of storm water is

a promising long-term approach to addressing the complex issues involved. We must balance requirements for and enforcement of immediate, but often incomplete, solutions with allowing enough time and leeway for dischargers to invest in infrastructure that will provide for a more reliable trajectory away from storm water-caused pollution and degradation. We believe that the Los Angeles MS4 Order, with the revisions we have made, strikes that balance at this stage in our storm water programs, but expect that we will continue to revisit the question of the appropriate balance as the water boards' experience in implementing watershed-based solutions to storm water grows.

IV. ORDER

IT IS HEREBY ORDERED that the Los Angeles MS4 Order is amended as described above in this order. The Los Angeles Water Board is directed to prepare a complete version of the Los Angeles MS4 Order (including any necessary non-substantive conforming corrections), post the conformed Los Angeles MS4 Order on its website, and distribute it as appropriate.

CERTIFICATION


The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held June 16, 2015.

AYE: Chair Felicia Marcus
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc
Board Member Steven Moore
Board Member Dorene D'Adamo

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

VOLUME IV
TAB 2

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001- 15

In the Matter of the Petitions of

**BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY
AND
WESTERN STATES PETROLEUM ASSOCIATION**

For Review Of Waste Discharge Requirements Order No. 2001-01
for Urban Runoff from San Diego County
[NPDES No. CAS0108758]

Issued by the
California Water Quality Control Board,
San Diego Region

SWRCB/OCC FILES A-1362, A-1362(a)

BY THE BOARD:

On February 21, 2001, the San Diego Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 2001-01 (permit) to the County of San Diego (County), the 18 incorporated cities within the County, and the San Diego Unified Port District. The permit covers storm water discharges from municipal separate storm sewer systems (MS4) throughout the County. The permit is the second MS4 permit issued for the County, although the first permit was issued more than ten years earlier.¹

¹ NPDES permits generally expire after five years, but can be extended administratively where the Regional Water Board is unable to issue a new permit prior to the expiration date. As the record in this matter amply demonstrates, the Regional Water Board engaged in an extensive process of issuing draft permits, accepting comments, and holding workshops and hearings since at least 1995.

The permit includes various programmatic and planning requirements for the permittees, including construction and development controls, controls on municipal activities, controls on runoff from industrial, commercial, and residential sources, and public education. The types of controls and requirements included in the permit are similar to those in other MS4 permits, but also reflect the expansion of the storm water program since the first MS4 permit was adopted for San Diego County 11 years ago.²

On March 23, 2001, the State Water Resources Control Board (State Water Board or Board) received petitions for review of the permit from the Building Industry Association of San Diego County (BIA) and from the Western States Petroleum Association (WSPA).³ The petitions are legally and factually related, and have therefore been consolidated for purposes of review.⁴ None of the municipal dischargers subject to the permit filed a petition, nor did they file responses to the petitions.

I. BACKGROUND

MS4 permits are adopted pursuant to Clean Water Act section 402(p). This federal law sets forth specific requirements for permits for discharges from municipal storm sewers. One of the requirements is that permits "shall require controls to reduce the discharge of

² For a discussion of the evolution of the storm water program, consistent with guidance from the United States Environmental Protection Agency (U.S. EPA), see Board Order WQ 2000-11.

³ On March 23, the State Water Board also received brief letters from the Ramona Chamber of Commerce, the North San Diego County Association of Realtors, the San Diego County Apartment Association, the National Association of Industrial and Office Properties, and the California Building Industry Association. All of these letters state that they are "joining in" the petition filed by BIA. None of the letters contain any of the required information for petitions, which is listed at Cal. Code of Regs., tit. 23, section 2050. These letters will be treated as comments on the BIA petition. To the extent the authors intended the letters be considered petitions, they are dismissed.

⁴ Cal. Code of Regs., tit. 23, section 2054.

pollutants to the maximum extent practicable [MEP].” States establish appropriate requirements for the control of pollutants in the permits.

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of numeric effluent limitations, and the expectation that the level of effort to control urban runoff will increase over time.⁵ We pointed out that urban runoff is a significant contributor of impairment to waters throughout the state, and that additional controls are needed. Specifically, in Board Order WQ 2000-11 (hereinafter, LA SUSMP order), we concluded that the Los Angeles Regional Water Board acted appropriately in determining that numeric standards for the design of BMPs to control runoff from new construction and redevelopment constituted controls to the MEP.⁶

The San Diego permit incorporates numeric design standards for runoff from new construction and redevelopment similar to those considered in the LA SUSMP order.⁷ In addition, the permit addresses programmatic requirements in other areas. The LA SUSMP order was a precedential decision,⁸ and we will not reiterate our findings and conclusions from that decision.⁹

⁵ Board Order WQ 2000-11.

⁶ As explained in that Order, numeric design standards are not the same as numeric effluent limitations. While BIA contends that the permit under review includes numeric effluent limitations, it does not. A numeric design standard only tells the dischargers how much runoff must be treated or infiltrated; it does not establish numeric effluent limitations proscribing the quality of effluent that can be discharged following infiltration or treatment.

⁷ The San Diego permit also includes provisions that are different from those approved in the LA SUSMP Order, but which were not the subject of either petition. Such provisions include the inclusion of non-discretionary projects. We do not make any ruling in this Order on matters that were not addressed in either petition.

⁸ Government Code section 11425.60; State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.

⁹ BIA restates some of the issues this Board considered in the LA SUSMP order. For instance, BIA contends that it is inappropriate for the permit to regulate erosion control. While this argument was not specifically addressed in our prior Order, it is obvious that the most serious concern with runoff from construction is the potential for increased erosion. It is absurd to contend that the permit should have ignored this impact from urban runoff.

The petitioners make numerous contentions, mostly concerning requirements that they claim the dischargers will not be able to, or should not be required to, comply with. We note that none of the dischargers has joined in these contentions. We further note that BIA raises contentions that were already addressed in the LA SUSMP order. In this Order, we have attempted to glean from the petition issues that are not already fully addressed in Board Order Board Order WQ 2000-11, and which may have some impact on BIA and its members. WSPA restated the contentions it made in the petition it filed challenging the LA SUSMP order. We will not address those contentions again.¹⁰ But we will address whether the Regional Water Board followed the precedent established there as it relates to retail gasoline outlets.¹¹

¹⁰ On November 8, 2001, following the October 31 workshop meeting that was held to discuss the draft order, BIA submitted a "supplemental brief" that includes many new contentions raised for the first time. (Interested persons who were not petitioners filed comments on the draft order asking the State Water Board to address some of these.) The State Water Board will not address these contentions, as they were not timely raised. (Wat. Code § 13320; Cal. Code of Regs., tit. 23, § 2050(a).) Specific contentions that are not properly subject to review under Water Code section 13320 are objections to findings 16, 17, and 38 of the permit, the contention that permit provisions constitute illegal unfunded mandates, challenges to the permit's inspection and enforcement provisions, objections to permit provisions regarding construction sites, the contention that post-construction requirements should be limited to "discretionary" approvals, the challenge to the provisions regarding local government compliance with the California Environmental Quality Act, and contentions regarding the term "discharge" in the permit. BIA did not meet the legal requirements for seeking review of these portions of the permit.

¹¹ On November 8, 2001, the State Water Board received eight boxes of documents from BIA, along with a "Request for Entry of Documents into the Administrative Record." BIA failed to comply with Cal. Code of Regs., tit. 23, section 2066(b), which requires such requests be made "prior to or during the workshop meeting." The workshop meeting was held on October 31, 2001. The request will therefore not be considered. BIA also objected in this submittal that the Regional Water Board did not include these documents in its record. The Regional Water Board's record was created at the time the permit was adopted, and was submitted to the State Water Board on June 11, 2001. BIA's objection is not timely.

II. CONTENTIONS AND FINDINGS¹²

Contention: BIA contends that the discharge prohibitions contained in the permit are “absolute” and “inflexible,” are not consistent with the standard of “maximum extent practicable” (MEP), and financially cannot be met.

Finding: The gist of BIA’s contention concerns Discharge Prohibition A.2, concerning exceedance of water quality objectives for receiving waters: “Discharges from MS4s which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited.” BIA generally contends that this prohibition amounts to an inflexible “zero contribution” requirement.

BIA advances numerous arguments regarding the alleged inability of the dischargers to comply with this prohibition and the impropriety of requiring compliance with water quality standards in municipal storm water permits. These arguments mirror arguments made in earlier petitions that required compliance with water quality objectives by municipal storm water permittees. (See, e.g., Board Orders WQ 91-03, WQ 98-01, and WQ 99-05.) This Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. We adopted an iterative procedure for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters. The language in the permit in Receiving

¹² This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.) We make no determination as to whether we will address the same or similar issues when raised in future petitions.

Water Limitation C.1 and 2 is consistent with the language required in Board Order WQ 99-05, our most recent direction on this issue.¹³

While the issue of the propriety of requiring compliance with water quality objectives has been addressed before in several orders, BIA does raise one new issue that was not addressed previously. In 1999, the Ninth Circuit Court of Appeals issued an opinion addressing whether municipal storm water permits must require “strict compliance” with water quality standards.¹⁴ (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The court in *Browner* held that the Clean Water Act provisions regarding storm water permits do not require that municipal storm-sewer discharge permits ensure strict compliance with water quality standards, unlike other permits.¹⁵ The court determined that: “Instead, [the provision for municipal storm water permits] *replaces* the requirements of [section 301] with the requirement that municipal storm-sewer dischargers ‘reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants’.” (191 F.3d at 1165.) The court further held that the Clean Water Act does grant the permitting agency discretion to determine what pollution controls are appropriate for municipal storm water discharges. (*Id.* at 1166.) Specifically, the court stated

¹³ In addition to Discharge Prohibition A.2, quoted above, the permit includes Receiving Water Limitation C.1, with almost identical language: “Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited.” Receiving Water Limitation C.2 sets forth the iterative process for compliance with C.1, as required by Board Order WQ 99-05.

¹⁴ “Water quality objectives” generally refers to criteria adopted by the state, while “water quality standards” generally refers to criteria adopted or approved for the state by the U.S. EPA. Those terms are used interchangeably for purposes of this Order.

¹⁵ Clean Water Act § 301(b)(1)(C) requires that most NPDES permits require strict compliance with quality standards.

that U.S. EPA had the authority either to require "strict compliance" with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time. (*Id.*) The court in *Browner* upheld the EPA permit language, which included an iterative, BMP-based approach comparable to the language endorsed by this Board in Order WQ 99-05.

In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

It is true that the holding in *Browner* allows the issuance of municipal storm water permits that limit their provisions to BMPs that control pollutants to the maximum extent practicable (MEP), and which do not require compliance with water quality standards. For the reasons discussed below, we decline to adopt that approach. The evidence in the record before us is consistent with records in previous municipal permits we have considered, and with the data we have in our records, including data supporting our list prepared pursuant to Clean Water Act section 303(d). Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we

must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require “strict compliance” with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.¹⁶ The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.¹⁷

We have reviewed the language in the permit, and compared it to the model language in Board Order WQ 99-05. The language in the Receiving Water Limitations is virtually identical to the language in Board Order WQ 99-05. It sets a limitation on discharges that cause or contribute to violation of water quality standards, and then it establishes an iterative approach to complying with the limitation. We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of

¹⁶ Exceptions to this general rule are appropriate where site-specific conditions warrant. For example, the Basin Plan for the Lake Tahoe basin, which protects an outstanding national resource water, includes numeric effluent limitations for storm water discharges.

¹⁷ While BIA argues that the permit requires “zero contribution” of pollutants in runoff, and “in effect” contains numeric effluent limitations, this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for storm water similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.

water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.¹⁸

BIA also objects to Discharge Prohibition A.3, which appears to require that treatment and control of discharges must always occur prior to entry into the MS4: "Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited."¹⁹ An NPDES permit is properly issued for "discharge of a pollutant" to waters of the United States.²⁰ (Clean Water Act § 402(a).) The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges "from municipal storm sewers."

We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. It is certainly

¹⁸ The iterative approach is not necessary for all Discharge Prohibitions. For example, a prohibition against pollution, contamination or nuisance should generally be complied with at all times. (See, Discharge Prohibition A.1.) Also, there may be discharge prohibitions for particularly sensitive water bodies, such as the prohibition in the Ocean Plan applicable to Areas of Special Biological Significance.

¹⁹ Discharge Prohibition A.1 also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occurs "in waters of the state." Therefore, it is interpreted to apply only to discharges to receiving waters.

²⁰ Since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States." In general, the inclusion of "waters (footnote continued)

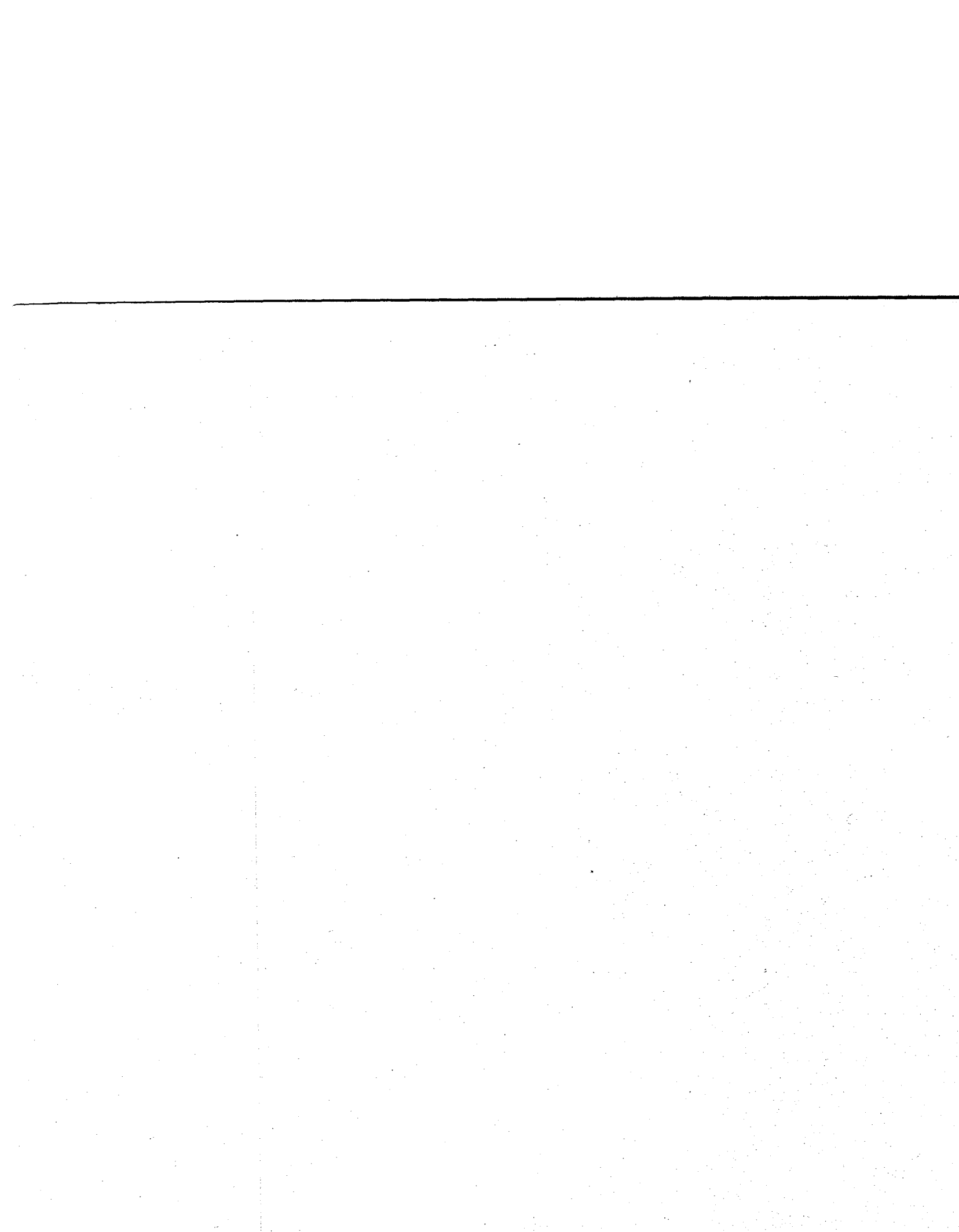
true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use "waters of the United States" as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.²¹ It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.

Contention: State law requires the adoption of wet weather water quality standards, and the permit improperly enforces water quality standards that were not specifically adopted for wet weather discharges.

Finding: This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions. In arguing that the permit violates state law, BIA states that because the permit applies the water quality objectives that were adopted in its Basin Plan, and those objectives were not specifically adopted for wet weather conditions only, the Regional Water Board violated

of the state" allows the protection of groundwater, which is generally not considered to be "waters of the United States."

²¹ There are other provisions in the permit that refer to restrictions "into" the MS4. (See, e.g., Legal Authority D.1.) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate controls for discharges into their system. For example, the federal regulations require that MS4s have a program "to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system . . ." (40 C.F.R. § 122.26(d)(2)(iv)(D).)



Water Code section 13241. These allegations appear to challenge water quality objectives that were adopted years ago. Such a challenge is clearly inappropriate as both untimely, and because Basin Plan provisions cannot be challenged through the water quality petition process. (See Water Code § 13320.) Moreover, there is nothing in section 13241 that supports the claim that Regional Water Boards must adopt separate wet weather water quality objectives. Instead, the Regional Water Board's response indicates that the water quality objectives were based on all water conditions in the area. There is nothing in the record to support the claim that the Regional Water Board did not in fact consider wet weather conditions when it adopted its Basin Plan. Finally, Water Code section 13263 mandates the Regional Water Board to implement its Basin Plan when adopting waste discharge requirements. The Regional Water Board acted properly in doing so.

BIA points to certain federal policy documents that authorize states to promulgate water quality standards specific to wet-weather conditions.²² Each Regional Water Board considers revisions to its Basin Plan in a triennial review. That would be the appropriate forum for BIA to make these comments.

Contention: BIA contends that the permit improperly classifies urban runoff as "waste" within the meaning of the Water Code.

Finding: BIA challenges Finding 2, which states that urban runoff is a waste, as defined in the Water Code, and that it is a "discharge of pollutants from a point source" under the federal Clean Water Act. BIA contends that the legislative history of section 13050(d) supports

²² These documents do not support the claim that U.S. EPA and the Clinton Administration indicated that the absence of such regulations "is a major problem that needs to be addressed," as claimed in BIA's Points and Authorities, at page 18.

its position that "waste" should be interpreted to exclude urban runoff. The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act. In discussing the definition of "waste," this document discusses its broad application to "current drainage, flow, or seepage into waters of the state of harmful concentrations" of materials, including eroded earth and garbage.

As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit. (At page 3.) It is also undisputed that urban runoff contains "waste" within the meaning of Water Code section 13050(d), and that the federal regulations define "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself.²³ The finding does create some confusion, since there are discharge prohibitions that have been incorporated into the permit that broadly prohibit the discharge of "waste" in certain circumstances. (See Attachment A to the permit.) The finding will therefore be amended to state that urban runoff contains waste and pollutants.

Contention: BIA contends that the Regional Water Board violated California Environmental Quality Act (CEQA).

²³ The Regional Water Board is appropriately concerned not only with pollutants in runoff but also the volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff. (See Board Order WQ 2000-11, at page 5.)

Finding: As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits.²⁴ BIA contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting “any waste discharge requirement” pursuant to Chapter 5.5 (§§ 13370 et seq., which applies to NPDES permits).²⁵ BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847. That case upheld the State Water Board’s view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant only to state law. The case did not concern an NPDES permit, and does not support BIA’s argument.

Contention: WSPA contends that the Regional Water Board did not follow this Board’s precedent for retail gasoline outlets (RGOs) established in the LA SUSMP order.

Finding: In the LA SUSMP order, this Board concluded that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. We also noted that, in light of the small size of many RGOs and the proximity to underground tanks, it might not always be feasible or safe to employ treatment methodologies. We directed the Los Angeles Regional Water Board to mandate that RGOs

²⁴ Water Code section 13389; see, e.g., Board Order WQ 2000-11.

²⁵ The exemption does have an exception for permits for “new sources” as defined in the Clean Water Act, which is not applicable here.

employ the BMPs listed in a publication of the California Storm Water Quality Task Force. (*Best Management Practice Guide – Retail Gasoline Outlets* (March 1997).) We also concluded that RGOs should not be subject to the BMP design standards at this time. Instead, we recommended that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. The LA SUSMP order did not preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

The permit adopted by the Regional Water Board did not comply with the directions we set forth in the LA SUSMP order for the regulation of RGOs. The permit contains no findings specific to the issues discussed in our prior order regarding RGOs, and includes no threshold for inclusion of RGOs in SUSMPs. Instead, the permit requires the dischargers to develop and implement SUSMPs within one year that include requirements for “Priority Development Project Categories,” including “retail gasoline outlets.” While other priority categories have thresholds for their inclusion in SUSMPs, the permit states: “Retail Gasoline Outlet is defined as any facility engaged in selling gasoline.”²⁶

The Regional Water Board responded that it did follow the directions in the LA SUSMP order. First, it points to findings that vehicles and pollutants they generate impact receiving water quality. But the only finding that even mentions RGOs is finding 4, which simply lists RGOs among the other priority development project categories as land uses that generate more pollutants. The Regional Water Board staff also did state some justifications for the inclusion of RGOs in two documents. The Draft Fact Sheet explains that RGOs contribute

²⁶ Permit at F.1.b(2)(a)(x).

pollutants to runoff, and opines that there are appropriate BMPs for RGOs. The staff also prepared another document after the public hearing, which was distributed to Board Members prior to their vote on the permit, and which includes similar justifications and references to studies.²⁷ The LA SUSMP order called for some type of threshold for inclusion of RGOs in SUSMPs. The permit does not do so. Also, justifications for permit provisions should be stated in the permit findings or the final fact sheet, and should be subject to public review and debate.²⁸ The discussion in the document submitted after the hearing did not meet these criteria. There was some justification in the "Draft Fact Sheet," but the fact sheet has not been finalized.²⁹ In light of our concerns over whether SUSMP sizing criteria should apply to RGOs, it was incumbent on the Regional Water Board to justify the inclusion of RGOs in the permit findings or in a final fact sheet, and to consider an appropriate threshold, addressing the concerns we stated. The Regional Water Board also responded that when the dischargers develop the SUSMPs, the dischargers might add specific BMPs and a threshold as directed in the LA SUSMP order. But the order specifically directed that any threshold, and the justification therefore, should be included in the permit. The Regional Water Board did not comply with these directions.

²⁷ See "Comparison Between Tentative Order No. 2001-01 SUSMP Requirements and LARWQCB SUSMP Requirements (as Supported by SWRCB Order WQ 2000-11)."

²⁸ See 40 C.F.R. sections 124.6(e) and 124.8.

²⁹ U.S. EPA regulations require that there be a fact sheet accompanying the permit. (40 C.F.R. § 124.8.) The record contains only a draft fact sheet, which was never published or distributed in final form. The Regional Water Board should finalize the fact sheet, accounting for any revisions made in the final permit, and publish it on its web site as a final document.

III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable. The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges "from" the municipal sewer system, and for discharges "to" waters of the United States, but not for discharges "into" the sewer system.

2. The Regional Water Board was not required to adopt wet-weather specific water quality objectives.

3. The Regional Water Board inappropriately defined urban runoff as "waste."

4. The Regional Water Board did not violate the California Environmental Quality Act.

5. The permit will be revised to delete retail gasoline outlets from the Priority Development Project Categories for Standard Urban Storm Water Mitigation Plans. The Regional Water Board may consider adding retail gasoline outlets, upon inclusion of appropriate findings and a threshold describing which outlets are included in the requirements.

IV. ORDER

IT IS HEREBY ORDERED that the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems in San Diego County (Order No. 2001-01) are revised as follows:

1. Part A.3: The words "into and" are deleted.
2. Part C.2: Throughout the first paragraph, the words ", Part A.2, and Part A.5 as it applies to Prohibition 5 in Attachment A" shall be inserted following "Part C.1."
3. Finding 2: Revise the finding to read: **URBAN RUNOFF CONTAINS "WASTE" AND "POLLUTANTS"**: Urban runoff contains waste, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the quality of the waters of the State.
4. Part F.1.b(2)(a): Delete section "x."

In all other respects the petitions are dismissed.

CERTIFICATION

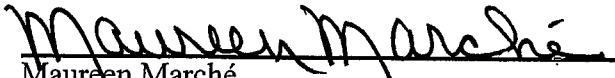
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 15, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Clerk to the Board

VOLUME IV
TAB 3

U.S. Environmental Protection Agency NPDES Permit Writers' Manual



U.S. Environmental Protection Agency
Office of Wastewater Management, Water Permits Division
State and Regional Branch

EPA-833-K-10-001 • September 2010



be found in the *EPA Great Lakes Water Quality Initiative Technical Support Document for the Procedure to Determine Bioaccumulation Factors*⁸ ([No link—see the endnote for ordering instructions](#)).

When establishing additional monitoring or special studies, permit writers must ensure that any requirements related to the study (e.g., special sampling or analytical procedures) are specified in the appropriate permit condition. In addition, permit writers should establish a reasonable schedule for completion and submission of the study or monitoring program. If the anticipated timeline is longer than one year, an interim progress report during the study is advisable.

9.1.2 Best Management Practices (BMPs)

In general, BMPs are actions or procedures to prevent or reduce the discharge of pollution to waters of the United States. Title 40 of the *Code of Federal Regulations* (CFR) section 122.2 includes the following in the definition of BMPs:

- Schedules of activities.
- Prohibitions of practices.
- Maintenance procedures.
- Treatment requirements.
- Operating procedures and practices to control
 - Plant site runoff.
 - Spillage or leaks.
 - Sludge or waste disposal.
 - Drainage from raw material storage areas.

9.1.2.1 When to Use BMPs

Clean Water Act (CWA) section 304(e) authorizes EPA to require BMPs as part of effluent limitations guidelines and standards (effluent guidelines) to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage that it determines are associated with or ancillary to the industrial manufacturing or treatment process and can contribute significant amounts of pollutants to navigable waters. Where effluent guidelines require specific control measures, including BMPs or development of a BMP plan, permit writers must include such requirements in permits. In addition, CWA section 402(p)(3)(B)(iii) states that permits for discharges from municipal storm sewers must require controls, including management practices, to reduce the discharge of pollutants. Finally, CWA sections 402(a)(1) and (2) give the permitting authority the ability to include BMPs in permits on a case-by-case basis to carry out the provisions of the CWA.

The NPDES regulations at § 122.44(k) track the statutory provisions cited above. This section of the regulations provides that permits must contain BMPs (when applicable) to control or abate the discharge of pollutants when any of the following are true:

- They are authorized under CWA section 304(e).
- They are authorized under CWA section 402(p) for the control of stormwater discharges.
- Numeric effluent limitations are infeasible.
- The practices are necessary to achieve effluent limitations and standards or carry out the purpose and intent of the CWA.

Circumstances under which numeric effluent limitations might be infeasible include the following:

- Regulating a pollutant for which limited treatability or aquatic impact data are available to allow development of numeric TBELs or WQBELs.
- Regulating discharges when the types of pollutants vary greatly over time.

In addition, a permit writer should consider using BMPs under any of the following circumstances:

- When chemical analyses are inappropriate or impossible.
- When there is a history of leaks and spills or when housekeeping is sloppy.
- When a complex facility lacks data for a pollutant or pollutants.

9.1.2.2 BMPs in NPDES Permits

Permit writers include BMP requirements in permits using two approaches: (1) site-, process-, or pollutant-specific BMPs, or (2) a requirement to develop a BMP plan. Site-, process-, or pollutant-specific BMPs might be appropriate in the case of an individual permit where a permit writer has the opportunity to review the circumstances at the facility. On the other hand, it might not be appropriate to include site-, process-, or pollutant-specific BMPs as conditions in a general permit, a permit for a particularly complex facility, or a permit for a facility with operations not familiar to the permit writer. Instead, complicated facilities and discharges covered under a general permit could be required to develop a BMP plan that requires the permittee to determine appropriate BMPs on the basis of circumstances at its facility.

Specific BMPs

Specific BMPs are designed to address conditions particular to a type of facility or to a specific site, process, or pollutant. Specific BMPs might be used in a permit when

- They are needed to address ancillary activities that could result in the discharge of pollutants to waters of the United States.
- Numeric effluent limitations for a specific process are otherwise infeasible and BMPs serve as effluent limitations for that process.
- They are required to supplement and ensure compliance with effluent limitations in the permit.

To select a specific BMP, the permit writer could

- Review the industry profiles or the specific facility to determine the applicable and appropriate management practices.
- Evaluate whether the BMP would help to achieve effluent limitations or other environmental objectives for that facility.
- Use information from other permits, pollution prevention sources, and EPA guidance documents to identify applicable and appropriate BMPs.

Specific BMPs frequently are required for certain types of dischargers such as concentrated animal feeding operations (CAFOs), combined sewer overflows (CSOs), and stormwater discharges.

BMP Plans

The *Guidance Manual for Developing Best Management Practices*⁹ <www.epa.gov/npdes/pubs/owm0274.pdf> describes the activities and materials at an industrial or municipal facility that are best addressed by BMPs. The manual also describes how BMPs work and gives examples of types of BMPs.

If a permit writer requires a BMP plan, it is the facility's responsibility to develop, implement, and evaluate the success or shortfalls of its own plan. Often, a BMP committee (i.e., a group of individuals within the plant organization) is responsible for developing the BMP plan and assisting the plant management in implementing and updating the BMP plan.

EPA has identified several recommended components of effective BMP plans and detailed each component in the *Guidance Manual for Developing Best Management Practices*. The minimum suggested components of a general BMP plan are presented below:

- General Provisions
 - Name and location of facility.
 - Statement of BMP policy and objective.
 - Review by plant manager.
- Specific Provisions
 - BMP committee.
 - Risk identification and assessment.
 - Reporting of BMP incidents.
 - Materials compatibility.
 - Good housekeeping.
 - Preventive maintenance.
 - Inspections and records.
 - Security.
 - Employee training.

BMP plans used to supplement effluent limitations or to describe how the discharger plans to meet effluent limitations can be submitted to the regulatory agency or be kept on-site and made available to the permitting authority upon request. A general schedule for BMP plan development can be included in the permit (e.g., complete and submit the plan within six months of permit issuance and begin implementing the plan within nine months of permit issuance).

Exhibit 9-1 presents example permit text for a requirement to develop and implement a BMP plan and should be adapted as necessary to reflect conditions at the individual facility.

Exhibit 9-1 Example BMP plan requirement

The following is example text for requiring development and implementation of a BMP plan through an NPDES permit. The text should be crafted and changed as necessary to meet the individual facility's needs and the permitting authority's goals. The bracketed text should be updated to be specific to the permit.

1. Implementation.

[IF A BMP PLAN DOES NOT EXIST:]

The permittee, must develop and implement a best management practices (BMP) plan that achieves the objectives and the specific requirements listed below. A copy of the plan must be submitted to the U.S. Environmental Protection Agency (EPA) [AND/OR STATE AGENCY] within six months of the effective date of this permit. The plan must be implemented as soon as possible but no later than nine months from the effective date of the permit. The permittee must update and amend the plan as needed.

[IF A BMP PLAN ALREADY EXISTS:]

The permittee must during the term of this permit operate the facility in accordance with the BMP plan [CITE EXISTING PLAN] and in accordance with subsequent amendments to the plan. The permittee must amend the plan to incorporate practices to achieve the objectives and specific requirements listed below, and a copy of the amended plan must be submitted to the U.S. Environmental Protection Agency (EPA) [AND/OR STATE AGENCY] within three months of the effective date of this permit. The amended plan must be implemented as soon as possible but not later than six months from the effective date of the permit.

2. Purpose

Through implementation of the BMP plan the permittee must prevent or minimize the generation and the potential for the release of pollutants from the facility to the waters of the United States through normal operations and ancillary activities.

3. Objectives

The permittee must develop and amend the BMP plan consistent with the following objectives for the control of pollutants.

- a. The number and quantity of pollutants and the toxicity of effluent generated, discharged, or potentially discharged at the facility must be minimized by the permittee to the extent feasible by managing each influent waste stream in the most appropriate manner.
- b. Under the BMP plan, and any Standard Operating Procedures (SOPs) included in the plan, the permittee must ensure proper operation and maintenance of the treatment facility as required by § 122.41(e).
- c. The permittee must establish specific objectives for the control of pollutants by conducting the following evaluations.
 1. Each facility component or system must be examined for its waste minimization opportunities and its potential for causing a release of significant amounts of pollutants to waters of the United States because of equipment failure, improper operation, and natural phenomena such as rain or snowfall, etc. The examination must include all normal operations and ancillary activities including material storage areas, plant site runoff, in-plant transfer, process and material handling areas, loading or unloading operations, spillage or leaks, sludge and waste disposal, or drainage from raw material storage. [NOTE THAT ONLY THE APPLICABLE AREAS SHOULD BE INCLUDED IN THE PREVIOUS LIST.]
 2. Where experience indicates a reasonable potential for equipment failure (e.g., a tank overflow or leakage), natural condition (e.g., precipitation), or other circumstances that may result in significant amounts of pollutants reaching surface waters, the program should include a prediction of the direction, rate of flow and total quantity of pollutants that could be discharged from the facility as a result of each condition or circumstance.

4. Requirements

The BMP Plan must be consistent with the objectives in the Objectives section above and the general guidance contained in the publication entitled *Guidance Manual for Developing Best Management Practices (BMPs)*, EPA 833-B-93-004, <www.epa.gov/npdes/pubs/owm0274.pdf> or any subsequent revisions to the guidance document. The BMP plan must

- a. Be documented in narrative form, must include any necessary plot plans, drawings or maps, and must be developed in accordance with good engineering practices. The BMP plan must be organized and written with the following structure:
 1. Name and location of the facility.
 2. Statement of BMP policy.
 3. Structure, functions, and procedures of the BMP Committee.
 4. Specific management practices and standard operating procedures to achieve the above objectives, including the following:

Exhibit 9-1 Example BMP plan requirement (continued)

- a. Modification of equipment, facilities, technology, processes, and procedures.
 - b. Reformulation or redesign of products.
 - c. Substitution of materials.
 - d. Improvement in management, inventory control, materials handling or general operational phases of the facility.
5. Risk identification and assessment.
 6. Reporting of BMP incidents.
 7. Materials compatibility.
 8. Good housekeeping.
 9. Preventative maintenance.
 10. Inspections and records.
 11. Security.
 12. Employee training.
- b. Include the following provisions concerning BMP plan review:
 1. Review by plant engineering staff and the plant manager.
 2. Review and endorsement by the permittee's BMP Committee.
 3. A statement that the above reviews have been completed and that the BMP plan fulfills the requirements set forth in this permit. The statement must include the dated signatures of each BMP Committee member as certification of the reviews.
 - c. Establish specific BMPs to meet the objectives identified in the Objectives section above, addressing each component or system capable of generating or causing a release of significant amounts of pollutants, and identifying specific preventive or remedial measures to be implemented.
 - d. Establish specific BMPs or other measures that ensure that the following specific requirements are met:
 1. Ensure proper management of solid and hazardous waste in accordance with regulations promulgated under the Resource Conservation and Recovery Act (RCRA). Management practices required under RCRA regulations must be referenced in the BMP plan.
 2. Reflect requirements for Spill Prevention, Control, and Countermeasure (SPCC) plans under Clean Water Act (CWA) section 311 and 40 CFR Part 112 and may incorporate any part of such plans into the BMP plan by reference.
 3. Reflect requirements for stormwater control under CWA section 402(p) and the regulations at 40 CFR 122.26 and 122.44, and otherwise eliminate to the extent practicable, contamination of stormwater runoff.

etc.

[NOTE: SECTION d. ABOVE COULD BE TAILORED TO EACH FACILITY BY THE PERMIT WRITER AND MAY INCLUDE PROCESSES OR AREAS OF THE FACILITY WITH HOUSEKEEPING PROBLEMS, NONCOMPLIANCE, SPILLS/LEAKS, OR OTHER PROBLEMS THAT COULD BE REMEDIATED THROUGH A BMP. IF THERE IS A KNOWN SOLUTION TO THE PROBLEM (E.G., MORE FREQUENT INSPECTIONS, PREVENTIVE MAINTENANCE, ETC.), THIS REMEDY COULD ALSO BE INCLUDED AS A PART OF THE BMP PLAN REQUIREMENTS. TO GATHER IDEAS FOR SUCH REQUIREMENTS, THE PERMIT WRITER MAY WANT TO CONTACT THE PERMITTEE, COMPLIANCE PERSONNEL, FACILITY INSPECTORS, OPERATIONS OFFICE PERSONNEL, AND STATE AGENCY COUNTERPARTS. THE PERMIT WRITER MIGHT ALSO WANT TO CHECK REQUIREMENTS IN OTHER PERMITS AND BMP PLANS FOR SIMILAR FACILITIES.]

5. Documentation

The permittee must maintain a copy of the BMP plan at the facility and must make the plan available to EPA **[AND/OR STATE AGENCY]** upon request. All offices of the permittee, which are required to maintain a copy of the NPDES permit, must also maintain a copy of the BMP plan.

6. BMP Plan Modification

The permittee must amend the BMP plan whenever there is a change in the facility, or in the operation of the facility, that materially increases the generation of pollutants or their release or potential release to the receiving waters. The permittee must also amend the plan, as appropriate, when plant operations covered by the BMP plan change. Any such changes to the BMP plan must be consistent with the objectives and specific requirements listed above. All changes in the BMP plan must be reported to EPA **[AND/OR STATE AGENCY]** in writing.

7. Modification for Ineffectiveness

If at any time the BMP plan proves to be ineffective in achieving the general objective of preventing and minimizing the generation of pollutants and their release and potential release to the receiving waters and/or the specific requirements above, the permit and/or the BMP plan must be subject to modification to incorporate revised BMP requirements.

9.1.2.3 Pollution Prevention in BMPs

BMPs are, by their nature, pollution prevention practices. Traditionally, BMPs have focused on good housekeeping measures and good management techniques that attempt to avoid contact between pollutants and water as a result of leaks, spills, and improper waste disposal. However, on the basis of the authority granted under the regulations, BMPs may include a range of pollution prevention options, including production modifications, operational changes, materials substitution, and materials and water conservation.

When developing BMPs, permit writers should be familiar with the fundamental principles of pollution prevention:

- Pollution should be prevented or reduced at the source, whenever feasible (*Reduce*).
- Pollution that cannot be prevented should be reused or recycled in an environmentally safe manner, whenever feasible (*Reuse-Recycle*).
- Pollution that cannot be prevented or recycled should be treated in an environmentally safe manner, whenever feasible (*Treat*).
- Disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner (*Dispose of*).

When writing an NPDES permit, a permit writer who has familiarity with a certain type of processes might identify pollution prevention practices that are not used at a facility and that would help that facility achieve its pollution prevention goals. Where the pollution prevention practices are necessary to carry out the purposes and intent of the CWA, the permit writer may develop BMPs to implement those practices.

9.1.3 Compliance Schedules

The NPDES regulations at § 122.47 allow permit writers to establish schedules of compliance to give permittees additional time to achieve compliance with the CWA and applicable regulations. Schedules developed under this provision must require compliance by the permittee *as soon as possible*, but may not extend the date for final compliance beyond compliance dates established by the CWA. Thus, compliance schedules in permits are not appropriate for every type of permit requirement. Specifically, a permit writer may not establish a compliance schedule in a permit for TBELs because the statutory deadlines for meeting technology standards (i.e., secondary treatment standards and effluent guidelines) have passed. This restriction applies to both existing and new dischargers. Permit writers should note, however, that § 122.29(d)(4) allows a new source or new discharger up to 90 days to *start-up* its pollution control equipment and achieve compliance with its permit conditions (i.e., provides for up to a 90-day period to achieve compliance).

Examples of requirements for which a compliance schedule in an NPDES permit might be appropriate include:

- Pretreatment program development.
- Sludge use and disposal program development and implementation.
- BMP plan development and implementation.
- Effluent limitations derived from new or revised water quality standards.

VOLUME IV
TAB 4



1 of 2 DOCUMENTS

FEDERAL REGISTER

Vol. 61, No. 166

Notices

ENVIRONMENTAL PROTECTION AGENCY (EPA)

[FRL-5559-9]

Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits

61 FR 43761

DATE: Monday, August 26, 1996

ACTION: Notice.

SUMMARY: Notice is hereby given that the Environmental Protection Agency (EPA) has issued a policy outlining an interim approach for incorporating water quality-based effluent limitations into storm water permits.

Background and Purpose

Due to the nature of storm water discharges, and the typical lack of information on which to base numeric water quality-based effluent limitations (expressed as concentration and mass), EPA has developed an interim permitting approach for National Pollution Discharge Elimination System (NPDES) storm water permits. While this interim permitting approach applies only to EPA, the Agency also encourages authorized States and Tribes to adopt similar policies for storm water permits.

The policy addresses issues related to the type of effluent limitations that are most appropriate for NPDES storm water permits to provide for the attainment of water quality standards. Since the policy only applies to water quality-based effluent limitations, it is not intended to affect technology-based limitations, such as those based on effluent guidelines or the permit writer's best professional judgements, that are incorporated into storm water permits. With this policy, the Office of Water is seeking to fulfill objectives of the 1996-1997 National Water Program Agenda for the Future, including reducing the threat of wet weather discharges to water quality, providing States and local governments with greater flexibility to solve wet weather problems, and identifying and taking appropriate steps to reduce the existing burden of the Storm Water Phase I program.

Numerous parties were involved in preparing this policy. In addition to receiving significant input from the Urban Wet Weather Flows (UWWF) Federal Advisory Committee, EPA also consulted with the States and Regional Storm Water Coordinators. This interim permitting approach may be modified as a result of ongoing policy dialogue with the UWWF Federal Advisory Committee.

Policy Statement

In response to recent questions regarding the type of water quality-based effluent limitations that are most appropriate for National Pollutant Discharge Elimination System (NPDES) storm water permits, the Environmental Protection Agency (EPA) is adopting an interim permitting approach for regulating wet weather storm water discharges. Due to the nature of storm water discharges, and the typical lack of information on which to base numeric water quali-

ty-based effluent limitations (expressed as concentration and mass), EPA will use an interim permitting approach for NPDES storm water permits.

The interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards. In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate. This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effluent limitations. Since the policy only applies to water quality-based effluent limitations, it is not intended to affect technology-based limitations, such as those based on effluent guidelines or the permit writer's best professional judgement, that are incorporated into storm water permits.

Each storm water permit should include coordinated and cost-effective monitoring program to gather necessary information to determine the extent to which the permit provides for attainment of applicable water quality standards and to determine the appropriate conditions or limitations for subsequent permits. Such a monitoring program may include, ambient monitoring, receiving water assessment, discharge monitoring (as needed), or a combination of monitoring procedures designed to gather necessary information.

This interim permitting approach applies only to EPA, however, EPA also encourages authorized States and Tribes to adopt similar policies for storm water permits. This interim permitting approach provides time, where necessary, to more fully assess the range of issues and possible options for the control of storm water discharges for the protection of water quality. This interim permitting approach may be modified as a result of the ongoing Urban Wet Weather Flows Federal Advisory Committee policy dialogue on this subject.

DATES: The policy was signed by the Assistant Administrator for Water on August 1, 1996.

FOR FURTHER INFORMATION CONTACT: If you have questions about the policy, please contact, Bill Swietlik, Storm Water Phase I Matrix Manager, Office of Wastewater Management, at (202) 260-9529 or William Hall, Urban Wet Weather Flows Matrix Manager, Office of Wastewater Management, at (202) 260-1458, or by Internet: hall.william@epamail.epa.gov.

Dated: August 19, 1996.

Fred Lindsey,

Acting Director, Office of Wastewater Management, Designated Federal Official.

[FR Doc. 96-21671 Filed 8-23-96; 8:45 am]

BILLING CODE 6560-50-P

VOLUME IV
TAB 5



2 of 2 DOCUMENTS

FEDERAL REGISTER

Vol. 61, No. 216

Notices

ENVIRONMENTAL PROTECTION AGENCY (EPA)

[FRL-5646-6]

Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits

61 FR 57425

DATE: Wednesday, November 6, 1996

ACTION: Notice.

To view the next page, type .np* TRANSMIT.
To view a specific page, transmit p* and the page number, e.g. p*1

[*57425]

SUMMARY: Notice is hereby given that the Environmental Protection Agency (EPA) has developed a set of questions and answers to assist municipalities and permitting authorities in implementing its recent policy outlining an interim approach for incorporating water quality-based effluent limitations into storm water permits.

Background and Purpose

On August 26, 1996, the EPA published in the **Federal Register** (61 FR 43761) a policy outlining an interim approach for incorporating water quality-based effluent limitations into National Pollution Discharge Elimination System (NPDES) storm water permits. The policy was developed to address the variable nature of storm water discharges, and the typical lack of information on which to base numeric water quality-based effluent limitations (expressed as concentration and mass). The policy addresses issues related to the type of effluent limitations that are most appropriate for NPDES storm water permits to provide for the attainment of water quality standards. Since the policy only applies to water quality-based effluent limitations, it is not intended to affect technology-based limitations, such as those based on effluent guidelines or the permit writer's best professional judgements, that are incorporated into storm water permits.

Based on numerous requests for additional information regarding the implementation of the policy, the EPA has developed the following set of questions and answers. For convenience, the policy is also reprinted below.

Policy Statement

In response to recent questions regarding the type of water quality-based effluent limitations that are most appropriate for National Pollutant Discharge Elimination System (NPDES) storm water permits, the Environmental Protection Agency (EPA) is adopting an interim permitting approach for regulating wet weather storm water discharges. Due

to the nature of storm water discharges, and the typical lack of information on which to base numeric water quality-based effluent limitations (expressed as concentration and mass), EPA will use an interim permitting approach for NPDES storm water permits.

The interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards. In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate. This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effluent limitations. Since the policy only applies to water quality-based effluent limitations, it is not intended to affect technology-based limitations, such as those based on effluent guidelines or the permit writer's best professional judgement, that are incorporated into storm water permits. [*57426]

Each storm water permit should include coordinated and cost-effective monitoring program to gather necessary information to determine the extent to which the permit provides for attainment of applicable water quality standards and to determine the appropriate conditions or limitations for subsequent permits. Such a monitoring program may include, ambient monitoring, receiving water assessment, discharge monitoring (as needed), or a combination of monitoring procedures designed to gather necessary information.

This interim permitting approach applies only to EPA, however, EPA also encourages authorized States and Tribes to adopt similar policies for storm water permits. This interim permitting approach provides time, where necessary, to more fully assess the range of issues and possible options for the control of storm water discharges for the protection of water quality. This interim permitting approach may be modified as a result of the ongoing Urban Wet Weather Flows Federal Advisory Committee policy dialogue on this subject.

Questions and Answers

Question 1: Must EPA require that storm water dischargers, industrial or municipal, be subject to numeric water quality-based effluent limitations (expressed as concentration and mass) in order to attain water quality standards (WQS)?

Answer 1: No. Although National Pollutant Discharge Elimination System (NPDES) permits must contain conditions to ensure that water quality standards are met, this does not require the use of numeric water quality-based effluent limitations. Under the Clean Water Act (CWA) and NPDES regulations, permitting authorities may employ a variety of conditions and limitations in storm water permits, including best management practices, performance objectives, narrative conditions, monitoring triggers, action levels (e.g., monitoring benchmarks, toxicity reduction evaluation action levels), etc., as the necessary water quality-based limitations, where numeric water quality-based effluent limitations are determined to be unnecessary or infeasible.

Analysis

A. The Clean Water Act does not require numeric effluent limitations.

Section 301 of the CWA requires that discharger permits include effluent limitations necessary to meet State or Tribal WQS. Section 502 defines "effluent limitation" to mean *any* restriction on quantities, rates, and concentrations of constituents discharged from point sources. The CWA does not say that effluent limitations need be numeric. As a result, EPA and States have flexibility in terms of how to express effluent limitations.

B. EPA's regulations do not always require numeric effluent limitations.

EPA has, through regulation, interpreted the statute to allow for non-numeric limitations (e.g., "best management practices" or BMPs, see 40 CFR 122.2) to supplement or replace numeric limitations in specific instances that meet the criteria specified at 40 CFR 122.44(k). This regulation essentially codifies a court case addressing storm water discharges. *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). In that case, the Court stated that EPA need not establish numeric effluent limitations where such limitations were infeasible.

C. EPA has interpreted the statute and regulations to allow BMPs in lieu of numeric limitations.

EPA has defended use of BMPs as a substitute for numeric limitations in litigation involving storm water discharges (*CBE v. EPA*, 91-70056 (9th Cir.)(brief on merits)) and in correspondence (Letter from Michael Cook, EPA, to Peter

Lehner, NRDC, May 31, 1995). EPA has found that numeric limitations for storm water permits can be very difficult to develop at this time because of the existing state of knowledge about the intermittent and variable nature of these types of discharges and their effects on receiving waters. Some storm water permits, however, currently do contain numeric water quality-based effluent limitations where adequate information exists to derive such limitations.

Question 2: Has EPA provided guidance on a methodology for deriving numeric water quality-based effluent limitations?

Answer 2: Yes, but primarily for continuous wastewater discharges at low flow conditions in the receiving water, not intermittent wet weather discharges during high flow conditions. Regulations at 40 CFR 122.44(d) specify the requirements under which permitting authorities establish water quality-based effluent limitations when a facility has the "reasonable potential" to cause or contribute to an excursion of numeric or narrative water quality criteria. In addition, EPA guidance in the *Technical Support Document for Water Quality-Based Toxics Control (TSD)* and the *NPDES Permit Writers Training Manual*, supplemented with total maximum daily load (TMDL) and modeling guidance, supports issuing permits that include numeric water quality-based effluent limitations. This guidance was based on crafting numeric water quality-based effluent limitations using TMDLs, or calculations similar to those used in developing TMDLs, and wasteload allocations (WLAs) derived through modeling. EPA expects the Urban Wet Weather Flows Federal Advisory Committee (60 FR 21189, May 1, 1995) will review this issue at greater length and may provide recommendations on how to proceed.

Question 3: Why can numeric water quality-based effluent limitations be difficult to derive for storm water permits?

Answer 3: Storm water discharges are highly variable both in terms of flow and pollutant concentrations, and the relationships between discharges and water quality can be complex. The water quality impacts of storm water discharges are related to the uses designated by States and Tribes in their WQS, the quality of the storm water discharge (e.g., conventional or toxic pollutants conveyed to the receiving water) and quantity of the storm water (e.g., erosion and loss of habitat caused by increased flows and velocity). Uses may be impacted by both water quality and water quantity. Depending on site-specific considerations, some of the water quality impacts of storm water discharges may be more related to the physical effects (e.g., stream bank erosion, streambed scouring, extreme temperature variations, sediment smothering) than the type and amount of pollutants present in the discharge. For municipal storm water discharges in particular, the current use of system-wide permits and a variety of jurisdiction-wide BMPs, including educational and programmatic BMPs, does not easily lend itself to the existing methodologies for deriving numeric water quality-based effluent limitations. These methodologies were designed primarily for process wastewater discharges which occur at predictable rates with predictable pollutant loadings under low flow conditions in receiving waters. Using these methodologies, limitations are typically derived for each specific outfall to be protective of low flows in the receiving water. Because of this, permit writers have not made wide-spread use of the existing methodologies and models for storm water discharge permits. In addition, wet weather modeling is technically more difficult and expensive than the simple dilution models generally used in the permitting process.

Question 4: Has EPA previously recognized the technical difficulty in deriving numeric water quality-based [*57427] effluent limitations for storm water discharges?

Answer 4: Yes. EPA recognized the technical difficulty in deriving numeric water quality-based effluent limitations for wet weather discharges in its brief on the merits in *Citizens for a Better Environment (CBE) v. United States Environmental Protection Agency*, 91-70056 (9th Cir.) and in the Great Lakes Water Quality Guidance (58 FR 20841, April 16, 1993).

In the *CBE* case, EPA explained why it was technically infeasible to derive numeric water quality-based effluent limitations for the discharge of metals in storm water into South San Francisco Bay and asserted that a water quality-based effluent limitation could take the form of a narrative statement, such as a BMP, if it was infeasible to derive a numeric limitation. In explaining its arguments in the *CBE* case, EPA cited 40 CFR 122.44(k)(2), which provides that BMPs may be imposed in NPDES permits "to control or abate the discharge of pollutants when * * * [n]umeric effluent limitations are infeasible."

In the Great Lakes Water Quality Guidance, EPA did not extend the method for calculating wasteload allocations, the basis for numeric water quality-based effluent limitations, to storm water or combined sewer overflow (CSO) discharges because the varying nature of these discharges is inconsistent with the assumptions used in developing the guidance. The Great Lakes Water Quality Guidance defers to national guidance and policy on wet weather and does not

seek to establish a separate and distinct set of wet weather requirements. EPA expects the Urban Wet Weather Flows Advisory Committee to provide recommendations about how to address the broader technical issues involved in achieving compliance with WQS in a wet weather context.

Question 5: What are the potential problems of using standard methodologies to derive numeric water quality-based effluent limitations for storm water permits?

Answer 5: Correctly derived numeric water quality-based effluent limitations provide a greater degree of confidence that a discharge will not cause or contribute to an exceedance of the WQS, because numeric water quality-based effluent limitations are derived directly from the numeric component of those standards. In addition, numeric water quality-based effluent limitations can avoid the expense associated with overly protective treatment technologies because numeric water quality-based effluent limitations provide a more precisely quantified target for permittees. Potential problems of incorporating inappropriate numeric water quality-based effluent limitations rather than BMPs in storm water permits at this time are significant in some cases. Deriving numeric water quality-based effluent limitations for any NPDES permit without an adequate effluent characterization, or an adequate receiving water exposure assessment (which could include the use of dynamic modeling or continuous simulations) may result in the imposition of inappropriate numeric limitations on a discharge. Examples of this include the imposition of numeric water quality criteria as end-of-pipe limitations without properly accounting for the receiving water assimilation of the pollutant or failure to account for a mixing zone (if allowed by applicable State or Tribal WQS). This could lead to overly stringent permit requirements, and excessive and expensive controls on storm water discharges, not necessary to provide for attainment of WQS. Conversely, an inadequate effluent characterization could lead to water quality-based effluent limitations that are not stringent enough to provide for attainment of WQS. This could result because effluent characterization and exposure assessments for discharges with high variability of pollutant concentrations, loadings, and flow are more difficult than with process wastewater discharges at low flows.

Question 6: How are water quality-based effluent limitations developed for combined sewer overflow (CSO) discharges?

Answer 6: The CSO Control Policy issued by EPA on April 19, 1994 (59 FR 18688) provides direction on compliance with the technology-based and water quality-based requirements of the CWA for communities with combined sewer systems. The CSO Policy provides for implementation of technology-based requirements (expressed as "nine minimum controls") by January 1, 1997.

In addition, under the CSO Policy, communities are also expected to develop long-term control plans that will provide for attainment of WQS through either the "presumption approach" or the "demonstration approach." Under the presumption approach, CSO controls would be presumed to attain WQS if certain performance criteria are met. A program that meets the criteria specified in the CSO policy is presumed to provide an adequate level of control to meet the water quality-based requirements of the CWA, provided the permitting authority determines that such presumption is reasonable based on characterization, monitoring, and modeling of the system, including consideration of sensitive areas. Under the demonstration approach, the permittee would demonstrate that the selected CSO controls, when implemented, would be adequate to meet the water quality-based requirements of the CWA.

The CSO Policy anticipates that it will be difficult in the early stages of permitting to determine whether numeric water quality-based effluent limitations are necessary for CSOs, and, if so, what the limitations should be. For that reason, in the absence of sufficient data to evaluate the need for numeric water quality-based effluent limitations, the Policy recommends that the first phase of CSO permits ("Phase I") contain a narrative requirement to comply with WQS. Further, so-called "Phase II" permits would contain water quality-based effluent limitations, as provided in 40 CFR 122.44(d)(1) and 122.44(k), that may take the form of numeric performance or design standards, such as a certain number of overflow events or a certain percent volume capture. Generally, only after the long-term control plan is in place and after collection of sufficient water quality data (including applicable wasteload allocations developed during a TMDL process) would numeric water quality-based effluent limitations be included in the permit. This would likely occur only after several permitting cycles.

Question 7: If BMPs alone are demonstrated to provide adequate water quality protection, are additional controls necessary?

Answer 7: No. If the permitting authority determines that, through implementation of appropriate BMPs required by the NPDES storm water permit, the discharges have the necessary controls to provide for attainment of WQS and any technology-based requirements, additional controls need not be included in the permit. Conversely, if a discharger

(municipal or industrial) fails or refuses to adopt and implement adequate BMPs, the permitting authority may have to consider other approaches to ensure water quality protection.

If, however, the permitting authority has adequate information on which to base more specific conditions or limitations, such limitations are to be incorporated into storm water permits, as necessary and appropriate. Such conditions or limitations may include an integrated suite of BMPs, performance objectives, narrative standards, monitoring triggers, numeric water quality-based effluent limitations, [*57428] action levels, etc. Storm water permits may also need to include additional requirements to receive State or Tribal 401 certifications.

Question 8: What is EPA doing to develop information about the linkage between BMPs and water quality and to facilitate a watershed-based approach to storm water permitting?

Answer 8: The Agency has cooperative agreements with WERF (Water Environment Research Foundation) and ASCE (American Society of Civil Engineers) to research which BMPs are most effective under which circumstances. The results of this research should provide permitting authorities and permittees with information about how to evaluate the effectiveness of different kinds of BMPs in different circumstances and to select the most appropriate controls to achieve water quality objectives. EPA also has cooperative agreements with the Watershed Management Institute and other organizations to conduct research over the next two to four years that will examine the capability of storm water BMPs to improve receiving water quality and restore/protect the biological integrity of those waters. EPA expects the Urban Wet Weather Flows Federal Advisory Committee to provide recommendations on how to permit storm water discharges on a watershed basis.

Question 9: The interim permitting approach states that permits should include monitoring programs to generate necessary information to determine the extent to which permits are providing for the attainment of water quality standards. What types of monitoring should be included and how much monitoring is necessary?

Answer 9: The amount and types of monitoring necessary will vary depending on the individual circumstances of each storm water discharge. EPA encourages dischargers and permitting authorities to carefully evaluate monitoring needs and storm water program objectives so as to select useful and cost-effective monitoring approaches. For most dischargers, storm water monitoring can be conducted for two basic reasons: (1) to identify if problems are present, either in the receiving water or in the discharge, and to characterize the cause(s) of such problems; and (2) to assess the effectiveness of storm water controls in reducing contaminants and making improvements in water quality.

Under the NPDES storm water program, large and medium municipal separate storm sewer system permittees are required to conduct monitoring. EPA recommends that each such municipal permittee design the monitoring effort to be supportive of the goals and objectives of its storm water management program when developing such a program for the term of its NPDES permit. To accomplish this, a municipal permittee may use a variety of storm water monitoring tools including receiving water chemistry; receiving water biological assessments (benthic invertebrate surveys, fish surveys, habitat assessments, etc.); effluent monitoring; including chemical, whole effluent and visual examinations; illicit connections screening; and combinations thereof, or other methods. Techniques that assess receiving waters will help to identify the degree to which storm water discharges are contributing to any water quality problems. Techniques that assess storm water discharge characteristics will help to identify potential causes of any identified water quality problems. The municipal permittee, in conjunction with the applicable NPDES permitting authority, should determine which monitoring approaches would be most appropriate given the objectives of the storm water management program. If municipal permittees conduct ambient monitoring, it may be most cost-effective to pool resources with other organizations (including, for example, other municipalities, States, and Tribes) conducting monitoring within the same watershed. This could be best accomplished through a coordinated watershed monitoring strategy.

For industrial storm water dischargers, monitoring may be required under the terms of an NPDES permit for storm water discharges. For those industrial storm water permits that do require monitoring, this is typically done to characterize contaminants that might be found in the industrial runoff and/or to assess the effectiveness of the industrial storm water pollution prevention plan in reducing these contaminants. This typically involves end-of-pipe chemical-specific monitoring. End-of-pipe monitoring may be more appropriate for an industrial facility than for a municipal permittee, given the industrial facility's more discrete site characteristics, which make management strategies such as collection and treatment more feasible. Industries, for the most part, have readily defined storm water conveyances into which runoff flows from discrete drainage areas. Industries may more readily identify and control existing on-site sources of storm water contamination or provide collection and treatment within these discrete drainage areas to control pollutant concentrations in their storm water discharges.

EPA and other organizations are currently working to improve approaches for monitoring storm water and the potential effects upon water quality. These new approaches are called storm water program "environmental indicators." Environmental indicators are designed to be more meaningful monitoring tools that storm water dischargers can use to conduct storm water monitoring for the purposes described above. A manual describing each of the recommended storm water program environmental indicators is being prepared by the Center for Watershed Protection in Silver Spring, Maryland. That manual is expected to be ready by the end of August 1996 and should provide useful information for storm water dischargers contemplating the need to develop a cost-effective, meaningful storm water monitoring program. In addition, EPA expects the Urban Wet Weather Flows Federal Advisory Committee to provide recommendations on how to better monitor storm water and other wet weather discharges using a watershed approach.

Question 10: Does this interim permitting approach apply to both storm water discharges associated with industrial activity and storm water discharges from municipal separate storm sewer systems?

Answer 10: Yes. The interim permitting approach is applicable to both discharges from municipal separate storm sewer systems and storm water discharges associated with industrial activity (as defined by 40 CFR 122.26(b)(14)). The interim permitting approach would not affect, however, permits that already incorporate appropriately derived numeric water quality-based effluent limitations. Since the interim permitting approach only addresses water quality-based effluent limitations, it also does not affect technology-based effluent limitations, such as those based on effluent limitations guidelines or developed using best professional judgement, that are incorporated into storm water permits. In addition, particularly for some industries, adequate information may already have been collected with which to assess the reasonable potential for a storm water discharge to cause or contribute to an excursion of a WQS, and from which a numeric water quality-based effluent limitation can be (or has been) appropriately derived. An adequate amount of storm water pollutant source information may also exist with which to assess the effectiveness of the industrial storm [*57429] water control measures in complying with the limitations and in reducing storm water contaminants for protecting water quality.

DATE: The policy was signed by the Assistant Administrator for Water on August 1, 1996.

FOR FURTHER INFORMATION CONTACT: Copies of the policy with the questions and answers are available by writing the U.S. Environmental Protection Agency, Water Resources Center, Mail Code 4101, 401 M Street, SW, Washington, D.C., 20460, or by calling (202) 260-7786. If you have additional questions about the policy, please contact, Bill Swietlik, Storm Water Phase I Matrix Manager, Office of Wastewater Management, at (202) 260-9529 or William Hall, Urban Wet Weather Flows Matrix Manager, Office of Wastewater Management, at (202) 260-1458, or by Internet at hall.william@epamail.epa.gov.

Dated: October 11, 1996.

Michael B. Cook,

Director, Office of Wastewater Management, Designated Federal Official.

[FR Doc. 96-28430 Filed 11-5-96; 8:45 am]

BILLING CODE 6560-50-P

VOLUME IV
TAB 6



1 of 1 DOCUMENT

FEDERAL REGISTER

Vol. 78, No. 215

Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY (EPA)

40 CFR Part 19

[FRL-9901-98-OECA]

RIN 2020-AA49

Civil Monetary Penalty Inflation Adjustment Rule

View PDF of Federal Register Print Version 

78 FR 66643

DATE: Wednesday, November 6, 2013

ACTION: Final rule.

SUMMARY: With this action, EPA is promulgating a final rule that amends the Civil Monetary Penalty Inflation Adjustment Rule. This action is mandated by the Debt Collection Improvement Act of 1996 (DCIA) to adjust for inflation certain statutory civil monetary penalties that may be assessed for violations of EPA-administered statutes and their implementing regulations. The Agency is required to review the civil monetary penalties under the statutes it administers at least once every four years and to adjust such penalties as necessary for inflation according to a formula prescribed by the DCIA. The regulations contain a list of all civil monetary penalty authorities under EPA-administered statutes and the applicable statutory amounts, as adjusted for inflation, since 1996.

EFFECTIVE DATE: This rule is effective December 6, 2013.

FOR FURTHER INFORMATION CONTACT: Caroline Hermann, Special Litigation and Projects Division (2248A), Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 564-2876.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 *U.S.C.* 2461 note, as amended by the DCIA, 31 *U.S.C.* 3701 note, each federal agency is required to issue regulations adjusting for inflation the statutory civil monetary penalties n1 ("civil penalties" or "penalties") that can be imposed under the laws adminis-

tered by that agency. The purpose of these adjustments is to [*66644] maintain the deterrent effect of civil penalties and to further the policy goals of the underlying statutes. The DCIA requires adjustments to be made at least once every four years following the initial adjustment. EPA's initial adjustment to each statutory civil penalty amount was published in the **Federal Register** on December 31, 1996 (61 FR 69360), and became effective on January 30, 1997 ("the 1996 Rule"). EPA's second adjustment to civil penalty amounts was published in the **Federal Register** on February 13, 2004 (69 FR 7121), and became effective on March 15, 2004 ("the 2004 Rule"). EPA's third adjustment to civil penalty amounts was published in the **Federal Register** on December 11, 2008 (73 FR 75340), as corrected in the **Federal Register** on January 7, 2009 (74 FR 626), and became effective on January 12, 2009 ("the 2008 Rule").

n1 Section 3 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, defines "civil monetary penalty" to mean "any penalty, fine or other sanction that--(A)(i) is for a specific monetary amount as provided by federal law; or (ii) has a maximum amount provided for by federal law. . . ."

Where necessary under the DCIA, this rule, specifically Table 1 in 40 CFR 19.4, adjusts for inflation the maximum and, in some cases, the minimum amount of the statutory civil penalty that may be imposed for violations of EPA-administered statutes and their implementing regulations. Table 1 of 40 CFR 19.4 identifies the applicable EPA-administered statutes and sets out the inflation-adjusted civil penalty amounts that may be imposed pursuant to each statutory provision after the effective dates of the 1996, 2004 and 2008 rules. Where required under the DCIA formula, this rule amends the adjusted penalty amounts in Table 1 of 40 CFR 19.4 for those violations that occur after the effective date of this rule.

The formula prescribed by the DCIA for determining the inflation adjustment, if any, to statutory civil penalties consists of the following four-step process:

1. *Determine the Cost-of-Living Adjustment (COLA).* The COLA is determined by calculating the percentage increase, if any, by which the Consumer Price Index n2 for all-urban consumers (CPI-U) for the month of June of the calendar year preceding the adjustment exceeds the CPI-U for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted. n3 Accordingly, the COLA applied under this rule equals the percentage by which the CPI-U for June 2012 (*i.e.*, June of the year preceding this year), exceeds the CPI-U for June of the year in which the amount of a specific penalty was last adjusted (*i.e.*, 2008, 2004 or 1996, as the case may be). Given that the last inflation adjustment was published on December 11, 2008, the COLA for most civil penalties set forth in this rule was calculated by determining the percentage by which the CPI-U for June 2012 (229.478) exceeds the CPI-U for June 2008 (218.815), resulting in a COLA of 4.87 percent. For those few civil penalty amounts that were last adjusted under the 2004 Rule, the COLA equals 20.97 percent, calculated by determining the percentage by which the CPI-U for June 2012 (229.478) exceeds the CPI-U for June 2004 (189.7). In the case of the maximum civil penalty that can be imposed under section 311(b)(7)(A) of the Clean Water Act, 33 U.S.C. 1321(b)(7)(A), which is the sole civil penalty last adjusted under the 1996 Rule, the COLA is 46.45 percent, determined by calculating the percentage by which the CPI-U for June 2012 (229.478) exceeds the CPI-U for June 1996 (156.7).

n2 Section 3 of the DCIA defines "Consumer Price Index" to mean "the Consumer Price Index for all-urban consumers published by the Department of Labor." Interested parties may find the relevant Consumer Price Index, published by the Department of Labor's Bureau of Labor Statistics, on the Internet. To access this information, go to the CPI Home Page at: <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>.

n3 Section 5(b) of the DCIA defines the term "cost-of-living adjustment" to mean "the percentage (if any) for each civil monetary penalty by which--(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law."

2. *Calculate the Raw Inflation Increase.* Once the COLA is determined, the second step is to multiply the COLA by the current civil penalty amount to determine the raw inflation increase.

3. *Apply the DCIA's Rounding Rule to the Raw Inflation Increase.* The third step is to round this raw inflation increase according to section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note. The DCIA's rounding rules require that any increase be rounded to the nearest multiple of: \$ 10 in the case of penalties less than or equal to \$ 100; \$ 100 in the case of penalties greater than \$ 100 but less than or equal to \$ 1,000; \$ 1,000 in the case of penalties greater than \$ 1,000 but less than or equal to \$ 10,000; \$ 5,000 in the case of penalties greater than \$ 10,000 but less than or equal to \$ 100,000; \$ 10,000 in the case of

penalties greater than \$ 100,000 but less than or equal to \$ 200,000; and \$ 25,000 in the case of penalties greater than \$ 200,000. (*See* section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.)

4. *Add the Rounded Inflation Increase, if any, to the Current Penalty Amount.* Once the inflation increase has been rounded pursuant to the DCIA, the fourth step is to add the rounded inflation increase to the current civil penalty amount to obtain the new, inflation-adjusted civil penalty amount. For example, in this rule, the current statutory maximum penalty amounts that may be imposed under Clean Air Act (CAA) section 113(d)(1), 42 U.S.C. 7413(d)(1), and CAA section 205(c)(1), 42 U.S.C. 7524(c)(1), are increasing from \$ 295,000 to \$ 320,000. These penalty amounts were last adjusted with the promulgation of the 2008 Rule, when these penalties were adjusted for inflation from \$ 270,000 to \$ 295,000. Applying the COLA adjustment to the current penalty amount of \$ 295,000 results in a raw inflation increase of \$ 14,376 for both penalties. As stated above, the DCIA rounding rule requires the raw inflation increase to be rounded to the nearest multiple of \$ 25,000 for penalties greater than \$ 200,000. Rounding \$ 14,376 to the nearest multiple of \$ 25,000 equals \$ 25,000. That rounded increase increment of \$ 25,000 is then added to the \$ 295,000 penalty amount to arrive at a total inflation adjusted penalty amount of \$ 320,000. Accordingly, once this rule is effective, the statutory maximum amounts of these penalties will increase to \$ 320,000.

In contrast, this rule does not adjust those civil penalty amounts where the raw inflation amounts are not high enough to round up to the required multiple stated in the DCIA. For example, under section 3008(a)(3) of the Resource Conservation and Recovery Act, 42 U.S.C. 6928(a)(3), the Administrator may assess a civil penalty of up to \$ 37,500 per day of noncompliance for each violation. This penalty was last adjusted for inflation under the 2008 Rule. Multiplying the applicable 4.87 percent COLA to the statutory civil penalty amount of \$ 37,500, the raw inflation increase equals only \$ 1,827.40; the DCIA rounding rule requires a raw inflation increase increment to be rounded to the nearest multiple of \$ 5,000 for penalties greater than \$ 10,000 but less than or equal to \$ 100,000. Because this raw inflation increase is not sufficient to be rounded up to a multiple of \$ 5,000, in accordance with the DCIA's rounding rule, this rule does not increase the \$ 37,500 penalty amount. However, if during the development of EPA's next Civil Monetary Penalty Inflation Adjustment Rule, anticipated to be [*66645] promulgated in 2017, the raw inflation increase can be rounded up to the next multiple of \$ 5,000, statutory maximum penalty amounts currently at \$ 37,500 will be increased to \$ 42,500.

Because of the low rate of inflation since 2008, coupled with the application of the DCIA's rounding rules, only 20 of the 88 statutory civil penalty provisions implemented by EPA are being adjusted for inflation under this rule. Assuming there are no changes to the mandate imposed by the DCIA, EPA intends to review all statutory penalty amounts and adjust them as necessary to account for inflation in the year 2017 and every four years thereafter.

II. Technical Revision to Table 1 of 40 CFR 19.4 To Break Out Each of the Statutory Penalty Authorities Under Section 325(b) of the Emergency Planning and Community Right-To-Know Act (EPCRA)

EPA is revising the row of Table 1 of 40 CFR 19.4, which lists the statutory maximum penalty amounts that can be imposed under section 325(b) of EPCRA, 42 U.S.C. 11045(b), to break out separately the three penalty authorities contained in subsection (b). Since 1996, EPA has been adjusting for inflation all of the statutory maximum penalty amounts specified under EPCRA section 325(b), 42 U.S.C. 11045(b). Under past rules, the Agency has grouped the maximum penalty amounts that may be assessed under section 325(b) under the heading of 42 U.S.C. 11045(b) in Table 1 of 40 CFR 19.4. For example, under the 2008 Rule, Table 1 of 40 CFR 19.4 reflects that the statutory maximum penalties that can be imposed under any subparagraph of EPCRA section 325(b) are \$ 37,500 and \$ 107,500. Consistent with how the other penalty authorities are displayed under Part 19.4, Table 1 now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (*i.e.*, 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)). That is, upon the effective date of this rule, the statutory maximum penalty that can be imposed under section 325(b)(1)(A) is \$ 37,500; the statutory maximum penalties that can be imposed under section 325(b)(2) are \$ 37,500 and \$ 117,500; and the statutory maximum penalties that can be imposed under section 325(b)(3) are \$ 37,500 and \$ 117,500.

III. Effective Date

Section 6 of the DCIA provides that "any increase under [the DCIA] in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect." (*See* section 6 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.) Thus, the new inflation-adjusted civil penalty amounts may be applied only to violations that occur after the effective date of this rule.

IV. Good Cause

Section 553(b) of the Administrative Procedure Act (APA) provides that, when an agency for good cause finds that "notice and public procedure . . . are impracticable, unnecessary, or contrary to the public interest," the agency may issue a rule without providing notice and an opportunity for public comment. EPA finds that there is good cause to promulgate this rule without providing for public comment. The primary purpose of this final rule is merely to implement the statutory directive in the DCIA to make periodic increases in civil penalty amounts by applying the adjustment formula and rounding rules established by the statute. Because the calculation of the increases is formula-driven and prescribed by statute, EPA has no discretion to vary the amount of the adjustment to reflect any views or suggestions provided by commenters. Accordingly, it would serve no purpose to provide an opportunity for public comment on this rule. Thus, notice and public comment is unnecessary.

In addition, EPA is making the technical revisions discussed above without notice and public comment. Because the technical revisions to Table 1 of *40 CFR 19.4* more accurately reflect the statutory provisions under each of the subparagraphs of section 325(b) (*i.e.*, under *42 U.S.C. 11045(b)(1)(A)*, (b)(2), and (b)(3)) and do not constitute substantive revisions to the rule, these changes do not require notice and comment.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (*58 FR 51735*, October 4, 1993) and therefore is not subject to review under the Executive Orders 12866 and 13563 (*76 FR 3821*, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995, *44 U.S.C. 3501-3521*. Burden is defined at *5 CFR 1320.3(b)*. This rule merely increases the amount of civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

C. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), *5 U.S.C. 601-612*, which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because although the rule is subject to the APA, the Agency has invoked the "good cause" exemption under *5 U.S.C. 553(b)*, therefore it is not subject to the notice and comment requirements.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), *2 U.S.C. 1531-1538* for state, local, or tribal governments or the private sector. The action implements mandates specifically and explicitly set forth by Congress in the DCIA without the exercise of any policy discretion by EPA. By applying the adjustment formula and rounding rules prescribed by the DCIA, this rule adjusts for inflation the statutory maximum and, in some cases, the minimum, amount of civil penalties that can be assessed by EPA in an administrative enforcement action, or by the U.S. Attorney General in a civil judicial case, for violations of EPA-administered statutes and their implementing regulations. Because the calculation of any increase is formula-driven, EPA has no policy discretion to vary the amount of the adjustment. Given that the Agency has made a "good cause" finding that this rule is not subject to notice and comment requirements under the APA or any other statute (*See* Section IV of this notice), it is not subject to sections 202 and 205 of UMRA. EPA has also determined that this action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule merely increases [*66646] the amount of civil penalties

that could conceivably be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

E. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule merely increases the amount of civil penalties that could conceivably be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule merely increases the amount of civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations. This final rule will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), 15 U.S.C. 272 note, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the U.S. Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA lacks the discretionary authority to address environmental justice in this final rulemaking. The primary purpose of this final rule is merely to apply the DCIA's inflation adjustment formula to make periodic increases in the civil penalties that may be imposed for violations of EPA-administered statutes and their implementing regulations. Thus, because calculation of the increases is formula-driven, EPA has no discretion in updating the rule to reflect the allowable statutory civil penalties derived from applying the formula. Since there is no discretion under the DCIA in determining the statutory civil penalty amount, EPA cannot vary the amount of the civil penalty adjustment to address other issues, including environmental justice issues.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801-808, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 19

Environmental protection, Administrative practice and procedure, Penalties.

Dated: October 29, 2013.

Gina McCarthy,

Administrator, Environmental Protection Agency.

For the reasons set out in the preamble, title 40, chapter I, part 19 of the Code of Federal Regulations is amended as follows:

PART 19--ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

1. The authority citation for part 19 continues to read as follows:

Authority: Pub. L. 101-410, 28 U.S.C. 2461 note; Public Law 104-134, 31 U.S.C. 3701 note.

2. Revise § 19.2 to read as follows:

§ 19.2 Effective date.

The increased penalty amounts set forth in the seventh and last column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations which occur after December 6, 2013. The penalty amounts in the sixth column of Table 1 to § 19.4 apply to violations under the applicable statutes and regulations which occurred after January 12, 2009, through December 6, 2013. The penalty amounts in the fifth column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations [*66647] which occurred after March 15, 2004, through January 12, 2009. The penalty amounts in the fourth column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations which occurred after January 30, 1997, through March 15, 2004.

3. Revise § 19.4 to read as follows:

§ 19.4 Penalty adjustment and table.

The adjusted statutory penalty provisions and their applicable amounts are set out in Table 1. The last column in the table provides the newly effective statutory civil penalty amounts.

Table 1 of Section 19.4--Civil Monetary Penalty Inflation Adjustments

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004
7 U.S.C. 136l. (a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT	\$ 5,000	\$ 5,500

Table 1 of Section 19.4--Civil Monetary Penalty Inflation Adjustments

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004
	(FIFRA)		
7 U.S.C. 136l. (a)(2)	FIFRA	\$ 500/\$ 1,000	\$ 550/\$ 1,000
15 U.S.C. 2615(a)(1)	TOXIC SUBSTANCES CONTROL ACT (TSCA)	\$ 25,000	\$ 27,500
15 U.S.C. 2647(a)	TSCA	\$ 5,000	\$ 5,500
15 U.S.C. 2647(g)	TSCA	\$ 5,000	\$ 5,000
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA)	\$ 5,000	\$ 5,500
31 U.S.C. 3802(a)(2)	PFCRA	\$ 5,000	\$ 5,500
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA)	\$ 25,000	\$ 27,500
33 U.S.C. 1319(g)(2)(A)	CWA	\$ 10,000/\$ 25,000	\$ 11,000/\$ 27,500
33 U.S.C. 1319(g)(2)(B)	CWA	\$ 10,000/\$ 125,000	\$ 11,000/\$ 137,500
33 U.S.C. 1321(b)(6)(B)(i)	CWA	\$ 10,000/\$ 25,000	\$ 11,000/\$ 27,500
33 U.S.C. 1321(b)(6)(B)(ii)	CWA	\$ 10,000/\$ 125,000	\$ 11,000/\$ 137,500
33 U.S.C. 1321(b)(7)(A)	CWA	\$ 25,000/\$ 1,000	\$ 27,500/\$ 1,100
33 U.S.C. 1321(b)(7)(B)	CWA	\$ 25,000	\$ 27,500
33 U.S.C. 1321(b)(7)(C)	CWA	\$ 25,000	\$ 27,500
33 U.S.C. 1321(b)(7)(D)	CWA	\$ 100,000/\$ 3,000	\$ 110,000/\$ 3,300
33 U.S.C. 1414b(d)(1) fn1	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA)	\$ 600	\$ 660
33 U.S.C. 1415(a)	MPRSA	\$ 50,000/\$ 125,000	\$ 55,000/\$ 137,500
33 U.S.C. 1901 note (See 1409(a)(2)(A))	CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CACSO)	\$ 10,000/\$ 25,000	\$ 10,000/\$ 25,000 fn2
33 U.S.C. 1901 note (See 1409(a)(2)(B))	CACSO	\$ 10,000/\$ 125,000	\$ 10,000/\$ 125,000
33 U.S.C. 1901 note (See 1409(b)(1))	CACSO	\$ 25,000	\$ 25,000
42 U.S.C. 300g- 3(b)	SAFE DRINKING WATER ACT (SDWA)	\$ 25,000	\$ 27,500
42 U.S.C. 300g- 3(g)(3)(A)	SDWA	\$ 25,000	\$ 27,500

Table 1 of Section 19.4--Civil Monetary Penalty Inflation Adjustments

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004
42 U.S.C. 300g-3(g)(3)(B)	SDWA	\$ 5,000/\$ 25,000	\$ 5,000/\$ 25,000
42 U.S.C. 300g-3(g)(3)(C)	SDWA	\$ 25,000	\$ 25,000
42 U.S.C. 300h-2(b)(1)	SDWA	\$ 25,000	\$ 27,500
42 U.S.C. 300h-2(c)(1)	SDWA	\$ 10,000/\$ 125,000	\$ 11,000/\$ 137,500
42 U.S.C. 300h-2(c)(2)	SDWA	\$ 5,000/\$ 125,000	\$ 5,500/\$ 137,500
42 U.S.C. 300h-3(c)	SDWA	\$ 5,000/\$ 10,000	\$ 5,500/\$ 11,000
42 U.S.C. 300i(b)	SDWA	\$ 15,000	\$ 15,000
42 U.S.C. 300i-1(c)	SDWA	\$ 20,000/\$ 50,000	\$ 22,000/\$ 55,000 fn3
42 U.S.C. 300j(e)(2)	SDWA	\$ 2,500	\$ 2,750
42 U.S.C. 300j-4(c)	SDWA	\$ 25,000	\$ 27,500
42 U.S.C. 300j-6(b)(2)	SDWA	\$ 25,000	\$ 25,000
42 U.S.C. 300j-23(d)	SDWA	\$ 5,000/\$ 50,000	\$ 5,500/\$ 55,000
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992	\$ 10,000	\$ 11,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972	\$ 10,000	\$ 11,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)	\$ 25,000	\$ 27,500
42 U.S.C. 6928(c)	RCRA	\$ 25,000	\$ 27,500
42 U.S.C. 6928(g)	RCRA	\$ 25,000	\$ 27,500
42 U.S.C. 6928(h)(2)	RCRA	\$ 25,000	\$ 27,500
42 U.S.C. 6934(e)	RCRA	\$ 5,000	\$ 5,500
42 U.S.C. 6973(b)	RCRA	\$ 5,000	\$ 5,500
42 U.S.C. 6991e(a)(3)	RCRA	\$ 25,000	\$ 27,500
42 U.S.C. 6991e(d)(1)	RCRA	\$ 10,000	\$ 11,000
42 U.S.C. 6991e(d)(2)	RCRA	\$ 10,000	\$ 11,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	\$ 25,000	\$ 27,500
42 U.S.C.	CAA	\$ 25,000/\$ 200,000	\$ 27,500/\$ 220,000

Table 1 of Section 19.4--Civil Monetary Penalty Inflation Adjustments

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004
7413(d)(1) 42 U.S.C.	CAA	\$ 5,000	\$ 5,500
7413(d)(3) 42 U.S.C. 7524(a)	CAA	\$ 2,500/\$ 25,000	\$ 2,750/\$ 27,500
42 U.S.C. 7524(c)(1)	CAA	\$ 200,000	\$ 220,000
42 U.S.C. 7545(d)(1)	CAA	\$ 25,000	\$ 27,500
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)	\$ 25,000	\$ 27,500
42 U.S.C. 9606(b)(1)	CERCLA	\$ 25,000	\$ 27,500
42 U.S.C. 9609(a)(1)	CERCLA	\$ 25,000	\$ 27,500
42 U.S.C. 9609(b)	CERCLA	\$ 25,000/\$ 75,000	\$ 27,500/\$ 82,500
42 U.S.C. 9609(c)	CERCLA	\$ 25,000/\$ 75,000	\$ 27,500/\$ 82,500
42 U.S.C. 11045(a)	EMERGENCY PLAN- NING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA)	\$ 25,000	\$ 27,500
42 U.S.C. 11045(b)(1)(A) fn4	EPCRA	\$ 25,000	\$ 27,500
42 U.S.C. 11045(b)(2)	EPCRA	\$ 25,000/\$ 75,000	\$ 27,500/\$ 82,500
42 U.S.C. 11045(b)(3)	EPCRA	\$ 25,000/\$ 75,000	\$ 27,500/\$ 82,500
42 U.S.C. 11045(c)(1)	EPCRA	\$ 25,000	\$ 27,500
42 U.S.C. 11045(c)(2)	EPCRA	\$ 10,000	\$ 11,000
42 U.S.C. 11045(d)(1)	EPCRA	\$ 25,000	\$ 27,500
42 U.S.C. 14304(a)(1)	MERCURY-CONTAINING AND RECHARGEABLE BATTERY MANAGE- MENT ACT (BATTERY ACT)	\$ 10,000	\$ 10,000
42 U.S.C. 14304(g)	BATTERY ACT	\$ 10,000	\$ 10,000

Table 1 of Section 19.4--Civil Monetary Penalty Inflation Adjustments

U.S. Code Citation	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Penalties effective after December 6, 2013
7 U.S.C. 136l. (a)(1)	\$ 6,500	\$ 7,500	\$ 7,500
7 U.S.C. 136l. (a)(2)	\$ 650/\$ 1,100	\$ 750/\$ 1,100	\$ 750/\$ 1,100
15 U.S.C. 2615(a)(1)	\$ 32,500	\$ 37,500	\$ 37,500
15 U.S.C. 2647(a)	\$ 6,500	\$ 7,500	\$ 7,500
15 U.S.C. 2647(g)	\$ 5,500	\$ 7,500	\$ 7,500
31 U.S.C. 3802(a)(1)	\$ 6,500	\$ 7,500	\$ 7,500
31 U.S.C. 3802(a)(2)	\$ 6,500	\$ 7,500	\$ 7,500
33 U.S.C. 1319(d)	\$ 32,500	\$ 37,500	\$ 37,500
33 U.S.C. 1319(g)(2)(A)	\$ 11,000/\$ 32,500	\$ 16,000/\$ 37,500	\$ 16,000/\$ 37,500
33 U.S.C. 1319(g)(2)(B)	\$ 11,000/\$ 157,500	\$ 16,000/\$ 177,500	\$ 16,000/\$ 187,500
33 U.S.C. 1321(b)(6)(B)(i)	\$ 11,000/\$ 32,500	\$ 16,000/\$ 37,500	\$ 16,000/\$ 37,500
33 U.S.C. 1321(b)(6)(B)(ii)	\$ 11,000/\$ 157,500	\$ 16,000/\$ 177,500	\$ 16,000/\$ 187,500
33 U.S.C. 1321(b)(7)(A)	\$ 32,500/\$ 1,100	\$ 37,500/\$ 1,100	\$ 37,500/\$ 2,100
33 U.S.C. 1321(b)(7)(B)	\$ 32,500	\$ 37,500	\$ 37,500
33 U.S.C. 1321(b)(7)(C)	\$ 32,500	\$ 37,500	\$ 37,500
33 U.S.C. 1321(b)(7)(D)	\$ 130,000/\$ 4,300	\$ 140,000/\$ 4,300	\$ 150,000/\$ 5,300
33 U.S.C. 1414b(d)(1) fn1	\$ 760	\$ 860	\$ 860
33 U.S.C. 1415(a)	\$ 65,000/\$ 157,500	\$ 70,000/\$ 177,500	\$ 75,000/\$ 187,500
33 U.S.C. 1901 note (See 1409(a)(2)(A))	\$ 10,000/\$ 25,000	\$ 11,000/\$ 27,500	\$ 11,000/\$ 27,500
33 U.S.C. 1901 note (See 1409(a)(2)(B))	\$ 10,000/\$ 125,000	\$ 11,000/\$ 137,500	\$ 11,000/\$ 147,500
33 U.S.C. 1901 note (See 1409(b)(1))	\$ 25,000	\$ 27,500	\$ 27,500
42 U.S.C. 300g- 3(b)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 300g- 3(g)(3)(A)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 300g- 3(g)(3)(B)	\$ 6,000/\$ 27,500	\$ 7,000/\$ 32,500	\$ 7,000/\$ 32,500
42 U.S.C. 300g-	\$ 27,500	\$ 32,500	\$ 32,500

Table 1 of Section 19.4--Civil Monetary Penalty Inflation Adjustments

U.S. Code Citation	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Penalties effective after December 6, 2013
3(g)(3)(C)			
42 U.S.C. 300h-2(b)(1)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 300h-2(c)(1)	\$ 11,000/\$ 157,500	\$ 16,000/\$ 177,500	\$ 16,000/\$ 187,500
42 U.S.C. 300h-2(c)(2)	\$ 6,500/\$ 157,500	\$ 7,500/\$ 177,500	\$ 7,500/\$ 187,500
42 U.S.C. 300h-3(c)	\$ 6,500/\$ 11,000	\$ 7,500/\$ 16,000	\$ 7,500/\$ 16,000
42 U.S.C. 300i(b)	\$ 16,500	\$ 16,500	\$ 21,500
42 U.S.C. 300i-1(c)	\$ 100,000/\$ 1,000,000	\$ 110,000/\$ 1,100,000	\$ 120,000/\$ 1,150,000
42 U.S.C. 300j(e)(2)	\$ 2,750	\$ 3,750	\$ 3,750
42 U.S.C. 300j-4(c)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 300j-6(b)(2)	\$ 27,500	\$ 32,500	\$ 32,500
42 U.S.C. 300j-23(d)	\$ 6,500/\$ 65,000	\$ 7,500/\$ 70,000	\$ 7,500/\$ 75,000
42 U.S.C. 4852d(b)(5)	\$ 11,000	\$ 16,000	\$ 16,000
42 U.S.C. 4910(a)(2)	\$ 11,000	\$ 16,000	\$ 16,000
42 U.S.C. 6928(a)(3)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 6928(c)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 6928(g)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 6928(h)(2)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 6934(e)	\$ 6,500	\$ 7,500	\$ 7,500
42 U.S.C. 6973(b)	\$ 6,500	\$ 7,500	\$ 7,500
42 U.S.C. 6991e(a)(3)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 6991e(d)(1)	\$ 11,000	\$ 16,000	\$ 16,000
42 U.S.C. 6991e(d)(2)	\$ 11,000	\$ 16,000	\$ 16,000
42 U.S.C. 7413(b)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 7413(d)(1)	\$ 32,500/\$ 270,000	\$ 37,500/\$ 295,000	\$ 37,500/\$ 320,000
42 U.S.C. 7413(d)(3)	\$ 6,500	\$ 7,500	\$ 7,500
42 U.S.C. 7524(a)	\$ 2,750/\$ 32,500	\$ 3,750/\$ 37,500	\$ 3,750/\$ 37,500
42 U.S.C. 7524(c)(1)	\$ 270,000	\$ 295,000	\$ 320,000
42 U.S.C. 7545(d)(1)	\$ 32,500	\$ 37,500	\$ 37,500

Table 1 of Section 19.4--Civil Monetary Penalty Inflation Adjustments

U.S. Code Citation	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Penalties effective after December 6, 2013
42 U.S.C. 9604(e)(5)(B)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 9606(b)(1)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 9609(a)(1)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 9609(b)	\$ 32,500/\$ 97,500	\$ 37,500/\$ 107,500	\$ 37,500/\$ 117,500
42 U.S.C. 9609(c)	\$ 32,500/\$ 97,500	\$ 37,500/\$ 107,500	\$ 37,500/\$ 117,500
42 U.S.C. 11045(a)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 11045(b)(1)(A) fn4	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 11045(b)(2)	\$ 32,500/\$ 97,500	\$ 37,500/\$ 107,500	\$ 37,500/\$ 117,500
42 U.S.C. 11045(b)(3)	\$ 32,500/\$ 97,500	\$ 37,500/\$ 107,500	\$ 37,500/\$ 117,500
42 U.S.C. 11045(c)(1)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 11045(c)(2)	\$ 11,000	\$ 16,000	\$ 16,000
42 U.S.C. 11045(d)(1)	\$ 32,500	\$ 37,500	\$ 37,500
42 U.S.C. 14304(a)(1)	\$ 11,000	\$ 16,000	\$ 16,000
42 U.S.C. 14304(g)	\$ 11,000	\$ 16,000	\$ 16,000

fn1 Note that 33 U.S.C. 1414b (d)(1)(B) contains additional penalty escalation provisions that must be applied to the penalty amounts set forth in this Table. The amounts set forth in this Table reflect an inflation adjustment to the calendar year 1992 penalty amount expressed in section 104B(d)(1)(A), which is used to calculate the applicable penalty amount under MPRSA section 104B(d)(1)(B) for violations that occur in any subsequent calendar year.

fn2 CACSO was passed on December 21, 2000 as part of Title XIV of the Consolidated Appropriations Act of 2001, Pub. L. 106-554, 33 U.S.C. 1901 note.

fn3 The original statutory penalty amounts of \$ 20,000 and \$ 50,000 under section 1432(c) of the SDWA, 42 U.S.C. 300i-1(c), were subsequently increased by Congress pursuant to section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law No. 107-188 (June 12, 2002), to \$ 100,000 and \$ 1,000,000, respectively. EPA did not adjust these new penalty amounts in its 2004 Civil Monetary Penalty Inflation Adjustment Rule ("2004 Rule"), 69 FR 7121 (February 13, 2004), because they had gone into effect less than two years prior to the 2004 Rule.

fn4 Consistent with how the EPA's other penalty authorities are displayed under Part 19.4, this Table now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (i.e., 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)).

[FR Doc. 2013-26648 Filed 11-5-13; 8:45 am]

BILLING CODE 6560-50-P

SECTION 7
VOLUME IV
TAB 8

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MEETING

STATE OF CALIFORNIA
SAN DIEGO REGIONAL WATER QUALITY BOARD
PARTIAL TRANSCRIPT

SAN DIEGO REGIONAL
WATER QUALITY CONTROL BOARD
2375 NORTHSIDE DRIVE, SUITE 100
SAN DIEGO, CALIFORNIA

REPORTED BY: KASEY L. MOBLEY, CSR 13407

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1 this two-and-a-half-year process. This is a list
2 of the pollutants of concern from 303 impairment
3 that Orange County will be dealing with and south
4 Orange County, that will be preparing final
5 numeric goals for, compliance schedules, other
6 implementation strategies and control measures.

7 So without compliance during the
8 two-and-a-half-year period of development, the
9 Orange County permittees will need to strictly
10 comply with the numeric limits for each of these
11 pollutants during this development period.

12 Now, normally when a pollutant has --
13 or a water body is on the 303D list, the state is
14 required to prepare or establish a total maximum
15 daily load, TMDL. If the state does not do that,
16 they can be sued to be establish the TMDL. If the
17 state fails to do so, the EPA must establish one.

18 In my opinion, when a county and the
19 permittees are putting together interim and final
20 numeric goals, implementation plans, control other
21 strategies, these are the things that typically go
22 into a TMDL, and it's accompanied by an
23 implementation plan that goes into the permit
24 later on when it's adopted.

25 Essentially, the permittees through

1 the WQIP process are preparing TMDLs, time
2 schedule, orders compliance schedules on behalf of
3 the state during this time. TMDLs typically take
4 several years to develop. They can take a decade
5 or more to implement. And we are sort of taking
6 on this responsibility in order to improve water
7 quality and hopefully obtain full compliance
8 during development and during implementation.

9 Now, most what I'm going to focus on
10 is development, but I will touch briefly on
11 projected implementation costs for coliform in
12 south Orange County. Geo Syntech, the county's
13 consultant, did a rough analysis including that.
14 Implementation costs alone will be somewhere
15 between 1.6 billion to 2.1 billion for the south
16 Orange County watershed. This will include some
17 other combinations as well, but it's primarily
18 looking at coliform bacteria.

19 CHAIRMAN ABARBANEL: These are five
20 year costs or annual costs?

21 MR. BARON: I believe this is the
22 total projected cost for a 10, 20 or 30-year
23 period.

24 BOARD MEMBER MORALES: That makes a
25 difference.

1 aren't required to meet numeric effluent
2 limitations, that's true. And we don't have
3 numeric effluent limitations that need to be met.
4 We have a narrative of maximum extent practicable
5 standard. But the receiving water limitation is
6 different than a effluent limitations. The
7 receiving water limitation is a condition in the
8 water that needs to be protected or restored, such
9 that the beneficial use is supported.

10 That's the ultimate end goal that
11 we're trying to achieve. That is a numeric goal
12 that can be proposed as part of the water quality
13 improvement plan but they have the option of
14 proposing effluent limits of some sort that would
15 be self-imposed, and they're not in our permit.
16 We have nothing in our permit that actually
17 requires them to be in compliance with a numeric
18 effluent imitation.

19 I think, again, it was Mr. Baron who
20 said the permit is placing upon the Copermittees
21 the responsibility of -- placing on the
22 Copermittees responsibilities typically taken by
23 the regional Board, such as developing TMDLs or
24 time schedule orders and those types of things. I
25 would agree. I think we have placed a lot of

1 these things in their realm of responsibility if
2 they so choose. And we don't require them to
3 develop these things. This is an optional
4 pathway, but the benefit of it is that they get to
5 develop it. They get to develop the model. They
6 will get to develop the numeric goal. They will
7 get to propose it to us for us to buy into it. If
8 it was all us, it would be us doing the modeling.
9 It would be us going to them and trying to
10 convince them, and, typically, it was not an easy
11 convincing process. Trying to convince them this
12 was the best thing for water quality.

13 This allows them to tell us what is
14 best for water quality, and to avoid TMDLs, which
15 then hand cuffs everybody in the process because
16 then we have things in the basin plan we cannot
17 change easily. This process, it does place a
18 little bit more on the Copermittees, but it's up
19 to them if they want to take on that challenge,
20 and there are a lot of benefits to it. To realize
21 those benefits does take more time and a few more
22 resources.

23 I think that covers, hopefully, all
24 the comments we heard. Last one: The language
25 request for changing -- if the San Diego Water

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.

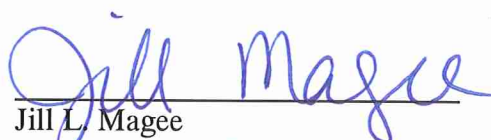
On September 12, 2016, I served the:

**Joint Test Claim Filing; Notice of Complete Joint Test Claim Filing;
and Schedule for Comments**

San Diego Region Order No. R9-2015-0100 and Order No. R9-2015-0001, 15-TC-02
California Regional Water Quality Control Board, San Diego Region,
Order No. R9-2015-0100, an Order Amending Order No. R9-2013-0001,
NPDES No. CAS0109266, as Amended by Order No. R9-2015-0001,
Adopted on November 18, 2015
County of Orange, Orange County Flood Control District, and the Cities of
Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Lake Forest,
Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano,
Claimants

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 12, 2016 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/9/16

Claim Number: 15-TC-02

Matter: San Diego Region Order No. R9-2015-0100 and Order No. R9-2015-0001

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

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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